



**USING COPYRIGHT LAW TO ENHANCE EDUCATION FOR ECONOMIC
DEVELOPMENT: AN ANALYSIS OF INTERNATIONAL AND NATIONAL
EDUCATIONAL EXCEPTIONS, WITH SPECIFIC REFERENCE TO
UGANDA**

BY

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Declaration

I confirm that the work presented in the thesis is the result of my own research and all references are cited accordingly.

I accept that the College has the right to use plagiarism detection software to check the electronic version of the thesis.

Henry Nampandu

Abstract

Strict enforcement of copyright in least developed countries like Uganda would negatively affect realisation of the right to education which is both intrinsic and instrumental to realisation of economic development goals including the Millennium Development Goals. The right to education is recognised internationally, regionally and by the Constitution of the Republic of Uganda 1995. Universal access to copyrighted educational materials is needed if education in less developed countries is to serve its purposes. However, to stimulate creation of materials for the future, copyright restricts both access and use of copyrighted materials which negatively affects realisation of the right to education in less developed countries. Unfortunately, exceptions as copyright's tool for enabling access and use are unclear and narrowly construed. For TRIPS compliance, Uganda enacted the Copyright and Neighbouring Rights Act, 2006 without optimally transposing exceptions. Moreover, under the current international framework, even the most maximalist approach to exceptions would not serve less developed country needs. Accordingly, the Berne Appendix for developing countries, though procedurally complex, should be used.

This thesis undertakes a critical comparative analysis of relevant international and national copyright provisions. While referencing legislation from selected countries, Uganda's commendable fair use provisions are nevertheless not optimal for supporting education for economic development. Various doctrinal issues arise from the exceptions and Uganda's Berne Union 'absentee' status. Pending international reforms, maximally transposing and utilising available exceptions is imperative. Key recommendations include: incorporating the human right to education among fair use factors and joining the Berne Union. Classical utilitarianism is used to justify maximising exceptions within the current international copyright framework to promote quality education. Arguably, maximally transposing and using exceptions to support education is the way to facilitate economic development as the 'greatest good' for the world's greatest number living in poverty in less developed countries in an era of globalisation.

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Table of international legislative instruments

African Charter on Human and Peoples' Rights, 1981

African Charter on the Rights and Welfare of the Child, 1990

Agreement Establishing a Framework for an Economic Partnership Agreement between the European Community and its Member States, on the one Part and the East African Community Partner States on the other Part

Agreement Establishing the World Trade organisation 1994

Berne Convention for the Protection of Literary and Artistic Works (1971 text)

International Convention on the Elimination of all Forms of Racial Discrimination 1965

Convention on the Elimination of all Forms of Discrimination Against Women 1979

Convention on the Rights of the Child 1989

Council Directive (EEC) on harmonizing the Term of Protection of Copyright and Certain related Rights [1993] OJ L290/9

Directive 96/9 (EC) of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases [1996] OJ L77/20

Directive 2001/29 (EC) of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L1767/10

Doha Declaration on the TRIPS Agreement and Public Health 2001

European Convention on Human Rights and Fundamental Freedoms 1950

First Protocol of the European Convention on Human Rights and Fundamental Freedoms

International Covenant on Civil and People’s Rights 1966

International Covenant on Economic, Social and Cultural Rights 1966

International Labour Organization Tripartite Declaration of Principles Concerning
Multinational Enterprises and Social Policy 1977

OECD Guidelines for Multinational Enterprises (revised 2002)

Rome Revision of the Berne Convention 1928

Stockholm Revision of the Berne Convention 1967

Treaty Establishing the East African Community 1999

TRIPS Agreement 1994

UNESCO Convention Against Discrimination in Education 1960

UNESCO Convention on Technical and Vocational Education 1989

UNESCO Declaration of Principles of international Cooperation

Universal Copyright Convention 1954

Universal Declaration of Human Rights 1948

Vienna Convention on the Law of Treaties 1986

WIPO Copyright Treaty 1996

WIPO Performances and Phonograms Treaty 1996

Table of national legislative instruments

Australia

Copyright Act, 1968 (as variously amended)

France

Declaration of the Rights of Man and the Citizen 1789

Intellectual Property Code (Code de la propriété intellectuelle)

Germany

Constitution (Grundgesetz)

Law on Copyright Act and Neighbouring Rights 1965(Urheberrechtsgesetz)

India

Indian Copyright Act 1957 (as amended)

Thailand

Copyright Act of B.E. 2537 (1994)

Uganda

Children Act 1997(Chapter 59 Laws of Uganda)

Companies Act (Chapter 110 Laws of Uganda)

Constitution of the Republic of Uganda, 1995

Copyright Ordinance, 1915(Repealed)

Copyright Act, 1956 (Repealed)

Copyright Act, 1964(Repealed)

Copyright and Neighbouring Rights Act, 2006

Copyright and Neighbouring Rights Regulations, 2010

Education (Pre-Primary, Primary and Post primary) Act 2008

Land Act 1998

Land Transfer Act 1969(Repealed)

Universities and other Tertiary Institutions Act, 2001

United Kingdom

Copyright Act 1911

Copyright Act 1956

Copyright Designs and Patents Act 1988

Copyright and Related Rights Regulations 2003 SI 2003/2498

Human Rights Act 1998

United States of America

Constitution of the United States of America

Copyright Act 1976, 17 U.S.C. §§ 101

Digital Millennium Copyright Act, 1998

Fairness in Music Licensing Act, 1998

Sony Bono Copyright Term Extension Act, 1998

Technology, Education and Copyright Harmonization Act, 2002 (TEACH Act)

Trade Act, 1974

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Table of abbreviations

Acronyms

ACA2KP	African Copyright and Access to Knowledge Project
ACODE	Advocates Coalition for Development and the Environment
AfCHPR	African Charter on Human and Peoples’ Rights
A2K	Access to Knowledge
BC	Berne Convention for the Protection of Literary and Artistic Property 1886
BFP	Budget Framework Paper (Uganda)
CDIP	Committee on Development and Intellectual Property (WIPO)
CDPA	Copyright, Designs and Patents Act 1988 (United Kingdom)
CIPR	Commission on Intellectual Property Rights (United Kingdom)
CJRP	Commercial Justice Reform Programme (Uganda)
CONRA	Copyright and Neighbouring Rights Act 2006 (Uganda)
CRC	Convention on the Rights of the Child 1989
CUP	Cambridge University Press
DMCA	Digital Millennium Copyright Act, 1998 (USA)
EAC	East African Community
ECHR	European Convention on Human Rights 1950
EPA(s)	Economic Partnerships Agreement(s)

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and People’s Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and Communication Technologies
ILM.	International Legal Materials
ILO	International Labour Organisation
IMF	International Monetary Fund
IPR(s)	Intellectual Property Right(s)
LDC(s)	Least Developed Country (ies)
LIC(s)	Low Income Country (ies)
LTM s	Learning and teaching materials
NEPAD	New Partnership for African Development
NGO	Non-Governmental Organisation
MDGs	Millennium Development Goals
MoES	Ministry of Education and Sports (Uganda)
MoFPED	Ministry of Finance, Planning and Economic Development (Uganda)
MoGLSD	Ministry of Gender, Labour and Social Development (Uganda)
MTEF	Medium Term Expenditure Framework (Uganda)

OAU	Organisation for African Unity
OECD	Organization for Economic Cooperation and Development
RAM	Random-Access Memory
R2E	Right to Education
SSRN	Social Science Research Network
TPM(s)	Technological Protection Measure(s)
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TVE	Technical and Vocational Education
UCC	Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
ULRC	Uganda Law Reform Commission
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children’s’ Emergency Fund
UPE	Universal Primary Education
USE	Universal Secondary Education
USTR	(Office of the) United States Trade Representative
WB	The World Bank
WCT	WIPO Copyright Treaty 1996

WHOWorld Health Organization

WIPOWorld Intellectual Property Organisation

WPPT.....WIPO Performances and Phonograms Treaty 1996

WTOWorld Trade Organisation

WUS.....World University Service

Journals

EIPR.....European Intellectual Property Review

IIC.....International Review of Intellectual Property and Competition Law

IJL & IT.....International Journal of Journal of Law and Information Technology

IPQ..... Intellectual Property Quarterly

J Copr Soc’y USA..... Journal of the Copyright Society of the USA

JIPL.....Journal of Intellectual Property Law

JIPLPJournal of Intellectual Property Law and Practice

OJLSOxford Journal of Legal Studies

OUPOxford University Press

RIDA*Revue Internationale du Droit d’Auteur*

Chapter 1 – Introduction

1.1 Terminology- a preliminary explanation

1.1.1 “Less developed countries” and “least developed countries”

This thesis is about the linkage between copyright, education and the economic development of less developed countries especially the least developed among them. Accordingly, this study will make specific reference to Uganda, a least developed country. One way the United Nations and economists classify the world’s countries or economies is with reference to their level of development. Accordingly, countries are broadly classified either as ‘Less developed countries’ and others as ‘More developed countries’ (MDCs). Less developed countries (a synonym for ‘developing countries’) are those countries that lag behind the more developed countries (MDCs) comprised of the now economically advanced capitalist countries of western Europe, North America, Australia, New Zealand and Japan.¹

Among the less developed countries, there is the group that is referred to as ‘Least Developed countries’ or LDCs. Where used, the acronym or its full version shall refer to least developed countries and not the broader term ‘less developed countries’. LDCs as a group represent the poorest and weakest segment of the international community. They comprise more than 880 million people (about 12 per cent of the world population), but account for less than two percent of world Gross domestic product

¹ See Michael P Todaro and S C Smith, *Economic development* (11th edition, Addison Wesley Pearson, London 2011) 8, 780; hereafter, “Todaro and Smith, Economic development”.

(GDP) and about one percent of the global trade in goods. To be included in the list, a country must have: low income, low human capital and high economic vulnerability.²

The category of LDCs was officially established in 1971 by the United Nations (UN) General Assembly with a view to attracting special international support for the most vulnerable and disadvantaged members of the UN family. Consequently, there are some ‘benefits’ in the form of special development programmes for least developed countries at the United Nations level. As of 2010, there were 49 LDCs, 33 of them in Africa, 15 in Asia, plus Haiti, the only LDC in the Caribbean region. But as of December 2013, there were 48 such countries including Uganda, our case study with four countries having graduated and some new ones like South Sudan added. Botswana, Cape Verde, Maldives and Samoa are the only four countries that have so far graduated from ‘LDC’ status to ‘developing country’ status. A few other countries have been found eligible to graduate, including Angola, Vanuatu and Tuvalu. South Sudan, the world’s youngest nation, was the latest country to be admitted to the list of least developed countries.³ The recommendations for joining and graduating from the LDC status are made by the Committee for Development Policy (CDP), a subsidiary body of the UN Economic and Social Council. This committee is also mandated to review the category of LDCs every 3 years and monitor their progress after graduation from the category. Ultimately, decisions have to be endorsed by the United Nations General Assembly.

² See “Todaro and Smith, Economic Development (fn 1 above) 39-41. For other details on LDC status and graduation, see UN-OHRLLS (UN Office of the High Representative for the Least Developed Countries, Landlocked Developing, Less developed Countries and Small Island Less developed States) at: <<http://unohrlls.org/about-ldcs/criteria-for-ldcs/>>;(last accessed 7 January 2014).

³ For details on LDC status and graduation, see UN-OHRLLS (UN Office of the High Representative for the Least Developed Countries, Landlocked Less developed Countries and Small Island Less developed States) at: <<http://unohrlls.org/about-ldcs/criteria-for-ldcs/>>(last accessed 7 January 2014). There are ‘benefits’ in the form of special development programmes for least developed countries at the United Nations level.

However, under the World Trade Organisation terminology including under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)⁴, the classification used is that of: LDCs; developing countries; and developed countries. Under the WTO system, LDCs have some special status in terms of transitional periods for implementation of TRIPS. However, as far as copyright and the TRIPS Agreement are concerned, the fact that in 2006 Uganda enacted new copyright legislation to comply with its TRIPS obligations long before the transitional period for LDCs was due to expire on 1 July 2013 (which has since been extended to 1 July 2021) makes the LDC status arguably less significant for purposes of this thesis. This is notwithstanding the view that the extension given to LDCs up to 2021 may allow for ‘roll-back’ on intellectual property legislation. Rolling-back of copyright protection will not be explored as a policy option for purposes of this thesis.⁵ The World Bank, one of the leading international development institutions has a different classification based on income levels. For instance, countries/economies are classified as low, middle or high income.⁶

⁴ WTO Website, available at: http://www.wto.org/english/docs_e/legal_e/27-trips.pdf last accessed 7 January 2014.

⁵ See WTO, ‘The least developed get eight years more leeway on protecting intellectual property’, at: < http://www.wto.org/english/news_e/news13_e/trip_11jun13_e.htm>; last accessed 7 January 2014. There is an argument as to whether the extension of the transitional period for LDCs to January 2020 without inclusion of the ‘no roll-back’ provision contained in the previous extension means that LDCs can ‘roll-back’ the heightened intellectual property legislation they could have enacted before the extension was agreed upon. One activist from Uganda thought they could but the EU has a different view, pointing out that “Where least-developed countries voluntarily provide some kinds of intellectual property protection even though they are not required to do so under the TRIPS Agreement, they have committed themselves not to reduce or withdraw the current protection that they give.” For this argument, see, Catherine Saez, ‘LDCs obtain new waiver on IP obligations at WTO, take it as a limited victory’, IP-Watch, 12 June 2013 at: < <http://www.ip-watch.org/2013/06/12/lcds-obtain-new-waiver-on-ip-obligations-at-wto-take-it-as-a-limited-victory/>> (last accessed 7 January 2014).

⁶ See Todaro and Smith, Economic Development (fn 1 above) 39.

Moreover, it can be argued that as far as education is concerned, especially in sub-Saharan Africa,⁷ ‘less developed’ countries (like South Africa and the Democratic Republic of Congo) have largely the same needs as their least developed counterparts such as Uganda, our case study. Accordingly, in this thesis, the terms “less developed country” shall be preferred as referring to both developing and least developed countries respectively. However, where there is need for emphasis, the terms “least developed country” or “least developed countries” will be used. It should be noted however that the Appendix to the Berne Convention for the Protection of literary and Artistic Works (discussed in chapter 6) uses the term ‘developing countries’ but not ‘least developed countries’ or “less developed countries”.⁸ Accordingly, in that chapter, the terms ‘developing country’ and ‘developed country’ and their plural equivalents shall be used.

A central theme of this thesis is ‘Education’ which shall be used to refer to formal education as discussed in chapter 2 sections 2.5 and 2.9. This does not imply by any means that informal education is not important.

1.1.2 Educational materials *vis a vis* learning or teaching materials

A central issue for investigation in this thesis is how, if at all, copyright affects access to and utilisation of educational materials. In terms of education theory, the better term to use would be ‘learning and teaching materials’ rather than ‘educational materials’ or ‘teaching materials’ or ‘learning materials’ alone. The term ‘Educational materials’ is more appealing to the topic of this thesis and with a wider meaning since it would

⁷ For a list of sub-Saharan African countries, see Library of Congress, Africana Collections, at<<http://www.loc.gov/rr/amed/guide/afr-countrylist.html>>, (last accessed 10 January 2014).

incorporate materials used by researchers. It is however a broader concept that could encompass notebooks, pens, other scholastic materials, materials for school laboratories such as chemicals and models such as skeletons of animals for biological studies. Arguably, learning materials may strictly speaking be said to exclude teaching materials.⁹ Despite these differences, the terms will be used interchangeably to refer to written texts of printed or electronic materials needed for formal education.

1.1.3 ‘Exceptions’, ‘limitations’ and ‘defences’

For the sake of convenience, this study shall mainly use the term ‘exceptions’. Other terms used to refer to exceptions include: “limitations”, “permitted acts” and “defences”.¹⁰

1.1.4 ‘Flexibilities’

In this thesis, the term “flexibility” including its plural form will be used to refer to those other provisions and principles in copyright (and IP generally) that aim to permit least developed countries to use TRIPS-compatible norms¹¹ in a manner that enables them to pursue their own public policies, either for specific needs like access to

⁸ S Ricketson and J C Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond* (2nd ed. Oxford University Press, Oxford 2006); hereafter, “Ricketson and Ginsburg, 2006”.

⁹ A Rens, A Prabhala and D Kawooya, ‘Intellectual property, education and access to knowledge in Southern Africa’, (ICTSD/ UNCTAD and tralac, 2006) <<http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>>, (last accessed 10 March 2013).

¹⁰ See Joseph Fometue, ‘Study on limitations and exceptions for copyright and related rights for teaching in Africa’ (Document SCCR/19/5, WIPO, Geneva, December 2009) at p. 8; Jonathan Griffiths, ‘The “three-step test” in European copyright law- problems and solutions’ (Queen Mary University of London, School of Law Legal Studies Research paper No. 31/2009) at footnote 1 at p.1; hereafter, “Jonathan Griffiths (2009)”, available at <http://ssrn.com/abstract=1476968> (last accessed 10 January 2013); See Silke von Lewinski, *International copyright law and policy*, (Oxford University Press, New York 2008) at p. 152-153 para. 5.150 for an alternative approach to the same terminology.

¹¹ This should also include, in the case of copyright, Berne-Convention compatible norms.

educational materials or more generally, in establishing macroeconomic, institutional conditions that support economic development.¹² For this study, the relevant flexibilities will be: the idea-expression dichotomy; the exhaustion regime and the duration or term of copyright.

1.2 Problem review

This research seeks to establish the relationship between copyright law and economic development by examining copyright's potential impact on the human right to education. The study is aimed at examining the increasingly vexed question of the role that the exclusive rights guaranteed to authors by copyright law as “balanced” by the mechanism of exceptions and flexibilities play in the realisation of the right to education and how that in turn affects the realisation of economic development by less developed countries. It is generally acknowledged that education is both a fundamental human right, a tool for and an end of economic development. To this end, the thesis will among others review and re-examine the causal linkage between education and economic development goals. Particularly, the study aims to examine the argument put forward by some commentators to the effect that one of the institutions that affect realisation of education is intellectual property rights,¹³ and in particular copyright.¹⁴ While denied by

¹² Adopted from the WIPO, ‘Advice on flexibilities under the TRIPS Agreement’, at: http://www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html; (last accessed 10 January 2014).

¹³ An increasing number of studies and commentaries have come up to look into the issue of the conflict between intellectual property rights and human rights including fundamental human rights. See for instance: H M Haugen, *The right to food and the TRIPS Agreement: with particular focus on less developed countries' measures for food production and distribution* (Martinus Nijhoff Publishers, Leiden 2007); H Hestermeyer, *Human rights and the WTO: the case of patents and access to medicines* (Oxford University Press, Oxford 2007); Paul L C Torremans (ed.), *Intellectual property and human rights: enhanced edition of copyright and human rights* (Wolters Kluwer, New York 2008); hereafter, “Torremans, IP and human rights”; C Geiger, ““Constitutionalising” Intellectual property law? The influence of fundamental rights on intellectual property in the European Union’ [2006] *International Review of Intellectual Property and Competition Law* 371; J Cornides, ‘Human rights and intellectual

others, this thesis will investigate the argument that there is a conflict between the right to education and copyright. Using Uganda as a case study, this thesis will investigate how that conflict, if at all it exists, is manifested in least developed countries.¹⁵

Uganda is situated in sub-Saharan Africa a region that could be described by economists and international, regional and national development institutions as an ‘axis of underdevelopment’. Sub-Saharan Africa has been of much concern to development economists and international policy makers as it has tended not to positively respond to various international interventions intended to promote economic development.¹⁶ To appreciate the implications and concerns arising from this, the concept of economic development needs to be explained. This will also set the stage for examining what role education can play in the pursuit of economic development. If copyright has a role to play in supporting education enhancement in a country like Uganda, it may as well be that it indirectly can affect the realisation of development goals including the

property, conflict or convergence?’ [2004] *Journal of World Intellectual Property* 1423; L Helfer and G Austin, *Human rights and intellectual property: mapping the global interface* (Cambridge University Press, Cambridge 2011); Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) generally but see chapters 9, 11 and 12 in particular; D Matthews, *Intellectual property, human rights and development: the role of NGOs and social movements* (Edward Elgar, Cheltenham 2011); W Grosheide (ed), *Intellectual property rights and human rights: a paradox* (Edward Elgar, Cheltenham 2009); J. Griffiths and L. McDonagh, ‘Fundamental rights and European intellectual property law - the case of Art 17(2) of the EU Charter’ in C. Geiger, (ed.) *Constructing European IP: achievements & new perspectives* (Edward Elgar, Cheltenham 2012). Available at <SSRN: <http://ssrn.com/abstract=1904507>> (last accessed 10 March 2013). For a view that there is generally no conflict between copyright and the right to education, see E Derclaye, ‘Intellectual property rights and human rights: coinciding and cooperating’ in Torremans, IP and human rights (fn 13, above) 133,146. She however discusses the human right to education based on Article 2 of the First Additional Protocol to the ECHR which arguably does not lend itself to detailed commentary since it applies to more developed countries.

¹⁴ Copyright is used here to refer to author’s rights as opposed to neighbouring or related rights. The thesis mainly deals with issues related to the regime of exclusive economic rights of authors and the exceptions to them.

¹⁵ Among those that argue vehemently that there is in fact no conflict is Dr Estelle Derclaye; see E Derclaye, ‘Intellectual property rights and human rights: coinciding and cooperating’ in Torremans, IP and human rights (fn 13, above) 133-160. See also Sharon E Forster, ‘The conflict between the human right to education and copyright’ in Torremans, IP and human rights (fn 13, above) 287-306. A helpful discussion of the broad doctrinal issues involved is provided by Professor Torremans; see Torremans, IP and human rights (fn 13, above) 202-215.

Millennium Development goals (MDGS). In fact, there are studies that have addressed the question of the impact of intellectual property rights, mainly patents, on the realisation of development goals in Uganda. The studies by Willem van Genugten, *et al* ¹⁷ and that by Susan Isiko Štrba are to our knowledge, some of the most recent.¹⁸

The study is aimed at examining the increasingly vexed question of the role that exceptions and flexibilities play in ‘balancing’ the exclusive economic rights guaranteed to authors by copyright law against the interests of users of copyrighted materials in a least developed country like Uganda. There is need to investigate whether and how exceptions and flexibilities can play an important role in the realisation of the right to education and how that in turn affects the realisation of economic development by those countries that presently lag behind the more developed ones.

Right from its inception, copyright was perceived to have an impact on the promotion of education and learning in general. Pro-copyright groups argued that this impact was positive in nature while those opposed to the introduction and entrenchment of copyright and its subsequent expansion and strengthening counter-argued that copyright law, particularly in an expanded and strengthened form would negatively affect the ability of educational users to access and utilise educational material. By contrast, the pro-copyright group even dubbed the first copyright statute in the world, the English

¹⁶ See Todaro and Smith, *Economic Development* (fn 1 above) 41.

¹⁷ ‘Harnessing intellectual property rights for development objectives: the double role of IPRs in the context of facilitating MDGs Nos. 1 and 6.’ (Wolf Legal Publishers, Nijmegen, The Netherlands 2011) available at: <http://www.wolfpublishers.com/harnessingipr/harnessing%20IPR%20full%20book.pdf> (last accessed 05 March 2014).

¹⁸ The Ugandan-born *Susan Isiko Štrba's book entitled, International copyright law and access to education in less developed countries: exploring multilateral legal and quasi-legal solutions* (Martinus Nijhoff Publishers, Leiden, 2012).

Statute of Anne of 1710¹⁹, as “an act for the encouragement of learning.”²⁰ This presupposed that copyright law would play a positive role in encouraging learning in general and education in particular. The idea was to encourage the authorship of more books by discouraging piracy and ensuring that authors were assured of economic returns to their labour. However, as critics would later point out, the aim was largely to benefit the book publishers who bought the copyright from the authors and invested in the printing and dissemination of more copies of books used for education and learning in general.

Less developed countries have obligations to promote realization of the human right to education under international, regional and even national human rights instruments on the one hand and to comply with their international obligations under intellectual property treaties including the TRIPS Agreement of the World Trade Organisation on the other. In what ways do the two obligations clash, if at all, and what should be done when they do conflict? In considering whether there is any conflict between copyright and the right to education, how can we deal with the argument that copyright is itself a human right? Moreover, this raises another question of what should happen in the event of any conflict between copyright and the right to education. Can the right to education trump copyright and if so on what basis? This will call for revisiting the human rights credentials of copyright. What suggestions have come from organisations such as the

¹⁹ The petition to Parliament to enact this statute was filed in December 1709 and the drafting of the bill as well as its passage was in 1710 with the bill receiving Royal Assent on April 6, 1710. Refer to J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008). There are contemporary debates as to whether the Statute of Anne was indeed the first copyright statute, see L Bently, ‘Introduction to part I: the history of copyright’ in L. Bently, U Suthersanen and P. Torremans (eds) *Global Copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace* (Edward Elgar, Cheltenham 2010) 7.

²⁰ The promotion of learning was however, viewed more in terms of stimulating the creativity and production of works rather than the dissemination and diffusion of knowledge goods, at that time, mainly books. See further discussion in Chapter 2.

United Nations Economic and Social Council (ECOSOC) that is mandated to interpret human rights provisions of international instruments, notably, the ICESCR?²¹ Considering the need to promote education, how can these arguments fit in with a utilitarian interpretation of copyright?

The problem of the apparent conflict between copyright in recognition of the interests of authors and publishers on the one hand and the need for educating members of the public on the other is not new and did not start in 1971 when the United Nations started the list of least developed countries. Right from the first enactment of copyright law in England, this major concern was not only highlighted but hotly debated. With time however, the law was passed and subsequently, an international framework was agreed upon in the form of the Berne Convention for the Protection of Literary and Artistic Works 1884. This leading international copyright instrument entrenched a set of exclusive economic rights in favour of authors. The exclusive economic rights were subsequently strengthened and widened in subsequent revisions of the Berne Convention, the latest being the 1971 Paris text. Some exceptions and what came to be known as ‘flexibilities’ (notably: the ‘idea-expression’ dichotomy, the duration of copyright and the exhaustion doctrine) were also developed or acknowledged to be in existence to among others cater for the needs of users including educational users. However, the exceptions in particular were not regarded as a key concern of the Convention or its subsequent revisions. In a bid to keep one leading exception in check, a test formulated in vague diplomatic language was agreed upon to govern national

²¹ Two General Comments will be reviewed in this study: General Comment No 13 on the right to education and General Comment No 17 on ‘intellectual property’. In his essay, Professor Paul LC Torremans, does not deal with the implications of the interpretations contained in General Comment No. 15 but points out that enjoying a benefit from protection of IPRs is clearly not the same as enjoying an

exceptions to the reproduction right. The interpretation of the test-the Berne three-step test, would later become problematic and controversial thus raising questions as to how its interpretation and application would impact on the development of the intended national exceptions.

Since the Second World, human rights came to international prominence with the conclusion of the United Nations Declaration of Human Rights (UNDHR).²² Among the rights declared was the right to education. This was followed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and various other regional instruments such as the African Charter on Human and Peoples' Rights, 1981. These instruments entrench the right to education and in some ways entrench the right to property which has been argued to include intellectual property. In working out a balance between copyright and the right to education, some commentators have been keen and rightly so to point to the human rights credentials of copyright. There is debate surrounding the interface between these two areas. This research therefore will investigate the importance of education from a human rights angle and will take into consideration interpretations on the human rights status of copyright in trying to resolve how Uganda a least developed country should go about resolving any tensions between the two.

Apart from the human rights credentials, copyright is protected by international treaties namely: the Berne Convention on the Protection of Literary and Artistic Works

unrestricted monopoly. See Paul L C Torremans 'Copyrights (and other intellectual property rights) as a human right in Torremans, IP and human rights (fn 13, above) 202-215.

originally concluded in 1884 but variously updated till 1971. In 1994 with the conclusion of the TRIPS Agreement, Articles 1-21 (excluding Article *6bis*) of the Berne Convention 1971 text were incorporated as part of the Multi-lateral trading agreements. One of the reasons for bringing IP under the umbrella of the global trade regulation mechanism was the weak enforcement mechanisms within the existing international framework, including that contained in the Berne Convention with respect to copyright. Additionally, most less developed countries (including the LDCs) lacked IP legislation or had weak legislation that was poorly enforced. TRIPs incorporated the Berne-three step test but arguably widened it thereby furthering the controversy and the potential to impact not only exceptions to the reproduction right but also other exclusive economic rights such as those that will be examined in this thesis. This rekindled the debate leading to arguments that there is a conflict between copyright and other human rights including the right to education (which I am to focus on) on the one hand and those arguing that there is in fact no conflict but co-existence or just a ‘false conflict’.²³ This thesis will examine these arguments in light of the socio-economic needs of less developed countries, with Uganda as a case study.

In 2006, Uganda enacted the Copyright and Neighbouring Rights Act (hereafter ‘CONRA’ to comply with its obligations under the TRIPS Agreement and to some extent, in response to the needs of the music industry. Among the changes brought about by this new legislation was the introduction of a United States style ‘fair use’ defence that applies to all exceptions. This defence remains largely untested and hence

²² See, Sharon E Forster, ‘The conflict between the human right to education and copyright’ *Torremans, IP and human rights* (fn 13, above) 287-306.

²³ Sharon E Forster, ‘The conflict between the human right to education and copyright’ in *Torremans, IP and human rights* (fn 13, above) 287-306.

there is need to study its possible implications with regard to the right to education. There is also need to find out if the new defence complies with the international legal framework contained in the Berne Convention and the TRIPS Agreement. Equally important is the need to investigate whether Uganda's fair use defence, in as far as it has the potential to impact education, is an optimal transposition of the available exceptions. How does this defence compare with the United States fair use defence? Further, there will be need to investigate the possible weaknesses in the way this defence was constructed and to suggest possible improvements that could help copyright play a more positive role in enhancing education in a least developed country like Uganda.

It is noted that even before the enactment of CONRA in 2006, when many former colonies in Africa and other parts of the world got their political independence, there was a realisation of the need to access and utilise educational materials both in the English language (in the case of Uganda) and in translated versions. The Berne Appendix for developing countries was eventually concluded after a lot of wrangling and arm-twisting. The Appendix is notorious for being procedurally complex and consequently has largely remained unimplemented. Its lack of implementation has led to calls for its removal from the international copyright system by copyright owners in the more developed countries. This study will use education theory and some empirical studies carried out by other organisations to analyse whether the Berne Appendix is still relevant. In the event the Appendix is still relevant, the thesis will seek to review the procedural issues and how they impact education. Thereafter, it will be pertinent to analyse whether the way the Appendix was implemented in CONRA complies with the Berne Appendix, as the parent instrument. Related to this and to fulfil the overall aim of this project, the capability of CONRA's compulsory licence regime to contribute to the

enhancement of education in Uganda will be analysed. Finally, it is imperative that an investigation is done as to whether there are any doctrinal problems that would stop Uganda from implementing the Berne Appendix and to suggest ways such problems would be overcome. It is submitted that Uganda is currently not a member of the Berne Union.²⁴

Key highlights of the study will therefore be the possible shortcomings of copyright law and its exceptions at the international level, followed by the possible constraints caused by the interpretation of the three-step test and how less developed countries could circumvent its potential for assuming a “show-stopping” status to come up with exceptions that promote education for economic development. This will then be followed by an analysis of the actual or possible impact of CONRA and in particular, the educational exceptions including fair use ones and the compulsory licence provisions.

²⁴ Uganda is not a member of the Berne Union but is bound by the Berne Convention articles 1-20 including the Appendix (but excluding article *6bis*) that were incorporated by the TRIPS Agreement via its article 9(2). But see Edgar Tabaro, “Copyright law reform in Uganda: addressing international standards at the expense of domestic objectives” (ACODE Policy Briefing Paper No. 10, 2005) at p. 6, fn. 12: available at: <<http://www.acode-u.org/documents/PBP%2010.pdf>>, (last accessed 10 January 2014). He states, erroneously, that Uganda is a member of the Berne Convention by virtue of its colonial heritage. It is true that Uganda is a former British colony whose copyright law was introduced by the British colonialists by virtue of an Order in Council of 1912 promulgated under the provisions *inter alia*, of section 28 of the United Kingdom Copyright Act of 1911. That Order in Council was repealed as to Uganda by an Order in Council dated December 21, 1961 as part of the arrangements for Uganda’s political independence in 1962. Accordingly, except where colonial laws were explicitly saved and enacted as part of the laws of the country after independence, they stopped applying as law in independent Uganda. Similarly, the post-colonial government of Uganda was responsible for ratification of any treaties including the Berne Convention. Information from WIPO is clear that Uganda is not a member of the Berne Union. See <www.wipo.org> (last accessed 10 March 2014); On the nature of international copyright relations before the conclusion of the Berne Convention in 1886, it is stated that nations especially in Europe had relied on bilateral agreements in what has been described as a “mosaic of treaties that formed an embryonic international system based on reciprocity”. See Geo Haven Putnam, *The Question of Copyright*, (Putnam’s Sons, New York 1891) at pp. 60-61 who among other things, lists the countries with which Great Britain had agreements for reciprocal protection of copyright; See also Claude Masouye, in an article contributed to the symposium on *International copyright: needs of less developed countries*, Government of India, New Delhi (1967). This was just before the Stockholm Berne Revision Conference in June 1967, p. 106; Also see Peter Burger, “The Berne Convention: its history and its key role in the future” (1988) 3 J.L. & Tech. 1 at pp.8-10 on the difficulties faced by France in her efforts to conclude bilateral treaties with other countries, particularly Belgium and Holland where French works were blatantly pirated.

In sum, this study will investigate whether and how the efforts of least developed countries like Uganda to achieve economic development may be hampered by copyright because of its potential or actual effect on education. In order to do this however, the thesis will first have to examine in some detail and establish the meaning and goals of economic development, and the role of education in economic development before answering the question of what does copyright have to do with education. If linkages are found, the nature of the linkages will have to be explored and expounded in the context of our case study, Uganda.

1.3 Research questions

The research will be about how copyright law can be more effectively used to enhance education for the economic development of less developed countries and more so the least developed ones like Uganda. Three central questions will be under investigation:

- With specific reference to Uganda, what is the role of copyright in facilitating the enhancement of education for economic development of less developed countries?
- If there is any role, are international and national copyright exceptions and flexibilities fit for the purpose?
- If the exceptions and flexibilities are not fit for the purpose, what further reforms at the national level are required?

The ultimate goal will be to analyse whether Uganda's Copyright and Neighbouring Rights Act 2006 was optimally crafted to facilitate the enhancement of education to achieve its role.

In all, I shall attempt to answer the following sub-questions:²⁵

- What is the role of education in attaining economic development in a least developed country like Uganda?
- What role does copyright play in promoting education as a human right, a means and an end of economic development?
- In view of the exceptions and flexibilities available under the international copyright regime, what if any doctrinal tensions exist between copyright and the human right to education?
- How can classical utilitarianism as a theory be used to reconcile the tensions between copyright and the right to education in order to solve the current needs of less developed countries?
- How, if possible, should the three-step test be interpreted to meet the educational and development needs of less developed countries?
- Is Uganda's copyright regime of exceptions and flexibilities an optimal transposition of international copyright law sufficient to maximise copyright's role in enhancing education?
- Subject to the restrictions imposed by the current international framework, what reforms, if any, are needed for copyright to more effectively contribute to the enhancement of education for economic development of Uganda?
- Is the Berne Appendix for developing countries still relevant, and if so, how well was it domesticated by Uganda's copyright legislation and what needs to be done to put it to practical use?

²⁵ JW Creswell, *Research design: qualitative, quantitative and mixed methods approach* (Sage, London 2009) 129-130, the seasoned commentator states that qualitative researchers should state research questions followed by associated sub questions as opposed to using objectives or specific goals and hypotheses.

1.4 Research methodology

This research will employ a multi-disciplinary, critical and comparative²⁶ doctrinal analysis of theory on: copyright, the human right to education, economic development and education. A qualitative approach will be used for purposes of reviewing relevant literature on the role of education in economic development and on the possible conflict or tensions between copyright and the right to education as represented by access to and utilisation of educational materials. The comparative analysis, it is hoped, will facilitate the drawing of lessons from the experiences of other countries, including developed countries with strong copyright traditions, but which nevertheless do have or have had at various stages of their development to deal with the question of whether a conflict exists and how to ensure copyright law supports education as a human right, a means and an end of economic development. To this end, reference will be made to the legislation and case law of countries such as Australia, Canada, the United States of America, United Kingdom, Germany and France will be used as well as legislative provisions from other less developed countries such as South Africa, Kenya, India²⁷ and Thailand.²⁸

²⁶ For some views on comparative legal studies, see generally Zweigert-Kötz, *An introduction to comparative law* (Clarendon Press, 1992).

²⁷ In 2012 Cambridge University Press (CUP), Oxford University Press and Taylor & Francis launched a lawsuit last year against Delhi University (DU) and a reprographics shop near its campus for producing "course packs" -- bound collections of photocopied extracts from books and journals that are sold for much cheaper than textbooks. The publishers claim the practice infringes on copyright, and that they and their authors are losing money as a result. The publishers are demanding over \$110,000 in damages for this alleged infringement. The defendants claim protection under section 52 of the Indian Copyright Act. The suit has attracted responses from among others Nobel Laureate Professor Amartya Sen. See his letter attached as *Appendix 1* to this thesis. For the story, see Debika Ray, 'Photocopying courts India campus controversy' (Story of 17 March 2013, Aljazeera); online at: <http://www.aljazeera.com/indepth/features/2013/03/2013317104829368899.html> (accessed 10 April 2013).

²⁸ Less developed countries (including least developed ones) are not homogenous as such, they are heterogeneous; though there are typical characteristics common to all, there are differences and some less developed countries are better off than others. South Africa for instance is relatively more developed than

The multi-disciplinary approach was dictated by the very nature of the topic which requires linking of theories from the disciplines of: development economics, human rights law, copyright law/ intellectual property law and education and to some degree, sociology.

1.5 Theoretical framework

In seeking to balance the human right to education with the rights of authors to achieve economic development, the thesis will apply consequentialism as the grand theory.²⁹ In particular, classical utilitarianism will be the philosophical theory used to critique existing provisions and to anchor and justify the proposed reforms.³⁰ Utilitarianism is always used to justify strong copyright (and general IP) protection as a means of incentivising creativity and production of works almost as ends in themselves.³¹ It will be asserted that such application of utilitarianism has disproportionately focussed on

Uganda or even Kenya, which is not a least developed country. Even Kenya, Uganda's neighbour, has a more robust economy and has enjoyed longer periods of political stability. According to See Todaro and Smith, *Economic Development* (fn 1 above) 14 & 38 ff. The common characteristics of less developed countries (with much applicability to Uganda) include: lower levels of standards of living and productivity, lower levels of human capital, higher levels of inequality and absolute poverty, higher population growth rates (Uganda's population growth rate is one of the highest in the world see discussion in Chapter 2), larger rural populations, lower levels of industrialisation, adverse geography (Uganda is a landlocked country), lingering colonial impacts such as poor institutions and often external dependence. On this, see pp 56-77. On the heterogeneous nature, see Willem van Genugten, *et al* "Harnessing intellectual property rights for development objectives: the double role of IPRs in the context of facilitating MDGs Nos. 1 and 6." (Wolf Legal Publishers, Nijmegen, The Netherlands 2011) available at: <http://www.wolfpublishers.com/harnessingipr/harnessing%20IPR%20full%20book.pdf> last accessed 05 March 2014. At p. 7 they state that while the 47 SSA countries have common IP and development concerns, each of them have individual characteristics and circumstances necessitating specific analysis and policies.

²⁹ See A Bryman, *Social Research Methods* (3rd ed, Oxford University Press 2008).

³⁰ For an economics commentary that grapples with the importance of determining which social justice theory to follow, see C Bertram, 'Social justice' in D A Clark (ed), *The Elgar companion to development studies* (Edward Elgar, Cheltenham 2006) 568.

³¹ There are various strands of utilitarianism. We however are using classical utilitarianism also sometimes referred to as *Benthamite utilitarianism* since it was propounded by Jeremy Bentham. On theories of justice generally, see W. Twining, *General jurisprudence: understanding law from a global*

creativity and production of works *for the future*³² at the expense of access and utilisation *in the present*. In other words, such interpretation ignores the problem of access and utilisation as experienced in less developed countries and more so the least developed ones. This thesis will seek to demonstrate that utilitarianism can be used to promote rather than impede present day access and utilisation of copyrighted works for educational purposes.³³ The theory will help to justify access for the present rather than waiting in the very long run when copyrighted educational materials eventually fall into the public domain. In focusing on the criticality of education to the multi-dimensional phenomenon of economic development, the thesis draws on and is grounded in development economics, education theory and to some extent, sociological thinking. In particular, Amartya Sen’s ‘development as freedom’ approach is particularly embraced, (though critically) because it helps to define development goals from a less developed country perspective.

A review and analysis of relevant literature and doctrines on copyright, economic development, education as a human right and a discipline will thus be undertaken.

1.6 Sources

We are often reminded that there is no such thing as international copyright law because copyright law is territorial in nature.³⁴ However, there exists an international framework that national legislatures must work within when enacting legislation for their respective

perspective (Cambridge University Press, Cambridge 2009); hereafter, “Twining 2009”; on theories of justice as applied to copyright law in this thesis, see discussion in Chapter 2.

³² See Z Efroni, *Access- right* (Oxford University Press, Oxford 2011) 120.

³³ For a discussion of utilitarianism with respect to copyright, see Chapter 2 section 2.6.

territories or jurisdictions. To analyse the conflict between the human right to education and copyright, I have therefore looked at the principles contained in the Berne Convention for the Protection of Literary and Artistic Works, the TRIPS Agreement and the WIPO Copyright Treaty (WCT). An issue whose implications are to be examined is whether any doctrinal issues arise from the fact that Uganda, our case study, is neither a signatory to the Berne Convention nor the WCT. Uganda never even signed the Universal Copyright Convention 1952.³⁵ As earlier mentioned, using a comparative approach, I shall look at the national laws of some countries with very strong copyright regimes, namely, France, Germany, the United States of America and the United Kingdom.³⁶ This may make it imperative to make some reference to the copyright framework established by relevant European Union copyright Directives and legislative instruments.

From a human rights angle, it will be necessary to examine relevant key provisions of the leading international treaties on the human right to education including the non-binding but nevertheless authoritative Universal Declaration of Human Rights.³⁷ This also will allow us look at the right to education in the context of other socio-economic rights. Other treaties of relevancy that will be canvassed include regional treaties notably the African Charter on Human and People's Rights³⁸ and the African Charter on

³⁴ See Paul L.C. Torremans book review of Professor Paul Goldstein's book, 'International copyright: principles, law and practice' (2003) IPQ 234.

³⁵ Available at < http://www.wipo.int/wipolex/en/other_treaties/details.jsp?group_id=22&treaty_id=208> last accessed 20 March 2013. On the possible reasons for this, see discussion in chapter 5.

³⁶ The choice of France and Germany, two leading civil law countries will also allow us to look at civil law while USA and UK are leading Anglo-Saxon tradition countries.

³⁷ Office of the Commissioner for Human Rights, <www.ohchr.org> OHCHR › English › Universal declaration> (last accessed 20 March 2013).

³⁸ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force on 21 October 1986) (1982) 21 ILM 58 (African Charter) available at: <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf>; (last accessed 03 March 2014).

the Rights and Welfare of the Child.³⁹ Various international and regional human rights instruments on the right to education⁴⁰ may also be used to justify protection of copyright as a right to property- how then is a balance to be achieved in view of potential conflict? Guidance will be sought from authoritative interpretations such as United Nations General Comments of these important issues-education and copyright (IPRs). At the national level, I shall investigate how the Constitution of the Republic of Uganda 1995 addresses the twin but potentially conflicting issues of protection of the right to property on the one hand and the human right to education on the other.⁴¹

A wide range of legal literature will be consulted for the necessary analysis. This will include: legislative reports, consultation papers, academic and policy documents, treatises and journal articles from various jurisdictions and organisations including the United Nations.

1.7 Scope and limitations of the study

The work does not promise to cover in detail all less developed countries but will focus on Uganda, a typical sub-Saharan African least developed country. Uganda has been chosen among other reasons because it has most of the recognized characteristics of a less developed country even though it has been experiencing a high rate of economic

³⁹ African Charter on the Rights and Welfare of the Child 1990< http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf> (last accessed 10 March 2013). Article 11(3)(b) and (c) even provide for secondary and higher education. The charter came in force in 1999.

⁴⁰ The Treaty establishing the East African Community, 1999 in article 81(2) provides for protection of property while article 103(1)(i) provides for harmonisation of, among others, protection of intellectual property rights (IPRS); such harmonisation is yet to be done. See further discussion in chapter 2. Treaty available at < <http://www.wipo.int/wipolex/en/profile.jsp?code=EAC>> (last accessed 20 March 2013).

⁴¹ Article 30 discussed in Chapter 2.

growth for a long time.⁴² In discussing economic development, the thesis will not deal with the question of environmental sustainability which is one of the goals of economic development. However, this is in no way intended to undermine this concept which is Goal Number 7 of the MDGs. Suffice it to mention that it is possible that education plays an important role in promoting sustainable use of the environment.

Secondly, the thesis will not cover all the possible independent variables or factors that may account for the problems faced by educational users and researchers in accessing and utilising educational materials in less developed countries.⁴³ Further, the study does not purport to exhaust all potential tensions that may arise between copyright and the education. This study will restrict itself to the following exclusive economic rights: reproduction, distribution, translation, communication to the public and making derivative works. To facilitate an in-depth analysis, the study shall not deal with the broadcasting right,⁴⁴ public recitation right, public performance right and moral rights among others even though these may have the potential to affect the right to education.

Moreover, in terms of limitations, this will not be an empirical study of the impact of copyright on access to and utilization of educational materials. Such a study, would call

⁴² In 2008, the country's GDP grew at a rate of 9.5 percent but due to lapses in internal controls and the global economic downturn, the rate of growth reduced considerably in the last 2 years. See World Bank profiles at: http://ddpext.worldbank.org/ext/ddpreports/ViewSharedReport?REPORT_ID=9147&REQUEST_TYPE=VIEWADVANCED&DIMENSIONS=213. Further mentioned in chapter 2 dealing with the socio-economic context of Uganda.

⁴³ This could include things like taxation policy on imported educational materials and poor national transport infrastructure that does not allow for book distribution.

⁴⁴ For a discussion including the educational exceptions, see F M Makeen, *Copyright in a global information society: the scope of copyright protection under international, United States, United Kingdom and French law* (Arnhem, Kluwer 2000) 92-93. The broadcasting right was previously regarded as very essential for educational purposes at the time of the Stockholm Berne Revision Conference. However, educational broadcasting has ironically declined in importance despite a proliferation of FM radio stations in Uganda. See Ricketson and Ginsburg, 2006 (fn 8) 937, para 14.72 referring to Dr Straschnov's submission. Dr Straschnov was the adviser to the Kenyan Government at the said conference.

for more detailed qualitative and quantitative analysis. This was neither planned for nor will it be possible due to limited financial resources and time. The study will nevertheless be informed by empirical studies such as the African Copyright and Access to Knowledge Project (ACA2K),⁴⁵ the tralac study on Southern Africa,⁴⁶ Consumers International studies⁴⁷ and reports⁴⁸ and WIPO commissioned studies and the study by Willem van Genugten *et al*⁴⁹ involving empirical studies in Uganda and South Africa.⁵⁰ Empirical evidence from other sources such as international development bodies like the World

⁴⁵ See ACA2K book entitled *Access to knowledge in Africa*, containing final report at <http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf> last accessed 20 March 2013. For the report specific to Uganda, see <http://www.aca2k.org/attachments/154_Uganda_Country_Report.pdf> last accessed 10 April 2013.

⁴⁶ A Rens, A Prabhala and D Kawooya, 'Intellectual property, education and access to knowledge in Southern Africa', (ICTSD/ UNCTAD and tralac, 2006) <<http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>> (last accessed 10 March 2013).

⁴⁷ Consumers International, 'Copyright and access to knowledge: policy recommendations on flexibilities in copyright law' <www.eifl.net/system/files/201105/ci_report.pdf> (last accessed 20 March 2013).

⁴⁸ Willem van Genugten, *et al*, *Harnessing intellectual property rights for development objectives: the double role of IPRs in the context of facilitating MDGs Nos. 1 and 6.*' (Wolf Legal Publishers, Nijmegen, The Netherlands 2011) available at: <http://www.wolfpublishers.com/harnessingipr/harnessing%20IPR%20full%20book.pdf> (Wolf Legal Publishers, Nijmegen, The Netherlands 2011) available at <http://www.wolfpublishers.com/harnessingipr/harnessing%20IPR%20full%20book.pdf> >, (last accessed 05 March 2014). This study that covered Uganda (our case study) and South Africa, examined the impact of patent law on access to medicines and to agriculture-related MDG objectives.

⁴⁹ Willem van Genugten, *et al*, *Harnessing intellectual property rights for development objectives: the double role of IPRs in the context of facilitating MDGs Nos. 1 and 6.*' (Wolf Legal Publishers, Nijmegen, The Netherlands 2011) available at: <http://www.wolfpublishers.com/harnessingipr/harnessing%20IPR%20full%20book.pdf> (Wolf Legal Publishers, Nijmegen, The Netherlands 2011) available at <http://www.wolfpublishers.com/harnessingipr/harnessing%20IPR%20full%20book.pdf> >, (last accessed 05 March 2014). This study that covered Uganda (our case study) and South Africa, examined the impact of patent law on access to medicines and to agriculture-related MDG objectives.

⁵⁰ J Fometue, 'Study on limitations and exceptions for copyright and related rights for teaching in Africa', Document SCCR/19/5, WIPO, Geneva, December 2009 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241> (last accessed 20 March 2013).

; J. C. M Rodríguez, 'WIPO study on the limitations and exceptions to copyright and related rights for the purposes of educational and research activities in Latin America and the Caribbean' <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_4.pdf>

WIPO Geneva, 2009, (last accessed 20 March 2013); J Sullivan, 'WIPO Study on Limitations & Exceptions for the Visually Impaired' <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696> WIPO, Geneva; (last accessed 20 March 2013); S Ricketson, 'WIPO study on limitations and exceptions of copyright and related rights in the digital environment' Available at: <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805> (last accessed 20 March 2013); Kenneth Crews, 'WIPO Study on copyright limitations and exceptions for libraries and archives' available at:

Bank and UNESCO will also be analysed and used, for example in chapter 2 when examining the quality of education in Uganda and in Chapter 6 when discussing the need for the Berne Appendix.

Further, though conscious of the different approaches to copyright in *droit d'auteur* countries, this thesis will lean more on the Anglo-Saxon or so-called 'copyright' tradition. This has some implications since commentators with a *droit d'auteur* background, for instance, Raquel Xalabarder and more recently Professor Joseph Fometue, who have analysed this aspect of copyright law, are bound to have been hugely influenced by the so-called *personalist* approach to copyright that operates in civil law countries.

Finally, in terms of time, the law examined is largely that which existed as at 31st January 2011; where later changes are discussed, these will be pointed out.⁵¹

1.8 Structure of the thesis

The thesis begins with this introductory chapter (**Chapter 1**) where I introduce the key themes and issues by reviewing the problem to be investigated; outline the research questions; sources, methodology, scope and anticipated limitations of the study. This chapter also deals with the theoretical framework and the structure of the thesis.

<http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192> last accessed 20 March 2014; and, WIPO, 'Scoping study on copyright and related rights and the public domain' <http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf>, (last accessed 20 March 2013).

⁵¹ For instance the most recent US Supreme court case of *Kirtsaeng, Dba Bluechristine99 V. John Wiley & Sons, Inc.* 568 U. S. ____ (2013) on the 'first sale' or exhaustion doctrine is referred to.

Chapter 2 will discuss the linkage between the key themes: economic development, education and copyright. It will thus begin by examining the relationship between education and economic development; the meaning and goals of economic development, the role of education in economic development before examining how, if at all, education can be linked to copyright from two perspectives: development economics and human rights. The other part of the chapter will examine aspects of education as a fundamental human right and an empowerment right. Furthermore, an investigation will be done into the intrinsic nature of the human right to education with a view to among others clarifying the various core obligations of less developed country states and the entitlements of citizens. This will explain what makes education so important as to necessitate a balancing against or even trumping of the rights of authors. This question will be approached firstly from the development economics angle and secondly using human rights theory. It is this chapter that will investigate and expound on the linkage between copyright and the right to education.

Finally, this chapter will explain how utilitarianism as a grand theory may be invoked as a philosophical justification for initiating, implementing, interpreting and enforcing further reforms to international copyright instruments and more so Ugandan copyright law to ‘balance’ or even trump right holders’ rights to enhance education for economic development.

Chapter 3 will deal with the balancing of the human right to education with the rights of authors. It will examine and critique the educational exceptions under the international copyright regime using a utilitarian lense (from the perspective of less developed countries). Are these exceptions capable of facilitating access and use of

copyrighted educational materials for quality education to support economic development in Uganda? Are the criticisms justified or to borrow from Justice Laddie,⁵² are they over-rated? Another important part of this chapter will be an examination of the so-called ‘flexibilities’ that were arguably designed to be used as another tool for ensuring that copyright plays a positive role in enhancing education for economic development. These include: the idea-expression dichotomy, the exhaustion doctrine and the vexed question of the effect of the duration of copyright on the right to education in less developed countries.

In **Chapter 4** I shall analyse the controversial three-step test to which most copyright exceptions must comply. Accordingly, I shall examine various doctrinal challenges that may be faced by less developed countries attempting to use exceptions to diffuse the conflict between copyright and the right to education. Related to this, I shall analyse the usefulness of the so-called ‘public interest’ provisions in international instruments (notably TRIPS and WCT) and underscore the need to infuse with meaning these key provisions that deal among others, with one of our ultimate concern-promotion of economic development. What approach should less developed country legislatures and courts take in order to avoid an overly restrictive approach to the exceptions?

Chapter 5 will investigate the extent to which the Ugandan legislature managed, if at all, to construct an educational-friendly copyright regime. A brief background to Uganda’s copyright law will be examined including the policy objectives behind the current law, the Copyright and Neighbouring Rights Act 2006. The crux of the chapter

⁵² Justice Laddie, ‘Copyright: over-strength, over-regulated, over-rated?’ EIPR 1996, 18(5), 253-260.

will be an analysis of Uganda's fair –use defence which replaced the fair dealing defence. This is where the question of whether Uganda optimally transposed the available educational exceptions will be investigated. How different is Uganda's formulation of the fair-use defence from that of the United States of America and what implications does this have on access and utilisation of educational materials? What lessons can be drawn from the interpretation of fair use in the United States of America where the fair use defence originated and has been used and tested for a long time? It is here that reference will be made to relevant educational exceptions of other countries such as the United Kingdom and other less developed countries including South Africa, Kenya and India. One aim of doing will be to underline the importance of having clear exceptions that maximally utilise the available policy space within international copyright law.

Chapter 6 will deal with the question of whether the Berne Appendix for developing countries is still relevant and if so how and why. Arguably, the Berne Appendix regime remains very much relevant to today's urgent need for reproduction and translation, on a large scale, of educational materials protected by copyright. Chapter 6 therefore will be an analysis of key provisions of the Berne Appendix as well as CONRA's transposition of those provisions with regard to the compulsory licences for reproduction and translation in order to deal with the question as to whether such licences can be a useful tool to supplement the educational exceptions. The analysis will further test the compliance of relevant CONRA provisions with the Appendix provisions. An underlying concern will be examining whether CONRA provisions make maximum utilisation of the restrictive Appendix provisions to promote access to and utilisation of

copyrighted educational materials. This chapter will further investigate if any doctrinal issues might arise if Uganda were to attempt to operationalize the Appendix provisions as transposed in CONRA. Even though a member state of the WTO (and therefore a signatory to the TRIPS Agreement), Uganda is notoriously not a member of the Berne Union.⁵³ The thesis will examine whether there are any doctrinal and practical problems emanating from this before making recommendations as to what needs to be done if Uganda is to avail itself of the provisions of the Berne Appendix. Inevitably, the chapter will address the strong criticism especially by publishing companies based in the more developed countries that the Berne Appendix is irrelevant and should be abolished due to its non-use.⁵⁴

Chapter 7 will summarise the study's key findings and make final recommendations.

⁵³ See discussion in Chapter 5.

⁵⁴ Indeed countries like Kenya have not even transposed its provisions into their copyright legislation. In the ACA2K study of 2009-2010, Kenyan researchers realised that their legislation is not as maximalist as it should be with regard to access to knowledge for educational purposes. For this, see, Marisella Ouma and Ben Shihanya, ACA2K, 'Kenya Country Report', (June 2009) 4 available at: <http://www.aca2k.org/attachments/154_ACA2K%20KENYA%20CR%20WEB.pdf> (last accessed 10 January 2014). Much earlier on, a leading Kenyan educational publisher, Dr. Henry M Chakava, in one of his works expressed surprise at learning that under the international copyright system there is provision for compulsory licensing for educational purposes. Lamenting about the rigours of getting foreign licences from the global North to reproduce works, it can be concluded he felt compulsory licence would have helped solve the problem. See H M Chakava, *Publishing in Africa: one man's perspective* (Bellagio Publishing Network Research and Information Center 1996). Even India that was the *de facto* leader of less developed countries during the negotiations did not declare its intention to avail itself of the Berne Appendix provisions until 1984, 13 years after the 1971 Paris Revision Conference that adopted the Berne Appendix for less developed countries. See India's declaration at: <www.wipo.int/treaties/en/notifications/berne/treaty_berne_108.html> (last accessed 17 February 2013). See discussion by U Butalia, 'The issues at stake: an Indian perspective on copyright' PG Altbach (ed), *Copyright and development: inequality in the information age*, (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass 1995) 43, 48.

Chapter 2: Linking economic development, education and copyright

2.1 Introduction

Having mapped the problem in the previous chapter (Chapter 1), the present chapter examines the link between economic development, the right to education and copyright. It does this by using development economics theory to analyse the concept of economic development and the importance of education in the pursuit of economic development. Interestingly economists and human rights commentators agree that education is both intrinsic to and a means of economic development. By intrinsic is meant that a country with low levels of education cannot qualify to be classified as ‘developed’ regardless of its income levels. In order to review the role, I begin by briefly examining the meaning of the concept of ‘economic development’. One of the objectives of doing this is to differentiate economic development from the concept of ‘economic growth’ and to point in the direction Uganda needs to take on its path of realising the greatest good of its country’s greatest number. As pointed out in Chapter 1, this thesis is predicated on consequentialism as expounded in the classical utilitarian theory to argue that economic development of less developed countries is the greatest good of the world’s greatest number which necessitates legal reforms that help attain this morally right objective in a globalised world.⁵⁵ In this connection, this chapter will attempt to show how utilitarianism can be used to locate copyright within the right to education and to justify enactment of copyright exceptions and their interpretation in such a way as to enhance education for economic development of less developed countries.

⁵⁵ See section 1.4 of Chapter 1 above.

From the economic development theory point of view, I shall review the available literature on the role of education in economic development. Historical lessons will be drawn from the more developed countries including the USA that successfully played ‘catch-up’ or convergence. Even more importantly, lessons have to be drawn from the East Asian Tigers: Singapore, South Korea, Malaysia, Taiwan and Hong Kong (China)⁵⁶ with a view to establishing what role education played in their development ‘miracle’ and how other less developed countries especially in sub-Saharan Africa (SSA) can use these lessons in pursuing economic development with education as a priority.⁵⁷ Since one sub-question is to examine and establish how copyright law can be reformed to better support education for economic development, it becomes necessary from the outset to have a clear understanding of the meaning and nature of economic development.⁵⁸

Because this thesis uses a multi-disciplinary approach, the above discussion will be followed by an examination of the nature of education as a human right protected by international, regional and national human rights instruments.⁵⁹ I shall examine aspects of the human right to education and try to link them to copyright. This will involve examination of the core elements of the right to education as represented by what are referred to as the ‘4As’ of the right to education: availability, acceptability, accessibility

⁵⁶ See generally, M P. Todaro and S C Smith, *Economics for a less developed world* (Addison Wesley Pearson, London 2011); hereafter “Todaro and Smith, Economic development”.

⁵⁷ Economists have discussed the concept of endogeneity but nevertheless concluded that education is important contributor to economic growth and development. The concept of endogenous growth among others addresses the question of whether countries like the ‘East Asian Tigers’ and India have attained economic growth because of the contribution of education successes or the education successes are realised because of high levels of economic growth. See following discussion.

⁵⁸ The concept has been changing over time and today means something different from the traditional sense. See discussion below.

⁵⁹ See discussion at below.

and adaptability.⁶⁰ The idea behind the core elements of states under the right to education is that education must have the four attributes. I shall discuss the implications of each of these attributes with respect to educational materials. Closely linked with this will be a discussion of the core obligations imposed on states by the right to education.

2.2 Meaning of economic development

‘Every nation strives after development’.⁶¹ In fact according to this current study which applies the classical utilitarianism theory, it is arguable that development is the ultimate good, or utility that least developed nations like Uganda can pursue. It can be further argued that attainment of development is what would make the ultimate ‘greatest good’ of the world’s greatest number.⁶² Development is a multi-dimensional process involving major changes in social structures, popular attitudes, and national institutions, as well as the acceleration of economic growth, the reduction of inequality, and the eradication of poverty.⁶³

2.2.1 ‘Economic development’ and ‘economic growth’

Economic development as defined by development economists refers to the process of improving the quality of all human lives and capabilities by raising people’s levels of living, self-esteem, and freedom. This definitely calls for economic growth as one of the pre-conditions. Traditionally however, development meant achieving sustained rates of growth of income per capita to enable a nation expand its output at a rate faster than the

⁶⁰ See Figure 4 below and discussion in section 2.5.2.

⁶¹ Todaro and Smith, *Economic Development* (fn 56 above) 109.

⁶² For explanation of the application of this theory in our thesis see discussion below.

⁶³ Todaro and Smith, *Economic Development* (fn 56 above) 109.

growth rate of its population.⁶⁴ Even though sometimes used interchangeably by economists,⁶⁵ the study will mainly use the term ‘economic development’ and not just ‘development’.

‘Economic growth’ on the other hand refers to the quantitative increase in the volume of goods and services produced as measured by the gross domestic product (GDP) and income per capita. The concern of economists previously was the attainment of sustained rates of economic growth of income per capita which was necessary to enable a country increase its output at a rate faster than the rate of growth of the population.⁶⁶ Another aim was to turn economies from high levels of dependency on agriculture as a source of employment and production and replacing it with greater levels of manufacturing and services industries.⁶⁷ However, it was later realised that reaching economic growth targets did not necessarily improve the levels of living of the masses of people.

Development in its essence, must represent the whole gamut of change by which an entire social system, tuned to the diverse basic needs and evolving aspirations of individuals and social groups within that system, moves away from a condition of life widely perceived as unsatisfactory toward a situation or condition of life regarded as materially and spiritually better.⁶⁸ By virtue of its classification as a least developed country by the United Nations and by the World Bank as a Low Income Country (LIC),

⁶⁴ See M P. Todaro and S C Smith, *Economics for a less developed world* (Addison Wesley Pearson, London 2011) 14.

⁶⁵ See for instance, Todaro and Smith, Economic development (fn 56 above) 14.

⁶⁶ For a detailed discussion, refer to Todaro and Smith, *ibid*.

⁶⁷ See Todaro and Smith, Economic development (fn 56 above) 14.

⁶⁸ Todaro and Smith, Economic development (fn 56 above) 16.

Uganda needs to and is pursuing policies aimed at attaining economic development. In line with the utilitarian theory therefore, Uganda's Parliament should ensure that as much as possible, all legislation is influenced by this philosophy.

As mentioned in Chapter 1, I use Amartya Sen's approach in understanding what education can do for Ugandans. Amartya Sen, who is regarded as the leading thinker on the meaning of development has identified the human goals of economic development. He argues that income and wealth are not ends in themselves but instruments for other purposes. However, it is said this idea-that income and wealth are a means not an end) goes back as far as Aristotle. According to Sen, 'Economic growth cannot be sensibly treated as an end in itself. Development has to be more concerned with the enhancing the lives we lead and the freedoms we enjoy.'⁶⁹ This led economists to realise that focusing on growth targets alone was not enough to lead to the development of the majority in less developed countries.⁷⁰

In effect, Sen argues that poverty cannot be properly measured by income or even utility as conventionally understood; what matters fundamentally is not what things a person has- or the feelings these provide- but what a person is, or can be, and does, or can do. What matters for well-being is not just the characteristics of commodities consumed, as in the utility approach, but what use the consumer can and does make with commodities. Sen noted that a person with parasitic diseases will be less able to extract nourishment from a given quantity of food than someone without parasites.

⁶⁹ Amartya Sen, *Development as freedom* (Oxford University Press, Oxford 1999) 14; hereafter "Amartya Sen 1999".

⁷⁰ See Todaro and Smith, *Economic development* (fn 56 above) 16ff.

Sen is right and should possibly not be understood in any way as suggesting that a parasite free person without food is better off than one with parasites and food. It would appear that his argument assumes that both people have some food. Education helps people to attain well-being as described by Sen. For Sen, human “well-being” means being well, in the basic sense of being healthy, well nourished, well clothed, literate, and long-lived and more broadly, being able to take part in the life in the community, being mobile, and having freedom of choice in what one can become and can do.⁷¹ Here again the critical importance of education in attaining human well-being is quite evident. It helps to justify why the institution of copyright may have to be interfered with to allow for pursuit of the human right to education.

For education to meet the development goals, the objectives of education must be aligned with the development goals of a country. It is important therefore to understand what the objectives of development are since the concept may mean different things to different people.

⁷¹ See Todaro and Smith, *Economic development* (fn 56 above) 16ff. See also, Amartya Sen 1999 (fn 69) 14.

2.2.2 Three objectives of development

It has been stated that development in all societies must have at least the following objectives:

- To increase the availability and widen the distribution of basic life-sustaining goods such as food, shelter, health, and protection.
- To raise levels of living, including in addition to higher incomes, the provision of more jobs, better education, and greater attention to cultural and human values, all of which serve not only to enhance material well-being but also to generate greater individual and national self-esteem.⁷²
- To expand the range of economic and social choices available to individuals and nations freeing them from servitude and dependence not only in relation to other people and nation-states but also to the forces of ignorance and human misery.⁷³

Looking at these objectives, not only is education part of them, but it is arguably a determinant to their attainment. Educated people that find jobs are better able to find food, shelter and protection. Educated people generally have higher standards of living than their uneducated counterparts. It is also cogent to argue that educated people on the whole have wider choices and are less likely to live in conditions of servitude than the uneducated.

2.2.3 The Millennium Development Goals (MDGs)

In September 2000, the (then) 189 member countries of the United Nations adopted eight development goals referred to as the Millennium Development Goals (MDGs) committing themselves to making substantial progress toward the eradication of poverty

⁷² Todaro and Smith, Economic development (fn 56 above) 22.

⁷³ Todaro and Smith, Economic development (fn 56 above) 23.

and achieving human development goals by 2015(see Appendix 3 containing all the MDGs).⁷⁴ Each MDG has individual targets to be achieved. The MDGS are the strongest statement yet of the international commitment to end global world poverty. Unfortunately, sub-Saharan Africa where Uganda belongs is doing worse than South Asia in making progress towards the achievement of the MDGs. In terms of education targets, the projections suggest that there will still be by 2015, 47 million children out of school. In view of the above goals of development, it can be reaffirmed that education is both an end a means to attaining those goals.

While a detailed discussion of all the MDGS is outside the purview of this work, an examination of some of them and their respective targets would help demonstrate the importance of education. It has been stated by Consumers International that education is critical to the attainment of virtually all the MDGs.

2.2.4 Role of education in achieving the MDGS

It has been acknowledged by various commentators that education is central to the achievement of virtually all the MDGs.⁷⁵ A report by Consumers International⁷⁶ makes the following assertion and observations:

In fact, education underpins virtually all the Millennium Development Goals that have been pledged by the member states of the United Nations. Eradication of poverty, reduction of child mortality, combating

⁷⁴ Appendix 3 at end of this thesis.

⁷⁵ See for instance, K M Lewin, 'Education for all and the Millennium development goals' in D A Clark (ed), *The Elgar companion to development studies* (Edward Elgar, Cheltenham, 2006) 145. One commentator who argues that the relationship between the MDGs has not been articulated is G Rist, *The history of economic development: from Western origins to global faith* (Zed Books, London 2008).

⁷⁶ Consumers International, 'Copyright and access to knowledge: policy recommendations on flexibilities in copyright law', p. 7, para 7, 20 < www.eifl.net/system/files/201105/ci_report.pdf> (last accessed 20 March 2014).

HIV/AIDS, etc., can all be achieved through education. A UNESCO study indicates that four years of primary education raises the output of a farmer in Uganda by seven per cent. The child of a Zambian mother with primary education has a 25 per cent better chance of survival than a child of a mother with no education. Further, educated girls have significantly lower risk of HIV infection.

Goal number 1 is to eradicate extreme poverty and hunger.⁷⁷ The specific targets for this goal include reducing by half the proportion of people living on less than a dollar a day. Another target is to achieve full and productive employment and decent work for all, including women and young people. Under this goal, the third target is to reduce by half the proportion of people who suffer from hunger. Education that can lead to better employment and can equip people with skills and knowledge for self-employment can play an important role in attaining these targets. With employment secured and with knowledge about how to increase agricultural productivity through formal education, education can play an important role in the eradication of hunger.

Goal 2 of the MDGs is to achieve universal primary education.⁷⁸ As shall be discussed below, primary education is so important and arguably, any year spent in primary education contributes to the economic development of the individual and the nation as a whole. By ensuring that all boys and girls complete a full course of primary schooling, this would go a long way in promoting economic development. So in line with the title

⁷⁷ United Nations Development Programme (UNDP), Millennium Development Goals, <<http://www.undp.org/content/undp/en/home/mdgoverview/>> (last accessed 20 February 2014). See also, Todaro and Smith, Economic development (fn 56 above) 23 ff. International efforts and consultations are on to develop the MDGs post 2015.

⁷⁸ United nations Development programme (UNDP), Millennium Development goals, <http://www.undp.org/content/undp/en/home/mdgoverview/> (last accessed 20 February 2014).

of this study, education is indeed an end in itself. However, as shall be discussed under the human rights section, education is an empowerment right and hence plays an important role in the enjoyment of virtually all other rights.

The third MDG is the promotion of gender equality and empowerment of women. Again here, education stands out as one way through which gender equality can be secured.⁷⁹ By educating all both women and men, there would be increased chances of bridging the inequality gap and ensuring that women have same opportunities as their male counterparts be it in urban areas but more so in rural areas. In relation to this, one specific target of the MDG goal 3 was stipulated as the elimination of gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015. These time-bound targets are soon approaching. Since education plays an important role, it is important that quality education is imparted immediately and not just as a matter for the future. One of the factors that may impact the quality of education as shall be argued, is the access to and utilisation of educational materials, some of which are protected by copyright held by owners in MDCs. Eliminating gender disparity means that there would be increased enrolment in schools and hence increased demand for educational materials. Exclusive economic rights guaranteed to authors and publishers mean that books may not be freely reproduced and translated to meet such demand. Where copyright stands in the way, a real conflict may exist.

⁷⁹ United Nations Development Programme (UNDP), Millennium Development Goals, <http://www.undp.org/content/undp/en/home/mdgoverview/> (last accessed 20 February 2014). See also, Todaro and Smith, Economic development (fn 56 above) 23 ff.

Studies have shown that MDG number 4 of reducing child mortality especially among children under five can be improved by the level of education of the mothers and no doubt by the presence of educated and qualified health workers in the less developed countries like Uganda.⁸⁰ These should be able to acquire access to and utilise educational materials-that may however, be protected by copyright. The same arguments can be replicated in the case of reducing maternal mortality rates in less developed countries. The study by Willem, *et all*, has discussed some of the MDG targets and how other IPRs can affect them. Combating HIV/Aids, malaria and tuberculosis requires educated citizens to do research and participate in the design of local strategies for combating these killer diseases. As indicated in Chapter 1 (scope), this thesis does not deal with environmental sustainability but suffice it to say that education has an important role to play in changing consumption and habits that may be environmentally unsustainable.

The last goal (No 8) of building global partnerships for development will work out best if the less developed countries have well-educated people. It is instructive that target 8b talks about addressing the special needs of the least developed countries while target 8c mentions the needs of the special needs of landlocked less developed countries like Uganda, our case study. In line with target 8a of developing further an open, rule-based, predictable, non-discriminatory trading and financial system,⁸¹ it is arguable that without large numbers of educated people in the less developed countries, this would not be a reality. Instead, the ‘Asian

⁸⁰ United nations Development programme (UNDP), Millennium Development goals, <http://www.undp.org/content/undp/en/home/mdgoverview/> (last accessed 20 February 2014). See also, Todaro and Smith, Economic development (fn 56 above) 23 ff.

⁸¹ United Nations Development Programme (UNDP), Millennium Development Goals, <<http://www.undp.org/content/undp/en/home/mdgoverview/>> (last accessed 20 February 2014).

tigers' that have been able to educate their people will have a better chance of participating in and benefitting from these partnerships.

Target 8f of MDG No. 8 is about working in cooperation with the private sector to make available the benefits of new technologies, especially information and communications. This indeed can only be achieved with educated citizens in less developed countries. As John Macionis and Ken Plummer have argued, the so-called 'new illiteracy' refers to the inability to use computers, word processing, e-mail and web sites.⁸² Formally educating the citizens of less developed countries would be the solution. A look at Appendix 5 of this thesis shows that most of the books used for computer studies are copyrighted by owners in the more developed countries. While not absolutely necessary for all citizens to acquire the 'new literacy, they are needed by the instructors. Education will remain critical to the attainment of the development goals even post 2015.

2.3 The role of education in fostering economic development

The role of education in contributing to economic development has been underscored by both human rights commentators and development scholars including development economists.⁸³ Development economists acknowledge that education is instrumental to the attainment of development.⁸⁴ Having been a late comer on the development scene, Japan's development has been linked to pursuit of a social policy that involved massive expansion of education, including realizing high levels of literacy of its population.⁸⁵ By

⁸² John Macionis and Ken Plummer, *Sociology* (4th Edition, Prentice Hall, 2008) 641.

⁸³ Amartya Sen 1999 (fn 69), see generally chapter 2, but in particular, pp. 36-39.

⁸⁴ Amartya Sen 1999, *ibid* 36-39.

⁸⁵ Amartya Sen 1999 (fn 69) 41; see also, Arne Bigsten and Steve Kayizzi-Mugerwa, 'Is Uganda an emerging economy? a report for the OECD project "Emerging Africa"' *May 1998*,

contrast, many of today's high-income countries such as Qatar, United Arab Emirates, Pakistan and Saudi Arabia, are not classified as developed (but as less developed) countries because of their low levels of human development which confirms the constitutive nature of education.⁸⁶

By its very definition, "human development" is the process of expanding education, health care and other conditions of human life.⁸⁷ Investment in the development of human capital is both a measure of and an end of development. Investment in education is one of the kingpins of human capital investment. The United Nations Development Programme (UNDP) Human Development Index (HDI)⁸⁸ is measured, among others, basing on the levels of literacy and of educational attainment in a country. Even using a basic needs approach to development,⁸⁹ education is given as one of the key basic needs besides health. Moreover, inevitably, education has a very important role to play in improving health in less developed countries.

<<http://www.oecd.org/countries/uganda/2674943.pdf>> Last accessed 10 March 2013. See also X Liang, 'Uganda tertiary education sector report', (Africa Region Human Development Working Paper series, The World Bank 2004), <http://siteresources.worldbank.org/AFRICAEXT/Resources/no_50.pdf> (accessed 12 March 2013). 45-46 who gives brief accounts of the technological and economic development of Germany, Japan and South Korea, all linked to highly educated and skilled human capital able to develop their own technology by learning from others (diffusion of technological knowledge). The World Bank studies have widely cited the experience of the East Asian 'Tigers'.

⁸⁶ Todaro and Smith, *Economic development* (fn 56 above) 41. Pakistan is given as an example of a nation with high growth but which is not developed. In the 2011 edition of this book, Saudi Arabia and the United Arab Emirates are mentioned as high income nations that are 'still less developed'.

⁸⁷ Amartya Sen 1999 (fn 69) 41; M P. Todaro and S C. Smith, *Economic development* (fn 56 above)

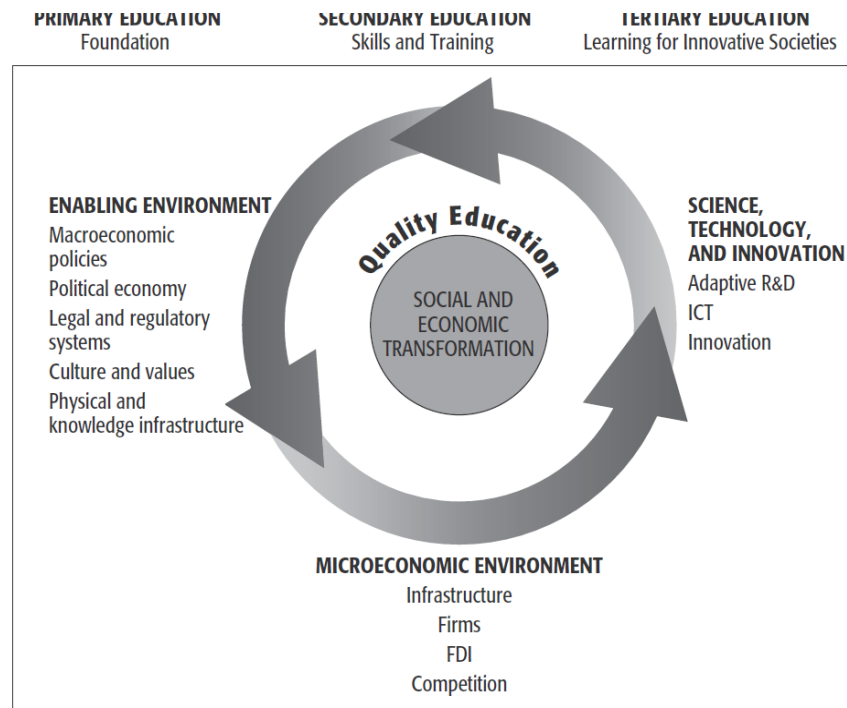
⁸⁸ The Human Development Index is an index for measuring national socio-economic development, based on combining measures of education, health, and adjusted real income per capita. In other words it looks at life expectancy at birth, educational attainment, literacy and adjusted real income per capita. The income is adjusted to reflect actual cost of living in a country. See M P. Todaro and S C. Smith, *Economic development* (fn 56 above). Refer to glossary at p.778.

⁸⁹ See Todaro and Smith, *Economic development* (fn 56 above) 8 & 780.

(11th edition, Addison Wesley Pearson, London 2011) 21 discussing the sustenance of basic needs as one of the three core values of development; I Fägerlind and L J Saha, *Education and national development: a comparative perspective* (Butterworth-Heinemann, Oxford: 1989) 96.

Amartya Sen⁹⁰ and Michael Todaro and S C Smith⁹¹ emphasise that education is both constitutive of and critical to the attainment of economic development. In short, less developed countries like Uganda cannot attain economic development without promoting and realising the right to education which is both a tool for and an end of economic development. Failure to realise the right to education and promote economic development has negative implications not only at the national but also international level; for instance, in an era of increasing globalisation, better participation in a globalised world requires educated citizens.

Figure 1: A virtuous cycle of education and development (adapted from R. Kagia, below)



Source:
 FDI = Foreign Direct Investment
 ICT = Information and communication technologies
 R&D = research and development

⁹⁰ Amartya Sen 1999 (fn 69).

In her article⁹², R Kagia, former Director of Education at the World Bank argued to the effect that quality education relative to the unregulated free market advocated by Adam Smith, had a better capability of bringing about the common good by eventually benefitting all people including the poor. This helps to further buttress the need for education in promoting education and in turn the need to examine what role copyright law plays in education. Indeed the figure points out that the legal and regulatory environment (of which the copyright system is one) are enabling factors for quality education.

It can thus be concluded that education is one of the engines of economic growth and development. As figure 1 (above) illustrates, what is needed is not just any education but ‘quality education’. Accordingly less developed countries and more so least developed ones like Uganda should ensure that the education imparted is such that it helps to promote economic growth and development. This calls for access to learning and teaching materials for all and not just for some who can afford them.

2.3.1 The question of quality: providing the link with copyright

It is noteworthy that while the role of education has for long been acknowledged in fostering economic growth and development, development economists recently started to emphasise that if education is to meaningfully contribute to long term economic

⁹¹ Todaro and Smith, Economic development (fn 56 above) 359 ff.

⁹² R Kagia, ‘Securing the future through education: a tide to lift all boats’ in V Bhargava (ed) *Global issues for global citizens: an introduction to key development challenges* (The World Bank, Washington, DC 2006) 187, 189. This was based on Adam Smith’s assertion in his masterpiece, “The wealth of nations” that “a rising tide lifts all boats” arguing that the natural activities of wealthy capitalists, such as expenditure and investment, would ultimately benefit both the wealthy and also improve the conditions of the poor. See a critique in Brian R Farmer, *American political ideologies: an introduction to the major systems of thought in the twenty-first century* (McFarland & Co, Inc., 2006) 65, 102.

growth and development, it is not enough to focus on quantity of learners while ignoring the question of quality.⁹³ For primary education, the concern with educational quality has been taken up as part of the Education For All Initiative (EFA).⁹⁴ Goal Number 6 states: *‘Improving all aspects of the quality of education and ensuring excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.’*

As the Figure 1 above illuminates, the quality of the education in an economy has to go hand in hand with the previously focused on quantity based indicators such as the number of learners and number of years spent in school.⁹⁵ This thesis argues that one way of improving the quality of education in less developed countries is to minimise exclusive rights protected by copyright while maximising the exceptions available to promote access to and utilisation of the mainly foreign educational works that are relied upon for teaching, research and self-study.

⁹³ R. Nallari ‘Education access and quality: what we know and don’t know: in R. Nallari, S Shahid, B Griffith and R. Bhattacharya, *Frontiers in development policy: a primer on emerging issues* (World Bank, Washington DC, 2011).

⁹⁴ UNESCO <<http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/efa-goals/>> (last accessed 10 March 2013).

⁹⁵ It is for this reason that the World Bank changed its mantra from ‘Education for all’ to ‘Learning for all’. See their new strategy paper on education, entitled, ‘Learning for all: investing in people’s knowledge and skills to promote development: World Bank Group Education Strategy 2020 (World Bank, Washington DC, 2011)

Figures 2 and 3 showing relative importance of instructional materials

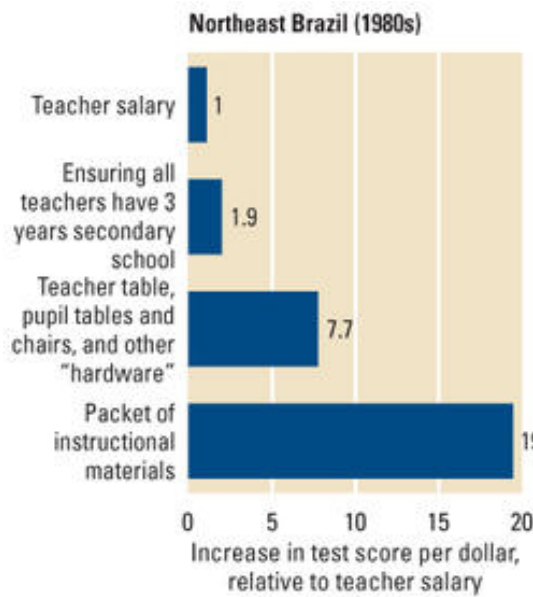


Figure 2

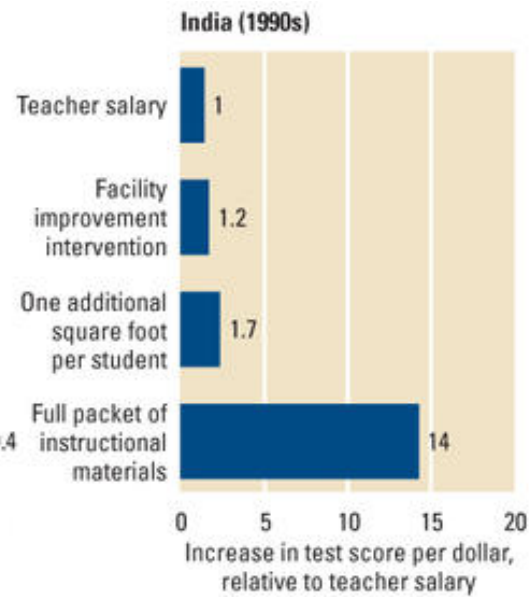


Figure 3

Source: World Bank.⁹⁶

Educational materials play an important role in enhancing the quality of education and therefore should I find in this thesis that copyright plays a negative role, there would be need to recommend some reforms to copyright law to ensure that it does not overly restrict access to and use of educational materials.⁹⁷ Figure 2 and 3 (above) help illustrate the impact on learning outcomes resulting from increases in test scores per dollar spent on different school inputs. It is instructive that instructional materials had the highest impact in both India and Brazil. It is a key argument of this thesis that if copyright law is strictly enforced in Uganda, it would affect access to and utilisation of

<http://siteresources.worldbank.org/EDUCATION/Resources/ESSU/463292-1306181142935/WB_ES_ExecutiveSummary_FINAL.pdf> accessed 13 March 2013.

⁹⁶ World Bank, World Development Report 2004: making services work for poor people,(World bank, Washington DC 2003, original source not excluded) online at: <http://wdronline.worldbank.org/worldbank/a/c.html/mediaview/world_development_report_2004/chapter_7_basic_education_services/adequate_resources_adequately_distributed/WB.0-8213-5468-X.ch7.sec4.2#WB.0-8213-5468-X.ch7.sec4.fig3>; (Accessed 20 March 2013).

⁹⁷ See discussion in section 2.3.1 on importance of learning materials and figures 2 and 3.

educational materials and thereby impact the quality of the education and in turn affect not only economic growth but also realisation of economic development and enjoyment of many other human rights (as will be explained below).⁹⁸

2.4 Education as a fundamental human right:- the international framework

Having looked at education from a development economics point of view, this section will look at education from a human rights perspective. Education is both a fundamental human right as well as an empowerment right necessary for the enjoyment of most if not all other rights. Article 13(1) of the ICESCR provides:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.⁹⁹

⁹⁸ In 2012, Cambridge University Press (CUP), Oxford University Press and Taylor & Francis, leading publishers launched a lawsuit against Delhi University (DU) and a reprographics shop near its campus for producing "course packs". An injunction was issued by the court stopping the photocopying pending disposal of the suit. This caused lots of concern as many people argued that it would negatively affect access to educational materials. See Debika Ray, 'Photocopying courts India campus controversy', (Story of 17 March 2013, Aljazeera; online at: <http://www.aljazeera.com/indepth/features/2013/03/2013317104829368899.html>) (accessed 10 April 2013). See also Appendix '1' a letter by Nobel Laureate Professor Amartya Sen written in reaction to the dispute.

⁹⁹ Compare with the Universal Declaration of Human Rights (UDHR); Article 26 of the UDHR states:
(1) [E]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

At the outset, it is pertinent to clarify that this thesis does not purport to be a discussion of the right to education in its broadest terms. Rather, the discussion on the right to education is done to lay a foundation for locating copyright law within the right to education by showing what aspects of the right to education can or are potentially affected by strictly enforced copyright laws. This is subsequently done in section 2.8 below where I explore the inherent conflict between the right to education and copyright. For this section therefore, apart from giving the foundation of the right to education in international and national human rights law, emphasis has been laid on those aspects of the right to education that are impacted upon by copyright. Also covered are aspects of the right to education that are in tandem with economic development theory on the role of education in economic development.

Accordingly, I am more interested in those aspects of the core obligations and essential features¹⁰⁰ such as the requirement that education be of some internationally recognised minimum quality in order to satisfy the interrelated features of *acceptability*¹⁰¹ and *accessibility*.¹⁰² Before I look at the intrinsic nature of the right to education, it is important to look at the instrumental role of the human right to education in the enjoyment of other human rights. It will be seen that there are many similarities between the instrumental role of education from a human rights perspective and from a development economics angle.

¹⁰⁰ See UN General Comment 13, para. 6. Minimum core obligations resulting from the core content of the right to education apply irrespective of the availability of resources. See F. Coomans, “Content and scope of the right to education as a human right and obstacles to its realization” in Y. Donders and V. Volodin (eds.), *Human rights in education, Science and Culture*, (UNESCO Publishing /Ashgate 2007)183 ff. He further contends rather strongly that: In my view, the core content of a right must be understood as meaning its essence, i.e. that essential element without which a right loses its substantive significance as a human right. In fact, therefore, the core content embodies the intrinsic value of each human right. It is a non-variable element of a substantive right.

¹⁰¹ See para. 6(c) of UN General Comment 13 on the right to education.

The United Nations Convention on the Rights of the Child 1989¹⁰³ is another important instrument to which Uganda is a signatory. Article 28 provides: ‘1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all.’ Being a signatory to this Convention means that in case of any conflict, Uganda has to balance its obligations under this Convention with other obligations such as those arising under the TRIPs Agreement.¹⁰⁴

2.4.1 The right to education as an empowerment right

Human rights commentators refer to the right to education as a right in itself and an empowering right that leads to the enjoyment of other rights.¹⁰⁵ Thus, the right to education is both an end in itself (a fundamental human right) and a very important means for realizing other rights. To this end, promoting the right to education is an important tool of social-economic policy especially for less developed countries. The aspect of education as an empowerment right thus refers to the fact that education, as interpreted by the UN CESCR in General Comment 13, is instrumental to the realisation of many, if not all the other human rights.¹⁰⁶ The United Nations Children’s Fund has

¹⁰² See para. 6(a) (iii) of UN General Comment 13 on the right to education.

¹⁰³ UNICEF, The United Nations Convention of the Rights of the Child 1989: <http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf>, (last accessed 10 February 2014).

¹⁰⁴ About Uganda being a signatory, see African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), Background Information, Online: < http://www.anppcanug.org/wp-content/uploads/press_kits/Legal_Frawrk_of_child_protection.pdf>, (last accessed January 2014).

¹⁰⁵ Those are indeed the opening words of General Comment 13 on the Right to education. .

¹⁰⁶ In fact Article 13(1) of ICESCR that provides the goals of education states that ‘...They agree that education shall be directed to the full development of the human personality and the sense of its dignity,

affirmed that: ‘... the right to education is an internationally recognized right in its interrelationship with the right to development, and that the legal and constitutional protection of this right is indispensable to its full realization.’¹⁰⁷ While space does not allow a detailed discussion of how education is an empowerment right, a few illustrations are given below.¹⁰⁸

The UN CESCR especially affirms the importance of education in eliminating child labour.¹⁰⁹ Education is linked to reducing infant mortality rates in less developed countries. Education increases the productivity of farmers by equipping them with basic knowledge about improved farming practices such as use of pesticides, crop rotation and vaccination of animals. In fact, according to a UNESCO study on Uganda (our case study), even a mere four years of primary education increases the productivity of a farmer by 4 per cent.¹¹⁰ The enjoyment of the right to work is facilitated by education since it increases the employability of the recipient of education. The World Bank has conducted a broad research that details the improvements that result from education.

and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society...’.

¹⁰⁷ UNICEF/UNESCO, A human rights-based approach to education for all: a framework for the realization of children’s right to education and rights within education (UNICEF, New York, undated) 9; also available at: <http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf> (last accessed 10 March 2013).

¹⁰⁸ For a detailed discussion, see for instance F. Coomans, ‘Content and scope of the right to education as a human right and obstacles to its realization’ in Y. Donders and V. Volodin (eds.), *Human rights in education, Science and Culture*, (UNESCO Publishing /Ashgate 2007)183, 185-186; see Amartya Sen 1999 (fn 69); Todaro and Smith, *Economic development* (fn 56 above) ; Manisuli Ssenyonjo, *Economic, social and cultural rights in international law* (Hart Publishing, Oxford and Portland, Oregon, 2009).

¹⁰⁹ See paragraph 55 of General Comment 13.

¹¹⁰ Cited in Consumers International, ‘Copyright and access to knowledge: policy recommendations on flexibilities in copyright law’, p. 7, para 7, 20 < www.eifl.net/system/files/201105/ci_report.pdf> (last accessed 20 March 2013).

2.5 Intrinsic nature and attributes of the human right to education

2.5.1 Levels of education

This aspect of the right to education is important while discussing the nexus between copyright and the right to education. This is because copyright reform to provide optimal conditions for educational access and utilisation of copyrighted materials for economic development is bound to attract, as it did before, resistance from copyright owners and exploiters especially in the MDCs. In the event of accepting to make concessions, they may argue for instance that the maximisation of copyright exceptions to exclusive rights, as advocated by this thesis, should only benefit certain levels of education.¹¹¹ For this reason, it is important to outline the levels of education and their importance. There are four levels of education that are provided for under the ICESCR namely: primary, secondary, higher and fundamental education.¹¹²

2.5.1.1 Primary education

Primary education relates to the first layer of a formal school-system and usually begins between the ages of 5 and 7 and lasts approximately six years, but in any case no fewer than four years. Primary education includes the teaching of basic learning needs or basic education.¹¹³ In Uganda, primary education lasts seven years.¹¹⁴

¹¹¹ Sharon Forster, addressed this issue even after having raised the question of ‘what is meant by primary education being ‘available free.’ as used in the International instruments. See Sharon E Forster, ‘The conflict between the human right to education and copyright’ in Torremans, IP and human rights (fn 13, above) 287-306.

¹¹² ICESCR Article 13(1).

¹¹³ In human rights language, the term primary education is used rather than the term ‘basic education’ which is used in some contexts. According to Professor F Coomans, the term basic education does not exist in human rights discourse. He clarifies that: ‘Basic education relates to the content of education, not to the form (formal or non-formal schooling) in which it is presented. Basic education within the context of the right to primary education as an element of the core content of the right to education would include literacy, arithmetic, skills relating to one's health, hygiene and personal care, and social skills such as oral expression and problem solving.’ See F. Coomans, ‘Identifying the key elements of the right to education: a focus on its core content’ (2007) < <http://www.crin.org/docs/Coomans-CoreContent-Right%20to%20EducationCRC.pdf>> (last accessed 22 December 2013) 5.

¹¹⁴ See further discussion in section 2.9.1 below.

Under the ICESCR, primary education should be free. This is partly why one commentator Sharon Forster who discusses the potential conflicts between copyright and the human right to education, in a leading commentary on the interaction between Intellectual Property and human rights, chose to mainly deal with the obligation to provide free primary education.¹¹⁵ The obligation to provide free primary education is contained in the Universal Declaration of Human Rights (UDHR)¹¹⁶, the International Covenant of Economic, Social and Cultural Rights¹¹⁷ as well as the United Nations Convention on the Rights of the Child.¹¹⁸ Article 26(1) of the UDHR provides that: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.” Having provided for the right to education in Paragraph 1 of Article 15, the ICESCR in paragraph 15(2) provides that: “The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all.” This underscores the importance of primary education in the educational system. It could be argued that if there is any level where the need for access and utilisation of educational materials should rank highest, this should be the level.

¹¹⁵ Sharon Forster, ‘The conflict between the human right to education and copyright’ in Torremans, IP and human rights (fn 13, above) 287-306.

¹¹⁶ General Assembly Resolution 217A (III), U.N. Doc A/810 at 71 (1948), available at <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>, (last accessed 20 January 2014).

¹¹⁷ See < <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>>, (last accessed 20 January 2014).

¹¹⁸ See:< <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>>, (last accessed 20 January 2014)

2.5.1.2 Secondary education

This is the next level after primary school. It includes the traditional secondary education and the technical and vocational education (TVE). Article 13(2)(b) of ICESCR states:

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

Secondary education plays an important part in making advancement to the full development of the individual. It is a step higher than the primary school education stage where children mainly deal with the 3Rs of: reading, writing and arithmetic. According to the UN CESCR, secondary education actually includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.¹¹⁹ Technical and vocational education (TVE) on the other hand is important for equipping citizens with the necessary skills needed in many employment sectors and for general personal, social and national development.

The UN CESCR relied on the UNESCO Convention on Technical and Vocational Education (1989),¹²⁰ in explaining the right to technical and vocational education. TVE consists of "all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes

¹¹⁹ UN General Comment 13 paragraph 12.

and understanding relating to occupations in the various sectors of economic and social life".¹²¹ The importance of having a critical mass of people in a less developed country with quality technical and vocational education cannot be over emphasised. As lessons from countries like Germany, Japan and more recently the East Asian Tigers show, other less developed countries need these skills if they are to catch up¹²² and set themselves on the track for sustained long term growth in a technologically complex globalising world.

What is clear for purposes of this thesis is that access to and utilisation of learning materials is key to mastering the subject of technical and vocational education. This helps justify why an optimal copyright regime should be in place. Secondary and TVE also prepares learners for higher education.

2.5.1.3 Higher education

There is no definition of the term higher education in international treaties. However, the term is understood to include education provided by post-secondary institutions such as universities, polytechnics, colleges and other providers of higher education.¹²³ According to Article 13 (2) (c), higher education is not to be “generally available”, but only available “on the basis of capacity”. The “capacity” of individuals should be assessed by reference to all their relevant expertise and experience”. It would appear

¹²⁰ UNESCO, < http://portal.unesco.org/en/ev.php-URL_ID=13059&URL_DO=DO_TOPIC&URL_SECTION=201.html> (last accessed 10 January 2014).

¹²¹ UN General Comment 13 paragraph 16.

¹²² According to development economists, the technical word for ‘catch up’ is ‘convergence’. See P Collier, ‘On missing the boat: the marginalization of the bottom billion in the world economy’ in S Chari and S Corbridge (eds), *The development reader* (Routledge, London 2008) 491, 492. Countries like China are converging on the development nations.

that capacity does not refer to the economic or resource capacity of state parties to provide higher education, but rather, of individuals to pursue higher education. This is seen from General Comment 13 paragraph 19. It states in the last sentence that: ‘The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.’ I further submit that the reference to the capacity of individuals concerns capacity to pursue higher education as opposed to capacity to pay for it. This is important because it is possible for state parties, especially the least developed like Uganda, to argue that they are exempted from this obligation since they do not have economic capacity to provide higher education. This interpretation is further augmented by the state obligation to progressively introduce free higher education.¹²⁴ Moreover, with the economic benefits of education, no less developed country should take its obligation to develop all levels of education lightly. In that connection therefore, the state of Uganda has a duty to ensure that there is an optimal copyright regime conducive for accessing and utilising educational materials at all levels of education.

As mentioned above, in an attempt not to attract much objection from book publishers, it may be argued that an optimal copyright regime as advocated for in this thesis should only target basic education and fundamental education. However, it is important to emphasise the importance of higher education to less developed countries. Consumers International has observed that:

But being able to read and write i.e. literacy alone is not the determinant of an educated citizenry who can contribute to development. Educational attainment needs to be pitched at a higher level to ensure human and

¹²³ J. Taylor and A. Miroiu, *Policy-making, strategic planning, and management of higher education*, (UNESCO, Bucharest, 2002) 19.

¹²⁴ Article 13(2)(c) of the ICESCR; see detailed discussion in M Ssenyonjo, *Economic, social and cultural rights in international law* (Hart Publishing, Oxford and Portland, Oregon, 2009) 386-391.

economic development. Tertiary education plays this critical role in human development. It is at this level that people acquire the high level skills necessary to enter the work force and to ultimately contribute to society. Moreover, without people skilled in science, technology and research, less developed countries (and more so least developed countries) will be less able to absorb new technologies, generate innovation and participate in the global knowledge economy (words in parenthesis added).¹²⁵

The World Bank, that with the International Monetary Fund (IMF) promoted budgetary cuts to higher educational institutions in the name of structural adjustment programmes (SAPs) during the 1990s, later acknowledged that primary and secondary education alone cannot help less developed states to get into and participate meaningfully in the global economy.¹²⁶ Contrary to their earlier indifference to higher education that led to the government of Uganda to make budgetary cuts in the 1980s and 1990s to social services including education, the World Bank in 2000 observed that “higher education is essential to national social and economic development.”¹²⁷ In a scathing attack, Economist Professor David Bloom acknowledged that economists had been in the lead in portraying modern ignorance about returns and value of higher education.¹²⁸

¹²⁵Consumers International, ‘Copyright and access to knowledge: policy recommendations on flexibilities in copyright law’ < www.eifl.net/system/files/201105/ci_report.pdf> (last accessed 20 March 2014).

¹²⁶ The World Bank, *Education in Sub-Saharan Africa: policies for adjustment, revitalization and expansion*, (The World Bank, Washington DC, 1989). This is the study that recommended increased state withdrawal from funding higher education. An earlier report had among others claimed to the effect that higher brings comparatively meagre returns relative to primary and secondary education and that higher education aggravates inequalities. See The World Bank, ‘Higher education in developing countries: peril or promise?’ (The World Bank, Washington DC, 2000< <http://www.tfhe.net/>>) 10; last accessed 12 March 2013. It is good however, that the World Bank later abandoned this policy: See fn.19 below. See also A B K Kasozi ‘University education in Uganda: challenges and opportunities for reform’ (Fountain Publishers, Kampala 2003) 17.

¹²⁷ The World Bank, *Constructing knowledge societies: challenges for tertiary education*, (The World Bank, Washington DC, 2000) <www.go.worldbank.org/GX5J0A0KK0> (last accessed on 22 March 2013).

¹²⁸ Professor David Bloom's, Professor of Economics and Demography at Harvard School of Public Health and Co-Director of the Task Force on Higher Education and Society convened by the World Bank and UNESCO. He stated that: “Our habit of knowing the worth of everything, but the value of nothing, has led us into an incredibly simplistic way of assessing the return on investments in higher education (Speech at a Conference on " Globalisation and Higher Education:

However, a lot of damage had been done as a result of this misconceived approach that starved higher education of the badly needed resources. For instance, cost-sharing was introduced as a World Bank-backed policy of Government for funding tertiary education.¹²⁹ This meant that students had to contribute to the costs of higher education. One way of implementing cost-sharing was the abolition of textbook allowances for students. University students who had hitherto been able to acquire their own copies of books were now left to use a new system of a book bank that enabled them only to borrow books for as long as they were students.¹³⁰ This would for instance make it difficult for a student intending to re-sit an examination or to write an academic proposal for further studies to competently do so. The ability to do further research was thereby hampered, including writing for publication.

Table 1 below gives a non-exhaustive summary of the private and public benefits of higher education. The public benefits in particular help emphasise why higher education should be of high quality.

Views from the South", Cape Town, South Africa March 28, 2001), available at: <http://www.tfhe.net/resources/Cape_town.htm> (last accessed 20 January 2014).

¹²⁹ J.C. Ssekamwa, *History and development of education in Uganda* (Fountain Publishers, Kampala 1997) at 211.

¹³⁰ This researcher was among the first lot of students denied textbook allowances in 1990 at Makerere University (Uganda's leading university). The cost-sharing policy was resisted by students in a sit-down strike that tragically ended with the death of two students in December 1990. Consequently, a law graduate left the university without even a single personal copy of even a basic book like Glanville Williams, "*Learning the Law*".

Table 1: Illustration of the economic and social benefits of higher education

Benefits	Private	Public
Economic	Higher salaries Employment Higher savings	Greater productivity National and regional development Reduced reliance on Government financial support
	Improved working conditions Personal and professional mobility	Increased consumption Increased potential for transformation from low-skill industries to knowledge-based economy
Social	Improved quality of life for self and children Better decision-making	Nation-building and development of leadership Democratic participation; increased consensus; perception that the society is based on fairness and opportunity for all citizens
	Improved personal status Increased educational opportunities Healthier lifestyle and increased life expectancy	Social mobility Greater social cohesion and reduced crime rates Improved health Improved basic and secondary education

Source: X Liang, 'Uganda tertiary education sector report'.¹³¹

2.5.1.4 Fundamental education

Fundamental education can be said to be a sub-set of basic education aimed at people that did not satisfy their basic education needs for various reasons.¹³² Adult literacy education programmes, like those implemented by Ugandan local governments with supervision of the Ministry of Gender, Labour and Social Development would fall under this level.¹³³ These programmes apart from benefitting the participants to catch up

¹³¹ X Liang, 'Uganda tertiary education sector report', (Africa Region Human Development Working Paper series, The World Bank 2004), <http://siteresources.worldbank.org/AFRICAEXT/Resources/no_50.pdf> (last accessed 12 June 2014).

¹³² Such as dropping out of school due to illness, parental responsibilities. See Ministry of Gender, Labour and Social Development, 'National Report On the Development and State of the Art of Adult Learning And Education (ALE) in Uganda' (2008) 'hereafter MOGLSD study' <http://www.unesco.org/fileadmin/MULTIMEDIA/INSTITUTES/UII/confintea/pdf/National_Reports/Africa/Africa/Uganda.pdf>(last accessed 10 March 2013).

¹³³ Previously, before decentralisation of local governance in Uganda, the Ministry of Gender, Labour and Social Development (MOGLSD) was the implementing ministry. For a review of adult education

on the acquisition of knowledge and skills also help adults change their attitudes. For instance, it has been pointed out in a Ugandan report that adult education can lead to increased interest and participation by parents in the education of their children, leading to reduced drop outs from the educational system.¹³⁴ This reinforces the view that an educated parent is more likely to educate their children. For fundamental education to be relevant, acceptable and accessible and adaptable there is need to have access to learning materials. This however, can be a problem in a less developed country like Uganda that is a net importer of learning materials which are usually protected by copyright (see discussion in Chapter 3). All the levels of education discussed above have some common features that must be present if a state is not to be in breach of its international obligations. These are called core obligations or elements of the right to education.

2.5.2 Linking the core elements of the right to education with copyright

In this part of the chapter, I discuss the core elements of the right to education and attempt to link them with copyright. According to the UN CESCR, though subject to the peculiar conditions in a country, the right to education must have certain elements/features common to all levels of education- basic, primary, secondary, tertiary and foundational. These features are closely interlinked, just like human rights are interlinked and must all be respected, protected and fulfilled.¹³⁵ These features,

programmes in Uganda, see Ministry of Gender, Labour and Social Development, 'National Report On the Development and State of the Art of Adult Learning And Education (ALE) in Uganda' (2008) 'hereafter MOGLSD study' <

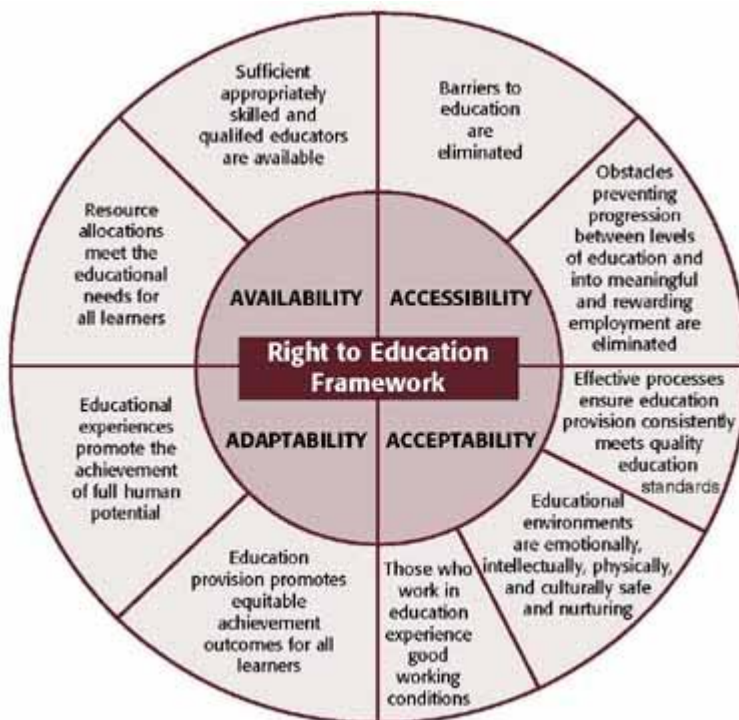
http://www.unesco.org/fileadmin/MULTIMEDIA/INSTITUTES/UII/confintea/pdf/National_Reports/Africa/Africa/Uganda.pdf> (accessed 20 June 2014). The report states 'adult education is defined as all learning processes, activities or programs, intended to meet the needs of various individuals considered by society as adults, including out of school youths forced by circumstances to play the roles normally played by adults'.

¹³⁴ MOGLSD study, (2008) 10.

¹³⁵ Paragraph 50 UN General Comment 13. See discussion below on the nature of state obligations.

commonly referred to as the 4 ‘As’ of the right to education are illustrated in the figure below and will be discussed individually even though they overlap in practice. These are: availability, accessibility, acceptability and adaptability. As core aspects, they have to be present as a minimum if a country is to be said to be complying with its international obligations.¹³⁶

Figure 4: The right to education framework



Source: New Zealand Human Rights Commission website.¹³⁷

¹³⁶ D. Hodgson, *The human right to education* (Ashgate Publishing, Aldershot 1998).

¹³⁷ 'Human rights in New Zealand today' Chapter 15, <<http://www.hrc.co.nz/report/chapters/chapter15/education01.html>> (last accessed 20 June 2014).

2.5.2.1 Availability

This essentially means that operational educational institutions such as schools, colleges and universities must be available in sufficient quantity. However, it is not enough to focus on the surface. I contend that schools must have learning materials available as well. In least developed countries like Uganda, the rural schools and others in hard to reach areas such as the Karamoja sub-region,¹³⁸ tend not to have available learning materials.¹³⁹

The CESCR in general Comment 13 noted to the effect that some institutions may also require facilities such as a library, computer facilities and information technology. However, availability as an element would require that all educational institutions should have some kind of stocked book store, if not a library. With changing times, even computer facilities and information communication facilities will become a necessity if less developed countries are to have human capital equipped for the knowledge economy. The diffusion of technological knowledge is now largely dependent on understanding of computer literacy.

¹³⁸ Karamoja in the North-Eastern part of Uganda bordering Kenya and South Sudan is one of the least developed areas of Uganda. It is inhabited by semi-Nomadic cattle-keeping ethnic groups. Insecurity and lawlessness are a problem due to illegal firearms that are used in cattle rustling and other illegal activities. The levels and quality of education are very low relative to the rest of the country. For a brief overview, see Quam, 'A bibliography of Karamoja: books and articles published in English, Electronic Journal of Africana Bibliography (EJAB), available at: <<http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1004&context=ejab>> (last accessed 20 June 2014).

¹³⁹ See for instance, A B K Kasozi *University education in Uganda: challenges and opportunities for reform* (Fountain Publishers, Kampala 2003).

2.5.2.2 Accessibility

Accessibility as a core element requires among others that educational institutions and programmes have to be accessible to everyone in a particular country without discrimination. Moreover, accessibility has three overlapping dimensions, namely: non-discrimination; physical accessible, in terms of physical reach geographically or by use of modern technology such as that used in digital distance education (DDE) programmes, and; economic accessibility in the sense of being affordable to all. Makerere University for instance has for a long time been offering DDE courses for some of its degree programmes, such as Bachelor of Education and bachelor of Commerce.¹⁴⁰ It should be pointed out that the aspect of economic accessibility has to be construed in light of the differential wording of Article 13 (2) ICESCR in relation to primary, secondary and higher education levels. Primary education shall be available "free to all", hence all the learning materials including textbooks should arguably be provided as well just like in the case of Namibia where this is a statutory requirement.¹⁴¹ States parties are required to progressively provide free secondary and higher education. Uganda has already introduced free Universal Secondary Education and hence should provide the necessary learning materials free of charge.

¹⁴⁰ See generally, A B K Kasozi, *University education in Uganda: challenges and opportunities for reform* (Fountain Publishers, Kampala 2003).

¹⁴¹ Part V11 section 38 (1) of the Education Act of 2001(Act No. 16 of 2001: 24) stipulated that "All tuition provided for primary education in state schools, including all school books, educational materials and other related requisites, must be provided free of charge to learners until the seventh grade, or until the age of 16 years, whichever occurs first." (Information kindly provided in 2001 by Ms Alberthina Nangolo Peneyambeko, formerly Chief Inspector of Education, Government of Namibia and student Institute of Education, London). Available at: <http://www.moe.gov.na/files/downloads/cda_Education%20Act%2016%20of%202001.pdf> (last accessed 17 June 2014).

2.5.2.3 Acceptability

This element this concerns the form and substance of the education that is imparted. This aspect considers among other things, the curricula and teaching methods, and in line with this thesis, by the availability of learning materials if the education is to be acceptable. Currently the international spotlight has been turned on the issue of the quality of the education that is imparted to and received by students (as discussed above). Acceptability requires that the education must meet the objectives stipulated in Article 13 (1) as well some minimum educational standards as may be approved by the State (see art. 13 (3) and (4)).¹⁴² Regarding quality as a key aspect of acceptability, to borrow from copyright parlance, the requirement is that education must have a modicum of internationally recognised quality. Professor Coomans has summed up the right to education in the following manner:

In fact, the right to education implies the right to quality education-that is education that is available, accessible, acceptable and adaptable to the needs of learners. A State party is under an obligation to provide and maintain this quality level, otherwise attending classes would be meaningless.¹⁴³

2.5.2.4 Adaptability

Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and

¹⁴² F. Coomans, fn 113.

¹⁴³ F Coomans, fn 113, at p. 7. All modes of education delivery including distance education should be characterised by good quality. For a paper questioning the quality of distance education in Uganda, see Matovu, Musa, 'Distance education in Uganda: issues, opportunities, and challenges' (August 19, 2012). OIDA International Journal of Sustainable Development, Vol. 4, No. 9, pp. 63-70, 2012. Available at SSRN: <<http://ssrn.com/abstract=2132030>> (last accessed 20 June 2014).

cultural settings.¹⁴⁴ This requires an understanding of the socio-economic setting within which the relationship is sought to be established. It is my contention that one way of ensuring adaptability of education is to ensure that the learning materials used in the educational process can actually be changed to suit the particular circumstances of Uganda. In my view, one aspect of realising this feature is having educational materials that are written in a language understood by the recipients of especially *basic*¹⁴⁵ or *fundamental* education.¹⁴⁶ Another feature is to have books that use local examples and culturally familiar illustrations in order to aid the learning process.¹⁴⁷ A mathematics book that talks about counting pears and strawberries, which are not tropical fruits, does not make the learning easier and interesting in a tropical climate country like Uganda. Reading or even teaching should lead to learning as they are not ends in themselves.

Adaptability should be distinguished from the element of relevancy which, though related, does not emphasise the dynamic nature of the education. As will be explained in chapter 3, the ability to change the available educational materials to suit changing needs may be impacted upon by the adaptation right¹⁴⁸ where the learning materials are protected by copyright.

¹⁴⁴ General Comment 13 paragraph 6(d); F Coomans, fn 113.

¹⁴⁵ See discussion below.

¹⁴⁶ See discussion below.

¹⁴⁷ See K R Samanya, 'Passionate about mathematics' (Daily Monitor Newspaper of Uganda September 11, 2011), article featuring an interview with a leading Ugandan mathematics teacher and now author of mathematics books for secondary schools. He was quoted as saying "We had been reading math text books written by Europeans, with European examples. We want a book that relates to our community to make learning easier," he expounds. Magino adds that at the time, they were reading Arithmetic, geometry and Algebra by Durrell and the likes of Snail and Morgan. They decided to become the Durrell of Uganda. That is how work on Secondary Mathematics for Uganda, book I to IV started. It was later published in 1987." This also shows that access to books with less strict restrictions on their utilisation can lead to creativity while boosting education. See <<http://www.monitor.co.ug/Magazines/Life/-/689856/1233590/-/bo3sw5/-/index.html>> (last accessed 13 March 2013).

¹⁴⁸ In Uganda, this right is protected under the broader right to make derivative works, see section 9 (f) CONRA. Detailed discussion in chapter 3.

Having seen the core obligations of the right to education, it is imperative to briefly analyse the nature of obligations a least less developed state like Uganda has with regard to the internationally recognised right to education.

2.5.3 Nature of state obligations in pursuing the human right to education

There is a concern as to whether observance of WTO laws including TRIPs leads less developed countries to fail in the performance of their obligations as state parties to international human rights instruments. It is therefore important to look at the nature or form of these obligations with regard to the right to education. State parties to the ICESCR have three types or levels of obligation with regard to the right to education. These have been given by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 13 as: the obligation to respect, protect and fulfil.¹⁴⁹ The interpretation by the CESCR is not meant to be exhaustive but merely illustrative. This allows us to further analyse the core obligations in the context of other institutions such as copyright.

2.5.3.1 Duty to respect

The CESCR in General Comment 13 illustrated what the *duty to respect* the right to education involves on the part of a state party by stating that a state must respect the availability of education by not closing private schools.¹⁵⁰ Applying this illustration to the concern of access and use of educational materials, it is our argument that the state of Uganda can for instance do this by not restrictively interpreting the doctrine of fair use for educational purposes that is incorporated in Uganda's copyright legislation

¹⁴⁹ UN General Comment No. 13, UN Document E/C12/1999/10 (1999) paras. 46-47.

(CONRA). This would allow learners to have access to and utilise available education exceptions.

2.5.3.2 Duty to protect

A state party to the ICESCR has the duty to protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school.¹⁵¹ Relating this to our thesis, arguably the state of Uganda has a duty to stop educational book publishers from denying the majority of Ugandan learners the ability to access and utilise essential learning materials.¹⁵² This can be done through enacting an optimal copyright regime of minimised exclusive rights and maximised educational exceptions (see Chapters 3-5).

2.5.3.3 Duty to fulfil

Basing on the interpretation of the Committee on Economic, Social and Cultural Rights in General Comment 13, the State's duty to fulfil the right to education can be discharged through facilitating and providing.¹⁵³ It is expected that a state will facilitate the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples. Further, the state has a duty to facilitate good quality of education for all its citizens, not just the rich or those in urban areas. One way to do this may be in the way the three-step test is applied to avoid a situation of providing books only for some but not all the people that need them.

¹⁵⁰ UN General Comment 13 paragraph 50.

¹⁵¹ UN General Comment 13 paragraph 50.

¹⁵² See discussion in Chapter 3 on how copyright can affect ability to access and use essential learning materials.

Facilitating access and use of learning materials that are culturally relevant contributes both to achieving cultural relevancy and overall enhancement of quality. Doing this may however conflict with the exclusive rights protected by copyright including the adaptation (or making derivative works) right, the reproduction and distribution rights (see chapter 3).

The duty to fulfil the right to education can take also the form of providing the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world. This again involves the adaptation right. Further, the state obligation to fulfil can be discharged by providing for the availability of education by among others providing relevant teaching materials for enhancing quality education.¹⁵⁴

The above discussion gives a brief overview of the intrinsic nature of the human right to education as provided for in international human rights instruments, particularly the ICESCR. Regional human rights instruments and national legislative instruments do also provide for the fundamental right to education.

2.5.4 Regional framework for the right to education: Africa

Apart from the international framework, the key regional instruments are the African Charter on Human and Peoples' Rights 1981¹⁵⁵ and the African Charter on the Rights

¹⁵³ UN General Comment 13 paragraph 50.

¹⁵⁴ UN General comment No. 13 on the right to education.

¹⁵⁵ < http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf> (last accessed 20 June 2014).

and Welfare of the Child 1991.¹⁵⁶ Article 17(1) of the Charter on Human and People's Rights provides in generic terms that: "Every individual shall have the right to education." It does not elaborate what this entails. For instance it does not even explain the levels of education. Interestingly, the African Charter on the Rights and Welfare of the Child 1991¹⁵⁷ does not only provide for compulsory primary education as a right but goes on to stipulate obligations and rights dealing with secondary and higher education. One would have expected these to have been covered by the former treaty rather than the one that was intended to specifically deal with rights of children.

2.5.5 The Constitutional and statutory protection of the right to education in Uganda

The main source of provisions on the right to education in Uganda, our case study, is the Constitution of the Republic of Uganda 1995 and the Children Act 1997.

2.5.5.1 Constitution of the Republic of Uganda

According to Article 30 of the Constitution of the Republic of Uganda, everyone has a right to education.¹⁵⁸ However, Article 30 does not elaborate on the nature and contents of the right to education. A look at some other provisions gives good guidance on this matter. According to objective XIV of the National Objectives and Directive Principles of State Policy (hereafter 'NOPS') contained in the Constitution, it is an obligation of

¹⁵⁶ < http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf > (last accessed 10 March 2013).

¹⁵⁷ < http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf > (last accessed 10 March 2013).

¹⁵⁸ Article 30 of the Constitution of the Republic of Uganda 1995. See Parliament of the Republic of Uganda, 'Constitution of the Republic of Uganda 1995', <http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf>, (last accessed 17 January 2014).

the state to endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development. In particular, the state is to ensure that all Ugandans enjoy rights, opportunities, and *access to education* (emphasis added).¹⁵⁹ According to another NOPS that specifically deals with education, it is the duty of the state to promote free and compulsory basic education.¹⁶⁰ NOPS XVIII dealing with educational objectives states: “(i) The State shall promote free and compulsory basic education. (ii) The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible.” While the first provision deals with basic education (primary education), with regard to other levels of education above basic education, the constitution requires the State to take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible. As pointed out above, the attainment of levels of education higher than basic education is dependent on availability of resources, as provided for under the ICESCR.¹⁶¹

Another noteworthy provision is Article 6 regarding the issue of an official language. It states that:

(1) The official language of Uganda is English.

¹⁵⁹ NOPS No. XIV of the Constitution of the Republic of Uganda 1995 at: <http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf> (last accessed 17 January 2014).

¹⁶⁰ Parliament of the Republic of Uganda, Constitution of the Republic of Uganda 1995, <http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf> (last accessed 17 January 2014).

¹⁶¹ Article 13(2) (b) and (c) of ICESCR talk of ‘progressive realization’ while Gen. Comment No. 13 para. 44, explains that this means ‘States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 13’. In other words, while this depends on availability of resources, it is not a leeway for countries to relax and go slow, postpone or act intermittently. See discussion in Chapter 9 of Manisuli Ssenyonjo, *Economic, social and cultural rights in international law* (Hart Publishing, Oxford and Portland, Oregon, 2009).

(2) Subject to clause (1) of this article, any other language may be used as a medium of instruction in schools or other educational institutions or for legislative, administrative or judicial purposes as may be prescribed by law.

A possible interpretation of Article 6(2) is that though the Constitution of the Republic of Uganda 1995 envisaged the use of other languages of instruction for educational purposes, such use requires to be authorised by an Act of Parliament. This would put into question the legality of using local languages as part of the so-called ‘thematic education curriculum’ where children from primary 1 to 4 are taught in a language in common use in the local area.¹⁶² This would have to be sorted if maximisation of exceptions to the translation right is to benefit the quality of education (See discussion in chapter 3).

2.5.5.2 Statutory provisions

Since the Constitution was enacted in 1995, no amendments have been done to provide any details on how to realise the human right to education in light of the Constitutional provisions. However, section 5(1) (a) of the Children Act¹⁶³ impliedly gives children a right to education in view of the duty it imposes on the persons with parental responsibility over the child (parents, guardians or adopters of children) to ensure the child enjoys the right to education. It provides that: (1) It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular, that duty gives a child the right to—(a) education and guidance.

¹⁶² Refer to discussion in Chapter 6 on the Berne Appendix translation licence.

¹⁶³ Chapter 59 Laws of Uganda 1997.

A child's right to education can further be gleaned from other provisions (in the Children Act 1997) that allude to the child's right to education; for instance, section 51(a) concerning the effects of an adoption order is to the effect that upon an adoption order being made, all rights, duties, obligations and liabilities of the parents and guardians in relation to the future custody, maintenance and education of the child. Accordingly there are no statutory provisions on the right to education for adults since the Children Act (needless to mention) only protects children.

The discussion on the human rights aspects of education is important because in Uganda, the provision of education tends to be looked at more from the economic and political angle than as a human rights obligation. This is the case despite Uganda being a signatory to all the relevant human rights instruments discussed above.¹⁶⁴ To illustrate, the universal primary education was presented in Uganda as a campaign promise by the President and was initially intended to benefit only 4 children before an overwhelming turn up for enrolment, in some cases by adults, led the Government to extend the UPE programme to all children.¹⁶⁵ It is imperative that the Uganda government starts looking at the provision of education as both a human right and economic development issue. As this thesis has shown, such a stance is well justified since education is not only an end in itself but a means to many ends including satisfying Uganda's international human rights obligations and development targets.

¹⁶⁴ Uganda is marked in green on the website of the African Commission on Human and People's Rights as proof that it has ratified all the relevant treaties. See < <http://www.achpr.org/instruments/>> last accessed 10 June 2014).

¹⁶⁵ Adults, some as old as 80 years continue to make national news headlines from year to year by joining primary school. See for instance, <<http://www.youtube.com/watch?v=qh0ogJRGMHU>>(last accessed 10 March 2014).

2.6 The utilitarian theory of copyright protection and its impact on education in a least developed country

Utilitarian justifications of copyright suggest that protection of creations of the human mind is necessary in the interests of the society as a whole.¹⁶⁶ In other words, it is for the common good that intellectual property rights should be protected. The reason for this assertion is the presumption that without protection such as copyright, there would be no incentive on the part of creators to produce and disseminate their works.¹⁶⁷ Consequently, the public good would suffer because the society would go without those goods. Protection is also regarded as a way of ensuring that the investments made by creators and other intermediaries such as publishers (relative to books) can be recouped.¹⁶⁸

The incentive theory, said to be the more traditional and most influential economic rationale for copyright, maintains that copyright operates as an incentive for the creation of certain types of cultural products. The underlying premise, according to this theory, is that a work will only be created if the expected revenues exceed the cost of expression and the cost of making and distributing the copies.¹⁶⁹ In addition, the price of a successful work must compensate for the risk of failure.¹⁷⁰ Relating this to copyright

¹⁶⁶ See generally, Peter Drahos, *A philosophy of intellectual property*, (Dartmouth Publishing, 1996).

¹⁶⁷ L Bently and B Sherman, Sherman B and Strowel A (eds.), *Of authors and origins* (Clarendon Press, 1994) 35 para 5.3. See Daniel Gervais, in Torremans, IP and human rights (fn 13, above).

¹⁶⁸ L Bently and B Sherman, Sherman B and Strowel A (eds.), *Of authors and origins* (Clarendon Press, 1994) 35 para 5.3.

¹⁶⁹ The incentive effect was alluded to in the United States of America seminal case of *Eldred v Ashcroft* (123 S.Ct.769 (2003)) where the court observed, among others, that the extended terms could provide greater incentive for American and other authors to disseminate their work in the United States.

¹⁷⁰ R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005) 170 using terminology from Landes and Posner. They comment on the argument that creating a work is a time consuming and expensive business, but once a work has been created, it can usually be reproduced quickly and cheaply, which creates an almost classic public goods problem, as in the absence of copyright protection, others would be tempted to free-ride – either potential purchasers would copy the work for themselves or rival publishers would emerge who would be able to undercut the author or first publisher since they would not have to bear the cost of expression, , and they waited until a work was a proven success, neither would they have to bear the risk of failure. Thus without copyright protection, no

exceptions, Burrell and Coleman submit that if we accept that copyright acts as an incentive for the creation of certain works in at least some circumstances, broad exceptions to it might result in underproduction of some type of copyright subject matter.¹⁷¹

In an economist's language, if there were no intellectual property protection, the market would underinvest in the production of new knowledge, because innovators would not be able to recover their costs.¹⁷² By granting authors the exclusive rights to commercialize their intellectual assets over a certain period, intellectual property rights offer an incentive for the production of knowledge. In short, intellectual property rights introduce a static distortion (ie access to proprietary knowledge is sold above its marginal cost), which is rationalized as an effective way to foster the dynamic benefits associated with innovative activities.¹⁷³ This is the dominant theory behind the Anglo-American copyright tradition.

According to Professor John Feather, copyright has always been and remains important to publishers because the unique right to publish a book is the legal guarantee of security of the capital base of a publishing house. He adds that copyright ensures that

one would bother to create or to publish copyright works, or at the very least, the market would be skewed towards cheap to produce, faddish works from which authors and publishers might be able to recoup their investment by relying on lead time alone.

¹⁷¹ R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005) 19.

¹⁷² Carsten Fink and Carlos A. Primo Braga, *How stronger protection of intellectual property rights affects international trade flows*, available at: <<http://www.worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2051/wps2051.pdf>> at 3 (last accessed on May 4, 2008).

¹⁷³ Carsten Fink and Carlos A. Primo Braga, *How stronger protection of intellectual property rights affects international trade flows*, available at <<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2051>> at p. 3 (last accessed on 20 June 2014).

authors produce a commodity which has a commercial value and which therefore can be used to create income.¹⁷⁴ This is because copyright law right from the time of the Company of Stationers, allows the author to transfer or assign his economic rights in a work to a publisher. Combined with the other bundle of rights assured to authors, the publishers then become the assignees of rights such as the right to reproduce and distribute the work to the public. Such an analysis conflates author's interests with those of publishers: this, it is submitted, is not justified. It is argued that even without the current overly strong levels of copyright protection, authors would still lead a decent standard of living. Moreover, not all authors are moved to create works because of money and neither would clarification by a least developed country like Uganda, of her educational exceptions to copyright, lead such authors to stop creating works.

2.6.1 How utilitarianism can help justify copyright reforms

In this study, utilitarian philosophy, hitherto applied to support an overly strong copyright system focussing disproportionately on production at the expense of global dissemination, effective access and utilisation of educational works, has been re-applied to reform and interpret copyright law for the common good (economic development) of the world's greatest number living in less developed countries for a better globalised world.¹⁷⁵

¹⁷⁴ John Feather, 'Authors, publishers and politicians: the history of copyright and the book trade' [1988] E.I.P.R. 377, 377.

¹⁷⁵ P Collier, 'On missing the boat: the marginalization of the bottom billion in the world economy' in S Chari and S Corbridge (eds), *The development reader*, (Routledge, London 2008) p. 491, 492. Collier argues that the world economic system is running on a 1-4-1 system with a top billion who are developed, 4 billion experiencing growth and hence beginning to develop and the bottom billion that are still in abject poverty living on less than one dollar a day; most of them live in Sub-Saharan Africa where Uganda our case study belongs. Even by this account, the middle 4 billion are still technically not yet developed to attain our understanding of the greatest good or ultimate utility. The world's greatest number is therefore yet to attain the greatest 'good'-development.

As mentioned in Chapter 1, I opted in this thesis to use, broadly speaking, the consequentialist approach to copyright law and policy. In particular, I lean more on the classical strand of utilitarianism as the philosophical theoretical framework¹⁷⁶ It is strongly submitted that consequentialism as explained by utilitarians led by Bentham, is the philosophical theory at the level of grand theory that can best justify the reforms to copyright law to promote access to educational materials in less developed countries where the world's greatest number live in poverty.¹⁷⁷ Utilitarianism is the most

176 For an instructive discussion on the importance of theory given by a historian, see R Lowe, *The welfare state in Britain since 1945* (Macmillan Press Ltd, London 1999) 5, after pointing out the difficulties encountered by historians in the use of theory, he nevertheless usefully explains that: 'Theoretical awareness is, nevertheless, indispensable. By clarifying implicit, and often confused, assumptions it can expedite research by clarifying how an argument should be structured and what sort of evidence should be sought. By helping to counterbalance the bias of contemporaries and of extant records, it can help in the task of both empathising with the past and assessing it critically. By opening horizons and suggesting new relationships, it can give meaning to evidence which might otherwise be overlooked. It can also in supranational developments...provide the means by which international comparisons can be made, as well as making available a wide range of literature written on an equally wide range of competing assumptions.' He adds that theory can provide a bridge between the competing academic disciplines. I am particularly in concurrence with the benefits of clarification, helping with structuring arguments, counterbalancing the bias of contemporaries and bridging the gap between different disciplines. In our case, economics, human rights and copyright law are involved. While there is not much conflict on the need for education in economics and human rights theory, the gap arises with copyright theory. For a more technical discussion, see John W Cresswell, *Research design: qualitative, quantitative and mixed methods approaches* (3rd ed. Sage Publications 2009) Chapter 3 at 49 ff.

177 On the application of theories of justice to intellectual property, see Axel Gosseries, Alain Marciano and Alain Strowel (eds.), *Intellectual property and theories of justice*, Palgrave Macmillan, New York, 2008; See also, Peter Drahos, *A philosophy of intellectual property*, (Dartmouth Publishing, 1996). One other theory that could be used is the maximin prioritarianism theory of justice. This theory is a variant of John Rawls egalitarian theory of justice. It was compounded by philosophers such as Derek Parfit. It looks at how to redistribute resources in a way that ensures that the worst-off (educational users in less developed countries) can improve their capabilities without necessarily aiming at achieving equality with the better off, in this case, mainly, the copyright producing countries of the developed Western World. See, Axel Gosseries, in *ibid*, at pp. 3, 4-7; for a detailed general discussion, see Derek Parfit, *Equality or priority*, in Matthew Clayton and Andrew Williams (eds.), *The ideal of equality*, Macmillan Press Ltd, UK, 2000, at p. 81 ff; see also Larry Temkin, 'Equality, priority and the leveling down objection', in Matthew Clayton and Andrew Williams (eds.) *The ideal of equality*, *ibid*, p. 126. See further, Matthew Clayton and Andrew Williams, 'Some questions for egalitarians', in Matthew Clayton and Andrew Williams (eds.), *The ideal of equality*, *ibid*, at p. 1; Karsten Klint Jensen, 'What is the difference between (moderate) egalitarianism and prioritarianism', available at : <http://journals.cambridge.org> (last accessed 29.03.2010); see also Ingmar Persson, 'Why levelling down could be worse for prioritarianism than for egalitarianism', Springer Science+ Business Media BV, December 2007: available at: <http://www.springerlink.com/content/r122327p71303430/fulltext.pdf>: (last accessed 01 April 2010); see also H McCoubrey and N D. White, *Textbook on jurisprudence* (Blackstone Press Ltd., London, 3rd ed. 1999); On theories of distributive justice as propounded by John Rawls, see Samuel Freeman (ed.), *The Cambridge companion to Rawls*(Cambridge University Press Cambridge, 2003); See also Jeremy Waldron, *Theories of rights*(Oxford University Press, Oxford 1984).

common form of consequentialism.¹⁷⁸ The utilitarian theory of justice requires that actions are taken that lead to the greatest good of the greatest number.¹⁷⁹ The Benthamite classical utilitarian theory of justice suggests that: ‘Actions are right to the degree that they tend to promote the greatest good for the greatest number.’¹⁸⁰

It follows that legal and policy reforms should be guided by making consequentialist judgments as to what reforms lead to the greatest good of the greatest number. This is because it is the greatest happiness of the greatest number that should guide us in

¹⁷⁸ Consequentialism is a theoretical approach that justifies actions as morally right based on their likely outcomes. Once actions or decisions have are likely to have a good outcome(s), such decisions are taken as morally right. See Twining 2009 (fn 31). This approach is in contrast with deontology where actions may be morally right regardless of their outcomes. For an application of these theories to copyright, see Suthersanen U, ‘The future of copyright reform in less developed countries: teleological interpretation, localized globalism and the “public interest” rule’, UNCTAD/ICSTD 2005 <http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf > last accessed 10 March 2013.

¹⁷⁹ Twining 2009 (fn 31) 133 ff.

¹⁸⁰ See Twining 2009 (fn 31) 133-153. See also E Mansfield, ‘Utilitarianism and the N.H.S.’, 136, 139 (UCL Jurisprudence Review (1994)). An alternative theory would be *prioritarian egalitarianism*, also referred to as *maximin prioritarianism*. This theory of justice, allows for reforms that benefit the least well-off people in the global community. Though intended to guide reforms and policy actions at the national jurisdictional level, it can be extended to refer to the global community in view of the fact that we live in an era of increasing globalisation in both fields of copyright and education. I assert that the attributes of the theory would be appropriate for guiding reforms to contemporary educational use provisions under the contemporary international copyright regime. The maximin prioritarianism theory of justice is a variant of John Rawls egalitarian theory of justice, as compounded by philosophers such as Derek Parfit. I would embrace a modified parfitian version of prioritarianism (“parfitian prioritarianism”) because it looks at how to redistribute resources in a way that ensures that the worst-off (educational users in less developed countries) can improve their capabilities without necessarily aiming at achieving equality with the better off, in this case, mainly, the copyright producing countries of the developed Western World. For a recent effort to apply theories of justice to intellectual property, see Axel Gosseries, Alain Marciano and Alain Strowel (eds.), *Intellectual property and theories of justice*, Palgrave Macmillan, New York, 2008; See also, Peter Drahos, *A philosophy of intellectual property*, Dartmouth Publishing, 1996; specifically on prioritarian egalitarianism, see, Axel Gosseries, in, *ibid*, at p. 3, 4-7; for a detailed general discussion, see Derek Parfit, ‘Equality or priority’, in Matthew Clayton and Andrew Williams (eds.), *The ideal of equality*, (Macmillan 2000) 81 ff; see also Larry Temkin, *Equality, priority and the leveling down objection*, in Matthew Clayton and Andrew Williams (eds.), *The ideal of equality*, *ibid*, p. 126. See further, Matthew Clayton and Andrew Williams, *Some questions for egalitarians*, in Matthew Clayton and Andrew Williams (eds.), *The ideal of equality*, *ibid*, at p. 1; Karsten Klint Jensen, *What is the difference between (moderate) egalitarianism and prioritarianism*, available at : <http://journals.cambridge.org> (last accessed 29.03.2010); see also Ingmar Persson, *Why levelling down could be worse for prioritarianism than for egalitarianism*, Springer Science+ Business Media BV, December 2007: available at: <<http://www.springerlink.com/content/r122327p71303430/fulltext.pdf>>: (last accessed 01.04.2010); see also Hilaire McCoubrey and Nigel D. White, *Textbook on jurisprudence* (Blackstone Press Ltd., London, 3rd ed. 1999); On theories of distributive justice as propounded by John Rawls, see Samuel Freeman (ed), *The Cambridge Companion to Rawls* (Cambridge University Press, Cambridge 2003); See also Jeremy Waldron, *Theories of rights* (Oxford University Press, Oxford 1984).

determining what is right and wrong as far as copyright law is concerned.¹⁸¹ According to Bentham:

The only right and proper end of government is the greatest happiness of the members of the community in question: the greatest happiness –of all of them without exception, in so far as possible: *the greatest happiness of the greatest number* of them, on every occasion on which the nature of the case renders the provision of an equal portion of happiness for every one of them impossible, by its being a matter of necessity, to make the sacrifice of a portion of the happiness of a few, the greatest happiness of the rest (emphasis added).¹⁸²

In the past, the utilitarian theory has been one-sidedly applied by pro-copyright owner groups in the publishing and entertainment industries of the more developed countries to ratchet up copyright protection by increasing the scope and strength of copyright while using a minimalist approach to copyright exceptions and flexibilities. As pointed out above, the justification has been that stronger copyright protection leads to increased production of knowledge goods in the future.¹⁸³ The problem is that this reasoning perceives production of knowledge goods almost as an end in itself. To this end, pro-book publisher groups have utilised utilitarian arguments to lobby for and prop up a widened and strengthened international copyright system that has in turn been domesticated at national levels including in least developed countries like Uganda, as part of the international obligations for joining the World Trade Organisation.

It is submitted that increased access to and utilisation of educational works through appropriate copyright exceptions and flexibilities rather than increased protection is what would lead to the greatest good of the world's greatest number. This study thus will propose a new way of applying utilitarianism to solve the access and utilisation problems faced by less developed countries in their resource constrained pursuit of

¹⁸¹ Twining 2009 (fn 31) 134.

economic development. The access and use is needed for the present and not for the future.

2.6.2 Reinterpreting and applying utilitarianism

It is my considered opinion that the principle of ‘utility’ (as applied in utilitarianism) should be used as a metaphor for economic development as the ultimate goal. Moreover, I submit that it should be possible to look at ‘the community’ from both a national and global perspective since we now live in an era of globalisation¹⁸⁴ unlike during Bentham’s time. Previous applications of utilitarianism have restricted themselves to the ‘national level’ to call for stringent copyright legislation at the international level. By looking at ‘the community’ from the global level, we should be able to consider the present needs of less developed countries that need access to copyrighted educational materials to pursue the greatest good of the world’s greatest number. As pointed out by economists, the majority of the world’s population lives in the less developed world, some of them in the poorest of countries such as Uganda.

International political morality should be geared towards the attainment of economic development on a global scale for the majority of the world’s population. This might in the short term involve, as Bentham pointed out making ‘the sacrifice of a portion of the happiness of a few (mainly book publishers but also some authors who write for profit). This would provide an answer to those right holders who contend that there is no justification for them to provide help to less developed countries- and that this should be up to their home governments to grant development aid to poor countries like Uganda.

¹⁸² Cited in Twining 2009 (fn 31) (original source omitted).

¹⁸³ See Z Efroni, *Access- right* (Oxford University Press, Oxford 2011) 120.

It is submitted that the individual pleasures are the individual human rights and ‘functionings’¹⁸⁵ that are to be derived from realisation of economic development.

Professor Twining raises the question of the possibility of significantly different interpretations about choice of pleasure- whether it refers to desires, preferences, or satisfaction.¹⁸⁶ He then opts for the choice of ‘give people what they would choose (which he refers to as ‘choice utilitarianism’). However, I would recommend ‘giving as many people as possible as much as possible of what will in fact satisfy them’ (option 3-which I would refer to as: ‘actual results’ utilitarianism). This should take the form of realisation of economic development goals including in the intermediate term, the MDGs.¹⁸⁷ While Bentham has been criticised for only considering the goals of individuals, it is submitted that Bentham was concerned with the community as well as the individual. Further, the *felicific calculus*¹⁸⁸ that has attracted much criticism should not be taken literary; in my view, it should be taken as a development scale, with the national ‘communities’ aspiring to reach the highest end of the scale. Further, it is submitted that education which is offered here as a means to the greatest happiness of the greatest number would pass the test of *fecundity*- a term which refers to the chance of being followed by sensations of the same kind.¹⁸⁹ This is because education is an empowerment right necessary for the enjoyment of other rights. Hence, the other dependant rights would be the sensations of the same kind. Arguably, education also has

¹⁸⁴ Todaro and Smith, Economic development (fn 56 above).

¹⁸⁵ Professor Amartya Sen’s term.

¹⁸⁶ Twining 2009 (fn 31) 135.

¹⁸⁷ Discussed above in this chapter in section 2.2.2.

¹⁸⁸ Twining 2009 (fn 31) 136-138.

¹⁸⁹ Twining 2009 (fn 31) 136.

the quality of *purity*¹⁹⁰ in the sense that it would not have the chance of offering ‘pain’ instead of pleasure- or benefits to the community.

Regarding the criticism of diminishing marginal utility, I contend that if utility or as I prefer to call it, *ultimate utility*, is looked at as economic development, then it is hard to envisage how diminishing marginal utility would come in.¹⁹¹ Countries, even the most developed ones like Norway which ranks number 1 on the UNDP Human Development Index, also have further aspirations for development. So the felicific calculus is a metaphor for a scale of development just like ‘happiness’ is a metaphor for welfare however measured, including by use of parameters provided by Amartya Sen- ‘human capabilities’ and ‘functionings’. As Bentham argued, the maintenance of property cannot be the only end of government.¹⁹² The criticism by Professor Amartya Sen that utilitarianism suffers from ‘distributional indifference’ would not arise if happiness is not looked at in the literal sense but at a higher level as human welfare improvements resulting from enacting laws that promote economic development for the greatest number. Education for instance is looked at as a ‘tide to lift all boats’.¹⁹³ It is conceded that people could be lifted to different levels but there would be an element of uplifting all the same.

¹⁹⁰ Twining 2009 (fn 31) 136 footnote 61(original source omitted) explains that ‘purity’ is the chance of not being followed by sensations of the opposite kind: that is pains, if it be pleasure; pleasure, if it be pain. Linked to economic development as the ultimate utility, I do not see how education would instead lead to underdevelopment or even pain generally.

¹⁹¹ Twining 2009 (fn 31) 137.

¹⁹² Twining 2009 (fn 31) 138.

¹⁹³R. Kagia, ‘Securing the future through education: a tide to lift all boats’ in V Bhargava (ed) *Global issues for global citizens: an introduction to key development challenges* (The World Bank, Washington, DC 2006) 187.

The other criticism attributed to Professor Amartya Sen is that ‘the utilitarian approach to individual well-being is not very robust, since it is easily swayed by mental conditioning and adaptive attitudes’.¹⁹⁴ This criticism would be avoided if a macro rather than a micro view of happiness or well-being is taken by looking at the nation rather than the individual. Development economists have developed some standard measures of economic well-being. The MDGs for example, should be looked at as intermediate goals along the pursuit of utilitarian development policies. It is further submitted that Professor Sen’s ‘capabilities approach’ would work in tandem with rather than against the goals of utilitarianism as applied in the field of development economics and in this study. The approach helps to measure when progress has been made or is being made towards the attainment of economic development as the greatest good of the world’s greatest number.

2.6.3 Responding to other common criticisms of utilitarianism

One other criticism of utilitarianism is that like other consequentialist theories, it is not concerned with how the overall benefits are shared.¹⁹⁵ This indeed is true of the previous use (abuse) of this theory to perpetrate strong copyright protection. However, by recasting the utilitarian arguments in a less developed country perspective, I have been able in this thesis to establish that utilitarianism can lead to more user-friendly copyright laws that can facilitate access to and utilisation of educational materials in less developed countries, including in the short term, moreover for the greatest

¹⁹⁴ Twining 2009 (fn 31) 141.

¹⁹⁵ Axel Gosseries, *How (un)fair is intellectual property?*, in Axel Gosseries, Alain Marciano and Alain Strowel (eds.), *Intellectual property and theories of justice*, Palgrave Macmillan, New York, 2008, at p. 3, 6.

number.¹⁹⁶ Hitherto extant interpretations and application of utilitarianism (with respect to copyright) have rarely addressed the short term availability and affordability aspects of access to copyrighted works in less developed countries and more so, the least developed ones like Uganda. The best that such views can offer is that increased incentives may lead to increased production and reduced prices.¹⁹⁷ They ignore the fact that most book publishing companies, being purely profit-motivated are the main determinants of book prices hence would not produce books to a level that would reduce prices.¹⁹⁸

Moreover, these capitalistic conglomerates are not bothered about the need for development in less developed countries. Publishing conglomerates maintain that those are concerns for their home governments (MDC governments) and that support should come in the form of development assistance which, they further argue is not a matter for business entities. Development aid has so far failed to sufficiently address the access problem in less developed countries. Worse still, development aid may solve access but not the issue of the many restrictions on utilisation of copyrighted educational materials.¹⁹⁹ While it is true that some publishing houses endeavour to keep prices low for less developed country markets relative to prices in MDCS economies, this still leaves the access problem unresolved due to the very low per capita incomes or what is

¹⁹⁶ Previous arguments were that with increased production, eventually works will be available to less developed countries, after expiry of the copyright. This ignores the fact that copyright now lasts for much so longer period (life plus 50 years after the death of the author in the case of Uganda) and cannot therefore serve time-bound development targets for less developed countries least developed countries.

¹⁹⁷ What is regarded as reduced prices is still not affordable to most citizens of less developed countries due to low purchasing power amidst many unsatisfied pressing basic needs.

¹⁹⁸ There are other factors that may influence price of books such as taxes on books and distribution costs.

¹⁹⁹ A counter-argument could be that developed country governments would provide budget support to pay royalties for utilisation of works for educational purposes. This however is not an optimal solution for various reasons including sustainability and the fact it would mainly address utilisation but not the initial bulk access. Royalties even if availed for reproduction licences would not guarantee grant of such licences by right holders.

now referred to as purchasing power parity (PPP).²⁰⁰ For instance, in Uganda, the percentage of the population living on less than a dollar a day is still very high.

I therefore advocate for a utilitarian approach that allows governments of less developed countries to enact and apply copyright legislation to address the issue of availability, affordability and utilisation in order to ensure quality education as an end in itself and as a means to economic development to benefit the greatest number of people in the world. The argument here is that such construction of utilitarianism would indeed lead to ‘the greatest good’ of the greatest number of the world’s population that live in less developed countries.

Another common criticism of utilitarianism is that the concept of the ‘common good’ is not clear. The initial formulations of utilitarianism referred to *human happiness and pleasure* as the units of measurement of the common good; it is argued that what amounts to human happiness and pleasure cannot be easily universally ascertained. I instead submit that as applied to this thesis, this is not a problem: the greatest good or bottom line in this case is attainment of improved human welfare and economic development which less developed countries strive for and which is the standard by which these countries are rated internationally.

Utilitarianism is further criticised on the grounds that it looks at utility or satisfaction in aggregate terms thereby ignoring the needs of the minority. With respect to the problem

²⁰⁰ Professor Helfer and Austin have observed that: ‘While publishers located in developed countries continue to engage in initiatives such as donation, differential pricing, publishing partnerships and the like, there is consensus that much more needs to be done to ensure access to textbooks and to ensure local publishing capacity in less developed countries.’ See L. Helfer and G Austin, *Human rights and*

being addressed by this thesis, the reforms that I suggest are indeed aimed at promoting the greatest good of the world's majority. It is beyond dispute that the majority of the world's poor people live in what are collectively referred to as less developed countries.²⁰¹ Looking at the needs of 'the minority' (in this case, the authors, other right holders and their book publishing corporations mainly based in a few more developed countries), will not substantially affect their interests. After all, most of these users cannot even afford the cost of making a photocopy. They do not represent lost income at all²⁰².

Further, and more specifically addressing the arguments of book publishers of the more developed countries whose educational works are to be accessed and utilised, I submit that authors in the such will not surely lead a less than adequate standard of living simply because of the reforms that are suggested here to promote access to and greater utilisation of copyrighted materials for educational purposes. The greatest part of their revenue comes not from these less developed countries but from the more developed countries. To the publishing companies in the more developed countries, my argument, to borrow from a cunning source in the Biblical book of Genesis, is that they shall not surely perish simply because of the reforms that I am proposing.

intellectual property: mapping the global interface (Cambridge University Press, Cambridge 2011) 342. For purchasing power parity, see Todaro and Smith, *Economic development* (fn 56 above) .

²⁰¹ See definitions in chapter 1.

²⁰² See Sharon E Forster, 'The conflict between the human right to education and copyright' in Torremans, *IP and human rights* (fn 13, above) 287-306 arguing that in such a situation, it is a 'false conflict'. See also Uma Suthersanen, 'The right to knowledge', (Presentation at UNCTAD/ ICTSD / BA Regional Arab Dialogue on "Intellectual Property Rights (IPRs) Innovation and Sustainable Development 26 – 28 June, Alexandria, Egypt, available at: <http://www.iprsonline.org/unctadictsd/docs/Suthersanen_A2K.pdf> (last accessed 14 June 2014) at p. 12.

It is a fact that most of the revenue for authors and other right holders (mainly publishing corporations) is derived from the rich countries of the global North.²⁰³ Overly restrictive copyright regimes do not make authors and publishers in developed countries earn more revenue from poor less developed countries but rather simply lock away the world's collection of educational materials and condemn least developed countries to lagging behind the more developed countries. Contrary to current fears by publishers in the more developed countries, promoting more access and relaxing the restrictions on utilisation will instead, as argued below, benefit the more developed countries more than the current regime.²⁰⁴

It is my argument that promoting educational access and utilisation of educational materials by users in less developed countries will benefit not only those less developed countries but also will have benefits for the more developed countries. First and foremost, we now live in an increasingly globalising world and hence it is only morally right that citizens of less developed countries receive education that meets internationally acceptable levels of quality if they are to be better cosmopolitan citizens.²⁰⁵

Secondly, if education contributes to economic development in the less developed countries, then there would be less need if at all for development aid by developed

²⁰³ See discussion in chapter 5. See discussion on the three-step test by Uma Suthersanen, 'The right to knowledge', (Presentation at UNCTAD/ ICTSD / BA Regional Arab Dialogue on "Intellectual Property Rights (IPRs) Innovation and Sustainable Development 26 – 28 June, Alexandria, Egypt, available at: <http://www.iprsonline.org/unctadictsd/docs/Suthersanen_A2K.pdf> (last accessed 14 June 2014).

²⁰⁴ Development in the global South is good for the global North not only under the theme of globalisation but also in terms of stimulating more demand for more copyrighted goods and other goods and services offered by the global North.

country governments to poor countries. This could translate into reduced taxes in MDCs or at least a justification for arguing for reduced taxes. This would be much to the benefit of book publishers and other right holders in the MDCs. Thirdly, and more directly relevant to publishers is that there is likely to be increased demand for more knowledge goods including other copyrighted materials (and even other goods) from the more developed countries if citizens of less developed countries attain formal education based on the extant ‘Western world’ models of education. For instance, more educational and trade books as well as other entertainment works will be demanded and afforded by educated citizens of the now less developed countries.

Fourthly, creativity (including authorship of books) should not be regarded as a preserve of citizens of the more developed countries. With higher levels of quality education for the greatest number of the world’s citizens in the less developed countries, there is likely to be more creativity and production of works that would benefit both today’s less developed and more developed countries.²⁰⁶ This creativity needs to be nurtured by allowing the potential authors in poor countries to ‘stand on the shoulders of giant’ authors from the more developed countries. Creativity is an incremental process where authors and other creators build on the works of other authors. This could be referred to as ‘trans-global equity’.²⁰⁷ Moreover, global diversity requires a two-directional

²⁰⁵ Another term would be global citizens.

²⁰⁶ Even presently, there is authorship in less developed countries but only a minority of authors create works of international quality. Most of these have benefitted from high quality education either in the global North or during the colonial times or attended what are sometimes colloquially referred to in Uganda as ‘first world schools’. Most of the so-called ‘first –world’ schools were established by missionaries during colonial times.

²⁰⁷ Contrast with the idea of ‘inter-generational equity’, see Martin Senftleben, *Copyright, limitations and the three-step test: an analysis of the three-step test in international and EC copyright law* (Kluwer Law International, The Hague 2004) 23, 189-197; hereafter, “Senftleben 2004”.

dissemination of cultural ideas including from South to North and not just the current asymmetrical pre-dominantly North-South flow.

Finally, there is likely to be many other direct and indirect benefits to the more developed countries resulting from attainment of economic development in the now less developed countries as a result of the contribution of high quality education to the development of the currently less developed countries.²⁰⁸ For these reasons, it is argued that the greatest good (economic development) to the greatest number (the world's poor living in less developed countries) will result from a utilitarian approach to copyright reforms to facilitate access and utilisation of copyrighted educational materials. In this, my arguments are further fortified by the approach advocated by the Nobel laureate and leading economist Professor Amartya Sen, of looking at development as freedom.²⁰⁹

The 'development as freedom' approach to development views the process of development as requiring the elimination of certain 'unfreedoms' that affect human beings, and in particular, those in less developed countries such as Uganda (our case study). Sen discusses a number of what he calls 'unfreedoms' that people in underdeveloped countries have to be liberated from.²¹⁰ Most importantly for this study is what Sen writes about the role of education. In line with many authors, Sen points out that education is both constitutive and instrumental to development.²¹¹ This is another way of saying education is a development target in itself and a means of realising other

²⁰⁸ Reduced economic migrations may be one of the indirect benefits in the long run if access to educational materials facilitates education which is instrumental to and can in turn lead to economic development. The counter-argument is that quality education only leads to brain drain; however, that could change in the medium and long term.

²⁰⁹ Amartya Sen 1999 (fn 69) see particularly, the introduction and chapters One to Four.

development targets.²¹² This way of looking at education is in harmony with human rights theory (as discussed above) since education is regarded as both a fundamental human right and an empowering right essential to the attainment and enjoyment of other rights.

The convergence between development economics theory and human rights about the relationship between education and development further buttresses the need for copyright law making to accommodate attainment of development targets like the MDGs which incorporate, but are also, to varying degrees, dependent on the right to education.²¹³ This call is supported by the wording in the preamble to the WTO Agreement (the Marrakesh Agreement), TRIPS and more clearly in the WCT preamble.²¹⁴ Unfortunately the impact of those provisions has often been downplayed by rights exploiters who believe they stand to benefit from separating economics issues from development and human rights issues (discussed in chapter 4).

²¹⁰ Amartya Sen, *ibid.*

²¹¹ Amartya Sen 1999 (fn 69), *ibid.*

²¹² See recent recommendations in a report by the United Nations' Secretary General's Eminent Persons Group entitled, 'A compact for inclusive development and prosperity in least developed countries'; its recommendations include: adequate, prioritized and better targeted development assistance; duty- and quota-free access for LDC exports; *doubling farm productivity and school enrolment*; and, *beefing up the developmental and democratic capacities of LDC governments* (emphasis added). While doubling school enrolment is directly mentioned, education has a key role to play in attaining the other measures, such as doubling farm productivity and beefing up the developmental and democratic capacities of LDC Governments. See a commentary at UN News Centre 'Half of world's poorest countries can escape poverty by 2020 – UN' at: <<http://www.un.org/apps/news/story.asp?NewsID=37926&Cr=least&Cr1=developed>> last accessed 17/01/2014). See full report at http://www.un.org/wcm/webdav/site/ldc/shared/EPG_Report_ENGLISH_w_v2.pdf (accessed 17/09/2011). Refer also to UNICEF study quoted in Consumers' International, 'Copyright and access to knowledge: policy recommendations on flexibilities in copyright law', p. 7, para 7, 20 <www.eifl.net/system/files/201105/ci_report.pdf> (last accessed 20 March 2014).

²¹³ The MDGS include attainment of universal primary education by the year 2015. Refer to discussion in 2.2.3 above on MDGs.

²¹⁴ See discussion in chapter 4.

2.7 Dealing with the argument that copyright is a human right

Apart from the various theoretical justifications of copyright (including utilitarianism, discussed above), another philosophical tool deployed by right holders in justifying their monopolistic privileges to control access and utilization of copyrighted works such as educational materials is the argument that copyright has human rights foundations (the human rights theory). It is argued by some that copyright is as much a human right as any other human rights such as the right to education.²¹⁵ This assertion would make it hard to use one right to trump another. A number of commentators have addressed this issue of whether copyright is a human right.²¹⁶ This debate is of utmost importance in discussions like the present one that concern the nature of the interface between copyright and human rights, including the fundamental human right to education.

²¹⁵ Paul L C Torremans ‘Copyrights (and other intellectual property rights) as a human right in Torremans, IP and human rights (fn 13, above) 202, 203 where he argues that the fact that the rights of authors and creators can also stand in their own right is instead an ancillary point. In fact in my view, Professor Torremans gives a quite optimistic view on the need for copyright and other IPRs to facilitate rather than constrain access and fulfilment of the other relevant articles including, in my view, facets of Articles 15 of the ICESCR. After all, human rights are inter-related.

²¹⁶ Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) Chapter 9 at p. 213 discussing article 15 ICESCR and concluding at p. 218 that ‘.. the reading of the law allows one to regard IPRS as human rights’. They however, strongly argue for an optimal balance between the rights of authors and the needs of the society, pointing out the complications arising from the involvement of corporate entities in claiming the protection otherwise intended for authors; J. Morsink, *The Universal declaration of human rights: origins, drafting and intent*, (University of Philadelphia Press, Philadelphia 1999) see particularly pp. 217-222; see also M. Green, *Drafting history of Article 15(1)(c) of the international covenant*, para. 45, 9 October 2000, U.N. Doc. E/C.12/2000/15; Peter K. Yu, *Reconceptualizing intellectual property interests in a human rights framework*, U.C. Davis Law Review 40 (2007), pp. 1039-1149; See generally, Torremans, IP and human rights (fn 13, above) 202-215. Also C Geiger, “‘Constitutionalising’ Intellectual property law? The influence of fundamental rights on intellectual property in the European Union’ [2006] International Review of Intellectual Property and Competition Law 371; J Cornides, ‘Human rights and intellectual property, conflict or convergence?’ [2004] Journal of World Intellectual Property 1423; L Helfer and G Austin, *Human rights and intellectual property: mapping the global interface* (Cambridge University Press, Cambridge 2011); D Matthews, *Intellectual property, human rights and development: the role of NGOs and social movements* (Edward Elgar, Cheltenham 2011); W Grosheide (ed), *Intellectual property rights and human rights: a paradox* (Edward Elgar, Cheltenham, 2009); J. Griffiths and L. McDonagh, ‘Fundamental rights and European intellectual property law - the case of Art 17(2) of the EU Charter’ in C. Geiger, (ed.) *Constructing European IP: achievements & new perspectives* (Edward Elgar, Cheltenham 2012. Available at <SSRN: <http://ssrn.com/abstract=1904507>> last accessed 10 March 2013. See U Suthersanen, ‘Tracing the copyright stakeholders: from the Renaissance to radio Google’ <<http://www.copyright.bbk.ac.uk/contents/workshops/suthersanenu.pdf>> undated; accessed 10 April 2013 where she refers to the human rights argument as one of the often cited justifications of copyright law for the wide protection offered by copyright law.

This study takes the view that not all aspects of copyright or indeed other IPRs are of a human rights nature.²¹⁷ Additionally, it is submitted that the present levels of copyright protection are not necessary to realise the human right to copyright protection as guaranteed by Article 15(1)(c) of the ICESCR. It would be important to trace the development of Article 15(1) (c) of the ICESCR if one is to fully appreciate the nature of protection guaranteed by the Bill of Rights. However, a detailed analysis is outside the purview of this work. Moreover, there is now a good aid to understanding this provision in the form of the interpretation proffered by the UN CESCR in General Comment No. 17. This interpretation though not legally binding is highly persuasive. It has pointed to the presence of inconsistencies between copyright and other IPRs and other human rights.²¹⁸

2.8 Tensions between Article 15 ICESCR and the present copyright system

According to the United Nations Economic, Social and Cultural Committee, present IPRs are over and above the protection provided for by Article 15(1)(c) of the ICESCR.²¹⁹ Put another way, present international IPR regimes, including that governing copyright (with which this work is concerned), are ICESCR-*plus*. It is our argument that though there would be nothing wrong with granting more human rights than are provided, such excess guarantee is unjustified where it conflicts with other

²¹⁷ See for instance, P. Drahos, 'Intellectual property and human rights' [1999] *3IPQ* 349; See also generally, Peter K. Yu, *Reconceptualizing intellectual property interests in a human rights framework*, U.C. Davis Law Review 40 (2007).

²¹⁸ Refer to discussions by Daniel J Gervais, 'Intellectual property and human rights: learning to live together', in Torremans, *IP and human rights* (fn 13, above) 3 ff.

²¹⁹ United Nations CESCR, General Comment No. 17 on Article 15(1)(c) of the ICESCR < <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/400/60/PDF/G0640060.pdf?OpenElement> > ; (last accessed 10 June 2014).

fundamental human rights including the right to education.²²⁰ I note that the ICESCR, unlike the Berne Convention and TRIPS, does not expressly provide for the right of national legislatures to legislate in excess of its minimum standards including those set for copyright.

It is submitted that in principle, no problem should arise with creating wider rights except where the wider scope tampers with the interdependence, interrelatedness and indivisibility of other established human rights norms including the right to education. Our main argument is that the current copyright law does not pass this test in as far as access and utilisation of educational materials in less developed countries is concerned. In the field of IPRs as currently recognised, there is greater emphasis on rights than on user exceptions and other flexibilities that are in public interest. The main differences as pointed out in the General Comment are discussed below.

2.8.1 Beneficiaries

Only human authors (blood and flesh authors) are protected by the ICESCR. According to General Comment No. 17, Article 15(1)(c) of the ICESCR was intended to protect personal links and ‘basic’ material interests of authors and their creations unlike (current) IPR regimes that protect primarily business and corporate interests and investments.²²¹ Notwithstanding current criticism of this General Comment which

²²⁰ The field of human rights is itself not immune from criticism about continued ratcheting-up of human rights through the creation of new rights. See for instance, P. Alston, ‘Conjuring up new human rights: a proposal for quality control’ (1984) *American Journal of International Law*, 78, 607-621. The right to education is however, undoubtedly, a fundamental human right subject of course to the interpretation that has been given as to what it entails.

²²¹ According to para. 2 of General Comment No. 17, “...Whereas the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c),

results in a paradoxical relationship between human rights and IPRs,²²² it is submitted that it represents some of the most serious criticism, by a highly placed international body, of the present IPR regime championed by the multinational corporations and governments of the more developed countries. It unravels the arguments relied on by copyright MNCs in MDCs in justifying particularly strong copyright protection.

According to this interpretation, such MNCs being legal rather than blood and flesh persons have no right to advance the human right argument by relying on Article 15 ICESCR in defence of their copyright claims. This should to this extent lessen chances of the “embarrassment” that is predicted to face those of us arguing for a human rights approach to the regulation of copyright. The anticipated “embarrassment”, the argument goes, would arise should ICESCR-*plus* IPRS be firmly pronounced as human rights. In such a case, it would make it harder to argue for the trumping of copyright as a human right in order to promote another human right like the right to education.²²³

2.8.2 Level of protection

Related to the above distinction, the aim of copyright, according to UN General Comment No. 17, is to protect the basic material interests of authors which are

does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.”

²²² For some of the criticism, see, 3D, ‘An assessment of the committee on economic, social and cultural rights’ General Comment No. 17 (2005) on “the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”, (Policy brief 3, October 2006): online at :<http://www.3dthree.org/pdf_3D/3D_GC17_IPHR.pdf>, (last accessed 10 March 2013); see also Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) Chapter 9. The criticism includes some internal contradictions where the General Comment seems to encourage maintenance of current IPR standards while at the same time condemning them as being over and above the provisions of article 15(1)(c) of the ICESCR.

²²³ Graeme W. Austin and Amy Zavidow, ‘Copyright law reform through a human rights lense’ in Torremans, *IP and human rights* (fn 13, above) 257, 261-273.

necessary to enable authors to enjoy an adequate standard of living. This, it is submitted, implies that the currently ratcheted-up copyright regime is not in sync with the basic human rights instrument. For instance, the present long durations of copyright, that do not promote social justice from the point of view of less developed country users who need access to educational materials, are more than is necessary to enable authors enjoy an adequate standard of living. Considering the lower life expectancy in less developed countries, without appropriate balancing provisions to ensure user rights, in the form of exceptions or other flexibilities, whole generations of citizens may never have *effective* access to the world's rich store of knowledge.

Going by the General Comment, copyright as contained in Article 17 ICESCR, is intrinsically linked to other rights contained in other provisions of the ICESCR (including the right to education contained in Article 13 and the other rights that can be promoted as externalities of realising the right to education). It is now necessary to review the situation in Uganda that calls for reforms to copyright law to support education as an end of a means to economic development.

2.9 Socio-economic context of Uganda

Uganda is a landlocked country located in East Africa within Sub-Saharan Africa, a region with peculiar underdevelopment problems and characteristics (including political instability). As mentioned in Chapter one, the underdevelopment problems of sub-Saharan African countries are of concern to contemporary development economists and

international development agencies.²²⁴The country is a member of the regional grouping known as the East African Community (EAC) that was traditionally comprised of three states-Uganda, Kenya and Tanzania; the East African Community has been expanded to include Rwanda and Burundi. With exception of a few regions and periods, Uganda has on the whole been politically stable since 1986 when the present political leadership came to power. The country has experienced high and stable rates of economic growth for a long time.²²⁵ Uganda is a former British colony; accordingly the country's legal system is based on the English legal system. Uganda is therefore a common law country. Many of Uganda's laws were inherited from the colonial masters.

Despite its improved economic growth since 1987, by United Nations classification, Uganda remains a least developed country having been so recognised in 1971 when the least developed country classification was introduced by the United Nations.²²⁶ On the Human Development Index, Uganda shares its 161st position out of 187 with Haiti.²²⁷

²²⁴ See Todaro and Smith, Economic development (fn 56 above) .

²²⁵ See, S. Ssewanyana, Matovu J.M and Twimukye, E, *Building on growth in Uganda*, in Punam Chuhan-Pole, Manka Angwafo (eds) *Yes Africa can: stories from a dynamic continent*, World Bank, Washington DC June 2011, pp.51-64 Also available online:< <http://issuu.com/world.bank.publications/docs/9780821387450>> (last accessed 24 February, 2013).

²²⁶ For purposes of the law of copyright, the United Nations classification is particularly important for application of the Berne Appendix for less developed countries and even for purposes of TRIPS and the WTO Agreement that make reference to the needs of least developed countries. See para. 2 of the preamble to the Agreement establishing the WTO: available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf; see also para. 6 of the preamble to the TRIPS Agreement: http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm (both web pages last accessed on 27/03/2011). For further explanation of the classification, see D Ghai, 'Least developed countries' in D A Clark (ed), *The Elgar Companion to development studies*, (Edward Elgar, Cheltenham 2006) 333.

²²⁷ The Human Development Index (HDI) is a summary measure for assessing long-term progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. Source: UNDP, *Human Development Report 2013: the rise of the South: human progress in a diverse world* (Explanatory note on Uganda) < <http://hdr.undp.org/sites/default/files/Country-Profiles/UGA.pdf>>(last accessed 10 March 2014).

Despite hailing Uganda's economic progress, the World Bank classifies Uganda as a low-income less developed country (LIC).²²⁸

Uganda's economic growth has been mainly attributed to the political stability in most parts of the country and the introduction of economic reforms and good leadership by the National Resistance Movement government. Uganda's achievements have been hailed by many international development organizations led by the World Bank (WB) and International Monetary Fund (IMF), whose economic reform policies the country has implemented since the current National Resistance Movement Government came to power in 1986.²²⁹ For many years prior to the current world economic downturn, Uganda enjoyed a relatively high rate of economic growth of over 6 per annum.²³⁰

Despite the many positive strides made politically, economically and socially since 1986, Uganda remains a least developed country (LDC) that is characterised by many of the problems typical of less developed countries in Sub-Saharan Africa.²³¹ To mention but a few, relatively high levels of illiteracy;²³² abundant supply of unskilled labour; a disease burden including HIV/AIDS; low per capita Gross National Income (GNI); a

²²⁸ Todaro and Smith, *Economic development* (fn 56 above) 43.

²²⁹ See for instance, M Ward, A Penny and T Read, *Education reform in Uganda-1997 to 2004: reflections on policy, partnership strategy and implementation* (DFID, London 2006) p. 4; J Eilor, *Impact of primary education reform program (PERP) on the quality of education in Uganda* (Association for the Development of Education in Africa (ADEA) 2005). Both books deal with primary education reforms but also canvas the historical background and socio-economic and political context of Uganda.

²³⁰ For a discussion of the economic reforms, see S Ssewanyana, J M M Matovu and E Twimukye 'Building on growth in Uganda' in P. Chuhan-Pole and M Angwafo (eds), *Yes Africa can: success stories from a dynamic continent*, (The World Bank, Washington DC 2011) 51; see also B. Essama-Nssah 'Achieving universal primary education through school fee abolition: some policy lessons from Uganda' in P. Chuhan-Pole and M Angwafo (eds), *Yes Africa can: success stories from a dynamic continent* (The World Bank, Washington DC 2011) 465.

²³¹ Todaro and Smith, *Economic development* (fn 56 above) 56-71.

²³² Uganda nevertheless has higher literacy rates relative to the other East African countries. See

high population growth rate;²³³ rampant corruption and leakage of public funds; and brain drain. Uganda currently is said to have the highest population growth in the world. Uganda has a per capita Gross National Income (GNI) of USD 420. Political stability is just returning to the Northern region of the country after a 16 year rebel insurgency. The country has an agro-based economy since 23 per cent of her revenue is derived from agricultural based activities;²³⁴ by 2005, 63.7% of Uganda's population was employed in agricultural based sector.²³⁵ The country has high infant mortality and morbidity rates. Uganda is dependent on foreign budget support with at least 30 per cent of the national budget being funded externally. The percentage of foreign budget support has however been reducing as a result of improved revenue collection and increased taxable economic activities. The country has good economic prospects with the recent discovery of oil deposits.²³⁶

As a least developed country, Uganda has a host of problems that are characteristic of less developed countries. These include the problem of low levels of education and the resultant abundance of unskilled labour juxtaposed with lack of highly skilled human resources. Education is hailed as the key to the development of the individual and consequently, communities and nations.²³⁷ It is argued that education can improve the quality of all aspects of life. Uganda is implementing the Millennium Development

²³³ Professor Amartya Sen argues that education is the best contraceptive. See Amartya Sen 1999 (fn 69). Lower levels of education thus contribute to the population explosion being experienced in the country which is now of concern to development agencies including the World Bank.

²³⁴ World Bank statistics 2008. Available online at < <http://www.worldbank.org/en/country/uganda> > last accessed 14 June 2014).

²³⁵ UNDP Country statistics Uganda, where.

²³⁶ There are fears of the so-called "oil curse" if the oil revenue is not properly managed and utilised.

²³⁷ UN Economic and Social Council, 'General Comment No. 13 on the right to education'. . Amartya Sen 1999 (fn 69); Consumers International, *ibid*, at p. 1.

Goals (MDGs).²³⁸ Goal Number 2 is about achieving Universal Primary Education by the year 2015. Virtually all the other MDGS that were agreed upon by the member states of the United Nations are underpinned by education. Goal number two of the MDGs is to attain Universal Primary Education by 2015. When free Universal Primary Education was introduced in Uganda, school enrolment increased tremendously. This strained the already meagre supply of educational materials and worsened the learner to textbook ratio. All these programmes demonstrate Uganda's realization that education is of critical importance in the pursuit of economic growth and development.²³⁹ That however, is not necessarily reflected by the amount of resources allocated to the education sector as a proportion of the annual government expenditure.

2.10 Education in Uganda

As of 2008, Uganda had a population of 35.2 million with a population growth rate among the highest in the world. By 2012, the population was estimated at 36.35 million by the World Bank.²⁴⁰ Only 68.9 per cent of Uganda's population is literate.²⁴¹ A larger

²³⁸ See explanation above on how they came up. Post 2015 targets are being developed.

²³⁹ See Todaro and Smith, Economic development (fn 56 above) 14 ff for a historical and contemporary definition and distinction between economic growth and economic development. Economic growth is a quantitative growth in the economy while economic development looks at both the quantitative and qualitative growth. For instance, increase in incomes means there is economic growth but it is not development if the gap between the poor and the rich is widening. A country's gross domestic income may grow but this may be corruptly utilized by a few, or spent on non-productive sectors such as defence with little spent on social services like education for the benefit of the majority. Most importantly for this thesis, despite their high incomes, countries such as Kuwait and Qatar are grouped among less developed countries, among other reasons because significant parts of their populations remain relatively uneducated or in poor health. See, *ibid*, at p. 41.

²⁴⁰ World Bank data of 2008: available at: <http://data.worldbank.org/country/uganda>, (last accessed 19 March 2014).

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/UGANDAEXTN/0,,menuPK:374963~pagePK:141132~piPK:141109~theSitePK:374864,00.html>.

²⁴¹ UNDP statistics: see <http://www.undp.or.ug/resources/45>. Literacy according to UNESCO means 'the ability to read and write, with understanding, a short, simple sentence about one's everyday life'. See, "Literacy: the core of education for all", in the EFA, "Education For All Global Monitoring Report" (2006); available at: <http://www.unesco.org/education/GMR2006/full/chapt1_eng.pdf>. On the value of literacy, UNESCO (*ibid*) states that "Being literate adds value to a person's life. Literacy can be instrumental in the pursuit of development – at personal, family and community levels, as well as at macro-levels of nations, regions and the world". Literacy is part of the right to education and it facilitates

percentage of the population however, suffer from what has been described as ‘the new illiteracy’-the inability to use computers, word processing, email and websites.²⁴² By 2011, it was estimated that only 13 percent of the population were Internet users.²⁴³ This is not surprising considering that by there were less than 5 computers per one thousand people in Uganda.²⁴⁴ This has implications for the use of electronic educational materials, however liberal the relevant exceptions may be.²⁴⁵

2.10.1 Formal education in Uganda: an overview

Formal education in Uganda was introduced by British missionaries in the 1880s during colonial rule. The Ugandan education system follows a 7-4-2-3 pattern. The first seven years are for primary education; this is sometimes preceded by a two-year pre- primary stage of education attended by three to five year olds especially in urban areas. Primary school education is followed by four years of lower secondary or “Ordinary” level and two years of upper secondary or “Advanced” level. There is then a further three to five years of tertiary education. Side by side, there exists technical and vocational education, including three-year technical and farm programs that follow immediately after primary education. Post-secondary TVE lasts three or four years. The proportion of the population over fifteen years old who have received some years of primary education

the achievement of other rights, UNESCO, *ibid.* For a more recent and improved definition of literacy developed by UNESCO, see, UNESCO, “The global literacy challenge: a profile of youth and adult literacy at the mid-point of the United Nations Literacy Decade 2003-2012”; available at: <www.unesdoc.unesco.org/images/0016/001631/163170e.pdf>.

²⁴² John J. Macionis and Ken Plummer, *Sociology*, (4th ed. Pearson Prentice Hall, 2008) 641.

²⁴³ UN statistics, Uganda, <<http://data.un.org/CountryProfile.aspx?crName=Uganda>>, (last accessed 10 March 2014).

²⁴⁴ John J. Macionis and Ken Plummer, *Sociology*, (4th ed. Pearson Prentice Hall, 2008) 641. The commentators observe that: ‘The US has more computers than the rest of the world put together , while South Asia –with 23 percent of the world’s population- has hardly 1 percent of the world’s users. In 2004, while there were 750 computers per thousand people in the USA, there were less than five per thousand in Cambodia, **Uganda**, Laos, Niger, Liberia and the Congo’, (Citing *The New Internationalist*, 2007: 60, 6-7)- (Emphasis added). Computer access and use of the Internet, though not synonymous are to some extent inter-linked.

²⁴⁵ Discussion in Chapter 5 on exceptions to the communication to the public right.

has been increasing greatly, partly due to the government's introduction of universal primary education (UPE) effective 1997. Tertiary education in Uganda is provided by universities (both public and an increasing number of private ones), national teachers' colleges, colleges of commerce and technology, and other tertiary institutions. The system is predominantly comprised of the traditional full-time-attendance universities and teacher training colleges but it is rapidly being transformed. Degree programs are offered only in universities where students complete a three to five year program with minimum standards. The publicly funded Makerere University is the oldest in the country. Colleges and other tertiary institutions offer diplomas, and other programs usually requiring two to three years of study.²⁴⁶

The 21st century is witnessing a significant number of mobile students. .. Sub Saharan Africa has the highest outbound mobility ratio of 5.9 % almost three times greater than the global average.

2.10.2 Quality of Uganda's education

To improve the levels of education and as part of her international obligations contained in the Millennium Development Goals and various international human rights instruments, the country introduced free universal primary education (UPE) in

²⁴⁶ M Ward, A Penny and T Read, *Education reform in Uganda-1997 to 2004: reflections on policy, partnership strategy and implementation* (DFID, London 2006) 4; J Eilor, *Impact of primary education reform program (PERP) on the quality of education in Uganda* (Association for the Development of Education in Africa (ADEA) 2005). See also X Liang, 'Uganda tertiary education sector report', (Africa Region Human Development Working Paper series, The World Bank 2004), <http://siteresources.worldbank.org/AFRICAEXT/Resources/no_50.pdf> (last accessed 10 March 2014).

December 1996.²⁴⁷ It is however, not clear if the programme is compulsory as required by international human rights treaties, notably, the International Covenant on Economic, Social and cultural Rights (ICESCR) and the Convention on the Rights of the Child, and the African Convention on Human and Peoples' Rights.²⁴⁸ As a result of this, the World Bank, one of the leading international development institutions involved in Uganda reported that: **'primary school enrolment was not only sustained, but has continued to grow. Uganda's own universal primary education policy resulted in an increase in primary school enrolment from 3.1 million in 1996 to 7.3 million in 2006 and removed wealth and gender gaps among primary pupils'**.²⁴⁹ This went a long way in solving the availability question (one of the 4As of the right to education) but raised other concerns with respect to the quality of education and access to educational materials.²⁵⁰

The UPE programme was followed by the introduction of free universal secondary education (USE) to absorb the products of UPE. One of the persistent criticisms of the UPE and USE programmes has been the poor quality of the education being received.²⁵¹ This has partly been attributed to the inadequate supply of educational materials, notably, textbooks. The Ministry for education in its 2010/2011 budget planned to take the following actions: 'provide reports and disseminate findings on the quality of

²⁴⁷ J N Aguti, 'Facing up to the challenge of Universal Primary Education, (UPE) in Uganda through distance teacher education programmes,' (Conference paper, Durban, South Africa, 2002): available at <http://www.col.org/pcf2/papers/aguti.pdf> (last accessed 20 January 2013) 2.

²⁴⁸ J Eilor, *Impact of primary education reform program (PERP) on the quality of education in Uganda* (Association for the Development of Education in Africa (ADEA)2005) 45 where it is stated that UPE is neither compulsory nor free due to absence of legislation to make it so.

²⁴⁹ World Bank, 'IDA at Work: a better managed education system in Uganda' at: <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTEDUCATION/0,,contentMDK:21308931~menuPK:5546517~pagePK:210058~piPK:210062~theSitePK:282386,00.html>>, (last accessed 10 March 2014).

²⁵⁰ Refer to discussion in section 2.5.3.

education and give expert advice to stakeholders; initiate, develop and review curricula and instructional materials for primary, secondary and tertiary levels to promote quality education for national development; and coordinate the procurement of instructional materials for schools and other institutions.²⁵²

Economic liberalization, one of the economic policies implemented by Uganda and hailed by International development institutions, has led to many private educational providers being established from nursery and basic education level to tertiary level including University and professional levels. Most of these institutions do not have the necessary funds to purchase the required educational materials notably textbooks. They often leave it to the students or parents to provide their own materials.²⁵³ Government (public) schools are supplied educational materials by the government but often parents have to supplement in order to improve the student to textbook ratio. However, this is often inadequate. For instance, in its 2006 Annual Report, the UNDP, that is overseeing the implementation of the MDGS reported that the Government of Uganda had not yet fulfilled its undertaking to provide learning (educational) materials under the UPE programme.²⁵⁴ This translates into very high student/pupil to textbook ratio. However, to say this may be misleading since some educational institutions, especially the privately owned in poor areas, hardly have any textbooks to ration. In recognition of

²⁵¹ UNDP, 'Uganda MDGs Implementation Report 2007', (UNDP, Kampala, 2008); For secondary education, see Liang, 'Tertiary education in Uganda' The World Bank, Washington DC., 2007.

²⁵² Ministry of Education and Sports, 'Budget Framework Paper' 2010/2011. Available at: http://www.education.go.ug/ESR_2010/Education%20Sector%20BFP%205th%202010-11_N.pdf, at p. 65.

²⁵³ See, World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014).

²⁵⁴ See, World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014).

this fact, the Government of Uganda planned to include private educational institutions implementing the UPE and USE programmes among those to be supplied with textbooks under a form of public private partnerships (PPP).

The programmes for UPE and USE have made great strides towards solving the aspect of availability and accessibility of education.²⁵⁵ What they have not done is guarantee that the education is of acceptable good quality.²⁵⁶ Good quality education among other things requires a supply of good quality educational materials. There is evidence to show that quality of education is a big concern in Uganda. The Government introduced a National Assessment of Progress in Education (NAPE) exercise that is conducted by Uganda National Examinations Board. It has been reported that 75 % of the districts covered showed that pupils in Primary 6 did not pass the numeracy and arithmetic tests.²⁵⁷ This shows that the quality of education in terms of cognitive skills is very low. This needs to be addressed; provision of educational materials could play an important role in improving literacy and overall educational standards. Also studying in the local languages with the aided of translated copies of books would help in enhancing understanding.

Even at the higher education level, concerns about quality of education have been raised. The number one blame is cast on the rise in numbers that strains the available resources including textbooks. Use of computer access point to provide simultaneous

²⁵⁵ See paragraph 2.5 above.

²⁵⁶ UNDP Report

²⁵⁷ P Ahimbisibwe, '70 per cent of pupils can't read or count' (The Sunday Monitor, March 24 2013) online at: <http://www.monitor.co.ug/News/National/70-per-cent-of-pupils-can-t-read-or-count/-/688334/1728626/-/9bhsr6/-/index.html> (accessed 24 March 2013).

access would go a long way in alleviating the problem.²⁵⁸ However, not only does that require infrastructure but it raises copyright issues since it involves communication to the public, a right protected by copyright in Uganda. Use of textbooks remains the best solution so far. However, that may be hampered by copyright law as shall be examined in chapters 3-6.

2.10.3 Educational materials availability and affordability: a situational analysis

The despicable situation regarding textbook availability in secondary schools in Uganda was discussed in a World Bank paper of 2008, following an empirical study.²⁵⁹

The paper noted among others that textbook rental schemes had been terminated in many countries including Uganda due to among others, rising costs and declining parental ability to pay textbook fees. The fact that parents cannot afford purchase of textbooks was seen in Uganda from the decline in students taking literature as a subject because of frequent changes in the set texts, which a majority of secondary schools and parents could not afford.²⁶⁰ Relying on parental purchase of books would result in textbooks for the rich and no textbooks for the poor besides disadvantaging rural and remote areas.²⁶¹ This is why this study explores how copyright law can be used to

²⁵⁸ A B K Kasozi, *University education in Uganda: challenges and opportunities for reform* (Fountain Publishers, Kampala 2003).

²⁵⁹ World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014).

²⁶⁰ World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014) 21.

²⁶¹ World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014) 22. On a study that underscores the importance of textbooks for rural areas relative to urban areas, see, J Muvawala and E Hisali, 'Technical efficiency in Uganda's primary education system: Panel data evidence' (The African Statistical Journal, Volume 15, August 2012 69) 80.

promote quality education for all and not just for some (see for instance discussion on Three-step test in Chapter 4).

Based on empirical studies carried out in Uganda, the World Bank provides evidence that even for schools regarded as “average” and “good” the attempt to maintain basic textbooks for core subjects may amount to as few as one textbook per 10 students or even fewer in “non-core” subjects. On the other hand, private schools at the bottom end of the market aspire to no more than one textbook per subject for the use of the teacher and they generally make no attempt to provide class sets or even loan access via a library.²⁶² Specific case studies of schools with varying characteristics were investigated.

Case study 1

In a case study of a large (1100 students), long-established, prestigious, grant-aided religious foundation secondary school in Kampala with a good and rapidly increasing reputation for sound management and good exam results, the current English and Math textbooks were found to be six years old. This was quite good except that the school head teacher *expected the textbooks to last “forever”*(emphasis added).²⁶³ Indeed, the Chemistry textbook set in the said school was said to be over 20 years old.

Case study 2

²⁶² World Bank, ‘Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa’, World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014) 26.

²⁶³ World Bank, ‘Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa’, World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014) 32.

This case is one of the most prestigious and sought after grant-aided secondary schools in the country with an annual operational budget of around US\$1.6 billion per year. Some of the Science textbook sets are very old indeed. Physics and Chemistry both have a majority of textbooks which are close to 20 years old.

Case study 3

To show the rural divide, the case study of a school in a small privately owned (entrepreneurial) day secondary school in Masindi District with an enrolment of 200 revealed that there was no library and no textbook sets for students. However, there was at least one copy of each basic textbook for the use of teachers. Investigators found that though the school issues a book list, students never buy. This was to be expected since the same report found that many students could even afford the fees and a number of students perform labour in lieu of fees.²⁶⁴

Case Study 4

Another case study involving a large privately-owned, unaided secondary school in Kampala with over 1000 students with annual fees of US\$685 for boarders found that there were very few textbooks in the school, a virtually empty library room and that very few students buy any textbooks. On a positive note, teachers in that relatively expensive city school had a copy of the relevant textbooks. For the students, informal pamphlets and teachers' notes copied from the blackboard were the commonest forms of instructional materials.²⁶⁵

²⁶⁴ World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014) 33-34.

Case Study 5

The last case study was of a rural, government-aided (religious foundation) girls boarding school operating up to S4 (Ordinary level). The school had an enrolment of 200 students and fees of Uganda shillings 90,000 (equivalent to US\$50.00) per term. The school had sets of Math books for S1 to S4 at a ratio of 1:2 but only one teachers' copy per class for English language. There are one or two science textbooks per class. There are no textbooks, even for teachers, in any other subject. The teachers had to rely on their own school notes. The stark reality was that food and building maintenance are the absolute budget priorities because fee rates were very low as a result of low levels of parent affordability. A basic book list is issued to students, but few students, if any, buy their own textbooks. At the rate of Uganda shillings 50,000 per term as fees, that is equivalent to the purchase price of one Longman's English Learner's Dictionary. So with parents struggling to pay fees, it would be inconceivable that they would buy a set of textbooks. These studies show the need for greater access to educational materials in Ugandan schools.

In Uganda, increased enrolment into primary and secondary education has aggravated the problem of inadequate (and in many cases total lack of) educational materials notably textbooks by worsening the pupil to textbook ratio²⁶⁶ (in addition to worsening

²⁶⁵ World Bank, 'Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa', World Bank working paper, Washington DC, March 2008) <<http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-7344-6>>, (last accessed 7 January 2014) 34.

²⁶⁶ According to official government sources, the student textbook ratio for secondary schools was 1:15 in 2008/2009 Financial year improving to 1:10 by the end of December 2009 against a planned ratio of 1:3. See 2010/2011 Budget Framework Paper (BFP) for the Ministry of Education and Sports: Available at: http://www.education.go.ug/ESR_2010/Education%20Sector%20BFP%205th%202010-11_N.pdf, at p. 53. The ratio was worse for primary schools (basic education institutions) where it is reported that in 2008/2009 financial year, the ratio was 18: 1 against a targeted ratio of 3:1. Due to resource constraints, the ministry set a target of 12:1 to be achieved during the financial year 2010/2011 with a forecasting that the desired ratio will be achieved in the medium term. See, BFP report, *ibid*, at p. 1. Plainly, resources do

the teacher to learner ratio). The Government of Uganda despite undertaking to provide educational materials is reported to have had, as would be expected, difficulties in providing these materials. The UNDP (Uganda office) reported that government had not yet fulfilled its pledge of availing textbooks to all the implementing educational institutions.²⁶⁷ The increased numbers therefore mean that there is increased pressure on the available educational materials. The situation is worse in rural private schools.

The Government entered into partnerships with existing private secondary education institutions²⁶⁸ to deliver Universal Secondary Education rather than establish new schools especially where there were no Government schools. This was intended to tap into the boom in private investment in education ever since the country started pursuing World Bank sanctioned economic policy reforms including liberalisation of the economy in the 1980s and use of Public private partnerships (PPPs).²⁶⁹ In any case, education, whether provided by the private sector or not is for the national benefit and not simply for the commercial gain of the private service providers. Just like many Government schools, many such privately owned secondary schools do not have educational materials.²⁷⁰ The Government therefore has to intervene if the problem is to

not allow the recommended ratio of 1:1 and neither do they allow attainment of the desired or optimal ratio in the short term. The money for improving the student to textbook ratio is itself seriously rationed.

²⁶⁷ UNDP Report on MDGS Implementation; according to the 2010/2011 Budget Framework Paper (BFP) for the Ministry of Education and Sports, the seriousness of the problem could be seen from the fact that there were plans to shift resources to address the problem of inadequate instructional materials. See http://www.education.go.ug/ESR_2010/Education_Sector_BFP_5th_2010-11_N.pdf (last accessed 10 January 2010), at p. 26.

²⁶⁸ The term 'private schools' as used in Uganda refers to what are called 'public schools' in England.

²⁶⁹ M Ward, A Penny and T Ward, "Education reform in Uganda: 1997-2004: Reflections on policy, partnership, straggly and implementation (DFID).

²⁷⁰ See, M Ward, A Penny and T Read, *Education reform in Uganda-1997 to 2004: reflections on policy, partnership strategy and implementation* (DFID, London 2006). This should be contrasted with the prevalent view especially in the developed North countries like the United Kingdom to the effect that private educational institutions (referred to as 'public schools') always have the required resources. That may be largely the case in developed countries but even then, possibly not for all such educational institutions. Just like in less developed countries, a considerable number of privately owned educational institutions in developed countries like the United Kingdom may not afford to purchase sufficient

be alleviated. Notwithstanding problems with completion rates, increased enrolment at the primary and secondary education levels led to increased demand for tertiary education. This in turn aggravated the problem of lack of educational materials in the tertiary institutions whose budgets are either fixed but in most cases declining. This worsened the textbook to student ratio in higher education institutions.

At higher education level, the situation is not any much better. According to research done by the African Copyright and Access to Knowledge Project,²⁷¹ there is rampant photocopying as a means of access. While this may be so, there are many materials needed for education that are not in print or on the internet. That includes materials on databases such as Westlaw and Lexis Nexis as well as other journals that may be in print but not in circulation in Uganda. These are way beyond the reach of Ugandan students. The net result is lack of international competitiveness of the products. It shall be shown that remedying the situation would among others, require an optimal copyright regime, with minimal exclusive rights and a maximalist approach to exceptions.

educational materials for their students. A case in point is with regard to some private or so-called independent business colleges, especially those serving minority communities and foreign student populations. Their library resources are far from adequate and in no way comparable to those of their government funded or aided counter parts. This is the main reason why the GOU has taken it upon itself to procure and supply textbooks to both government and private owned institutions implementing the UPE and USE programmes. See MoES, BFP, Available at http://www.education.go.ug/ESR_2010/Education%20Sector%20BFP%205th%202010-11_N.pdf, p. 55.4

²⁷¹ Dick Kawooya, Ronald Kakungulu and Jeroline Akubu, 'African Copyright and Access to knowledge: Uganda country report' (ACA2K, May 2009) online at: http://www.aca2k.org/attachments/154_Uganda_Country_Report.pdf >(last accessed 10 March 2014).

2.11 Where does copyright come in?

It is conceded that copyright played an important positive role in creation and dissemination of educational materials. Copyright was able to do this partly because of its initial limited ‘reach’, the notion of ‘balancing’ the rights of authors against those of users, and to a certain extent, a not so aggressive and robust enforcement mechanism especially as against educational users. Some mechanisms were put in place to ensure that copyright did not unduly restrict access to learning materials and thereby impede learning in general.

In fact, learning and teaching materials are a rare commodity in most less developed countries. One book per student (in any subject) is the exception, not the rule, and the rule in most classrooms is, unfortunately, severe scarcity or the total absence of textbooks.²⁷² When available, the books tend to be unaffordable largely due to prevalence of low parental purchasing power and little investment by Governments of less developed countries. One solution would be to locally reproduce and distribute the textbooks in a country. However, this cannot be done without following copyright law that grants exclusive rights to authors. Moreover, even when there is both availability and affordability, there are restrictions imposed by copyright law on the utilisation of such materials.²⁷³ It is for these reasons that I assert that copyright law is one of the institutions that determine availability, affordability and usability of educational materials in less developed countries.

2.12 Brief copyright history of Uganda

Prior to the introduction of British rule, there was no copyright law as this concept is understood in the Western World. The Copyright Ordinance of 1915 was the first Copyright Statute in Uganda. The present law, the Copyright and Neighbouring Rights Act 2006 (hereafter “CONRA”) ²⁷⁴ CONRA remains a relatively new piece of legislation because it has not been tested by the courts generally including with regard to the issues of exceptions and flexibilities that are of central concern to this study. CONRA however, has very important provisions that may have implications on access and utilisation of copyrighted educational materials in Uganda. This study will examine the implications of these provisions mainly in Chapters 5 and 6.

2.13 Status of ratification of relevant international copyright instruments

Uganda is a founder member of the World Trade Organisation (WTO) and was accordingly bound to implement the package of laws administered by the WTO including the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) that regulates copyright, among other IPRs.

It should be pointed out however, that being a least developed country, Uganda was not bound to enact TRIPS implementing legislation until July 2013, the expiry date of the transition period given to least developed countries. In fact this transitional period has since last July 2013 been extended to July 2021. However, Uganda reformed her

²⁷² UNESCO Education for All Basic Learning Initiative and DANIDA, ‘A guide to sustainable book provision’ (UNESCO, Paris 1997), <http://www.unesco.org/education/blm/chap4_en.php>, (Last accessed 29 November 2012).

²⁷³ Discussed in Chapter 3.

copyright law in 2006 largely to comply with the TRIPs Agreement and to some extent in response to the needs of the music sector.

The TRIPS Agreement is the only major international instrument (relevant to copyright) to which Uganda is a signatory. It is intriguing to note that Uganda is neither a member of the Berne Union nor a signatory to the Universal Copyright Convention 1952 (UCC).²⁷⁵ Uganda has not acceded to any of the so-called ‘WIPO Internet treaties’-the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The reluctance to accede to the Berne Convention and other international copyright instruments (with exception of TRIPs) could be attributed to the general reluctance by newly independent states during the 1960s to be bound by strict rules of copyright at a time when they were campaigning for greater access to educational materials for national development. This had led to the international copyright crisis that led to the still-born Stockholm Protocol and later the procedurally complex Berne Appendix for developing countries 1971 (discussed in Chapter 6).

²⁷⁵ Lynette Owen, *Selling rights* (Routledge, London 2010) 13. But see E Tabaro, ‘Copyright law reform in Uganda: addressing international standards at the expense of domestic objectives’ (ACODE Policy Briefing Paper No. 10, 2005) 6, fn. 12: available online at <http://www.acode-u.org/documents/PBP%2010.pdf>. He states, *erroneously*, that Uganda is a member of the Berne Union by virtue of its colonial heritage. It is true that Uganda is a former British colony whose copyright law was introduced by the British colonialists by virtue of an Order in Council of 1912. That Order in Council was promulgated under the provisions *inter alia*, of section 28 of the United Kingdom Copyright Act of 1911. However, that Order in Council was repealed as to Uganda by an Order in Council dated December 21, 1961 as part of the arrangements for Uganda’s political independence in 1962. See K Garnet, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (15th ed. Sweet and Maxwell, London 2005) 653, footnote 69 as to repeal and p. 771 as to original extension of application of 1911 Copyright Act, which was saved by section 50 of the 1956 Act. Accordingly, except where colonial laws were explicitly saved and enacted as part of the laws of the country after independence, they stopped applying as law in independent Uganda. Similarly, under international law of treaties, the post-colonial government of Uganda was responsible for ratification of any treaties including the Berne Convention. Moreover, information from WIPO is clear that Uganda is not a member of the Berne Union. See <www.wipo.org> (last accessed 20 March 2014).

By virtue of being a member of the WTO, in enacting a new copyright law in 2006, Uganda had to transpose the Berne Convention Articles 1-20 including the Appendix (but excluding Article *6bis*) that were incorporated by the TRIPs Agreement via its Article 9(2).²⁷⁶ In Chapters 6 and 7, the doctrinal and policy implications of Uganda's not being a member of the Berne Union and not being bound by the WCT will be analysed (for instance when it comes to implementing the Berne Appendix and when creating exceptions to the Communication to the public right introduced by the WCT). These implications may contribute to the tensions between copyright on the one hand and the right to education on the other.²⁷⁷

2.14 Some reflections

The overarching aim of this chapter was to create a thread that links the three major concepts of copyright, education and economic development. This called for an explanation of what economic development is and the role that education can play. This was explained using development economic theory as well as human rights theory. The role of education in achieving the MDGs was also explored. It was found that education has a key role to play in attaining most of the MDGs apart from the fact that primary school education is the subject of one of the MDGs.

The chapter also explained the nature of education as an end in itself and as an empowerment right that is necessary for the enjoyment and exercise of other rights.

²⁷⁶ The Berne Convention was incorporated into TRIPS using the *Berne-plus* approach adopted by the delegates to the Uruguay Round of Trade negotiations that led to the conclusion of the TRIPS Agreement as part of the Agreement establishing the World Trade Organisation in 1994. The approach is said to have been proposed by the Australian delegation to the Negotiations.

This required explanation of the attributes of (4As) of the human right to education: Availability, Accessibility, Acceptability and Adaptability and an explanation of how the core elements of the right to education are linked to the exclusive economic rights. This paved the way for arguing that the way the exceptions and flexibilities to copyright are constructed and construed would impact on the meeting of these elements. The study also nature of the state obligations imposed on less developed countries in the context of the human right to education. It was showed that the duties to respect, to protect and to fulfil the human right to education may be impacted upon by copyright. Another contribution of this chapter was a discussion of the human rights credentials of copyright. It was found that certain elements of copyright are indeed human rights but that in line with the interpretation by the Nations Committee on Economic, Social and Cultural Affairs, a wholesale acceptance of copyright as a human right would be unacceptable and would have the potential to worsen any tensions between copyright and the right to education especially in a less developed country context.

In linking copyright to the right to education, this chapter argued that the aspect of the right to education that is most affected by copyright is the requirement that education be of a certain level of quality if it is to be a human right in itself, a means and an end of economic development. The chapter further dealt with the context of our case study Uganda by reviewing the historical and legislative background, the current socio-economic conditions. In particular, Uganda's education system was reviewed and using empirical studies by the World Bank, an examination was done of the state of availability and access to educational materials, particularly textbooks.

²⁷⁷ The problem arises from being complying with TRIPS by enacting stronger copyright legislation but without ratifying the Berne Convention, a problem not solved by the *Berne-plus* approach adopted for

The chapter established that there is generally low textbook to student ratios, many books used are very old not to mention the absence of translations of educational materials into local languages. Another objective of this chapter was to establish which grand theory of global justice could be used to justify a less developed country analysis of copyright law that seeks to ensure that copyright is enabled to contribute to the enhancement of education for economic development more so in least developed countries like Uganda. Accordingly section 2.6 of this chapter examined utilitarianism as a theory that could be used to justify more user-friendly interpretation and even reforms of copyright law to ensure that copyright can contribute to the enhancement of education in less developed countries. This chapter rigorously addressed the challenges to Benthamite utilitarianism as expressed by various commentators including Nobel Laureate Amartya Sen. Arguing that utilitarianism would justify a pro-development drafting and interpretation of copyright law in less developed countries, it was argued that the greatest good of the greatest number is economic development that results in improved human welfare. Various jurisprudential attributes of utilitarianism as explained by Bentham were linked to our interpretation to show that copyright user-friendly copyright reform and interpretation would fit within Bentham's version of utilitarianism. This can be done through enacting an optimal copyright regime of minimised exclusive rights and maximised educational exceptions (see Chapter 3 and 4).

After the link was established, there was a need to explore the socio-economic context of our case study Uganda and to examine the state of availability of educational materials (mainly textbooks) to enhance the learning process. This was followed by a

TRIPS during the Uruguay Round of Trade Negotiations. See chapter 6 for a detailed discussion.

brief copyright history of Uganda as well as an appraisal of the status of Uganda's ratification of relevant international copyright instruments.

2.15 Conclusion

In sum, this chapter started by critically reviewing the relationship between education and economic development from both a development economics a human rights perspective. I have established that education is not only an economic tool, but intrinsic to economic development as well as being and a fundamental human right whose realisation in Uganda is one of the international treaty obligations Uganda must fulfil. The chapter reviewed the intrinsic nature of the human right to education making clear various obligations of the state and entitlements of citizens. From the economics point of view, the instrumental and constitutive nature of education was underlined. What came to the fore was that in most less developed countries, and more so the least developed ones, the quality of education is a big challenge that needs to be addressed if education is to play its role in economic development. By deploying utilitarianism and human rights theory, this chapter was able to locate copyright law into the right to education. Further, by applying utilitarianism, this chapter laid a strong philosophical foundation for carrying out reforms of copyright law to realise economic development. These reforms have to target educational exceptions to copyright law using the lens of utilitarianism. And by reviewing the socio-economic context of our case study and showing the need for greater access and utilisation of educational materials, the platform was set to examine the international and national copyright frameworks with a view to investigating the optimality or lack of it with regard to exceptions and flexibilities. Reviewing the copyright history of Uganda as well as the status of

Chapter 2: Linking economic development, education and copyright

ratification of international instruments paved the way for discussion in next chapter of the educational exceptions under the International copyright framework.

Chapter 3: A critique of exceptions under the international copyright regime

3.1 Introduction

Exceptions are the most important legal instrument for reconciling copyright with the individual and collective interests of the general public.²⁷⁸ This is even much more the case with less developed countries like Uganda. As underscored in Chapter 2, copyright law has to be responsive to the needs of educational users in less developed countries to be able to have access and use of copyrighted educational materials. Copyright exceptions are the most important way for balancing the exclusive rights of authors against the interests of educational users, thereby helping to minimise the conflict between copyright and the right to education. However, exceptions to copyright law at the national level have to be aligned to the exceptions available under the international copyright framework as contained in the Berne Convention and the TRIPS Agreement. Failure to do so could attract an action at the World Trade Organisation, as happened with respect to the *United States-Section 110(5) US Copyright Act* dispute (discussed in chapter 4).²⁷⁹

The first part of this chapter will critically examine the exceptions available at the international level in order to determine whether they allow national legislatures in less

²⁷⁸ C Geiger *et al*, “Declaration on Three-steps test 2009”, http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf (last accessed 20 June 2014).

²⁷⁹ Case WT/DS160/R: United States-Section 110(5) US Copyright Act: hereafter, “WTO Panel Report”. Decision available at: http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (last accessed 20 January 2014). For a general discussion of exceptions, see generally, S Ricketson and JC Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, Oxford University Press, Oxford 2006; hereafter, “Ricketson and Ginsburg, 2006”.

developed countries like Uganda to create an optimal environment for copyright to support the realisation of the right to education as a fundamental human right, a means for and an end of economic development of less developed countries.²⁸⁰

The second part of this chapter will be an analysis of the so-called ‘flexibilities’²⁸¹ available to less developed countries to utilise, in line with their national needs, when making copyright law. As mentioned in Chapter 1, the flexibilities to be discussed will be: the idea-expression dichotomy; the term of copyright; and the doctrine of exhaustion. By analysing the available exceptions and flexibilities, the chapter will thereby lay the foundation for analysing in a subsequent chapter (4) the exceptions and flexibilities at the national level.

This chapter builds on the analysis in chapter 2 where copyright was linked to the realisation of international human rights obligations with regard to the fundamental human right to education in a least developed country like Uganda.²⁸² In the event that

²⁸⁰ There are various calls for reforms in various developed countries. For instance the UK IP Office in 2011 issued a Consultation paper on Copyright detailing proposed reforms to among others, educational exceptions. Among the responses was a report by PriceWaterhouseCoopers on behalf of the Copyright Licensing Agency (CLA), ‘An economic analysis of education exceptions in copyright’ (Report published on behalf of the Copyright Licensing Agency in response to UKIP office consultation on Copyright 2011 <http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf> last accessed 10 April 2013). The report however, argues that educational access needs are well met under the present system and dismisses reform efforts as ‘minor short term cost savings’. See for instance, p. 3. There are similar efforts in the USA; see for instance Aufderheide P, and Jazsi, P, *Reclaiming fair use* (The University of Chicago Press, London 2011).

²⁸¹ As defined in Chapter 1 section 1.1.

²⁸² Obligations established in Article 26 of the Universal Declaration of Human Rights (UDHR), (see <http://www.un.org/en/documents/udhr/index.shtml>) and articles 13-14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (see <http://www2.ohchr.org/english/law/cescr.htm>), as well as article 28 of the Convention on the rights of the child (CRC) all of the United Nations; see also United Nations Economic and Social Council General Comment No. 13 on the right to education see <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf>; (last accessed 14 June 2014); Article 17 of the African Charter on Human and People’s rights: available at <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf>; (last accessed 20 June 2014). See also

the exceptions and flexibilities are not optimal, I shall examine how this could negatively impact education in less developed countries. The exceptions and flexibilities to be analysed in this chapter are those provided by the Berne Convention for the Protection of Literary and Artistic Property (hereafter, “the Berne Convention”)²⁸³ as modified by the Agreement for Trade Related Aspects of Intellectual Property Rights 1994 of the World Trade Organisation (hereafter, “the TRIPS Agreement” or “TRIPS”).²⁸⁴ It should be pointed out that unlike exclusive rights that are said to require a maximalist approach by being given as wide an interpretation as possible, exceptions to the guaranteed exclusive rights that are supposed to play a very important role of balancing the interests of rights-owners on the one hand and those of users on the other are not equally focused on. Many of the exceptions are not explicit and said to require to be interpreted in a narrow sense.²⁸⁵ To make matters worse, some countries, including least developed ones like our case study-Uganda, have transposed, in one way or the other, some of the provisions of the WCT 1996 (“the WCT”) even without being

Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008)282-285. For detailed discussion, refer to chapter 2 of this thesis.

²⁸³ Uganda is not a member of the Berne Union but is bound by the Berne Convention articles 1-20 including the Appendix (but excluding article *6bis*) that were incorporated by the TRIPS Agreement via its article 9(2).

²⁸⁴ Part of the Agreement establishing the World Trade Organisation following the Uruguay Round of Trade Negotiations.

²⁸⁵ Paul Edward Geller (ed), *International copyright law and practice*, (Lexis Nexis Matthew Bender 2007) at p. INT-31 where this is referred to as European conventional wisdom; Jonathan Griffiths (2009), *ibid*, fn. 12 at p. 11 describes this as a traditional *droit d'auteur* doctrine. It should be recalled that the *droit d'auteur* approach to copyright as a whole was the dominant influence behind the Berne Convention. He even points out that there is now increasing realisation that this approach may no longer be appropriate; André Lucas and H.J. Lucas, cited in Daniel Gervais, ‘Towards a new core international copyright norm: the reverse three-step test’, (2005) 9 Marq. Intell. Prop. L. Rev. 1 *see* fn. 95 at p. 22 thereof: hereafter, “Gervais, Reverse TST”; Kenneth Crews, ‘WIPO study on copyright exceptions for libraries and archives’, (WIPO, Geneva 2008) 27: available at: <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf> (last accessed 20 June 2014): (hereafter “Crews/WIPO study”); Raquel Xalabarder, ‘Copyright and digital distance education: the use of pre-existing works in distance education through the Internet’, (2002-2003) 26 Colum. J.L. & Arts 110: hereafter cited as “Xalabarder”, at p. 110 states that “we should never forget, however, that we are dealing with exceptions to copyright and, as such, the principle of strict interpretation of exceptions should guide our task”. See further discussion below in para. 3.3.2.

Contracting Parties to that treaty.²⁸⁶ Consequently, in critiquing the international regime of exceptions, relevant WCT provisions shall be examined.²⁸⁷

The doctrinal analysis shall draw on lessons from the historical background of the relevant provisions with a view to establishing their intended interpretation. Reference will be made to relevant discussions of various Berne Convention Revision conferences since 1886,²⁸⁸ which are given as explanations as to what exceptions exist within the Berne Convention and *acquis*.²⁸⁹ As a caveat however, it should be emphasized that this approach does not imply that I do not take a teleological approach to treaty interpretation; to the contrary, our theoretical view point here based on my reinterpretation and application of *Benthamite utilitarianism*, particularly calls for use of a teleological approach to interpretation of exceptions relevant to education in less developed countries.²⁹⁰

²⁸⁶ The WCT is available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html. The practice of countries transposing provisions of the WCT to which they are not party is not isolated: for other instances, see Consumers International Report (2006), *ibid*, fn. 1.

²⁸⁷ Refer to paras. 3.10 and 3.14, respectively.

²⁸⁸ The Berne Convention has been substantively revised six times mainly to keep pace with technological changes since its conclusion in 1886. The first amendment was in 1908 in Berlin, Berne in 1914, Rome in 1928, Brussels 1948, Stockholm in 1967 and Paris in 1971. The 1908 Paris Conference did not result in a substantive amendment. As a result of the revisions, there are various Acts of the Berne Convention with the latest being the 1971 Act concluded at Paris. By the time of conclusion of the TRIPS Agreement, not all members of the Berne Union were bound by the 1971 Act of the Berne Convention. However, the TRIPS agreement incorporated the provisions of articles 1-20 of the 1971 *text* of the Berne Convention including the Appendix but excluding article *6bis* regarding moral rights. It follows that with regard to the said articles, all WTO members are bound by the Paris Act 1971. For related argument regarding the WIPO Copyright Treaty, see J.A.L. Sterling, *World Copyright Law*, (Sweet and Maxwell, London 2008) at p. 882 para. 23.02: hereafter, “Sterling (2008)”; for an outline of salient features of the various Berne Revision Conferences, see Peter Burger, *ibid*, fn. 9 at pp.20-50.

²⁸⁹ The Berne Appendix for Less developed Countries is discussed in chapter 6. less developed

²⁹⁰ On a teleological approach, see Uma Suthersanen, ‘The future of copyright reform in less developed countries least developed countries: teleological interpretation, localized globalism and the “public interest” rule’ (UNCTAD-ICTSD, Bellagio 2005)3-4. Available online at http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf: hereafter: Suthersanen, ‘Public interest rule (2005)’ (last accessed 20 February 2013), see particularly p. 12 where a case is made for applying an evolutionary approach when interpreting some aspects of copyright like the three-step test. This would call for looking at factual and political contexts rather than just looking for the intention of the makers of the relevant conventions; Ricketson/WIPO study, at p. 33.

3.2 Some preliminary points

Two cardinal regimes that govern copyright and are of relevance to Uganda are the Berne Convention and the TRIPS Agreement.²⁹¹ Compared to the Berne Convention, the TRIPS Agreement fares much worse with regard to the twin aspect of guaranteeing access to and utilisation of copyrighted goods. This is because, TRIPS focuses on strengthening the economic gains to be made by owners and exploiters of copyrighted goods. It primarily looks at copyright through an economic or trade lens. While TRIPS has some public interest provisions like Articles 7 and 8 and the preamble, these provisions have largely been ignored and some MDC negotiators are said to have referred to them as being merely hortatory and of no practical significance.²⁹²

3.3 Overview of exceptions

As acknowledged above, it is not denied that international copyright law as contained in the Berne Convention and TRIPS Agreement has some provisions intended to allow access and utilisation of educational materials by users. Indeed, this was an issue from the very start since not all countries that participated in the conclusion of the Berne Convention were at the same level of development.²⁹³ The point therefore is not that there was no concern about the access and utilisation aspect of the public interest, but that it was not given as much attention.²⁹⁴

²⁹¹ Uganda is not a signatory to the WCT and is only indirectly bound by the Berne Convention by virtue of Article 9(1) of the TRIPS Agreement.

²⁹² The EU and US delegates to the Uruguay Round Negotiations argued that the articles 7 and 8 of the TRIPS Agreement are merely hortatory. See Okediji, *Fair use* (2000), *ibid* fn. 19 at p. 141 citing Robert Gorman in fn. 299.

²⁹³ It has been argued that strengthening of copyright at the expense of access and utilisation came in after the less developed European states closed the development gap between them and the more developed ones between 1886-1967. See Okediji, 'International fair use', *ibid*, fn.19 at p. 111.

Chapter 3: A critique of exceptions under the international copyright regime

The Convention left it to individual states or groups of member states of the Berne Union to legislate for the utilisation of copyright protected works for educational purposes.²⁹⁵ The approach taken in article 10(2) of the Berne Convention as well as TRIPS Article 13 may be viewed as user-centric in the sense that powers were deferred to national legislatures and policy makers to come up with suitable exceptions in line with national needs. The downside of this drafting strategy however, is that this freedom resulted in divergent approaches between different member states.²⁹⁶ The educational exception provision was and remains merely permissive.²⁹⁷ It leads to uncertainty on the part of users who cannot determine the extent of their “user rights.”²⁹⁸ Being an offshoot of the minimalist approach to exceptions, an exception such as that in Article 10(2) of the Berne Convention attests to the conceptual tension between copyright as protected in international instruments and the right to education as signified by access to educational materials for attaining quality education. Moreover, this gives opportunity for pro-IP bodies such as the USTR to monitor which countries have exceptions that they deem are prejudicial to their interests.

²⁹⁴ The 1886 Act of the Berne Convention had only two narrow exceptions. See Lewinski (2008), *ibid*, fn.3, at p. 151 para. 5.148.

²⁹⁵ Article 8 (now article 10(2)) of the very first Act of the Berne Convention, the Berne Act 1886, contained a provision leaving it to the legislatures of individual members of the Union or groups of members, to make decisions on the extraction of portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies; See also R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005) 2 fn 5.

²⁹⁶ Burrell and Coleman (2005), *ibid*.

²⁹⁷ Ricketson/WIPO, *ibid*, fn.3 at p. 14 for a distinction between the one and only mandatory exception as opposed to the permissive exceptions. The latter set limits within which national laws *may* provide exceptions to protection (emphasis not mine).

²⁹⁸ The concept of “users rights” is far from settled. The general inclination of the international copyright system is that users do not have rights. See discussion in chapter 6. See also Crews/WIPO *Study* (2008), *ibid*, fn.13 at p. 27. He discusses the issue of “users’ rights” with respect to copyright exceptions for libraries and archives, noting that most statutes generally do not create an explicit right with only a few exceptions on anti-circumvention provisions under the European Union Copyright Directive; See Jane C. Ginsburg, *Authors and users in copyright*, (45 J. Cop’r Soc’y U.S.A) 1997 at 1 for a critical view.

It has been pointed out that copyright limitations and exceptions, being very important tools of public policy require to be deftly constructed so as to be responsive to the peculiar national needs and local circumstances of individual less developed countries.²⁹⁹ Guidance for less developed countries regarding drafting of copyright exceptions could be sought from the legislation of developed countries with long copyright traditions.³⁰⁰ However, legislation of developed countries though often relied on and often replicated by less developed countries, is not only bound to be unsuitable for local needs but itself may not be clear.³⁰¹ For instance, exception provisions in member states especially those with long copyright traditions such as France, Germany, the United Kingdom³⁰² and the United States of America are themselves neither clear nor harmonized as such.³⁰³ Germany's educational provisions have historically been the subject of regular court contests.³⁰⁴

The EU, the cradle of and one of the leading proponents of strong copyright protection, in its harmonization drive has chosen to continue with the trend of non-mandatory exceptions³⁰⁵ despite acknowledgement of the importance of exceptions as a tool for

²⁹⁹ Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 96.

³⁰⁰ The other guidance could be got from the Tunis Model Law championed by WIPO and UNESCO but this too is not devoid of equivocal phrases; Universities in the Netherlands are reported to have believed that they could freely produce "anthologies" or course packs until they lost a court battle. See Gervais TST, *ibid*, fn. 28, at p. 23..

³⁰¹ Burrell and Coleman (2005), *ibid*, fn. 11, at p. 6 observe to the effect that educational exceptions are much too inflexible, outdated, unnecessarily complicated and bureaucratic. They further note that there is so much uncertainty about the scope and operation of some of the exceptions; see discussion on an ambiguous exception in Canadian copyright law in Crews/*WIPO Study*, *ibid*, fn. 13 at pp. 28-29.

³⁰² A report by the British Academy, *Copyright and research in the humanities and social sciences* (2006). Available at www.britac.ac.uk/reports/copyright/. The report among other says that exceptions are not clear enough to serve the ends of scholarship. See also Gowers' Review of intellectual property report.

³⁰³ Reference to the educational provisions of these jurisdictions is made in chapter 7. Hargreaves Review

³⁰⁴ See G Davies, *Copyright and the public interest* (2nd edition, Sweet & Maxwell 2002).

³⁰⁵ Article 5(2) of Directive 2001/29/EC of the European Parliament and of Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society (the Information Society Directive). See Estelle or Sharon Forster

addressing public policy issues.³⁰⁶ The United States' fair use exception (on which Uganda's current fair use regime is arguably based-chapter 5) is consistently attacked for possibly being non-compliant with the three-step test. This is despite the fact that the USA championed inclusion of IPR issues in the Uruguay Round of Trade Negotiations.³⁰⁷ The result on the international plane has been a disharmonious approach to exceptions at the national level³⁰⁸ with some country provisions, notably the USA, even being found or thought to be non-TRIPS compliant.³⁰⁹ While the USA has used its economic might to avoid changing its law to comply with the said WTO decision with which it is bound as a party to the case, less developed countries cannot afford to be caught up in such situations. In any case, less developed country exceptions need not be confined to those currently enacted in developed jurisdictions. Since their needs are different,³¹⁰ less developed country contexts and challenges indeed require innovative exceptions to copyright law.³¹¹

Moreover, it should be borne in mind that with a re-invigorated international copyright enforcement regime under the WTO system, less developed countries fear the prospect

³⁰⁶ Recital Number 14 of the EU Information Society Directive. The exceptions are dealt with in article 5. See detailed discussion in chapter four.

³⁰⁷ Okediji, *Fair use*, *ibid*, at p.p117-123, 149-150; for further discussion, see chapter four ; Japan was the other country that pushed the TRIPS agenda onto the Uruguay Round of Trade Negotiations; for a contrary view, see Guido Westkamp, *The "three-step test" and copyright limitations in Europe: European copyright law between approximation and national decision making*, ((2009) 56 J. Cop'r Soc'y of USA)1, 12.

³⁰⁸ The result of the "free hand" left to national legislatures but which has led to bewildering differences in national copyright laws. See Burrell and Coleman (2005) *ibid*, at p. 2.

³⁰⁹ WTO Panel report, *ibid*, fn. 21 where the Panel found the business style exception not to be compliant with the three-step test; On the lack of harmony in the transposition of exceptions within the European Union alone, see Guido Westkamp, *Study on implementation of directive 2001/29/EC on certain aspects of copyright and related rights in the information society*, (June 2006, February 2007). Available online at http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf (last accessed March 2009); See also Martin Senftleben,(fn 2017) 23, 189-197 and chapter 5, where he discusses the compliance of exceptions under article 5(5) EUCD with the three-step test. He argues that some of them, like the teaching exception are non-compliant. See further discussion in chapter four.

³¹⁰ Andrew Rens, *et al* (2006), *ibid*, fn. 1 at pp. 24-25.

³¹¹ Andrew Rens, *et al* (2006), *ibid*, fn. 1 at p. 46.

of reprisals against them in the event that their legislation is declared by a WTO panel to be non-compliant with international tenets.³¹² This is another reason for better and clearer international guidance on the contours of exceptions to copyright law especially for important public purposes such as promotion of education for economic development.

Consequently, less developed countries go to all lengths to ensure compliance with international obligations, notably the TRIPS Agreement and may in the process sacrifice national needs including, educational access and utilisation concerns. It is little wonder that at a 2009 high-level meeting organized by the World Intellectual Property Organisation for officials from less developed countries on the utilisation of intellectual property rights (IPRs) for economic growth, no mention was made of the use of exceptions or flexibilities.³¹³ In Uganda, CONRA which was intended to comply with TRIPS was done despite a timely warning sounded by a local research organization (ACODE). The warning was that the bill that led to the enactment of CONRA sought to address international standards at the expense of national objectives.³¹⁴ This should

³¹² There is also evidence of increasing vigilance in the enforcement of copyright in less developed countries. See for instance, Marisella Ouma and Ben Shihanya, ACA2K, 'Kenya Country Report', (June 2009) 4 available at: <http://www.aca2k.org/attachments/154_ACA2K%20KENYA%20CR%20WEB.pdf>, (last accessed 10 January 2014).

³¹³ According to a report by the IP Watch on 27 July 2009 concerning a meeting held in July 2009. See Kaitlin Mara, 'LDCs commit to use IP for development at WIPO: use of exceptions, flexibilities omitted' (Intellectual Property Watch, 27 July 2009, at: <<http://www.ip-watch.org/2009/07/27/ldcs-commit-to-use-ip-for-development-at-wipo-use-of-exceptions-flexibilities-omitted/>> last accessed 30 April 2013). The same happened this year. See Rachel Marusak Hermann, 'African Ministers focus on IP role in innovation for development: less on flexibilities' <<http://www.ip-watch.org/2013/03/18/african-ministers-focus-on-ip-role-in-innovation-for-development-less-on-flexibilities/>>, (last accessed 20 March 2013).

³¹⁴ Edgar Tabaro, *Copyright law reform in Uganda: addressing international standards at the expense of domestic objectives*, (ACODE Policy Briefing Paper No. 10, 2005): available online at: <<http://www.acode-u.org/documents/PBP%2010.pdf>>, (last accessed 10 January 2014) at p. 2. According to this paper, the 2005 copyright bill that led to the enactment of CONRA, should have had "Enrich learning opportunities for Ugandans" as one of four objectives. Unfortunately, not much advice was given to the legislators because the paper did not give a balanced treatment of all its stated objectives

have been an opportunity for seeking a better balance but the mindsets of the legislators and policy makers tend to focus only on compliance with international standards.

In defending the narrow exceptions, it is often pointed out that exceptions to copyright protection are however, not the only intrinsic mechanism intended to ensure that copyright serves its public policy objective. There are other provisions that are designed to ensure a robust public domain³¹⁵ from which works can be freely accessed and utilized. These include the idea/ expression dichotomy (IED) which limits copyrightability and the limits on the duration of copyright. Further, there exists a requirement for substantiality³¹⁶ in infringement proceedings.³¹⁷ These are discussed below.

of copyright reform. Rather, it mainly addressed issues of protection of traditional knowledge and folklore. See further comments in Chapter 4.

³¹⁵ See Uma Suthersanen, 'A2K and the WIPO Development Agenda: time to list the "public domain"' (UNCTAD-ICTSD Policy Brief Paper 1, December 2008) 4; available at: <<http://ictsd.org/downloads/2009/03/policy-brief-1.pdf>>, (last accessed 10 January 2014) who warns about the futility of past efforts to define the concept of "public domain" and makes various suggestions for defining the term public domain; Y Benkler, 'Free as the air to common use: first amendment constraints on enclosure of the public domain' ((1999) 74 New York University Law Review) 355, 362, available at <http://www.benkler.org/Pub.html> defines this concept to mean "the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged"; The principle that copyright protection could be limited in duration as determined by Parliament was enunciated in the seminal English case of *Donaldson v. Becket* [1774]: for this assertion, see John Feather, 'Authors, publishers and politicians: the history of copyright and the book trade' [1988] E.I.P.R. 377, 380; Hector L. MacQueen, 'Copyright law reform: some achievable goals?' In Fiona Macmillan, *New Directions in copyright law*, (Vol. 4, Edward Elgar, United Kingdom and USA 2007) 69.

³¹⁶ Not every utilisation of a work is an infringement of copyright. The utilisation must involve a substantial part in order to merit the intervention of the courts. Under section 7(2) of the repealed Copyright Act of Uganda, exclusive rights were defined in terms of dealing with the whole or substantial parts of a protected work. Under the present law, CONRA, the substantiality of what has been utilized is incorporated as one of the factors for assessing fair use. Substantiality however, is a question of fact that may be assessed qualitatively and not always quantitatively. See discussion on the fair use defence in the USA in chapter five. But see Lewinski (2008), *ibid*, fn.3 chapter 3 at p.33 ff, for a discussion on the different approaches between authors' rights countries and common law countries.

³¹⁷ PE Geller, INT-31, 'International copyright: an introduction', in PE Geller(ed), *International copyright law and practice* (Lexis Nexis Matthew Bender 2007) INT 31 refers to these as 'sliding-scale doctrines'.

3.4 Individual exceptions

There are various exceptions relevant to education under the international copyright regime that are applicable to Uganda. The key ones in relation to the exclusive rights covered by this thesis are illustrated in the table below and will be discussed and analysed one by one.

Table 2: Educational exceptions relevant to Uganda under the international copyright framework

Type of exception	International basis
Quotation	Art. 10(1) BC
Utilisation for teaching	Art. 10(2) BC
Private personal use	Art. 9(2) and Berne Convention <i>acquis</i>
Translation	Implied under Berne Convention <i>acquis</i>
Compulsory reproduction	Art. II Berne Appendix
Compulsory translation	Art. III Berne Appendix

Uganda is not a signatory to the WCT.

3.4.1 Teaching exception

The teaching exception is one of two cross-cutting exceptions stipulated by Article 10(2) in the Berne Convention that impact on the right to education. The provision reads:

(2) 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.

The usefulness of Article 10(2) of the Berne Convention in facilitating access and utilisation of works for educational purposes depends on how it is crafted by national

lawmakers, interpreted by the national judicial authorities and applied by policy makers and administrators, such as educational administrators in a country. This exception arguably affects exclusive rights of reproduction, communication to the public, translation and the distribution right.³¹⁸ It can thus be said to be a a ‘cross-cutting’ exception.

Article 10(2) permits national legislatures to make exceptions allowing for utilisation of literary and artistic works for teaching purposes by way of illustration. The utilisation must be to the extent justified by the purpose and subject to fair practice.³¹⁹ The major problem with the application of this exception is that it is vaguely worded and this leads to uncertainty in application especially in less developed countries.

The ambiguity of Article 10(2) Berne Convention is however, problematic even to more developed countries³²⁰ but it is aggravated in less developed countries with no developed national copyright traditions of their own and no strong institutions such as courts to render meaningful interpretations that are in the national interest (teleological approach).³²¹

³¹⁸ See generally, Ricketson, WIPO study, *ibid*; WIPO, Analytical Document (2009), *ibid* fn. 1, at p. 18 para. 73. Observation that some limitations and exceptions can be applied “across the board”; See also Consumers’ International report, *ibid*, at p. 30; Xalabarder, *ibid*, fn.13 at p. 156. Utilization of works in sound or visual recordings implicates the public performance right (which is not dealt with by this thesis. See Lewinski (2008), *ibid*, fn. 3 at p. 158 para. 5.169.

³¹⁹ The teaching exception has been transposed in Uganda under section 15(1)(c) & (d) of CONRA. See chapter 5.

³²⁰ See R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005) 278; Jonathan Griffiths, ‘Preserving judicial freedom of movement –interpreting fair dealing in copyright law’, [2000] I.P.Q. 164, 179, comments about little guidance to copyright users about the United Kingdom fair dealing defence.

³²¹ Even a country like South Africa, with a more developed judiciary and legislative arm of government as well as active citizenry, has had to call for legislative action to remove ambiguities on the level of photocopying for personal uses and in the educational context. See Andrew Rens, *et al* (2006), *ibid*, fn. 1

There are no authoritative interpretative judicial decisions or policy documents to guide legislators. The net result is a negative effect on access to educational materials which, as will be shown, is a manifestation of the conflict between copyright and the right to education. Moreover, the provision contains certain unclear terms/phrases notably: ‘utilisation’; ‘to the extent justified by the purpose’; and ‘by way of illustration and fair practice’.

3.4.1.1 What is meant by utilisation?

In our view, this question requires us to examine the exclusive rights that are exempted by Article 10(2) of the Berne Convention. A scrutiny of the language of Article 10(2) of the Berne Convention leads to the conclusion that the reproduction right is among those affected by the exception. In its terms, the teaching exception allows utilisation or use of works by way of illustrations *in publications, broadcasts or sound or visual recording*, for teaching (emphasis added). It is our submission that such permitted utilisation implicates the reproduction right since reproduction of works is a common way of utilisation. This exception should cover the provision of hand-outs (“course packs”³²² in the USA and “study packs” in the United Kingdom) which involves unauthorised reprographic reproduction of parts or the whole of protected works and distribution to the students for teaching purposes.

Moreover, the exception to reproduction permitted by Article 10(2) of the Berne convention would be redundant if a subsequent distribution of the reproduced works

at p. 35 citing a 2004 report of a study commissioned by the Ministry of Arts and Culture of the Republic of South Africa.

³²² In an October 2009 decision, Justice Avern Cohn in the case of *Blackwell Publishing, Inc., & 4 Others V. Excel Research Group, Llc and Anor* Case No. 07-12731 Eastern District of Michigan Southern Division at p. 3 defined a ‘course pack’ as follows: “a collection of readings designed by a professor for

could not be carried out without infringement of copyright. It is our submission therefore that the teaching exception entails an exception to the distribution right.³²³ To argue otherwise would lead to a legal absurdity. Nevertheless, it would be in the interests of educational users if the law were made more explicit on this matter.

3.4.2 International basis for Uganda's communication to the public right exceptions

It would be helpful to examine if Article 10(2) of the Berne Convention (the teaching exception) can be a basis for an exception in national law, to the expanded communication to the public right. This right deals with transmission of material by wire or wireless means to a remote place. This is the kind of utilisation needed for online distance education. It comes into play when uploading educational materials onto intranets or websites/the Internet for use by students regardless of whether they are on distance education programmes or not (such as for facilitating simultaneous access to works). Communication to the public through electronic transmission of educational materials would thus be an important aspect of a two-pronged approach to the access and utilisation problem in less developed countries. With Uganda having incorporated the communication to the public right (despite not having any international obligation to do so), the importance of an exception to this right for educational purposes cannot be over emphasised.

use in a particular course. A course pack may include, for example, journal articles, excerpts from books, and other printed material.”

³²³ A similar argument is made with regard to exceptions permitting reproduction for visually impaired persons, also point out that the distribution of the accessible copies and their communication to the public are in general the subsequent activities needed to supply accessible copies to such people. See WIPO, ‘Analytical document’ (2009) *ibid*, fn. 1, at p. 6 para. 14; See also Xalabarder, *ibid*, fn. 13, at p. 111 who states that few teaching exceptions expressly refer to the distribution or communication to the public as part of the teaching uses covered by the exception.

Does the provision apply to distance education? Distance education may be carried out using digital technology or in the form carried out in Uganda in what could be described as correspondence courses. The teaching exception covers utilisation of protected works for teaching by communicating them to the public as part of a publication.³²⁴ There is no requirement that the teaching should be akin to a face-to-face teaching in a classroom environment. However, one continental European commentator (where a narrow interpretation of exceptions is highly advocated as the norm) has expressed some reservations on the applicability of this exception to distance education.³²⁵

It is submitted in response that there is no legal provision prohibiting it except for the unwritten rule or practice that in international copyright law, limitations and exceptions to copyright should be construed narrowly.³²⁶ Teaching of students usually involves giving them materials for extra reading and such additional reading will be from examinable areas. Examinations are usually a logical end to most teaching in an academic setting (with the exception of nursery and adult learning). Moreover, the materials may also be for advance reading in preparation for a lesson or lecture. By extending these arguments to distance education, there is no justification for interpreting this exception in terms of the restrictive letter and spirit of the United States TEACH legislation.³²⁷

³²⁴ Xalabarder, *ibid*, fn. 13 at p. 158.

³²⁵ For some reservations on the applicability to distance education, see Lewinski (2008), *ibid*, fn.3, at p. 159 para. 5.17; on the restrictions, see Xalabarder, *ibid*, fn. 13, at p. 166.

³²⁶ Xalabarder, *ibid*, fn. 13 at p. 158.

³²⁷ The TEACH Act does not permit communication for teaching purposes in situations not *akin* to a traditional face-to-face teaching lesson (mediated instruction) conducted by a teacher or instructor with learners. See Copyright Clearing Center, 'The TEACH Act: New roles, rules and responsibilities for

However, others may argue that since the Berne Convention was made for the analogue era, it could not have envisaged such a mode of utilisation using digital means.³²⁸ As Professor Alan Story has pointed out, the Berne Convention suffers from technological anachronism³²⁹ and hence this may mean that digital use is contested. The only way out would be for countries that are Contracting Parties to the WCT (unlike Uganda) is to rely on the Agreed Statement³³⁰ that allows making exceptions for the digital age. That said, it is our submission that there is nothing in the letter of the Berne Convention to support any reservations about the applicability of the teaching exception to online publications and hence, creating an exception in national law by virtue of Article 10(2) for communicating works electronically, subject to the conditions outlined in that article (discussed above). Fortunately, for Uganda, the legislature introduced a specific fair use exception in section 15(1) (d) of CONRA (see chapter 4).

3.4.1.1 Who can utilise the exception?

The beneficiaries that can invoke this exception are educational establishments and teachers involved in the teaching. This is because the exception is restricted to teaching. A narrow interpretation of the provision would mean that the exception is thus not to be construed as a broad educational exception but only as a teaching exception. If I go by the narrow constructionists' view, some educational activities not directly regarded as or

academic institutions', <<http://www.copyright.com/media/pdfs/CR-Teach-Act.pdf>>. (last accessed 10 March 2013); See Xalabarder, *ibid*, fn. 13 at pp. 115-129.

³²⁸ For doubts as to applicability to online publications, see Lewinski (2008), *ibid*, fn. 3 at p. 158 para. 5.169. This view appears to be rooted in the Continental European narrow approach to exceptions.

³²⁹ A description used by Professor Alan Story, see Alan Story, 'Burn Berne: why the leading international copyright convention must be repealed,' *Houston Law Review* 40, 3 (2003): 763-803.

related to teaching activity may thus be left out. Given the requirement to construe exceptions narrowly, it is not possible to extend this exception to cover reproduction of works for self-directed private study or research. However, using a teleological approach to serve our version of Benthamite utilitarianism, such narrow construction should be avoided.

One final point about the eligible beneficiaries of Article 10(2) of the Berne Convention is the issue of whether for profit educational institutions can be beneficiaries. This was answered in the negative during negotiations at the 1967 Stockholm Berne Revision Conference.³³¹ This is very unfortunate and may cause serious inconsistencies: it would relegate the exception to serving only charitable educational institutions that do not charge fees. Private educational providers do charge fees. A generalized interpretation denying benefit of the exception simply because course fees are charged would be too restrictive. The exception should look more at the nature of the education, being in line with national development goals, rather than the mere fact of charging fees. Our view is that once the benefits of education serve the national interests of individual countries regardless of whether the institution is for profit or not, the exception should apply. In sum, the transposing provisions have to be in line with the overarching framework established by Article 9(2) of the Berne Convention as entrenched by the additional safeguard in Article 13 of the TRIPS Agreement.³³²

³³⁰ The Agreed statement to the WIPO Copyright treaty. These agreed statements have also been hailed as being capable of providing an important starting point for less developed a customary international norm of fair use. See Okediji, *International fair use*, *ibid*, fn.19 at p. 157-158.

³³¹ Lewinski, *ibid* fn. 3 at p.158 para. 5.169; see also Martin Senftleben, *Copyright, limitations and the three-step test: an analysis of the three-step test in international and EC copyright law* (Kluwer Law International, The Hague 2004) 23, 189-197; See Senftleben 2004, (fn 207) at p. 95 citing a 1992 report of experts on a Berne Protocol.

³³² Senftleben 2004, (fn 207) 86.

3.4.1.2 Extent justified by the purpose

The teaching exception does not provide any guidance as to the amount of a work that can be utilized and the number of copies that can be made. Does it allow making of multiple copies? This question has been answered in the affirmative in certain commentaries on the topic. Ricketson/Ginsburg for instance argue that as many copies as there are students can be made.³³³ However, it is arguable that whether this would be tolerated if a country were able to distribute photocopying machines to all schools in the hope of relying on this exception for reproduction of books. The three-step test (discussed in Chapter 4) would kick in and most likely such reproduction would be said to offend the provisions of the three-step test even when the schools are involved in internationally sanctioned educational programmes like Uganda's Universal Primary education (UPE).³³⁴ It is submitted that the teaching exception does not allow bulk access which is the pressing requirement of less developed countries like Uganda that want to promote quality education for all and not just for some. Utmost, the exception sanctions reproductions done at individual institution levels. In situations like those obtaining in less developed countries where there is need for a centrally coordinated bulk supply mechanism, local reprinting rights have to be purchased or recourse has to be had to the much disparaged but only existing bulk access mechanism, the Berne Appendix.³³⁵

³³³ 'Ricketson and Ginsburg, 2006 (fn 279, above).

³³⁴ On the UPE programme, see chapter 2. Paragraph 2.9.

³³⁵ Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 288; Uma Suthersanen, *Public interest rule* (2005), *ibid*, fn. 20, at p. 4. Discussed in Chapter 6.

3.4.1.3 What is meant by ‘to the extent justified by the purpose’?

Professor Suthersanen has noted that 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, she hastens to point out that the phrase does not preclude the utilisation of the whole of a work in appropriate circumstances.³³⁶ This begs the question: what are the appropriate circumstances? In our view, this is a mixed question of fact and law. As shall be discussed (in chapter 4), the three-step test may be invoked to prevent a situation where a whole work is copied.

3.4.1.4 ‘by way of illustration’

“Illustration” suggests that using the whole of a work is proscribed but whether this was the intended meaning is subject to argument. Professor Uma Suthersanen in dealing with this issue has raised some questions with regard to the wording of Article 10(2) of the Berne Convention: one of them being: is there a limit on the amount that may be copied from any given work? According to the Shorter Oxford English Dictionary, ‘illustration’ means ‘the action or fact of making clear or evident; elucidation; exemplification’.³³⁷ By this definition, there is nothing here to suggest that illustration calls for using only a small part of the work. If the aim is to make clear, then what helps achieve that aim has to be done. But if the aim is to exemplify, then depending on the work, the whole of it may not be needed.

³³⁶ Uma Suthersanen, *Stakeholder analysis*, *ibid*, at p. 13; Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 287; Ricketson, *Boundaries of copyright* (1999), *ibid*, fn. 11, at p.66; ‘Ricketson and Ginsburg, 2006 (fn 279, above) 791 para. 13.45; For some examples, see Lewinski (2008), *ibid*, fn. 3 at p.158 para. 5.170.

3.4.1.5 Meaning of 'fair practice'

This is yet another ambiguous term in the wording of Article 10(2) of the Berne convention. In countries with no established copyright practices like Uganda, it may be difficult to establish what fair practice is or should be. In the more developed countries with functioning copyright systems, this may be left to collecting societies to agree with the users. But such users like those represented by Universities UK, have a strong bargaining power and hence would get a better deal. Educational users in Uganda are presently not acting as a group and even then, would still have limited bargaining power.

In concluding on this point, I assert that in order to pursue the 'greatest good' of the greatest number, the delimitation of the boundaries of this exception should not be left to market forces because collecting societies would be in a stronger bargaining position.³³⁸ For instance, the Copyright Clearance Center in the United States of America has played a very instrumental role in the drafting of guidelines in respect of fair use in the United States of America.³³⁹ Often boundaries are pushed with inroads made into the fair use exception. This has resulted in talk about the need 'to reclaim fair use'.³⁴⁰ Absent clear exceptions, different educational users including acclaimed

³³⁷ Shorter Oxford English Dictionary, page 1022. For anyone unfamiliar with this dictionary, this is ironically, the more detailed version.

³³⁸ For example, the dispute in the United Kingdom between UK universities under their umbrella organisation Universities UK (UUK) on the one hand and the Copyright Licensing Agency (xx) underscores the need for strong educational user groups if they are to have better use terms from the collecting societies.

³³⁹ See chapter 4.

³⁴⁰ P Aufderheide and P Jazsi, *Reclaiming fair use* (The University of Chicago Press, London, 2011).

educational institutions in the more developed countries may resort to foregoing utilisation of educational works or having to seek out licences where none is needed.³⁴¹

3.4.2 Quotation exception

This is arguably the only mandatory exception in the Berne Convention.³⁴² According to Article 10(1):

“It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is *compatible with fair practice*, and their extent does not exceed that justified by the purpose...” (emphasis added).

Making quotations from works is common in education. It is needed in writing articles, books, setting examinations, in giving instruction and in academic discussions.³⁴³

During the historical development of the quotation exception, it was clearly envisioned that it would serve scientific, critical, informatory or *educational* purposes (emphasis added).³⁴⁴ Raquel Xalabarder has suggested that the quotation exception should not apply to teaching since there is an explicit teaching exception.³⁴⁵ This points to a dispute over the contours of quotation exception. These phrases need to be clarified in order to provide certainty to national legislators, policy makers, judicial authorities and educational administrators and users.

³⁴¹ See Kenneth Crews, *Copyright, fair use, and the challenge for universities: promoting the progress of higher education* (The University of Chicago Press, 1993) on how Universities in the USA coped with uncertain copyright exceptions; further see, William McGeeveran and William Fisher, ‘The digital learning challenge: obstacles to educational uses of copyrighted material in the digital age’ (August 2006 Berkman Center Research Publication No. 2006-09). Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923465> (last accessed 20 June 2014).

³⁴² ‘Ricketson and Ginsburg, 2006 (fn 279, above) 783 para. 13.38; also at 786 para. 13.41; but see Lewinski (2008), *ibid*, fn. 3 at p. 156 para. 5.163 on the possibility of a contrary argument- that the quotation exception may not be mandatory after all.

³⁴³ ‘Ricketson and Ginsburg, 2006, *ibid* observe that educational use was contemplated when the exception was made. This is an exception without a specific right.

³⁴⁴ ‘Ricketson and Ginsburg, 2006 (fn 279, above) 786 para.13.41, citing WIPO Document S/1.

3.4.2.1 *Compatibility with fair practice*

Some commentators have observed that right-holders from the developed world insist that fair practice is a universal norm, rather than one which takes into account local circumstances in less developed countries such as relative price, scarcity and even unavailability.³⁴⁶ Others point out that compatibility with fair practice may require referring back to the controversial three-step test.³⁴⁷ In other words, determining compatibility with fair practice may require that the quotation be made in such a way that it does not infringe the Berne Convention three-step test. For a country like Uganda whose quotation provision is subject to the fair use assessment,³⁴⁸ this may not be a problem. The problem though will be ensuring that the courts interpret the exception in a way that gives primacy to the human right to education as a tool for economic growth and development as the ‘greatest benefit’ to the ‘world’s greatest number’.³⁴⁹

3.4.2.2 *Extent justified by the purpose*

“To the extent justified by the purpose”, means that notwithstanding the dictionary meaning of the term quotation,³⁵⁰ the whole of a work can be quoted where for instance the nature of the work and the reasons for its being quoted so demand. A teacher of literature may or may not need to quote the whole of a poem while a teacher of fine art will in most cases need to utilise the whole of a painting.

³⁴⁵ Xalabarder, *ibid*, at p. 161. The commentator in fact gives other reasons why the argument should not be entertained.

³⁴⁶ Andrew Rens, et al (2006), *ibid*, fn. 1 at p. 48.

³⁴⁷ Graham Duffield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Chaltenham 2008) 287; ‘Ricketson and Ginsburg, 2006 (fn 279, above).786 para. 13.41. Discussed below.

³⁴⁸ See chapter 5.

3.4.2.3 *Affected rights*

Like the teaching exception, the quotation exception is one of the crosscutting exceptions.³⁵¹ In our view, it implicates the reproduction, distribution, communication to the public and making adaptation/alteration rights.

Unlike the teaching exception that is to be used for illustrative purposes *in a publication*, there is no such requirement that a quotation can only be made in another work. It would be necessary that if the quotation has been done in the process of creating another work, copies of the work in which the quotation is included must be reproduced. Further, those copies must be distributed to the intended beneficiaries. Further, if the dissemination is by way of electronic copies, the communication to the public right would thereby be affected if the purpose of the quotation is to be served. It is further submitted that making of quotations may involve making certain alterations to the work, even though these may be of a *de minimis* nature. For instance, emphasis may be made by the person making the quotation even when there is no such emphasis in the original work. This is common in educational usage, for instance when writing journal articles. This would therefore imply that the Article 10(1) Berne Convention exception allows making unauthorized alterations to a work contrary to the exclusive right granted to authors by Article 12 of the Berne Convention. It is not clear to what extent such alterations may not conflict with the integrity right of the author. Making a quotation could also require translating it and hence no authorization would be needed.

³⁴⁹ See chapter 5 on specific discussion of Uganda's exceptions.

³⁵⁰ Ricketson and Ginsburg, 2006 (fn 279, above) 788 para.13.42; also see *ibid*, p. 791 at para. 13.45.

³⁵¹ Xalabarder, *ibid* fn. 13, at p. 161. Ricketson, WIPO study, *ibid*,

3.4.3 Implied exceptions to the distribution right

As pointed out above, the distribution right is not explicitly recognised by the Berne Convention.³⁵² The WCT recognizes this right and hence it is subject to the exceptions contained in Article 10(1) of the WCT that governs exceptions to rights created by the WCT, as opposed to rights recognised only by the Berne Convention whose exceptions are governed by Article 10(2) as an additional safeguard. However, the doctrinal problem is that for Uganda, our case study that is not a contracting party to the WCT, it is not tenable to assert that the WCT is the basis for it to make any exceptions to the distribution right that it guarantees in its copyright legislation, CONRA³⁵³. Can the country rely on Article 10(2) of the Berne Convention as the basis for this exception? This would be theoretically possible considering that the teaching exception contained in Article 10(2) BC engages a number of exclusive rights. The problem however, is that since the distribution right is generally not formally recognised in the Berne Convention, Article 10(2) of the Berne Convention may be said not to apply to it. However, the counter argument is that Article 20 of the Berne Convention permits grant of protection beyond the minimum levels and hence the Convention anticipated such new rights.³⁵⁴

In view of the anticipation of additional rights, I submit that it would be unacceptable to argue that such anticipated and permitted ‘Berne-plus’ rights are not subject to any regime of exceptions including the cross-cutting teaching and quotation exception of

³⁵² See section above.

³⁵³ Section 9(b) of CONRA.

³⁵⁴ Strictly speaking, the wording of article 20 Berne Convention, unlike that of article 1(1) TRIPS, only allows creation of additional rights by treaty (special agreements) and arguably, not unilateral action.

Article 10(2), of the Berne Convention. Since Article 20 BC allows countries to make agreements creating more rights, an implicit power to make exceptions should be implied as accompanying such power. If there are exceptions, are such exceptions not subject to the overarching three-step test contained in Article 13 of TRIPS? Is there a need for a specially created regulatory regime outside the overarching regime created by the Berne Convention and Article 13 of TRIPS?³⁵⁵ For countries that are signatories to the WCT, Article 10(1) would govern such exceptions where the exclusive right in question is guaranteed by only that treaty. But what if in the country in issue, the exclusive right in question is protected by a treaty that is not binding on the country?

I strongly assert that one function of Article 13 of TRIPS is to regulate exceptions to rights not explicitly guaranteed by either the TRIPS Agreement itself or any other treaty. It is submitted that the wording of Article 13 TRIPS does not exclude its application to such rights more so in the absence of any special framework. As shall be seen in Chapter 4, the TRIPS three-step test is not restricted to rights created under the Berne Convention or those additional rights explicitly created by TRIPS: it retrospectively and prospectively applies to all exceptions. The distribution right is one such right, at least with respect to countries like Uganda that are not signatories to the WCT and hence cannot invoke or rely on the three-step test version of Article 10(1) of the WCT.

However, it would in line with, and not contrary to the letter and spirit of the Berne Convention where additional protection of authors is unilaterally given.

³⁵⁵ The aim here is not to have a black letter law analysis of the three-step test but whether it justifies an implied exception to the distribution right in Uganda's peculiar situation as non WCT country but which has provided for the distribution right. The black letter analysis is done in below.

It can thus be concluded that in the case of Uganda, that is not a contracting party to the WCT, Article 13 TRIPS allows it to make exceptions to the distribution right (even though it is neither provided for by the Berne Convention nor the TRIPS Agreement). The problem for educational users is the lack of specific guidance as to the shape such an exception should take. On a positive note, there is equally nothing to bar a country from designing its exception along the lines of the specific exceptions contained in the Berne Convention, for example Article 10(2) or Article 9(2). In this latter case, Uganda would be taking a leaf from the European Union Copyright Directive (EUCD) that allows exceptions to the distribution right to the extent justified by the purpose of the exception to the reproduction right.³⁵⁶ This would help ensure copyright facilitates education for economic development in line with the national interests and international human rights obligations of Uganda.

3.4.4 Implied exception to the translation right

Save for the exception contained in the Berne Appendix,³⁵⁷ it is submitted that there is no explicit exception to the translation right under international copyright law.³⁵⁸ There is however an implied exception, that in terms of the law governing interpretation of treaties, amounts to a subsequent ancillary agreement of Berne Union members. Accordingly, the implied exception has been found to form part of the Berne *acquis*.³⁵⁹ According to the *WTO Panel Report on section 110(5) of the United States Copyright Act*, incorporation of Berne Convention provisions 1-21 also included the applicable interpretations and agreements that had been made under the Berne text by successive

³⁵⁶ Article 5(4) EUCD.

³⁵⁷ Article II of the Berne Appendix. This however, has so many unworkable requirements, restrictions and conditionalities and is badly in need of revision. Refer to chapter five.

³⁵⁸ Ricketson and Ginsburg, 2006 (fn 279, above) 835 para. 13.83.

³⁵⁹ WTO Panel Report, *ibid*, fn. 21, at para. 6.63.

Berne revision conferences.³⁶⁰ In other words, TRIPS Article 9(1) incorporated not only the actual text of Articles 1-21 of the Berne Convention but also all agreements that are part of the Berne Convention *acquis* with respect to those provisions. In arriving at this holding, the WTO Panel applied principles of customary public international law embodied in Article 31 of the Vienna Convention on the Law of Treaties.³⁶¹

The existence of an implied exception to the translation right has been a controversial and problematic matter for a long time. One way of establishing that an exception to the translation right exists was by arguing, rather strenuously against the tide, that translation is a kind or species of reproduction of a work and that hence the former must be subject to the same exceptions as the latter.³⁶² The fact that there is no explicit provision regarding an exception to the translation right despite the many revision conferences is problematic considering the pre-eminent nature of the Berne Convention.

The lacuna raises even more concern considering the possible implications on the right to education of a lack of exceptions to the translation right. If as allowed under the teaching exception, extracts of a work can be used for teaching purposes, does that mean that in the case of works that need translation, only those extracts can be translated? Such a scenario would be very inconveniencing.

³⁶⁰ Ricketson and Ginsburg, 2006 (fn 279, above) 857 para. 13.107.

³⁶¹ Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

³⁶² Ricketson and Ginsburg, 2006 (fn 279, above) 835-840, paras. 13.83-13.87; Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 88 noted how this indeed is the case in many countries. This view received no consensus in international fora. See Ricketson/Ginsburg 2006, *ibid*. In any case, the two rights are treated, and rightly so, by the Berne Convention as distinct. Lewinski (2008), *ibid*, fn. 3, at 169 para. 5.203, argues that the absence of an exception to the translation right would cause inconsistency with other exceptions to other rights such as reproduction.

One other issue related to the implied exception to the translation right is whether the exception also implies a right to reproduce copies of the translated materials. Without such a conclusion, the implied exception to the translation right would be redundant. However, the problem with implying exceptions is determining the extent to which this should be done. For instance, translation requires publication of the translated work which in turn requires distribution. It is my view that since a translation is a new work, its publication should not require fresh authorisation once the authorisation or licence to translate had been obtained. This, it is argued, should be distinguished from other acts of utilisation or exploitation of the translated work, such as performance or recitation, that require authorisation by both the translator and the owner of the right of translation (the author of the underlying work). What then remains unanswered is the question of distribution- does it require authorisation, and if so, is that authorisation implied? It is submitted that there is an implied licence (not exception) to distribute the translated work and no further authorisation is needed.³⁶³

Presently, there are only two restrictions to the enjoyment of the translation right, both of which can serve national needs of less developed countries. Firstly is the implied exception agreed upon as part of the Berne *acquis* by virtue of analogy with exceptions to the reproduction right. The second is the compulsory licence provisions under the Berne Appendix aimed at promoting education in developing countries³⁶⁴. The lack of a clear express exception to the translation right is not in the best interests of less developed countries because given the problems associated with using the Berne

³⁶³ Lewinski (2008), *ibid*, fn. 3, at pp.144-145 paras.5.124 and 5.129 makes a contrary suggestion, which admittedly, is not backed by the Berne Convention.

³⁶⁴ 'Less developed countries' is the classification used by the Berne Appendix hence we use this expression by design, and not contrary to what was stated in Chapter 1 on use of terminology.

Appendix, such countries have no option but to seek licences for any translations. Reform along the lines suggested by Ricketson and Ginsburg³⁶⁵ would lead to more certainty and provide better guidance at national level to copyright importing less developed countries which are net importers of copyrighted educational materials. In the meantime, guidance is also needed on how to apply the three-step test, to the implied exception since the conditions of Article 9(2) of the Berne Convention have to apply to the implied exception to the translation right.³⁶⁶

3.4.5 Exception to the Article 12 Berne Convention rights

Less developed countries need to make adaptations of works to suit their local circumstances and enhance the learning process. This calls for an exception to the adaptation right contained in Article 12 of the Berne Convention. It is submitted that the Berne Convention does not provide an exception to this right.³⁶⁷ It can only be argued, with some constraints, that it is possible to place such an exception under the provisions of Article 10(1) and (2) of the Berne Convention (quotation and teaching exceptions respectively).

In the absence of what may be termed “the Berne *acquis* escape route”³⁶⁸, I may thus have to instead rely on the more general provisions of Article 13 of the TRIPS Agreement since there has not been any subsequent agreement of the Berne Union

³⁶⁵ Ricketson and Ginsburg, 2006 (fn 279, above) 835-840.

³⁶⁶ Ricketson and Ginsburg, 2006 *ibid.*, 838-839 para.13.85- 13.87; the implied exception to the translation right is however, wider in scope than the minor reservations exception that applies only to *de minimis* uses. See Ricketson, “Boundaries of copyright” (1999), *ibid.*, fn. 11, at p. 73.

³⁶⁷ Judith Sullivan, WIPO study, apparently concurs. She states at page 13 that: “No clear possibility of an exception being permitted by the minor reservations doctrine for the main adaptation right in Article 12, but it may be possible to argue this for cinematographic adaptation rights in Article 14.”

³⁶⁸ In the absence of explicit exceptions, the solution is to establish whether there is any subsequent agreement of the Berne Union members on the existence of an exception.

members establishing a specific or implied exception to the Article 12 right.³⁶⁹ This could be proffered as the basis for a fair use exception allowing an “adaptation” or making a derivative work of a protected work for educational use. Even then, with the possible constraints of the TRIPS three-step test, such an exception would not cover large scale “adaptations” or alterations of works for educational purposes- it exempts only private personal use which is of a *de minimis* nature.

It can therefore be seen that copyright law has potential to negatively impact on the right to education since it ties the hands of educational users and governments in less developed countries that want to “adapt” or alter foreign educational materials to better serve national educational policies. Licences must be sought for such “adaptations” or derivative works to be made. The chronic funding problem aside, the practical problems of obtaining licences are many and have been canvassed above and currently, there are no international mechanisms for easing this problem for less developed countries.³⁷⁰ The only available means is collective administration that is yet to take root in Uganda. The other is to rely on the International Copyright Information Centre for UNESCO, whose mandate covers this problem.³⁷¹ The International Copyright Information Centre however appears to be presently inactive, for reasons beyond the scope of this chapter, including possibly, non-use.

³⁶⁹ This researcher has already argued that article 13 TRIPS provides a basis for making exceptions even to rights not explicitly provided for by any treaty more especially for a country like Uganda that is not a Berne Union country. It should also provide, by extension, for rights not hitherto exempted by any treaty. But see para. 3.27.2.6.

³⁷⁰ Rens, Development Agenda; Altbach; see chapter 3 generally.

³⁷¹ See UNESCO document LA/ICIC/1/3, ‘The role of the International Copyright Centre’, Paris April 1973 at para. 21. National copyright legislation of Uganda and Malawi mentions the use of this Centre in compulsory licensing. See <http://unesdoc.unesco.org/images/0003/000332/033201eb.pdf> (last accessed 10 January 2013).

3.4.6 Exception to the communication to the public right

As already pointed out, Uganda, our case study is not a signatory to the WCT which provides for the communication to the public right (in its expanded form) and provides for exceptions to it under its Article 10(1). As argued with respect to implied exceptions to the distribution right in the case of a country like Uganda, our firm submission is that the one “big exception” permitted by Article 13 TRIPS is enough to accommodate the creation of an exception in this situation. To borrow one of the arguments of the USA team in the WTO dispute: “Article 13 TRIPS is straight forward and clear and talks about exceptions to exclusive rights: it does not have any qualifying words.”,³⁷² It is submitted that this is therefore the basis for a provision such as Uganda’s section 15(1) (d) CONRA (discussed in Chapter 5).³⁷³

An exception to the communication to the public right is particularly useful for promotion of the right to education at the tertiary education level particularly for colleges and universities, whose books are even more expensive than those used at primary and secondary school level. This is because colleges and universities in Uganda are fewer and are not as many and widespread as primary and secondary schools.³⁷⁴ It is therefore relatively easier and cheaper to set up the required Information and communication technology infrastructure or networks especially intranets as the platforms for disseminating educational materials for teaching purposes. This would also make it possible for critics to view the exception as being narrow in scope and hence compliant with the three-step test.

³⁷² Section 110(5) US Copyright Act at para.6.79.

³⁷³ Section 15(1)(d) of CONRA. See Chapter 4.

³⁷⁴ For an overview of Uganda’s education system, refer to Chapter 2 paragraph 2.9.1 and authorities cited there under.

3.4.6.1 Does the “minor reservations” doctrine cover the communication to the public right?

According to a 2009 WIPO document, the “minor reservations” doctrine covers the communication to the public right.³⁷⁵ It is submitted here that though this would be a favourable interpretation for less developed countries seeking to use copyright to enhance education this view is not entirely correct. The WIPO view is only accurate with respect to the communication to the public right as provided for in articles governing public performance. The doctrine does not apply to the broad communication to the public right involving for instance transmission of electronic forms of educational materials to a remote place to an audience that is not present at the place of origin of the communication.³⁷⁶

It is my considered opinion that though the list of national exceptions under the minor reservations doctrine was inexhaustible as found by the delegates at the Brussels Revision Conference 1948 and confirmed by the WTO Panel, the list of exclusive rights to which it applied then and now was and remains exhaustive.³⁷⁷ While the doctrine has been held to be applicable to new national exceptions to the public performance and recitation rights,³⁷⁸ it cannot be a basis for exceptions to other rights such as the

³⁷⁵ WIPO *Analytical document* (2009), *ibid*, fn. 1 at p. 18 para 74. Professor Jeffrey D Sachs a leading development economist and Director of the United Nations backed Millennium Villages Project, author, of *The end of poverty: how we can make it happen* (Penguin 2005) has noted that expert advice can sometimes be misleading. There were also complaints about WIPO advice being lopsided in favour of IP enforcement and less on development. This led to the WIPO Development Agenda. For a recent criticism, of the WIPO Development Agenda, see, Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question* (Routledge 2011).

³⁷⁶ ‘Ricketson and Ginsburg, 2006 (fn 279, above) 830 para. 13.78; Ficsor, ‘How much of what? The three-step test and its application in two recent WTO dispute settlement cases’ [2002] 192 RIDA 111; See also Senftleben 2004, (fn 207) 261.

³⁷⁷ ‘Ricketson and Ginsburg, 2006 (fn 279, above) 830 para. 13.78

³⁷⁸ WTO Panel report, *ibid*, fn. 21 at para. 6.59. Other rights mentioned were broadcasting, recording and cinematographic rights. See Ricketson, ‘Boundaries of copyright’ (1999), *ibid*, fn. 11, at p. 72.

reproduction right. It is further argued that a contrary view like that of the WIPO Secretariat would be a mistaken understanding of the historical contours of the minor reservations doctrine and the findings of the WTO Panel. It is one thing to apply the doctrine to new exceptions to rights that existed when it was agreed on and another to attempt to apply it to rights not earlier envisaged. Even though that would be good news for educational users, it is doctrinally wrong to assert it unless and until it becomes part of the Berne or TRIPS *acquis*.

3.4.7 Private use exception

This important and long established exception is wide enough to cover private educational and research activities which are necessary for enhancing learning outcomes to attain quality education. However, the exception does not appear in the two seminal copyright instruments: the Berne Convention and TRIPS (neither in the hind-sighted WCT). Under the Berne Convention umbrella, negotiations on this exception are reported to have taken place but with no adequate consensus to warrant explicit inclusion of the exception.³⁷⁹ Consequently, there is no firm consensus on the basis and contours of this exception. Discussions on the exception are made on the premises that private use is confined to the reproduction of a work.³⁸⁰ Accordingly, it is argued for instance that reproduction of a protected work for private study or research is allowed under Article 9(2) of the Berne Convention.³⁸¹ No private activity engaging other rights is envisaged; for instance, whether one can adapt a work for their own private use.³⁸²

³⁷⁹ ‘Ricketson and Ginsburg, 2006 (fn 279, above) 779 ff, para. 13.33.

³⁸⁰ ‘Ricketson and Ginsburg, 2006 (fn 279, above) 830 para. 13.78

³⁸¹ Sam Ricketson, “Boundaries of copyright”, [1999], *ibid*, fn. 11 at p. 88; see also ‘Ricketson and Ginsburg, 2006, *ibid*, 762 para. 13.09.

³⁸² But Uganda’s fair use defence allows adaptation for private personal use. See Chapter 5.

The above investigation has shown that there are a number of exceptions under the international copyright framework that would help to ensure that copyright can be used to enhance education. Apart from the above express and implied exceptions, there are other concepts in international copyright law that can be used to help play this role. These are referred to as ‘flexibilities’ and are discussed in the next section.

3.5 Flexibilities

While the discussion of exceptions under the international copyright framework, the discussion on the flexibilities will involve an exposition of both the international level as well as the national position for Uganda.

3.5.1 Idea expression dichotomy

3.5.1.1 International position

The rule known as the idea-expression dichotomy (IED), to the effect that it is the expressions and not the ideas that are protected is well-known but not necessarily trite bedrock copyright law.³⁸³ All national copyright laws respect this venerable principle.

³⁸³ For a view that discusses how elusive the rule is to understand and almost impossible to apply in a rational manner, see Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 82-83. For a detailed discussion of this concept, see Allen Rosen's "Reconsidering the idea/expression dichotomy" (1992) 26 UBC L. Rev. 26. He contends to the effect that the ambiguity between what is a protected expression and ideas is arbitrary and intended to be a balancing mechanism between the interests of members of the public and the rights of authors. However, a few UK and US decisions on the idea –expression dichotomy may help explain that the exact boundaries between ideas and expressions of ideas are not always clear. In *L B (Plastics) v. Swish Products*³⁸³ [1979] RPC551,629 HL (U.K.), Lord Hailsham’s observation was that: “Of course, it is trite law that there is no copyright in ideas...” but went on to add that: “But, of course, as the late Professor Joad used to observe, it all depends on what you mean by ‘ideas’.” In the famous US case of *Feist Publications v. Rural Telephone Service Co.* 113 L Ed 358 (1991) at 372, (U.S.) it was held that: “[C]opyright assures authors the right to their original expression, but encourages others to build freely upon die ideas and information conveyed by a work... This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will.' Meanwhile in *Bauman v. Fusse* [1978] R.P.C. 485, 488 a case that involved an allegation of

However, this doctrine was not explicitly incorporated into the foundational international copyright instrument, the Berne Convention.³⁸⁴ The principle was subsequently codified in TRIPS Article 9(2) to the effect that copyright protection shall extend to expressions and not to ideas. Article 2 of the Berne Convention updating treaty, the WCT, reiterates the provisions of Article 9(2) of TRIPS.³⁸⁵

The Idea-expression dichotomy is important in the promotion of access and utilisation of educational materials especially in resource constrained less developed countries. Arguably, this doctrine rests on the assumption that there are typically many different ways to express a particular idea or creative motif. Because ideas as such are not protected, authors in less developed countries can use the myriad of ideas in the world's existing stock of knowledge to create works that are not only affordable but are more relevant to their local circumstances in line with both the core elements (4As- Availability, Accessibility, Adaptability and Acceptability) and core obligations of the right to education.³⁸⁶

Less developed countries like Uganda need to emulate the example of Australia, which despite being a net importer of books has most of its educational books tailored to meet

infringement where a painting of cocks in a fight was admittedly inspired by a photograph by the claimant, Romer J agreed with the trial Judge and held that: 'Nobody denies [the] picture was inspired by the photograph. The mere taking of an idea would not be an infringement...'. In *Harper & Row v. Nation Enterprises*, the US Supreme Court emphasised that: "[N]o author may copyright facts or ideas; §102. The copyright is limited to those aspects of the work – 'expression' – that display the stamp of the author's originality." In *Miller v. Universal City Studios* 650 F. 2d 1365, 1368 (1981) (U.S.) where the Fifth Circuit U.S. Court of Appeal found that: "It is well settled that copyright protection extends only to an author's expression of the facts and not to the facts themselves...".

³⁸⁴ Ricketson and Ginsburg, 2006 (fn 279, above) 644, para.11.26 refer to implicit incorporation.

³⁸⁵ The two use different tenses.

³⁸⁶ Refer to the discussion in Chapter 2 on education as a human right.

the national needs of Australia.³⁸⁷ Education must be acceptable to the recipients and adaptable to the local circumstances of the recipients.³⁸⁸ As discussed in chapter 2, educational materials play an important role in ensuring that the education that is imparted and received is acceptable and adaptable to the needs of a country.³⁸⁹ One way to ensure this is for local authors to use the available ideas to create relevant works. In this era of increasing militancy and aggressiveness in the enforcement of copyright, this would not be possible if ideas were copyrightable. Latecomers on the educational scene would not have the ideas to work with and develop. The framers of copyright law thus knew only very well that creators do build on works of others.

Creating more works to benefit members of the public is certainly a public welfare benefit. In less developed countries that are book deficient and that heavily rely on imported books some of them very expensive and others not very suitable for local needs, creation of local content facilitated by the idea-expression dichotomy would contribute to addressing the problem. Locally relevant works would in the majority of cases be produced at a cheaper cost. Ugandan authors should prove that less developed countries are not only engaged in consumptive but also transformative use of works.³⁹⁰ The idea-expression dichotomy flexibility allows authors to create new works by “climbing of the shoulders of mainly “Western giants” and other giants from the global

³⁸⁷ Australian Productivity Commission, Research Report on *Restrictions on the parallel importation of books*, June 2009 at p. 40: hereafter “Australian Report (2009)”. Available at <http://www.pc.gov.au/data/assets/pdf_file/0004/90265/books.pdf>last accessed 7 March 2014.

³⁸⁸ UN Committee on Economic, Social and Cultural Rights General Comment 13 on the Right to Education. See further discussion in chapter two.

³⁸⁹ The term ‘adaptable’ is here used in the sense of making a work suitable to local circumstances of users of a particular country or region and not in the technical sense in which it is used in article 12 of the Berne Convention. See discussion below in para. 3.13. See also Section 2.5.2 of Chapter 2 for detailed discussion of the core elements.

³⁹⁰ Dick Kawooya, *ibid*, fn. 101; Peter Johan Lor and Johannes Britz, ‘Knowledge production, international information flows and intellectual property: an African perspective’, (Association of African

South.”³⁹¹ Creativity is after all an incremental activity. The idea-expression dichotomy is therefore an important legal copyright doctrines for facilitating accessible and acceptable educational materials to support education.

It directly facilitates utilisation of works including those under copyright protection since copyright is not infringed by utilising ideas from one work to create another.³⁹² I can to this end concur that copyright law has some inbuilt mechanisms for promoting education. It is therefore imperative to examine how Uganda has transposed this flexibility.

3.5.1.2 Uganda’s CONRA and the idea-expression dichotomy

Uganda’s section 6 of CONRA attempts to domesticate this principle even though the wording falls short of bringing out its whole ambit. The section provides that ideas, etc cannot be protected but falls short of stating that it is expressions that are protected. It provides that: “Ideas, concepts, procedures, methods or other things of a similar nature shall not be protected by copyright under this Act.” The Ugandan draftsman could have been better off replicating Article 9(2) of TRIPS or Article 2 of the WCT.

Universities, Accra, Ghana 2004) at p. 1. See <<http://aau.org/datad/reports/2004workshop/lor.pdf>> ,(last accessed 10 January 2014).

³⁹¹ G Dutfield, and U Suthersanen, ‘Harmonisation or differentiation in intellectual property protection? The lessons of history’ (Prometheus, Vol. 23, No. 2, June 2005) 1; See also Senftleben 2004, (fn 207) 38-41 on the concept of inter-generational equity.

³⁹² But see United Kingdom case of *Designers Guild v. Russell Williams (Textiles)*, [2001] FSR 113, 121 where Lord Hoffman held to the effect that since copyright can be infringed by a work which does not reproduce a single sentence of the original, what is being copied in such a case is the idea expressed in the copyrighted work. See further *Phx Products* per Lord Pritchard of the High Court of New Zealand who held that “it is no longer universally accepted that there is no copyright in ideas”. See Burrell and Coleman (2005), *ibid*, fn. 11 at p. 24; Consumers’ International report, *ibid*, fn. 1 at p. 26 also points out the occasional difficulty in drawing the line between idea and expression.

Nevertheless, the current wording is not bound to be a practical problem and will fall to be interpreted in light of the well-known idea-expression dichotomy. A court would take judicial notice of it. The people that need to know this best though are the potential and actual authors in Uganda. In fact, many works have been produced for primary and secondary school education in Uganda using ideas freely available. Companies like MK Publishers³⁹³ produce books for various subjects for use in primary and secondary schools. This has been further encouraged by the World Bank policy³⁹⁴ of procuring textbooks from local publishers, who in turn employ local authors who produce more locally relevant learning and teaching materials. The more flexibilities there are and the more they are utilised, the better for less developed countries.

3.5.2 Exhaustion doctrine-an exception to the distribution right-

3.5.2.1 International position

Described by one commentator as the most trade-related aspect of IPRs,³⁹⁵ the exhaustion doctrine (or the first sale doctrine as it is referred to in the United States of America)³⁹⁶ is arguably one of the most important (but implicit) exceptions to the distribution right.³⁹⁷ It has also been described as one of the most complicated

³⁹³ See MK Publishers website at < <http://mkpublishers.com/#>> last accessed 7 March 2014.

³⁹⁴ See Tony Read, Nicholas Read & Joshua Okwenu, 'Textbooks, school libraries and the provision of information & communication technologies for secondary schools: a roadmap for reform' (Draft report, World Bank Uganda, March 2008) available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/06/30/000426104_20120630171220/Rendered/PDF/703890ESW0P1030tional0materials0308.pdf> (last accessed 7 January 2014).

³⁹⁵ H C Jehoram, *Parallel imports*, *ibid*, at 506.

³⁹⁶ WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994) 835; Geller; Nimmer and Geller, *International copyright law and practice*, Lexis Nexis, 2007; Sterling (2008), *ibid*, fn.18 at p. 435 para 9.06.

³⁹⁷ G Westkamp, 'The "three-step test"', see fn. 81 at p. 1,7 fn. 22 points out that the exhaustion principle was traditionally not seen as a limitation to copyright but an exemption to the exercise of the distribution right.

regulations of business.³⁹⁸ The essence of the exhaustion doctrine is that upon putting a particular copy of a work into circulation, the owner of the right of distribution will have exhausted their right with regard to that particular physical copy.³⁹⁹ In other words, the particular copy that enjoys protection can only be put into circulation once.⁴⁰⁰ The right holder loses the right of exercising control over the distribution of that particular copy. However, it has been noted that under European Union law, the immaterial performance of, or dealing with a work, for instance on the Internet, does not exhaust the right of the author or other right holder.⁴⁰¹ Needless to mention, European Union law does not apply outside the European Union and hence a country like Uganda needs to craft its own rules on this matter or better still to remain silent.

It is submitted that the doctrine applies at two levels: the micro and macro levels. At a micro or individual level, the doctrine of exhaustion allows persons who have acquired a lawful copy to exercise their property right over the copy by being able to dispose of the item as they wish.⁴⁰² This is done by construing the distribution right as a right to authorise and control only the first distribution of a copy of a protected work.⁴⁰³ By holding that the distribution right is exhausted once this is done, the doctrine allows dealings in second hand copies of books. Such dealings are a valuable source of

³⁹⁸ C Fink, 'Entering the jungle of intellectual property rights exhaustion and parallel importation' in C Fink and K.E Maskus (eds), *Intellectual property and development: lessons from recent economic research* (World Bank, Washington DC, 2005) p. 171.

³⁹⁹ Sterling (2008), *ibid*, fn.18 at p. 435 para. 9.06; also p. 867 para. 9(5).

⁴⁰⁰ Lewinski (2008), *ibid*, fn. 3, at p. 146 para. 5.133. See Sterling (2008), p. 435 para 9.06.

⁴⁰¹ Article 3(3) EUCD outlaws the application of the exhaustion doctrine by any act of communication to the public as set out in that article.

⁴⁰² See WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994) at p. 835, particularly, fn. 3.

⁴⁰³ WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994) 839; 'Ricketson and Ginsburg, 2006 (fn 279, above) 658 para. 11.40; J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 435 para. 9.06. Guido Westkamp, 'Intellectual property, competition rules, and the emerging international market: some thoughts on the European

educational materials such as books in both developed but more so in less developed countries.⁴⁰⁴

At a macro level, the doctrine of exhaustion deals with the ability or not to import into one territory or customs area, goods produced in or destined for the market of another territory.⁴⁰⁵ Such subsequent importation of goods made in or destined for the market of another country is referred to as “parallel importation” and the goods involved are referred to as “parallel imports” or “grey imports”.⁴⁰⁶ This rule is said to be justified by the territoriality of copyright law⁴⁰⁷; another commentator however argues that the true rationale lies in free trade.⁴⁰⁸

The two seminal international copyright instruments (Berne Convention and TRIPS) left the matter of exhaustion intact.⁴⁰⁹ The Berne Convention is silent on which exhaustion rule should be adopted by Union members. The TRIPS Agreement adopts what may be described as a “hands-off” approach⁴¹⁰ to the exhaustion doctrine by

exhaustion doctrine’ 11 Marq. Intell. Prop. L. Rev. 293 (2007): hereafter, “Guido, *European Exhaustion doctrine*”.

⁴⁰⁴ WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994) 842-846.

⁴⁰⁵ J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 435 para. 9.06: also p. 867 para. 9(5);

436 ff para. 9.07. Parallel trade is certainly distinct from trade in counterfeit goods since it deals with genuine goods. See C Fink, *ibid.*, p. 172 for discussion on active parallel imports and passive parallel imports. It has been elaborated that for the exhaustion rule to apply, the distribution of a work must have been done by the right-holder or with his authorization.

⁴⁰⁷ On territoriality of copyright law, see Paul L.C. Torremans book review of Professor Paul Goldstein’s book, ‘International copyright: principles, law and practice’ (2003) IPQ 234 referred to in Chapter 1 section 1.5.

⁴⁰⁸ H C Jehoram, *Parallel imports*, *ibid.*, fn. 174, at p. 510.

⁴⁰⁹ H C Jehoram, ‘Parallel imports’, *ibid.*, fn. 174 at p. 508 discussing the debates around article 6 of TRIPS and 6(2) of the WCT declining to state any rule and also discouraging any deductions of a rule by proponents of either national or international exhaustion.

⁴¹⁰ Gervais/TRIPS (2008), *ibid.*, fn. 28, at p. 46 para.1.64; J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) at p. 867 para. 9(5); PE Geller, ‘Rethinking the Berne-plus framework: from

providing that nothing in the Agreement is to be used in determining the issue to resolve any disputes among Member Countries.⁴¹¹ The ‘flexibility is that in effect discretion is given to each member of the WTO to determine its own regime of exhaustion.⁴¹² Countries may choose from either national or international exhaustion.⁴¹³ This is a flexibility to be exploited maximally by less developed countries in a bid to access learning and teaching materials from the cheapest sources (see below for Uganda’s choice). For clarity, Article 6 of the TRIPS Agreement provides:

‘For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.’⁴¹⁴ This has been interpreted as an agreement to disagree⁴¹⁵ or a ‘hands off’ approach to the issue of which exhaustion regime is to be applied by individual state signatories to the TRIPS Agreement.

The ability to import goods such as textbooks from another country or customs area without authorisation of the copyright owner depends on the rule of exhaustion in force in a particular country. Moreover, as the one USA Supreme court decision taught us, this also depends on the interpretation to be given by the courts. In the American case of

conflicts of laws to copyright reform’ [2009] E.I.P.R. 391, 394. Geller attempts to distinguish between being silent on the issue and opting for a hands-off approach. In practice, the effect is the same.

⁴¹¹ Article 6; J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 867 para. 9(5). Sterling explains that reference to articles 3 and 4 in article 6 TRIPS leads to the conclusion that the matter is to be handled using national rules.

⁴¹² Gervais/TRIPS (2008), *ibid*, fn. 28 at p. 46 para. 1.64.

⁴¹³ On a brief history of the doctrine as developed by Joseph Kohler, the German patriarch of modern intellectual property law, see Herman Cohen Jehoram, *Parallel imports*, at pp. 497-498. Only the distribution right is exhausted but not other rights. The distribution right of the copyright owner is said to give way to the property right of the buyer of the particular copy. France and Belgium curtailed this right by less developed the destination right allowing the copyright owner to contractually determine the destination of the work even after an initial sale. For this, See, Lewinski, *ibid*.

⁴¹⁴ < http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm > (last accessed 20 June 2014).

⁴¹⁵ C Fink, *ibid*, p. 173.

Kirtsaeng, Dba Bluechristine V. John Wiley & Sons, Inc., decided in 2013,⁴¹⁶ Justice Stephen Breyer of the US Supreme Court in his lead judgment held to the effect that the first sale doctrine entrenched in section 109 of the US Copyright Act was not limited by the geography of where the item was made. Regardless of where the copy was lawfully made, the first sale doctrine applies, that is to say, the distribution right of the copyright owner is exhausted so long as a copy was lawfully made with the consent of the US copyright owner. According to this recent decision, it is immaterial that the copy though lawfully made, was not made in the country where it is resold.⁴¹⁷

3.5.2.2 Exhaustion options for less developed countries

Less developed countries have the flexibility to choose national, international or regional exhaustion. A national exhaustion rule means that the rights of first distribution or sale of copies of a work by a copyright owner are exhausted when those particular copies of the work are first distributed or transferred within a country or a particular customs area. With this option, the distribution right is not exhausted until the owner of the right of reproduction exercises it or authorizes its exercise in that country. This is the best rule from a right-holders' point of view allowing a right-holder to segment the market to suit their distribution plan well assured that their right has not been exhausted by some distribution in another territory.

⁴¹⁶ 568 U. S. ____ (2013) on the 'first sale' decided on 12 March 2013. Previously, book publishers and other copyright owners had relied on the interpretation that the 'first sale' doctrine only applies with regard to copies manufactured in the USA. In the instant case involving textbooks, the books in question were manufactured and bought in Thailand from where they were imported to the USA and sold

⁴¹⁷ This is what right holders had for long relied upon to defeat the first sale doctrine by arguing that the doctrine would not apply where the imported copies were not originally produced in the United States of America.

However, from the users' perspective, operating a national exhaustion principle means that a country cannot obtain cheaper copyright materials from other countries even where cheaper sources are available. The rights of the copyright owner would only be exhausted with respect to goods distributed in the territory of the importing country by that right-holder or with his authorization. Ugandan importers would be unable to import Indian reprints or even remainders⁴¹⁸ from any other country of works of a United Kingdom author however cheap they may be. Ugandan booksellers or importers would not legally deal with publishers in India (who publish works of foreign MDC authors) even when such publishers are more inclined to dealing with Ugandan booksellers than their counterparts in the Western World.⁴¹⁹

International exhaustion is the antithesis of national exhaustion. It is where a right-holder's distribution rights are exhausted the moment goods or works of such right-holder are put on the market in any country of the world by the right-holder or with their authorisation. It would serve better the interests of less developed countries that are net importers of educational materials.⁴²⁰ It paves the way for countries to source for works from the cheapest source as long as works in such territory have been distributed by or with the authorization of the right-holder.⁴²¹

⁴¹⁸ Term referring to books that are dramatically reduced in price by publishers to liquidate stock; definition adopted from Australian Report, *ibid*, fn. 106, at p. XI.

⁴¹⁹ Publishing agreements between the Indian publishers and their licensors would also provide a barrier.

⁴²⁰ J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 435 para. 9.06: p. 867 para. 9(5); Consumers International report, (2006), *ibid*, fn. 1 at p. 23; See also Australian Report (2009), *ibid*, fn. 106, at p. XIX, and in para. 4.1 where the possibility of sourcing cheaper books especially educational books from Asian markets is discussed and targeted.

⁴²¹ For a negative view, see C Fink, *ibid*, at p. 184 arguing that less developed countries least developed countries would be negatively affected if right holders chose to price their goods uniformly across countries.

The other option, a regional exhaustion rule, can be applied by a group of countries within a particular regional grouping such as the European Union or the East African Community. The European Union, for instance has adopted a regional exhaustion rule such that once works are distributed within any part of the Union (including the entire EEA) by the right-holder or with his authorization, the right of distribution is exhausted.⁴²² This allows interested parties within the European Union to import the protected work from any country of the European Union regardless of whether the right-holder had distributed the work in the country of the importer. If the East Africa Community were to become a union, it could choose regional exhaustion.

The argument is that allowing parallel importation under a regional or international exhaustion doctrine permits booksellers to source for works from the cheapest sources.⁴²³ In terms of educational materials such as textbooks, a less developed country like Uganda needs to procure them from where they are cheapest. Accordingly, book deficient less developed countries arguably need to adopt the international exhaustion rule.⁴²⁴ It would also enable those countries to ensure an increase in supply when the owner of the right of distribution does not supply any or adequate copies.

⁴²² Guido Westkamp, *European exhaustion doctrine*, *ibid*, fn. 294.

⁴²³ See Australian Report (2009), *ibid*, fn. 106; Consumers International report (2006), *ibid*, fn. 1, at p. 21-24.

⁴²⁴ Andrew Rens, et al (2006), *ibid*, fn. 1 at p. 13; Consumers International report (2006), *ibid*, at pp.23-24. This author has seen an intellectual property law textbook authored by English authors and printed in India exclusively for the Indian market but imported into Uganda and sold at reasonably good prices. Unfortunately, there were no copies intended for the Ugandan market to enable a price comparison. However, using examples from other countries, it is arguable that if copies of the same book had been directly imported to Uganda from the United Kingdom, they would have cost more than what the parallel imports cost. This demonstrates that parallel importation can help solve both the availability and affordability problems faced by Uganda as a least developed country.

In view of the above discussion, the advice given by WIPO whose effect may lead (or in fact mislead) less developed countries using the Model Copyright law to grant authors a right of importation whereas this is not a minimum requirement under the international copyright regime has been rightly criticised.⁴²⁵ Even though the advice is given in parenthesis with a footnote that clarifies that such right is not based on any provision of the international copyright instruments, but is aimed at safeguarding the principle of territoriality in copyright,⁴²⁶ it may mislead countries that rely on WIPO for advice. In effect the WIPO draft copyright law explicitly does not provide for parallel importation of copyright works which has the same effect as prescribing a national exhaustion rule (which is why WIPO talks of the need to protect territoriality). If the principle of territoriality needs to be protected, why did WIPO not endeavour to get it into the WCT that was concluded under its auspices and that was intended to update the Berne Convention? There is no evidence whatsoever, that there is international consensus on the issue of parallel importation. In fact, the available evidence points to the continuing lack of consensus on this issue.⁴²⁷ A case study of two more developed countries that are net importers of books can help us get more insight.

3.5.2.3 Some lessons from Australia and New Zealand

In the area of books, the matter of which exhaustion rule to apply has attracted significant attention in Australia where various studies have been commissioned at various times to study this issue and its impact on the Australian economy. This resulted in modification of the parallel importation restrictions in Australia, by the introduction

⁴²⁵ See Consumers International Report (2006), *ibid*, fn. 1 at p. 36.

⁴²⁶ Consumers International Report (2006), *ibid*, fn. 1 at p. 36.

⁴²⁷ C Fink, *ibid*, p. 174 has pointed out the possibility that the matter will be discussed at future negotiations. He points out an unsuccessful attempt to raise the matter prior to the Doha Round of negotiations.

of time restrictions within which right holders had to publish their works in Australia and within which they could re-supply stocks. A study concluded in 2009 by the Australian Competition Commission re-examined the issue and recommended abolition of that country's remaining parallel import restrictions.⁴²⁸ New Zealand earlier on abolished parallel import restrictions on books. In sum, these countries considered that adopting the international exhaustion regime is better for their economies.

One primary concern has been the effect of parallel import restrictions (PIRs) on the price of books. Studies from Australia are very helpful in analyzing the impact of PIRs on importation restrictions particularly in the book sector. In Australia, there had been concerns that books cost relatively higher than in other parts of the world particularly in the United Kingdom and the United States of America. This was largely confirmed by various studies including the above-mentioned 2009 study by the Australian Competition Commission.⁴²⁹ It was further noted that abolition of PIRs would enable booksellers in Australia to either source for possible cheaper books from other places including Asia. Further, it was hoped that abolition of PIRs would force the local publishing industry to reorganize itself in more economically efficient ways, which overall would be good for the Australian economy. Publishers who benefit from the parallel import restrictions naturally opposed the move arguing that it would negatively affect the local publishing industry among others by turning it into a market for "remainders"⁴³⁰ and reducing the international market for licences works by Australian authors. However, the study findings indicated that similar fears in New Zealand did not

⁴²⁸ Australian Report (2009), *ibid*, fn. 106, see Executive summary.

⁴²⁹ Australian report (2009), *ibid*; ; See also a similar British study report with respect to price of compact disks blaming the relatively higher prices on the parallel importation right. See fn. 7 at p. 836 of WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994).

materialize.⁴³¹ Uganda is not at the same level of development as Australia or New Zealand but relies heavily on imported books and hence can learn lessons from the Australian and New Zealand experiences, which after all are in consonance with similar prior recommendations for less developed countries.⁴³²

⁴³⁰ “Remainders” is a term used in the publishing trade to refer to books that are drastically reduced in price by the publisher in order to clear stock. See Australian report, *ibid.*, fn. 106, at p. XI.

⁴³¹ Australian report (2009), *ibid.*, fn. 106.

⁴³² Consumers’ International Report (2006), *ibid.*, fn. 1, at pp. 21-23.

3.5.2.4 Criticism against lifting parallel importation restrictions

Opponents of lifting restrictions on parallel importation of educational materials advance two main arguments. Firstly, it is contended that to do so would adversely affect local authorship of educational materials and the local book publishing industry.⁴³³ This argument was also raised with regard to the only internationally recognised bulk access mechanism for developing countries, the Berne Appendix.⁴³⁴ It was argued among others that developing countries would end up as dumping grounds for all sorts of books from the more developed countries, which would harm local publishing industries besides not being appropriate for their citizens. These subtle criticisms do not take into consideration the fact that copyright restrictions are not the only factors that determine the development of authorship and the publishing industries in less developed countries.

While the above argument holds water to some extent, there are many factors that determine the educational utilisation of a copyright work: a key one being that the educational systems in countries like Uganda are based on the western model of education introduced by their former colonial masters. Moreover, there is need to target reforms for purposes of lifting PIRs in respect of works needed for educational purposes and not for all types of cultural works. Besides, subjects of natural and physical sciences like physics, mathematics, chemistry and biology are universal just like the English language,⁴³⁵ which is the language of science. The same science books used in the United Kingdom or the United States of America can be used in Uganda since they have

⁴³³ Australia Report (2009)

⁴³⁴ For this analysis, see Okediji/ICTSD study (2006), *ibid*, fn. 29; Uma Suthersanen, Public interest rule, *ibid*, fn. 20, at p. 4; Consumers International, *ibid*, fn. 1, at p. 25 See chapter six.

⁴³⁵ There are of course minor variations in the English language.

no politically contextual limits.⁴³⁶ The problem however is that given the low incomes, what book publishing companies of the global North consider lower prices, are unaffordable to many people in less developed countries. Such people simply choose to do without the books thereby affecting the right to education. The four 'As' of the right to education cannot be realized without large scale access by all those engaged in education.⁴³⁷

Another argument advanced against parallel importation is that there is no guarantee that booksellers or importers do pass on the benefits of lower prices to the consumers.⁴³⁸ There is however, no empirical evidence to support this fear. To the contrary, cheaper editions of western books are imported from countries such as India and sold in less developed countries at comparatively lower prices. Even the Australian Productivity Commission Report supports the view that parallel importation is likely to lead to lower prices.⁴³⁹ In less developed countries where price is a key determinant of access of educational books, arguably the worst scenario would be that the price difference advantages would be shared between the importer and the final consumers. This small difference could help support education for economic development. For these reasons, it is important to examine what exhaustion regime operates in Uganda, our case study

⁴³⁶ Textbooks in some other fields such as the social sciences may have political sensitivity.

⁴³⁷ See chapter 2 of this thesis for a discussion on the 4As of the human right to education.

⁴³⁸ HC Jehoram, *Parallel imports*, *ibid*, fn. 174, at p. 496.

⁴³⁹ Australian Report, *ibid*, fn. 106. It would certainly be good to commission an empirical study to this effect in Uganda. Arguably the Australian Report may have limitations since the identified sources of cheaper books are in countries that are nearer to Australia geographically.

3.5.2.5 Uganda's exhaustion regime

It is submitted that Uganda, our case study, implicitly adopted a national exhaustion regime contrary to her national needs to use copyright exceptions to enhance the right to education for economic development. This is based on two reasons. Firstly, the net effect of the distribution right protected by section 9(b) CONRA as well as the infringement provisions that outlaw distribution imply that national exhaustion is provided for. This submission is supported by the view of Consumers International who argue that “parallel importation would be prohibited if the national legislation gives [the] copyright owner the right to control importation of works.”⁴⁴⁰ Secondly, though CONRA does not explicitly provide for the importation right, this is implicit from the fact that section 46(1) makes it a civil infringement of copyright “if contrary to the permitted free use a person does or causes or permits another person to import into Uganda otherwise than for his or her own private use⁴⁴¹ or if a person distributes in Uganda without licence by the right owner.” These civil infringement provisions are buttressed by section 47 of CONRA which makes it a criminal offence if a person without the authorisation of or licence from the rights owner or his or her agent, imports any work and uses it in a manner which, were it work made in Uganda, would constitute an infringement of copyright.⁴⁴²

In sum, a person who either imports into Uganda and or distributes in Uganda (or does both) copyrighted materials without authorisation and without being covered by the fair use defence of section 15 infringes copyright and commits an offence. Having

⁴⁴⁰ See Consumers International Report (2006), *ibid*, fn. 1, at p. 61.

⁴⁴¹ Section 46(1)(a) CONRA. South Africa has a similar restriction that prohibits imports of reproductions of works except for private and domestic use.

⁴⁴² Section 47(1)(e) CONRA while section 47(1)(a) criminalises unauthorised distribution.

established that Uganda adopted national exhaustion regime albeit only implicitly, the legislature thereby did not properly consider the best interests of Uganda as a less developed country that would benefit from parallel importation of educational materials from cheapest sources.

3.5.3 Term of protection

3.5.3.1 International position

The duration of copyright (the term of protection), has a direct bearing on access and utilisation of copyrighted educational materials since it determines when works fall into the public domain.⁴⁴³ It is only when works fall into the public domain that they can be accessed and utilized for educational purposes without the need for a licence or an exception. Works in the public domain can be reproduced using any means including reprinting; can be translated; used to make derivative works; imported and distributed without the need for a licence from the creator or exploiter. The historical development of copyright in the so-called copyright system (Anglo- American copyright tradition) countries shows that there was, at least in the early development of copyright, realization that it was not in society's interests to protect works perpetually.⁴⁴⁴ Authors were not to enjoy copyright for longer than was necessary to stimulate creation of works.⁴⁴⁵ A time had to come when a protected work fell into the public domain where

⁴⁴³ Uma Suthersanen, 'A2K and the WIPO Development Agenda: time to list the "public domain"', (UNCTAD-ICTSD Policy Brief Paper 1, December 2008), available at: <<http://ictsd.org/downloads/2009/03/policy-brief-1.pdf>>, (last accessed 10 January 2014).

⁴⁴⁴ Paul Edward Geller, *ibid*, fn. 14 at pp. 26-27 referring to the practice of English judges right from in the celebrated case of *Donaldson v Becket* and French Parliamentarians in the early French laws of 1791. For a discussion of the early French laws, see Jane C Ginsburg, 'A tale of two copyrights: literary property in revolutionary France and America', in Sherman B and Strowel A (eds.), *Of authors and origins* (Clarendon Press, 1994) 135 ff. See further discussion in chapter four of this thesis: see also Lewinski, *ibid*, fn. 3, at p. 18, para. 2.11 giving the shorter terms of protection in earlier bilateral treaties.

⁴⁴⁵ Lewinski (2008), *ibid*, fn. 3 at p. 58 para. 3.66.

it can be utilized without any need for authorization from the author or other copyright owner.

While still more mindful of the need for her citizens to access and utilise pre-existing works the utilitarian approach to copyright, meant that the United States in its maiden Copyright Act of 1790 protected authors for a shorter time and along the lines of the Statute of Anne.⁴⁴⁶ The increase in the duration of protection to the present levels was only achieved progressively and the latest increase in the United States of America was prompted by the need to catch up with the European Union.⁴⁴⁷ However, the US Trade Representative is said to have justified the increase on the need to increase the commercial viability of copyright industries.⁴⁴⁸ This even prompted litigation and a general outrage that copyright was deviating from its utilitarian approach entrenched in the copyright clause of the US Constitution.⁴⁴⁹ Even in authors' rights tradition jurisdictions (droit d'auteur countries) such as France, it has been shown that protection of copyright has not always been treated as nearly sacrosanct as presently.⁴⁵⁰ Germany, another personalist jurisdiction was initially opposed to long duration of copyright.

⁴⁴⁶ See June M. Besek, Jane C. Ginsburg and Caitlin Grusauskas, "U.S. Response to ALAI 2009 London Questionnaire, (2009): available at: <http://www.blaca.org/alai2009/Alai%20US%20Response%20to%20ALAI%20London%20Questionnaire%20final%2020April%202009.doc>: hereafter, "BLACA Research"; Mark Rose, *Authors*; See chapter 4r.

⁴⁴⁷ Refer to chapter three. The historical development of copyright law in leading copyright jurisdictions confirms this.

⁴⁴⁸ Andrew Rens, *et al* (2006), *ibid*, fn.1 at p. 23.

⁴⁴⁹ *Eldred v. Ashcroft* 537 U.S. 186, at: < <http://www.copyright.gov/docs/eldrdedo.pdf>>, (last accessed 20 January 2014).

⁴⁵⁰ This is the central argument in J.C. Ginsburg, *A tale of two copyrights: literary property in revolutionary France and America* in Brad Sherman and Alain Strowel, (eds.), *Of authors and origins*, Clarendon Press, Oxford, (1994) at p. 135. She shows that before the end of the Ancien regime, France put the public interest above that of individual authors and imposed formalities such as deposit requirements, as a prerequisite for protection.

Germany's change of heart to demand for extending the duration of the term of copyright in the Berne Convention is said to have been surprising.⁴⁵¹

In respect of works that are of interest to this thesis, Article 7(1) of the Berne Convention provides for the term of copyright to be the life of the author plus 50 years. It should be recalled however, that because international copyright instruments only set minimum rights with respect to rights of authors and other right-holders, the 50-year term is only a minimum standard and not a maximum. Article 7(6) of the Berne Convention is in fact very clear that members of the Berne Union may grant terms of protection longer than those granted under the Convention. As such, some members of the Berne Union led by the European Communities (now European Union) increased the term of protection of copyright to life plus 70 years.⁴⁵² This brought to memory some of the old debates on the issue of how long copyright should last.⁴⁵³

⁴⁵¹ G Davies, *Copyright and the public interest* (2nd edition, Sweet & Maxwell, London 2002) 183.

⁴⁵² Articles 1 of Directive 93/98: Moreover, under article 7, the EC adopted the material reciprocity rule to the effect that non community authors would not get protection within the EC for durations longer than in their countries of origin. This prompted the USA to adopt the life plus 70 year term. A similar proposal to increase the term of protection had been made by the International Bureau of WIPO.

⁴⁵³ A review of the history of copyright in some of the leading copyright jurisdictions however, shows that not all had 50-year pma duration of protection at the time this term was first incorporated into the Berne Convention. In England, the issue of term of copyright had been seriously contested, and rightly so as is signified by the long and bitter debates between Serjeant Talfourd and Lord Macaulay which was subsequently resolved by an arbitrary fixing of the term of protection. Catherine Seville, 'Talfourd and his contemporaries', in Fiona MacMillan (ed), *New directions in copyright law* ((Vol.5, Edward Elgar, Cheltenham, 2007)); See further Catherine Seville, *Literary copyright reform in early Victorian England*, (Cambridge University Press 1999). See also Isabella Alexander, *Copyright law and the public interest in the nineteenth century*, (Hart Publishing, Oxford and Portland, Oregon, 2010) 92-112; Justice Laddie, Copyright: over-strength, over-regulated, over-rated? (1996) EIPR 253; 256ff. See also chapter 4\$.

3.5.3.2 *Reasons advanced for term extension*

In Europe, the granting of longer durations of copyright in excess of the Berne Convention minimum term has been justified by increase in the life expectancy of authors.⁴⁵⁴ According to recital 5, the life plus 50 year minimum term guaranteed by the Berne Convention was intended to provide protection for the author and the first two generations of descendants. The recital then notes that the average life span in the Community has grown longer to the point where the life plus 50 year term was no longer sufficient to cover two generations.

It was argued that there was a need to increase the term of protection to cater for the intended beneficiaries (the author and the first two generations of descendants) but who were now living much longer. This reasoning was more or less a recycling of the argument advanced by Talfourd in his Victorian endeavours to increase the term of protection of copyright in England. It has been stated that Talfourd had in mind friends like the author Johnson who had many dependants. However, it should be pointed out that this reasoning was outdated particularly in the more developed countries where the author Johnson type of lifestyle has long been abandoned.⁴⁵⁵ Moreover, other socially cost-effective investment vehicles could be employed to guarantee earnings for future generations of authors. For example, earnings during a shorter duration of protection could be invested to yield future income and profits rather than making the works directly yield income for such long durations.

⁴⁵⁴ The European Council Directive 93/98/EEC of October 29, 1993 harmonizing the term of protection of copyright and certain rights related rights (available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0093:EN:HTML> (last accessed January 2010).

⁴⁵⁵ Author Johnson is said to have fathered many children.

It would be resented if civil servants of any country demanded that they be paid remuneration including pensions at levels that could sustain them for life and for two generations of descendants. Why then should authors and other creators be treated differently? The reason given in the EU is to be found in the Term Directive that in recital 10 and 11 talks about safeguarding the independence and dignity of authors and other creators. Dignity and independence are both looked at through an economics lens. While economic independence of authors is necessary to ensure that they do not resort to the old system of relying on patronage, it is our submission that guaranteeing it does not require the present long term of protection. Moreover, dignity should not be looked at only in monetary terms. Even though promoting economic prosperity is the primary objective behind European integration, it is surely neither the only way of safeguarding dignity of authors nor in line with the original objectives of copyright protection. But even taking all these into considerations, the present term is simply far too long to be justified by those reasons.⁴⁵⁶

The European Parliament even ensured that a rule of material reciprocity was adopted to ensure that other countries that needed to enjoy the life plus 70 year term of protection had to increase the term in their own legislation. The effect of this was so strong that even the United States could not resist despite its seemingly deep- rooted different policy objectives that had historically guided copyright in that country.⁴⁵⁷ Extension of market power of publishing industries leads to negative implications for education.

⁴⁵⁶ Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual property and theories of justice*, (Palgrave Macmillan 2008).

⁴⁵⁷ Lewinski (2008), *ibid*, fn. 3 at p. 115 para. 5.49.

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The relentless efforts by the EU, the United States of America and to some extent the World Intellectual Property Organisation⁴⁵⁸ to encourage Berne-*plus* terms of protection of copyright of life plus 70 years are not good for the use of copyright to enhance the right to education. This is because the proponents do not take into account the fact that a one-size- fits all approach is unsuitable for a world with countries at different levels of development and with divergent copyright needs. In particular, it does not take into consideration the need in less developed countries for sooner access and hence shorter protection.⁴⁵⁹ Unfortunately, even some less developed countries⁴⁶⁰ have legislated for the life plus 70 years' pma duration of copyright.

It is submitted that even this relatively shorter term of copyright protection (life plus 50 years pma), is not balanced enough and unduly negatively affects access to and use

⁴⁵⁸ Ricketson and Ginsburg, 2006 (fn 279, above) 577 para. 9.65, the International Bureau of WIPO is reported to have made a proposal of increasing the term of protection to life plus 70 years. The proposal was however dropped only for the EC unilaterally take it up and "force" it upon the rest of the world through use of the material reciprocity rule that prompted even the USA to adopt the said term.

⁴⁵⁹ Crews/WIPO Study (2008), *ibid.*; See further discussion below at para. 3.6.3; International copyright law cannot be detached from the societal, political, and economic changes, and the law will only remain relevant if these realities are considered. For this, see UNCTAD-ICSTD, Resource book on TRIPS and development, Cambridge University press, at p. 693.

⁴⁶⁰ India, a less developed country provides for life plus 60 years. Section 22 of the copyright Act, 1957 (as amended) available at: <<http://www.wipo.int/clea/en/details.jsp?code=IN007>> (last accessed 20 June 2014). India emerged as a leader of less developed countries least developed countries in demanding for special dispensation for less developed countries during the time of the international copyright crisis. This change of heart is explained by the fact that Indian publishing and general culture industries, that rely on copyright, have grown tremendously to the point where the country realized that it needed to protect its interests. Thus its interests, as far as these sectors are concerned demand strong copyright protection: India can be said to be going through the stages that the United States of America went through to the point that it is now able to kick away the ladder by embracing strong copyright protection. Refer to Urvashi Butalia, 'The issues at stake: an Indian perspective on copyright' in P.G. Altbach (ed), *Copyright and development: inequality in the information age* (Bellagio Studies in Publishing 4, Chestnut Hill, Mass.: Bellagio Publishing Network Research and Information Center, 1995) 45, 49: http://www.bc.edu/bc_org/avp/soe/cihe/publications/pub_pdf/copyright.pdf> (last accessed 20 June 2014). For further discussion, refer to Consumers' International Report (2006), *ibid*, fn.1 at pp. 21-24.

of educational materials in less developed countries by directly affecting the time when such works get into the public domain to allow royalty free access and utilisation.⁴⁶¹

A study by an economist has actually suggested that the optimum term of protection should be fifteen years and in any case, should not be post mortem auctoris.⁴⁶² While I do not entirely agree with the entire suggestion, I strongly contend that no author would stop writing simply because his second and third generation of descendants would not be looked after. Arguably, no author is incentivized to write because of knowing that royalties will flow to his estate 70 years after their death. I contend that all types of private individuals who seek to invest for the future (be they authors or not) do not first consider what would happen to their investments 70 years after their death.

The effect of very long terms of protection is that rights owners and future generations in developed nations benefit at the expense of users of educational materials in less developed nations. It promotes education for some but not for all, contrary to national and international development needs and human rights obligations. This, it is argued, distorts the traditional copyright balance and impedes the use of pre-existing works. The counter argument though, is that with regard to educational materials, most of the works in the world's store of knowledge are authored by writers in the more developed countries where higher life expectancy is enjoyed. However, from the user side of the copyright coin, the same reason is a ground for reducing the duration of copyright; if

⁴⁶¹ For the general socio-economic context of Uganda, including the percentage of Ugandans living below the poverty line, see chapter 2.

⁴⁶² Pollock Ruffus 'Forever minus a day? Some theory and empirics of optimal copyright', (Cambridge University, V1.1.2 August 7, 2007); <Available online at: http://www.rufuspollock.org/economics/papers/optimal_copyright.pdf>, (last accessed 10 March 2014).

authors now live much longer, it means that works take much longer to get into the public domain where they are needed by users. It therefore means that even protecting works for life becomes unacceptable since it means long delays and denial of the public domain.

Publishers, who are in fact the main beneficiaries of the increased terms of protection (with respect to educational materials) also advance the reason that some works take long to gain market and that others gain market only after the death of the author. It is hard to see how this applies to all works including those whose value may not always depend on the fame of the author⁴⁶³, and even if it did, it is unimaginable that it need always take the whole life time of the author, in the illustration above, 30 years to get the reward for the author.

The other reason advanced for advocating for long duration of copyright (which actually is advanced by the capitalists of the book world- the publishers) is the returns on investments argument. The publishers argue that not all books are successful and hence earnings from the successful books subsidise those from the less successful ones. This, they continue, enables publishers to disseminate all works regardless of their market success. It is submitted that equally, this should not take, as in our example below, 30 years to recoup the invested capital as well as profits. The truth of the matter is that copyright industries in pushing for longer durations of copyright were driven by the capitalistic greed to reap profits and sustain their multi-national conglomerates even

⁴⁶³ Educational books for instance at University level are selected by the particular professor while at primary and secondary levels of education, the National Curriculum Development Centre gives direction on the text books to be used. See also Australian Report (2009), *ibid*, fn. 106.

when this amounts to rent seeking. This should not prevail over the need to enhance education as a fundamental human right, a means and a measure of economic development.

3.5.3.3 A critique of the life expectancy argument

The practical impact of the very long durations of copyright protection can be analysed by the following hypothetical example. Taking a life expectancy of 70 years, protection for life plus 70 years means that a work authored today while the creator is for instance, 40 years old would only fall into the public domain after 100 years if the author were to live up to 70 years. From a less developed country perspective with low life expectancies (now put at 52 in Uganda), this in effect locks away badly needed knowledge from two generations of Ugandans. It relegates the majority of users in less developed countries, who have no purchasing power to buy or pay royalties, to using educational materials that may be long outdated. This is unacceptable in a globalized world with rapid changes especially in the field of science. As exposed in chapter 2 section 2.9.2, many Ugandan schools are using very old science books, which arguably, makes the education lack quality, an aspect of the core element of acceptability of the right to education.

If the more developed countries are serious about the promotion of human rights for all humanity regardless of location, action is needed in the field of copyright to promote the right to education given its human rights and economic development credentials as discussed in Chapter 2. After all, a reduction in the term of protection for instance to pre-Berne Convention term does not amount to denial of reward or returns on

investments at least by the standards set by the United Nations.⁴⁶⁴ Authors' fundamental rights are well catered for if they are paid enough money to lead a modest standard of living.⁴⁶⁵ Political economic analysis however, shows that the increase is to satisfy the capitalistic rent-seeking interests of exploiters who, right from the time of the Stationers' Company in England, have always hidden behind author's interests in order to further their own goals.⁴⁶⁶ Professor Uma Suthersanen has raised a number of possible reforms that despite being very much pro-author are nevertheless not championed by publishers and other players in the copyright industry.⁴⁶⁷ This helps to prove that publishers (and other players) are still playing the old game of fronting the need to protect authors' interests while disguising their capitalistic pursuits.⁴⁶⁸

While I appreciate the very important work publishers do especially in the analogue world,⁴⁶⁹ yet it can be argued that the "returns on investment" justification does not

⁴⁶⁴ The United Nations Committee on Economic, Social and Cultural Rights General Comment No. 17 on article 15(1)(c) only requires protection of intellectual creations to levels sufficient for the authors to live a decent standard of life. It is stated that "In order not to render this provision (article 15(1)(c)) devoid of any meaning, the protection afforded needs to be effective in securing for authors the moral and material interests resulting from their productions. The Committee further states that the requirement in article 15(1)(c) of the ICESCR (for everyone to benefit from their intellectual creations) does not necessarily have to be to the standards reflected in International copyright instruments. See 3D, 'Trade-Human Rights-Equitable Economy (Background Note: Intellectual Property, Human Rights and the Drafting of the General Comment on Article 15(1)(c) ICESCR', (3D, Geneva 2005) Also see detailed discussion in chapter two.

⁴⁶⁵ UN General Comment No. 17, *ibid*.

⁴⁶⁶ J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 76 para. 2.42.

⁴⁶⁷ Suthersanen, *Public interest rule* (2005), *ibid*, fn. 20, at p. 2; Academic authors are not always profit driven. Their interests lie in wide dissemination of their works, which coincides with the public interest in wide dissemination and access. See Reto M. Hilty, *et al*, 'European Commission: Green paper: Copyright in the knowledge economy-comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law', [2009] I.I.C. 309, 313; see also, Dina Nath Malhotra, 'Copyright: a perspective from the developing world', in P. G. Altbach, *Copyright and development: inequality in the information age*, *ibid*, fn. 127 at p.39.

⁴⁶⁸ Refer to the chapter 2. The stationers' company in England, for instance used this approach in lobbying for greater protection for the rights of its members to print and reprint books.

⁴⁶⁹ For an outline of the role of a publisher, see John Feather, *A history of British publishing*, (Routledge, London and New York 1988) vii- viii. Professor John Feather explains that a publisher is, in the literal sense, the capitalist of the world of books. There are currently debates raging as to what the role of a publisher is in the digital environment now that it is possible to do self-publishing using the Internet; see

adequately explain the current *Berne-plus* wave of countries legislating for durations of copyright higher than the Berne minima.⁴⁷⁰ The returns on investment in educational works does not require such long periods of protection: in any case, the wider gains from having the works accessed for educational purposes after a reasonable period of time, far outweigh the gains from guaranteeing the profiteering of right holder publishing corporations.

Unfortunately, as has been observed, this is not helped by the fact that reforms in copyright legislation have been influenced largely by the corporate lobbying⁴⁷¹ and pressure from the entertainment industry yet these reforms affect other activities including education. Moreover, returns on investments are only looked at from the narrow point of direct economic interests to the multinational publishing corporations. The exploiters' argument does not take into account the fact that the more there is access and use, the higher the chances of creating more authors who supply them (publishers and the public as a whole) with other works going by the principle of inter-generational equity.⁴⁷² Further, the more there is access to educational works, the more there is demand for other cultural goods such as entertainment goods and even more books for advanced study and research.⁴⁷³

also Willem Grosheide, 'Copyright law from a users' perspective: access rights for users', [2001] E.I.P.R.] 321,322.

⁴⁷⁰ The Berne Convention states that it only sets minimum requirements and allows Union countries to legislate in excess of the Berne minima. See for instance article 7(6) of the Berne Convention allowing for longer durations of copyright protection.

⁴⁷¹ G Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Chaltenham 2008) 8.

⁴⁷² Senftleben 2004, (fn 207) 31ff; Okediji/ICTSD (2006) at pp. x-xi does not use the language of inter-generational equity but emphasizes the importance of access for new authors.

⁴⁷³ For a supporting view, see Philip G. Altbach, *The subtle inequalities of copyright*, in Philip G. (ed) *Copyright and development: inequality in the information age.*, ibid, fn. 127, at p.7 argues that permissiveness in the short run may yield more profits in the long run; Burrell and Coleman (2005), ibid at p. 191 argue that "... the creation of and market for at least some works are partly determined by the

Works in the public domain can be reproduced through reprinting and or through digital reproduction and cheaply disseminated by governments of less developed countries to promote the right to education. Countries like Uganda are pursuing policies for realization of the Millennium Development Goals. It should be borne in mind that the Berne Convention in 1886 provided for only a term of life plus seven years.⁴⁷⁴ It is our submission that the shorter term of protection was necessitated by the development needs of members of the Union at the time. The strengthened copyright protection that was agreed on by countries in Europe and the MDC generally at the last Berne Revision Conference was only made possible because the previously less developed countries of Europe such as the Scandinavian countries had by then closed the development gaps that existed between them in 1886. Otherwise, by 1886 some of the initial European signatories to the Berne Convention needed access to educational works as a matter of serious national interest and hence strongly advocated for certain compromises.⁴⁷⁵

It is my argument that the flexibilities such countries needed then are what contemporary less developed countries need. However, the leading copyright countries of the more developed countries of the world, with lobbying from rent seeking groups of capitalistic exploiters in the culture industries (particularly the entertainment industry and publishers) have been ratcheting up the term of protection upwards oblivious of the

levels of education. For publishers of educational books, any short-term market loss would be compensated by long or even medium term market growth. In addition to the changes in consumption needs of the formally educated, parents who have received an education are more likely to educate their children.”

⁴⁷⁴ It was in 1908 that the present term of life plus 50 years was agreed on at the Berlin Conference. Germany that had initially opposed long periods of protection turned around and advocated for a longer period. See chapter four.

⁴⁷⁵ ‘Ricketson and Ginsburg, 2006 (fn 279, above) 31, para. 1.31.

needs of less developed countries. Though sounding pessimistic, it is possible to expect that even after securing the current TRIPS-*plus* term of life plus 70 years in the European Union and the United States of America, among others, these groups may ask for further an extension.⁴⁷⁶ After all, further increases of the term of protection are allowed and encouraged by the Berne Convention and TRIPS.

In their report on Copyright and Access to Knowledge, Consumers International has commented on the advice of WIPO with regard to the duration of copyright. The report condemns as wrong, the initiative taken by WIPO to indicate that the current *trend* is to protect copyright for life plus 70 years after the death of the author.⁴⁷⁷ The criticism is well placed considering that such duration of protection can only be Berne *plus* because it is neither part of the Berne Convention nor part of the Berne *acquis*. This position is acknowledged by WIPO as being in excess of the mandatory minimum.⁴⁷⁸ By choosing to advise countries, including less developed countries to rely on international tendencies rather than the letter of the Convention, WIPO thereby manifested further that it is solely led by the interests of a rights holders and has little regard to national development concerns. Moreover, the reference to ‘international’ practice is possibly a reference to the European Union and the United States of America.

⁴⁷⁶See prediction by Peter M. Gerhart, ‘Why law making for global intellectual property is unbalanced’, (2000) E.I.P.R. 22(7), 309, 311. For instance, the Mickey Mouse owners are likely to explore ways of asking for further extensions of their copyright when it expires.: one way is by transforming the nature of the work or the manner in which the out-of contract work is presented to the public. For this observation, see Uma Suthersanen, ‘A2K and the WIPO Development Agenda: time to list the “public domain”’, UNCTAD-ICTSD Policy Brief Paper 1 December 2008, (see fn. 92 above) endnote 26.

⁴⁷⁷ Consumers International Report (2006), *ibid.*, fn. 1 at p.22.

⁴⁷⁸ WIPO, ‘Understanding copyright and related rights’, at: <http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf>, (last accessed 20 June 2014) 13.

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This is not in the national interests of less developed countries like Uganda who are implementing time-bound targets and international obligations under the Millennium Development Goals (MDGs)⁴⁷⁹ that call for access and utilisation mechanisms that would be possible when works get into the public domain more sooner than later. By overly delaying when works fall into the public domain, international copyright law is therefore in direct conflict with the international human right obligation for promoting the right to education. It should be pointed out that though it is allowed to implement the right to education progressively, yet owing to its importance, further underscored by international agreement in the form of MDGs, all of which are underpinned by the right to education, immediate rather than future access is needed. Access to educational materials should be treated differently to demand for access to cultural works of a purely consumptive value such as entertainment goods. Education is not only part of the 'greatest good' (economic development) but is also instrumental in realising that 'greatest good'.

The wisdom of the founding fathers of the international copyright regime should be followed since though animated by a desire to give maximalist protection to authors, they nevertheless found it necessary to provide for only a limited term of copyright. This was good for national public policy purposes such as education and for supporting other authors who have to rely on building on the ideas of others. The problem is that the duration has been increased considerably over time to satisfy copyright exploiters. Less developed country legislators would be well-advised to resist demands for ratcheting up the term of protection of copyright.

⁴⁷⁹ For details about the Millennium Development Goals, see chapter Two, section 2.2.2. Goal number 2

3.6 Uganda and the term of protection of copyright

According to section 13 (1) of CONRA,⁴⁸⁰ the economic rights of an author in relation to a work are protected during the life of the author and fifty years after the death of the author. In other words, the legislature opted not to go for the TRIPS-plus terms that have been adopted in the United States of America and in the European Union, among others. The impact of this decision on the question of access to and utilisation of educational materials is however, of limited value since this researcher argues that even a term of fifty years is so long. Less developed countries need access to and utilisation of educational materials to deal with *current* human rights and development needs and not just for the future.

3.7 Some reflections and conclusion

This chapter was intended to investigate and critique the exceptions under the international copyright framework. The overall aim was to answer the question: In view of the exceptions and flexibilities available under the international copyright regime, what, if any, doctrinal tensions exist between copyright and the human right to education? It was hoped that the analysis would help establish whether the international exceptions and flexibilities are fit for the purpose of enhancing education for economic development. To meet this objective, I had to investigate what exceptions and flexibilities if any are available for educational purposes.

is to achieve universal primary education. The other goals are all underpinned by the right to education. See < <http://www.undp.org/mdg/goal2.shtml>>, (last accessed 20 June 2014).

⁴⁸⁰ Available at: < http://www.wipo.int/wipolex/en/text.jsp?file_id=141975> (last accessed 7 February 2014).

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Our findings reveal that there are various exceptions that were intended to provide a ‘balancing’ mechanism to minimise the conflict between the human right to education and copyright. However, I have argued that many of the available exceptions have qualifications that are not clear and may not provide a firm foundation for making optimal exceptions at the national level to support education especially in least developed countries like Uganda. Some exceptions are express while others implied mainly under what is called the Berne *acquis*. In this group is the minor reservations doctrine that was recognised even by the WTO Dispute Settlement panel. The leading exception, 10(2) BC is cross-cutting in the sense that it affects a number of exclusive rights while others attach to individual exclusive rights. I investigated the quotation right and its importance in education.

There are exclusive rights that do not have express or implied rights under the Berne *acquis*. However, I argued that in view of the anticipation of additional rights by the Berne Convention and even TRIPS, that it would be untenable to argue that such anticipated and permitted ‘Berne-plus’ rights are not subject to any regime of exceptions including the cross-cutting teaching and quotation exception of article 10(2), of the Berne Convention. It was argued that since article 20 BC allows countries to make agreements creating more rights, an implicit power to make exceptions should be implied as accompanying such power. Regarding an exception to the distribution right, the chapter finding was that a doctrinal problem would arise for Uganda, our case study that is not a contracting party to the WCT; it is not tenable to assert that the WCT is the basis for it to make any exceptions to the distribution right that it guarantees in its copyright legislation, CONRA. Attempts to resolve this problem were suggested based

on the fact that Article 10(2) of the Berne Convention engages a number of exclusive rights.⁴⁸¹ However, a better ground would be relying on Article 13 of TRIPs.

With regard to the translation right, our finding was that save for the exception contained in the Berne Appendix, there is no other explicit exception to the translation right under the international copyright framework.⁴⁸² There is however an implied exception, that in terms of the law governing interpretation of treaties, amounts to a subsequent ancillary agreement of Berne Union members (the *Berne acquis*).⁴⁸³ Reference was made to the historical path followed in establishing an implied exception to translation right; one suggested solution was by arguing that translation is a kind or species of reproduction of a work and that hence the former must be subject to the same exceptions as the latter. A pertinent issue related to the implied exception to the translation right was whether the implied exception also implies a right to reproduce copies of the translated materials. It was argued that without such a conclusion, the implied exception to the translation right would be redundant. It was our finding that the need for translated works would require an express exception along the lines suggested by Professors Ricketson and Ginsburg to create more certainty and provide better guidance at national level to copyright importing developing countries like Uganda, our case study.

Regarding an exception to Article 12 Berne Convention that creates the “alteration” or derivative works exclusive right, our finding was that the Berne Convention does not

⁴⁸¹ Section 3.4.3.

⁴⁸² Section 3.4.4.

⁴⁸³ Section 3.4.4.

provide an exception to this right. Accordingly, I concluded that in the absence of an exception under “the Berne *acquis* escape” route, the authority for making exceptions to the Article 12 Berne Convention right should be the more general provisions of Article 13 of the TRIPs Agreement.⁴⁸⁴ As argued with respect to implied exceptions to the distribution right in the case of a country like Uganda, our firm submission is that the one “big exception” permitted by Article 13 TRIPS is enough to accommodate the creation of an exception in this situation. This argument was made by borrowing one of the arguments of the USA team in the Section 110(2) US Copyright Act dispute before the WTO where it was argued to the effect that Article 13 TRIPS is straight forward and clear and talks about exceptions to exclusive rights: it does not have any qualifying words. In effect, its wording makes it a general exception.⁴⁸⁵

Further, this chapter found that with regard to an exception to the wider communication to the public right established by the WCT I found that Article 13 of TRIPS should be the basis for an exception for a country like Uganda that is not a signatory to the WCT but has nevertheless included this right in her copyright legislation. An exception to this right would be useful especially for higher education. It was argued that using intranets would be facilitated by such an exception. Another key finding was that contrary to a WIPO analytical document, there is no authority for stating that the minor reservations doctrine applies to the wider communication to the public right as contained in the WCT. The major argument was that it is one thing to apply the doctrine to new exceptions to rights that existed when it was agreed on, and another to attempt to apply

⁴⁸⁴ Paragraph 3.4.5.

⁴⁸⁵ Paragraph 3.4.6.

it to rights not earlier envisaged.⁴⁸⁶ In short, the minor reservations doctrine is not a general exception.

On flexibilities, in the form of the idea-expression dichotomy, the duration or term of copyright and the exhaustion doctrine are important flexibilities that ought to be taken advantage of by less developed countries. The idea expression dichotomy, I found, would enable creation of locally relevant educational materials by using the available ideas since they are not protected. The exhaustion flexibility would be helpful in sourcing cheap works from other jurisdictions notably India and even our neighbours Kenya and Tanzania. I have seen however that the practical significance of the duration of copyright flexibility is very limited in facilitating access to educational materials since the minimum term is set at a very high level. This research has considered some economic research that proposed that the copyright term should be a 15 years on a non pma basis. This would be desirable given the current need for educational materials and rapid changes that occur in some of the fields of knowledge particularly the sciences. The main criticism of the term flexibility was that it does not allow education for all for the present generations.

I have alluded to the view that under the international copyright regime, protected exclusive rights are required to be interpreted with a maximalist approach unlike exceptions that are to be interpreted with a minimalist approach. Such a trend may not favour use of copyright exceptions to enhance education in less developed countries that need to promote economic development as the greatest good of the greatest number. I

⁴⁸⁶ Paragraph 3.4.6

also noted that exceptions were approached in a very unsystematic manner with the result that some exceptions are simply implied but not explicit.

The contours of the exclusive rights guaranteed to right holders under the international copyright system are far clearer than the contours of the few largely permissive exceptions that are intended to protect the right to education. In contrast, it is clear that the preference for a ‘maximalist’ pro-rights interpretation⁴⁸⁷ of exclusive rights as opposed to a narrow interpretation of exceptions makes it difficult, especially for less developed countries that are net importers of educational works, to promote the right to education.

Fortunately, the needs of users are finally being looked into under the WIPO Development Agenda, and educational exceptions have been specifically targeted. However, I am alert to the fact that international copyright reform is a notoriously hard, slow and acrimonious process.⁴⁸⁸ Current efforts such as the WIPO Development Agenda, that has led to a number of studies aimed at reviewing exceptions (including specifically on educational exceptions) are commendable but may take a long time to achieve.⁴⁸⁹ Should they eventually be attained, one can only hope that this time round, the result will not be made as complex to utilise as the Berne Appendix for developing countries (discussed in Chapter 6).

⁴⁸⁷ Ricketson and Ginsburg, 2006 (fn 279, above) 852 para. 13.102.

⁴⁸⁸ Jonathan Griffiths (2009), *ibid.*, fn. 12, at p. 11; Kamiel Koelman (2006), *ibid.*, fn. 430, at p. 411.

⁴⁸⁹ Kamiel J. Koelman (2006), *ibid.*, fn. 430 at 411 had expressed the fear that the topic of exemptions was too sensitive and might never get to the negotiating table.

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In the meantime, there is need for less developed country legislatures to follow the growing body of South-friendly advice on designing appropriate educational exceptions and thereby ensure maximum utilisation of the available exceptions and flexibilities in international copyright instruments despite the minimalist approach to ‘users’ rights. Our main argument is that classical utilitarianism requires that a “maximalist” approach should be adopted when making, applying and interpreting copyright legislation in less developed countries to ensure maximum utilisation of all available exceptions and flexibilities that exist under the current “minimalist” approach to users’ rights.⁴⁹⁰

It is important that less developed countries in the meantime make maximum use of the exceptions and flexibilities available under the international copyright system. However, the maximalist approach that I advocate for with regard to copyright exceptions may achieve only limited results depending on the interpretation of the three-step test and other provisions in international law that cater for the interests of users. These are discussed in the following chapter (4).

⁴⁹⁰ ACA2K Report, (June 2009), at: < http://www.aca2k.org/attachments/281_ACA2K-2010-

Access%20to%20knowledge%20in%20Africa-s.pdf>, (last accessed 10 February 2014); Uma Suthersanen, Stakeholder analysis, *ibid*, fn.7, at p. 1.

Chapter 4: The three-step test: a less developed country perspective

4.1 Introduction

In the previous chapter the relevant educational exceptions under the international copyright framework were examined. This chapter seeks to answer the question: How, if possible, should the three-step test be interpreted to meet the educational and development needs of less developed countries? The three-step test that first appeared in the Berne Convention and later in the TRIPS Agreement is rather controversial in copyright law. Accordingly, this chapter will begin with a brief review of the test's background, raise some key general issues of controversy about the test before analysing the individual steps in light of how they have been interpreted and the implications this may have on exceptions that a less developed country like Uganda can rely on to promote the fundamental human right to education.

In other words, I shall deal with the interpretational problems surrounding the application of the three-step test. What was the aim of developing the test? Is it incurably defective and to who is it addressed are some of the issues that shall be canvassed. Moreover, this chapter will examine whether the three-step test in TRIPS Article 13 applies to all the specific exceptions within the Berne Convention.⁴⁹¹ This will lead us to the question of whether exceptions made at the national level for promoting the human right to education in a less developed country like Uganda would be subject to the three step test. In the event that is the case, I shall discuss , if at all, the Benthamite utilitarianism philosophy, as applied in this study could help the human

⁴⁹¹ With the exclusion of the exceptions in the Berne Appendix for Developing Countries which are dealt in in Chapter 6; the issue will specifically be dealt with in section 6.16.2 of the chapter.

right to education to trump the three-step test on the basis of promoting the greatest good of the greatest number.

Related to the issue of interpretation of the three-step test as the overarching restriction imposed on exceptions is the question of the relevance of Articles 7 and 8 of the TRIPS Agreement; do these provisions provide a weapon for trumping the three-step test to solve the potential problem of a narrow interpretation of the three-step test and allow for broad access to educational materials in Uganda? This chapter will also draw inspiration and lessons from the access to medicines debate to suggest ways for interpreting the three-step test in copyright law to support access and use of educational materials for economic development in less developed countries. Overall, I shall seek to establish how the three-step test can be interpreted from a less developed country perspective.

The analysis will be done with the aid of judicial decisions interpreting the TRIPS Agreement, particularly, those aspects that are directly relevant to access to educational materials, notably exceptions and the three-step test doctrine. Central to this analysis will be the World Trade Organisation (WTO) Appellate body interpretation of the TRIPS three-step test in the *United States - Section 110(5) of The US Copyright Act*: filed by the European⁴⁹² that will be examined. It is hoped that this decision will be

⁴⁹² Case WT/DS160/R: United States Section 110(5) Copyright Act: hereafter, "WTO Panel Report". Decision available at: <http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf>. (last accessed 10 January 2014).

helpful in refocusing attention to the appropriate interpretation of the three-step test⁴⁹³ and other relevant principles from a less developed country perspective.

A proper interpretation and application of international copyright law principles such as the three-step test, using a teleological approach, where possible, is one that would ensure promulgation, and judicial interpretation, of exceptions for access and use of copyrighted works for educational purposes thereby promoting the right to education in less developed countries. While providing helpful insight into how the exceptions discussed in the previous chapter can be constructed, this instant chapter will provide a background for examining whether Uganda's copyright legislation is compliant with the three-step test. It is imperative to start with a brief historical background.

4.2 Brief history

The three-step test was introduced first at the 1967 Stockholm Berne Revision Conference. It was a diplomatic compromise package that had to serve in lieu of listing allowable exceptions to the reproduction right that was incorporated at the 1967 Stockholm Berne Revision Conference.⁴⁹⁴ National legislatures, policy makers and

⁴⁹³ A group of eminent copyright lawyers have signed a Declaration on the interpretation of the three-step test. See <www.ip.mpg.de/ww/en/pub/.../declaration_on_the_three_step_cfm> (last accessed 10 March 2013).

⁴⁹⁴ Guido Westkamp, The "three-step test" *ibid*, fn. 81, at p. 5; S Ricketson and JC Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, (2nd ed. Oxford University Press, Oxford 2006) hereafter, "Ricketson and Ginsburg, 2006" 759 ff. See generally, Charlotte Waelde and Hector MacQueen, 'The scope of copyright' (Intellectual Property Institute, London 2003) 7 para 1.15; Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 95; Suthersanen, 'Public interest rule' (2005), *ibid*, fn. 20 at p. 3. Charlotte Waelde and Hector MacQueen argue that introduction of the three-step test was a recognition by the framers of the Convention that copyright could be a very strong right and thus should be limited on ground of public policy, quoting specifically, the ever increasing need for mass instruction. The learned authors state that: "it is clear that Article 13 TRIPS (the TST) is a recognition that copyright is limited inherently by the public interest, and that exceptions and limitations must exist." This is backed by the

judicial bodies⁴⁹⁵ must ensure compliance with the general restriction contained in the three-step test.⁴⁹⁶ The original version of the test, as enunciated in the 1967 Stockholm Revision of the Berne Convention Article 9(2), was intended to apply to exceptions to the reproduction right.⁴⁹⁷

Article 9(2) of the Berne Convention provides:

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

Subsequently, the TRIPS Agreement in Article 13, while borrowing heavily from the language of Article 9(2) of the Berne Convention, extended the application of the test to all exceptions.⁴⁹⁸ The three-step test also appears in two versions in the WCT Article 10 as well as in the WIPO Phonograms and Performances Treaty (WPPT). According to the TRIPS version:

“Members shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”. One notable

history of the test: it was introduced in the process of less developed an exception to the reproduction right. It is thus agreeable that the framers of the three-step test were alive to the potential of monopoly rights granted by copyright to negatively impact at the national level on national needs of access to and utilisation of protected works, including for educational purposes. This was thus one of the few instances when the twin aspect of the public interest-creation and dissemination versus access and utilization was recognized, as opposed focussing on the one aspect of stimulating creativity and facilitating returns on investments to lead to more works. Rather, as Professor Hector MacQueen observed, it was a reference to the potential restrictive impact of copyright on users’ access to cultural goods including educational books.

⁴⁹⁵ Nothing in this paragraph should be taken as a discussion on the issue of which state organ is the addressee. See discussion on that issue in para. 3.27.2.4. Rather, it is to show that these bodies or organs have to grapple with the issue at one point or the other in the course of their duties.

⁴⁹⁶ Jonathan Griffiths (2009), *ibid.*, fn. 12 at p. 1.

⁴⁹⁷ For a detailed history see Senftleben 2004, (fn 207) particularly chapter 3.

difference is that the TRIPS version of the test is concerned with the legitimate interests of right holders, not just the authors as in the Berne Convention.

Among its controversial aspects the biggest problem of concern to this study is to find out if the interpretation of the three-step test would affect the ability of less developed countries to craft optimal access and utilisation provisions needed to promote the right to education for national economic development. Does the test have a ‘show-stopping’ status or is its effect simply overstated?

4.3 Some key issues

4.3.1 Vagueness and purpose of the test

As can be seen from the wording of the test, it is shrouded in vagueness. According to some commentators, the vagueness in the wording of the three-step test was by design. Firstly, as a diplomatic compromise in lieu of a listing of all allowable national exceptions to the reproduction right, the test had to be vague. Further, as a standard, the “test” had to be sufficiently imprecise to be ‘uncontroversial’ and to accommodate the wide range of exceptions in existing national laws that had to be preserved since national legislatures would not give them up.⁴⁹⁹ Consequently, it is hard to ascertain the exact meaning of the test and how it should be applied to exceptions. Secondly, because authors and other rights holders (but more so, those deriving rights from authors, such as publishers), demand that exceptions be narrowly construed. This in turn has been

⁴⁹⁸ Gervais, TRIPS (2008), *ibid*, fn. 28, at p. 238 para. 2.119: see also para. 2.120 at p. 239; J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 869 para. 22.10; Gervais, Reverse TST, *ibid*, fn.3: Burrell and Coleman (2005), *ibid*, fn.11, at p 217

⁴⁹⁹ Jonathan Griffiths (2009,) *ibid* at p. 12.

interpreted to mean that the test should be restrictively interpreted and applied.⁵⁰⁰ As a result, it has been argued that the test has not been interpreted in a balanced way that would help create an optimal environment for meeting present needs of educational users of copyrighted material in less developed countries. It has so far mainly been construed as having the role of ensuring narrowly constructed and construed exceptions to exclusive rights.⁵⁰¹ This can be explained as being within the overall scheme for strong protection of IPRs- with maximalist rights but minimalist exceptions. In the process, only the interests of authors and other right-holders have been given prominence. Accordingly, from a users' perspective, the three-step test has been restrictively applied to curtail the discretion enjoyed by national legislatures in the making and interpretation of exceptions to copyright law to meet national policies such as pursuit of education.

The commentary by the group of copyright experts noted among others that “the Three-Step Test” has already established an effective means of preventing the excessive application of limitations and exceptions”.⁵⁰² Thus, while there was recognition of the need to recognise exceptions, the primary objective for including the three-step test was to put extant and future exceptions to that much-valued author's exclusive right of reproduction into a straitjacket that ensured that authors' interests are not wantonly

⁵⁰⁰ Jonathan Griffiths, ‘Preserving judicial freedom of movement –interpreting fair dealing in copyright law’, [2000] I.P.Q. 164, at p. 168; Ricketson/WIPO, *ibid.*, fn. at p. 46; Xalabarder, *ibid.*, fn.13, at p. 110.

⁵⁰¹ The Declaration on the Three-Step Test observes in this regard that the test has been utilized to this restrictive effect.

⁵⁰² C Geiger, *et al*, Declaration on a balanced interpretation of the “Three-step test” in copyright law, see paragraph 3 at page 1. (Max Planck Institute, 2012) Available at: <http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf>, (last accessed 10 March 2014).

eroded.⁵⁰³ To borrow from Dr Guido Westkamp,⁵⁰⁴ the test was and is ‘a market allocation and reservation tool, designed for limiting national legislatures when enacting exceptions to exclusive rights not to encroach on those markets that are or might be exploited by rights holders (as extended by TRIPS).’ While exceptions were intended to impose restrictions on copyright for the benefit of users, the three-step test was introduced to control the contours of the exceptions to copyright. As a result, and not unexpectedly, the three-step test has since been applied with little regard to the idea of balancing private rights with public welfare objectives that undergird copyright law.⁵⁰⁵

4.3.2 *To whom is the three-step test addressed*

European copyright lawyers have been engaged in debate as to whom the three-step test is addressed at the national level- the legislature or the judiciary?⁵⁰⁶ This researcher asserts that this is indeed a European issue that has arisen because of the way the three-step test has been transposed, partially or wholly into a number of EU copyright and

⁵⁰³ Jonathan Griffiths (2009), *ibid*, fn. 12 at p. 21. Jonathan Griffiths warns that the three-step test should be prevented from serving as a straitjacket on the development of copyright law in the face of rapid technological change.

⁵⁰⁴ Guido Westkamp, *The “three-step test”*, *ibid*, fn. 81, at pp. 42, 44.

⁵⁰⁵ Martin Senftleben for instance states that: “viewed from a functional perspective, the three-step test sets limits to limitations”. See, Senftleben 2004, (fn 207) 1. Senftleben however, initially states that the fundamental problem that the three-step test concerns is the delicate balance between grants and reservations of copyright law. If this were the primary thing, the initial version of the three-step test contained in the Berne Convention would have applied, like the subsequent versions under TRIPS and the WCT, to all exceptions and rights, including those preceding the exception to the reproduction right. This is true even if it were to be argued that the reproduction right was regarded as the primary exclusive right, which arguably it was not since it was not initially provided for. On the other hand, other rights, like the translation right, were provided for and efforts were made to limit them, to the extent of initially not fully assimilating this right to other rights. The only possible counter argument is to say that all those other exceptions were viewed as forms of reproduction, which argument is not wholly tenable. Senftleben further notes that at the interface between both sides of the copyright balance (authors’ side and users’); the three-step test has to accomplish the task of preventing copyright limitations from encroaching upon author’s rights. Senftleben (2004), *ibid*, 5. The use of the unqualified words ‘encroached upon’ is however, not accurate since copyright law has never had as its mission the task of ensuring that exclusive rights guaranteed to authors are kept sacrosanct or intact. Rather the concern has been to curtail the degree of “encroachment”.

⁵⁰⁶ Guido Westkamp, *The “three-step test”* *ibid*, fn. 81, at p. 1, 25; Jonathan Griffiths (2009), *ibid*, fn. 12 at pp. 4-5: see footnote 25 for other articles cited by Jonathan Griffiths.

related rights harmonisation Directives.⁵⁰⁷ For a country like Uganda, the issue should not arise as the only relevant wording is that in the TRIPS Agreement and the Berne Convention. The wording of Article 9(2) of the Berne Convention is that it “shall be a matter for legislation in the countries of the Union...” It is submitted that this leaves no doubt as to whom the addressee is. Even Article 13 TRIPS does not, pose a problem: it is addressed to Members; and a Member’s responsibilities, in a country like Uganda, where the law is not self-executing, is discharged by the legislature. The starting point for analysing whether Uganda complies with her treaty obligations is not by looking at individual court decisions but the legislation enacted by parliament. It is submitted that even in a country where treaties are self-executing, the act that determines which treaty comes into effect and when (for instance, accession to the treaty) is not left to the courts.

Nevertheless, as a leading commentator has pointed out, courts whether in jurisdictions where treaties are self-executing or not, follow a tradition of ensuring that national laws are interpreted compatibly with treaty obligations.⁵⁰⁸ A Ugandan court may therefore have to grapple with this controversial matter in a practical case. This is however, not the same as the court taking on the primary responsibility of ensuring compliance with

⁵⁰⁷ For instance, the EC Software Directive.

⁵⁰⁸ Jonathan Griffiths (2009), *ibid*, fn. 11 at p. 22; see Onoria, Henry, ‘Application of international law in domestic courts: a perspective from practice’, (Munyonyo, Kampala 29th July 2010,), who points out that with regard to interpretation, it is a principle generally recognized in national legal systems that in the event of doubt, the national rule is to be interpreted in accordance with the state’s international obligations (p. 2). He further observes, at p. 3, to the effect that whereas the Constitution recognises the importance (need to respect) international law treaties to which Uganda is a party, Uganda’s constitutional courts (the two courts with powers to determine matters of interpreting the Constitution are Court of Appeal sitting as the Constitutional Court of first instance and the supreme Court sitting as the Constitutional Court of Appeal) are not empowered (expressly) to refer to treaties to which Uganda is a party in interpreting the Constitution and especially the bill of rights. He notes however that the initial reluctance by the Constitutional Court had in the case of *Paul Ssemwogerere and 5 Others v Attorney General (Constitutional Petition No. 5/2002 CC (unreported))* was gradually abandoned not only by the Constitutional Court of Appeal (Supreme Court) but also the Court of Appeal (Constitutional Court) and by the High Court.

the Berne Convention and TRIPS. This researcher however submits that the duty on the courts is secondary while the primary duty is on the legislature.

4.3.3 Interests of users

Another cause of the controversy surrounding the three-step test as contained in Article 13 of TRIPS and even Article 9(2) of the Berne Convention is the absence of a reference to the balancing the interests of rights owners with those of third parties, especially users. The wording of the three-step test in copyright law is thus different to similar provisions in TRIPS with respect to exceptions to industrial property law: TRIPS provisions dealing with trademarks, industrial designs and even patents recognise the need to take into consideration the legitimate rights of third parties when constructing exceptions to protected rights.⁵⁰⁹ This aggravates the conflict between copyright and the right to education and works hardship on the part of educational users in a least developed country like Uganda. Such wording has the opportunity for clarifying the interests of users. It also perpetrates the tendency in international copyright circles to disproportionately focus on authors and right holders' interests.

On a positive note, some eminent scholars however, have argued that this omission does not detract from the necessity of taking such interests into account. Rather, they argue, it indicates an omission that must be addressed by the judiciary.⁵¹⁰ This would help address the needs of users including educational users in less developed countries. With

⁵⁰⁹ Article 17 with respect to trademarks, article 26(2) with respect to industrial designs and article 30 dealing with patents. See Jonathan Griffiths (2009), *ibid* fn. 12 at p.3; for an analysis of the implications of the different wording of Article 30 of the TRIPS Agreement with respect to patents, see Daniel

due respect, however, issues of necessity should be distinguished from issues of legality. The mischief to be addressed is the law itself. Courts in many less developed countries may not feel inclined to practise judicial activism. The net result is that should the issue of the three-step test compliance arise in a real dispute, a court may not factor in the interests of users.⁵¹¹ The only other room for manoeuvre on this point is to invoke the public policy provisions of the TRIPS Agreement, which have hitherto not been infused with meaning as to be applied in practice (discussed below).

4.3.4 TRIPS three-step test version vis a vis Berne Convention exceptions

Another pertinent issue is the relationship between the TRIPS Article 13 and Berne Convention Article 9(2). There is concern about whether the TRIPS version of the three-step test applies to other Berne Convention exceptions including those that form part of the Berne *acquis* notably, the implied exception to the translation right and the “minor reservations” exception (discussed in Chapter 3). My discussion is predicated on the view that the TRIPS three-step test contained in Article 13 applies to all exceptions.⁵¹²

Gervais, *the TRIPS Agreement: drafting history and analysis* (Sweet and Maxwell, London 3rd ed. 2008) at p.p. 380-383.

⁵¹⁰ Declaration on the “Three-Step test”, *ibid.*

⁵¹¹ In the Ugandan case of *Uganda Performing Rights Society Limited v Fred Mukubira* Misc. Application 818 of 2003 (Arising from High Court Civil Suit 842 of 2003), reported in *Uganda Commercial Law Reports 2002-2004* (2005) 476-483 at 476.

before Justice Geoffrey Kiryabwire of the High Court Commercial Division (as he then was) (2005, HCCS NO.), the court was not interested in analysing the evidence as much as it was in sending a strong signal that copyright infringement would not be tolerated).

⁵¹² Ricketson and Ginsburg, 2006 (fn 494, above) 852 para. 13.101, share this view to a certain extent though they give a mixed interpretation; Senftleben 2004, (fn 207) 118, and; Ricketson/WIPO, *ibid.*, fn.3, at p. 50; WTO Panel Report, *ibid.*, fn.21 at para. 6.80. See also J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 520, para. 10.02; see also pp.528-529 para. 10.13, (though hesitantly, in my view).

4.3.5 *Possibility of additional exceptions*

Related to the above is the issue of the possibility of new and possibly wider exceptions under the TRIPS Agreement. Some commentators argue that the interaction between the “Berne three-step test” and the “TRIPS three-step test” dictates that even if more generous exceptions were allowable under the latter agreement (TRIPS), the same would be open to challenge if they derogated from author’s rights in ways proscribed by, or that give less protection (to authors) than the Berne Convention.⁵¹³ The argument is that the non-derogation clauses in TRIPS and in the Berne Convention do not allow for intrusion into the exclusive rights of authors beyond what was secured under the Berne Convention. This trend of argument renders ineffective the flexibility to consider other interests protected by the TRIPS Agreement with regard to copyright, to allow a more user-friendly/balanced interpretation of copyright exceptions. To make matters worse, less developed countries consider themselves bound to enact only exceptions along the lines of those in other countries especially the more developed countries, yet their needs and means are considerably different.

Less developed countries and more so the least-developed ones should be able to come up with new exceptions relevant to their socio-economic development needs as long as they comply with the three-step test in line with a preferred less restrictive interpretation of the test advocated for in this part of the chapter.

The non-binding but heavily persuasive restrictive interpretation of the WTO Panel also poses a big roadblock for allowing new exceptions. The only way that the problem can be circumvented in the meantime is, as suggested by Jonathan Griffiths, through a

judicial pronouncement by a highly respected court such as the ECJ or ultimately, through international copyright reform (difficult as it may be).⁵¹⁴ On-going reform efforts under the WIPO Development Agenda also present an opportunity for a long lasting and negotiated solution. In the meantime however, less developed countries are indeed advised to exploit the current ambiguities to interpret and apply the three-step test in line with their local circumstances and needs.⁵¹⁵

4.3.6 *Is the three-step test incurably defective*

Concerned with the present restrictive approach to the three-step test, various proposals have been made as to how the test can be construed in a more user-friendly way that ameliorates its rigours.⁵¹⁶ Some scholars for instance, argue that despite the absence of an explicit requirement to take into consideration the interests of third parties, it should still be possible for courts to take into account such interests.⁵¹⁷ Since users are not uniform, this would at the national level, allow consideration of less developed country users' needs including those based on fundamental human rights, such as the empowering right to education. However, welcome as this proposal is, it is not the legally safest way of curing legislative omissions, whether at national or international level.

⁵¹³ Gervais, TRIPS (2008), *ibid*, fn. 28, at p. 237, para. 2.119; See also Sterling *ibid*, 869 para. 22.10 who argues that there is no such possibility envisaged as regards rights created under the Berne Convention.

⁵¹⁴ J. Griffiths, TST 2010, *ibid*.

⁵¹⁵ Uma Suthersanen, *Public interest rule*, *ibid*, fn. 20 at p.5.

⁵¹⁶ For a summary of these proposals, see Jonathan Griffiths (2009), *ibid* fn. 12 at pp. 11-14. The suggestions range from a reverse reading of the test to redrafting; for the latter proposal, see Uma Suthersanen, *Human rights and international copyright law*, in Jonathan Griffiths & Uma Suthersanen (eds), *Copyright and free speech*, Oxford University Press, (2005), at p.121ff. See para. 5.53 who proposes inclusion of a requirement to take note of the need to a balance between the interests of rights owners and the larger public interest; See also, Suthersanen, *Public interest rule* (2005), *ibid*, fn. 20, at p. 24.

⁵¹⁷ Declaration on the Three-step test, *ibid*.

Jonathan Griffiths however, expresses the rather cynical view that the three-step test may be fundamentally flawed and unsuitable to providing an analytical framework for the resolution of disputes concerning the scope of copyright exceptions.⁵¹⁸ Put in a legal practitioner's language, his argument is that the three-step test may be *incurably defective*. The learned commentator nevertheless makes some proposals as to how the rigours of the currently restrictive interpretation of the three-step test might be avoided at least in the context of the European Union. In brief, for a European solution, he suggests a pronouncement by the European Court of Justice that the three-step test does not have the restrictive interpretations adopted by the WTO Panel and various national courts within the EU. But what then should be done by a less developed country like Uganda that would be concerned about avoiding trade reprisals by other WTO Member countries and is thus interested in ascertaining the correct meaning, if any, of the test? Perhaps, WTO rules permitting, the country should arrange to have a complaint filed against it before the WTO by another less developed country like Kenya, which presently has narrower copyright exceptions (akin to those in Uganda's repealed Copyright Act that was based on the 1911 United Kingdom Copyright Act fair dealing provision⁵¹⁹). One foreseeable result of such an action would be that the United States of America, on whose fair use defence, Uganda's educational provisions are based,

⁵¹⁸ Jonathan Griffiths (2009), *ibid* fn. 12 at p. 2. He argues resolutely that: "Despite the entrenched position of the "three-step test" within international and national copyright law, its detailed requirements thus remain fundamentally uncertain. In such circumstances, it is hardly surprising that attempts to apply the "test" in concrete situations can, at best, be described as guesswork and, at worst, characterised as reverse reasoning disguising pre-determined policy preferences."

⁵¹⁹ Kenya is working on a revision of their Copyright law following the ACA2K project activities.

would get interested in the complaint since this would be an indirect attack on her otherwise unchallenged (in WTO dispute resolution terms) flexible defence.⁵²⁰

Having looked at some of the cutting edge contextual issues regarding the three-step test, the next main concern is to outline what the individual steps are and to explore what the correct interpretation of the test should be in light of the needs of educational users in less developed countries. I here highlight some of the issues that Uganda's educational exceptions may be subjected to in future regarding compliance with international interpretation of the three-step test as currently interpreted.⁵²¹

4.4 The three-steps

4.4.1 *Certain special cases*

The WTO Panel, relying on the dictionary meanings of the key words in the first step ("certain special cases") concluded that exceptions must be both narrow in a quantitative as well as qualitative sense. It elaborated that exceptions must be narrow in scope and they must be clearly defined.⁵²² In the context of TRIPS, the Panel did not find it necessary for an exception to be *qualitatively* "special" (that is to say, to be founded on an acceptably formulated policy rationale). J.C. Ginsburg agrees with this interpretation, arguing that a special case can include unworthy as well as laudable exceptions based on a clear public policy justification (the joint authors point out that this is Ginsburg's view and not a shared one). Accordingly, the learned authors

⁵²⁰ There would be a possibility that USA would strategically choose not to join in the proceedings. After all, under the rules of dispute settlement of the WTO, only Member countries party to a dispute are bound by the Panel's decision. See UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press, Cambridge 2005)) at p. 190 para. 3.1.

⁵²¹ Jonathan Griffiths (2009), *ibid*, fn. 12 at p. 2.

conclude that the first step requires that exceptions should be finite and limited in scope.⁵²³ It is tempting to point out that this reiterates rather than recasts the unclear and controversial WTO panel interpretation.

Some commentators however, disagree arguing that only exceptions having such a valid public policy rationale can successfully pass the filter of the first step of the “test”.⁵²⁴ At any rate, it is submitted, educational exceptions, being indisputably of valid public or national policy concern, would automatically pass this step. The harder question is how broad the exception can be. It has been argued that a broad exception provision allowing free or uncompensated usage of works for educational purposes may fall foul of the first step of the three-step test because of being too wide.⁵²⁵ In fact, though it sounds so pessimistic, it is possible that going by the prevailing WTO interpretation of the three-step test, even a compensated but broad exception would be deemed not a “certain special case” on account of its being too wide.

Accordingly, given that the tests must be cumulatively passed, such exception would be bad under international copyright norms’. The solution would be to have a teaching exception, but in view of the approach requiring a narrow and strict interpretation and application of exceptions (as seen in Chapter 3), this may not cover all educational activities some of which are only indirectly related to teaching, given an already strict interpretation of teaching. The next alternative is to attempt to draw clear boundaries for

⁵²² WTO Panel Report, *ibid*, fn. 21 at para. 6.112.

⁵²³ Ricketson and Ginsburg, 2006 (fn 474, above) 766-767; Gervais, TRIPS (2008), *ibid*, fn.28, at p. 239 para. 2.121 shares the same stance stating that exceptions must apply to “a fairly well delineated area, with or without public policy objective”.

⁵²⁴ See Senftleben 2004, (fn 207) 152.

a national educational exception. This is in line with the “Ginsburg interpretation” that is now in consonance with Daniel Gervais’ latest commentary.⁵²⁶ It has also been suggested that the word “certain” as used in the Berne three-step test formulation was ‘simply’ intended to mean “some”.⁵²⁷ This too resonates well with the idea of finiteness and narrowness and reduces the need to have an overly narrow restriction of exceptions. It also accommodates both exceptions rooted in public policy and those that are not. However, as far as educational use is concerned, its public policy nature need not be over emphasised.

It can therefore be said that the first step of the three-step test, though having been given a very narrow and restrictive interpretation in a non-binding WTO Panel, can be interpreted in a less restrictive manner if the word “certain” is construed as “some” and the provided the exceptions are made in a way that is not too broad. Exceptions need not be based on clear public policy objectives but if they are, such exceptions may easily pass the first step, especially if they are not broadly drawn. For educational purposes, there is need to delimit the educational activities or modes of utilization that are excepted rather than simply exempting all educational uses. Such flexible interpretation of the first step is necessary if education in Uganda and other less developed countries is not to be a preserve of a few rather than serving the ‘greatest number’. Narrow interpretations of the three-step test would only promote quality education for some but not for all.

⁵²⁵ Graham Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 289.

⁵²⁶ In the 2008 edition of his book Daniel J Gervais, *The TRIPS Agreement: drafting history and analysis* (3rd ed. Sweet & Maxwell, London 2012).
on TRIPS Implementing.

⁵²⁷ Jonathan Griffiths (2009), *ibid*, fn. 112 at p. 16 agreeing with Senftleben 2004, (fn 207).

4.4.2 *Non-interference with the normal exploitation of a work*

According to the WTO Panel Report, a normal exploitation of a work is a use that currently generates significant income for the rights-owner, or with some degree of likelihood and plausibility, could acquire considerable or significant economic value or importance.⁵²⁸ Thus it appears that the second step has normative connotations in the sense that an exception is not allowed if it covers any form of exploitation, which has, or is likely to acquire, considerable importance.⁵²⁹ This kind of interpretation would mean that most uses of copyrighted works would infringe the second step.⁵³⁰ This would be more relevant in the digital environment where technological means have the potential of enabling rights-holders to devise low cost means of licensing or exploiting⁵³¹ their works for virtually all uses. This indeed is partly what Jonathan Griffiths refers to as “the show- stopping” status of the test;⁵³² this I believe is because with use of technology, every use is capable of being a normal exploitation of a work according to the above construction of the WTO Panel.

⁵²⁸ WTO Panel Report, *ibid* fn.21, at para. 6-180. This interpretation does not seem to be original to the WTO Panel. The Swedish/BIRPI Study Group 1964 report (prepared for the Stockholm Berne Revision Conference 1967) had expressed the view that “...all forms of exploiting a work which have, or are likely to acquire, considerable economic or practical importance must in principle be reserved to authors”. See Ricketson and Ginsburg, 2006 (fn 474, above) 760 para.13.04.

⁵²⁹ Gervais, *Reverse TST*, *ibid*, fn. 28 at p. 16-17.

⁵³⁰ G Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 289. The authors in this instance, however, seem to mix the issue of no-payment or uncompensated uses on the one hand, and lack of specificity on the other. In our view, the latter implicates the second step (normal exploitation) and the third step of unreasonably prejudicing the right-holders.

⁵³¹ Exploitation was defined as referring to the activity by which copyright owners employ the exclusive rights given to them... to extract economic value from their rights to those works. See WTO Panel report, *ibid*, fn. 21 at para. 6.165.

⁵³² Jonathan Griffiths, *TST* 201.

As a mixed blessing, due to the technology and development divide, most uses of educational works in less developed countries currently do not take place in a digital environment.⁵³³ Even though digital technology is part of a preferred long term approach to the access and utilisation problem.⁵³⁴ That said, such restrictive construction of the three-step test would mean that digital uses would be further discouraged since the few current users would be found to be infringing copyright.

It has thus been proposed that a conflict with a “normal” exploitation of a work will only arise where an excepted use “substantially impair[s...] the overall commercialisation of that work by divesting the authors of a major source of income”. In the same vein, and of particular relevance to developed country users is the argument that normal exploitation should refer to ways in which a right holder would ordinarily expect to receive an income.⁵³⁵ Noting that many users in less developed countries are unable to pay for works even at discounted prices for cheap less developed country editions, it has thus been noted that authors and other right-holders would be unreasonable to expect any income from such use. This however, may be criticised as being a broad generalisation that does not separate users who can pay from those who cannot. After all, most less developed countries are characterized by the economic phenomena of dualism where the very rich exist side by side with the very poor because of sharp income inequalities.

⁵³³ The low level of computer literacy is discussed in Chapter 2, section 2.9.

⁵³⁴ See chapter seven on problems and solutions.

⁵³⁵ Suthersanen, *Stakeholder analysis*, *ibid*, fn. 7, at p. 12 of the UNCTAD-ICTSD online version; See WTO Panel report, at para. 6-177. On problems with definition of this step, see Martin Senftleben (2004) *ibid*, fn. 18 at pp. 171.

Yet another issue pertinent to this study, concerns works intended for educational use. Any exception covering the use of such works for educational purposes would tend to fail the second step since a good number of works used in education are intended for that very particular purpose.⁵³⁶ In other words, using the words of Martin Senftleben, the economic core of such works lies with educational exploitation. This then dictates that an approach similar to that taken by the United Kingdom be used where, educational exceptions do not apply to works intended for educational purposes.⁵³⁷ This would then exclude a big number of works in addition to causing administrative problems that require a collective society. This is a very serious matter as this study is exactly about how to access works that are for educational use such as happened in the case of *John Murray (Publishers) Ltd and Others v George William Senkindu and Another*.⁵³⁸ The textbook in question (a widely used biology textbook) was indeed meant for educational purposes. So would such an interpretation mean that an exception can never be made? A teleological approach would have to be employed to avoid such a ‘fencing-off’ of relevant educational materials.

In the face of such uncertainty, there is every reason to concur with the suggestion contained in the Declaration on a balanced Interpretation of the Three-Step test that exceptions should not be held to conflict with the normal exploitation of a protected work or other subject matter where they serve important competing considerations. The identified competing considerations include paying respect to important third party and public interests, including interests supported by human rights and fundamental

⁵³⁶ See Senftleben 2004, (fn 207) 23 & 189-197. See also R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005) 113 note that publishers while campaigning against broad educational exceptions emphasise that works most frequently copied in educational institutions are works made for the very educational market.

⁵³⁷ Section 33(1)(b) of the United Kingdom Copyright, Patents and Designs Act 1988.

freedoms,⁵³⁹ interests in competition and interests in scientific progress and cultural, social or economic development.⁵⁴⁰ Heeding this advice would benefit less developed countries' in their effort to enhance education for their economic development. Education is not only a human right but is also a means to realising cultural, social and economic aspects of development.⁵⁴¹ All these aspirations are compatible with the proclaimed development objectives of the TRIPS Agreement.⁵⁴²

4.4.3 No unreasonable prejudice to the legitimate interests of rights-holders

It is submitted that the WTO panel conflated the second and third step by holding that “prejudice to the legitimate interests of rights holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income.”⁵⁴³ Disagreeing with the Panel, Professor Gervais has argued, basing himself on the authentic French language version of the Berne Convention,⁵⁴⁴ that the emphasis should not be on economic harm. The French language version uses the word “unjustified prejudice” though the English version preferred to use the words “unreasonable prejudice”. He thus argues to the effect that an exception based on a public policy consideration would be justified even though it causes unreasonable economic loss to a right-holder.⁵⁴⁵ In other words, the fact that an exception is based on a public interest consideration, such as pursuit of education for socio-economic

⁵³⁸ HCCS 1018 of 1997 (unreported).

⁵³⁹ This would justify the proposed improvement of fair use in Uganda, to be discussed in Chapter 5.

⁵⁴⁰ Declaration on the Three-step test, *ibid*.

⁵⁴¹ G Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Chaltenham 2008) 284-285.

⁵⁴² See further discussion below in paras. 3.30.2- 3.30.4.

⁵⁴³ WTO panel report, at para. 6.229.

⁵⁴⁴ According to article 37(1) (c) of the Berne Convention, in case of differences of opinion on the interpretation, the French language text takes precedence over the English and any other official text of the Convention; Ricketson and Ginsburg, 2006 (fn 474, above) 774.

⁵⁴⁵ Daniel Gervais, Reverse TST, *ibid* fn. 31, at p. 19.

development, is sufficient to justify some level of prejudice to the rights of owners of copyright. Accordingly, on this basis, exceptions like those in CONRA, intended to promote education in Uganda, should be found compliant with the third step of the three-step test. The proportionality of the benefits accruing from the exception is arguably commensurate to the probable loss to the right-holder.⁵⁴⁶

Professor Gervais' suggestion is both as welcome as it is suspect considering that it is in France where rights of authors are treated as almost sacred. It would be hard to justify how the French delegates could have hoped to ensure that authors' rights are as sacred as French tradition would like them to be while at the same time requiring only a justification.⁵⁴⁷ This suggested interpretation even with the weight of the other steps, would not be in consonance with the restrictive approach of French copyright law, which the French delegates at the Stockholm Conference must have been guided by. It would not be surprising if a French *droit d'auteur* enthusiast were today to "disown" such interpretation and argue that actually, by the words *prejudice injustifie*, it was intended to mean either unreasonable prejudice, or prejudice whose basis is not unjustified and whose impact is not unreasonable in extent. After all, there was difficulty in translating the English language phrase "unreasonable prejudice" to the French language. Ironically, the learned author himself in later work interchangeably

⁵⁴⁶ Jonathan Griffiths (2009), *ibid* fn. 12 at p. 17.

⁵⁴⁷ It has been pointed out that French copyright law has not always been so obsessed with authors' rights protection almost at the expense of interests of the public. For this see J.C. Ginsburg, *A tale of two copyrights: literary property in revolutionary France and America*, in Brad Sherman and Alain Strowel, (eds.), *Of authors and origins*, Clarendon Press, Oxford, (1994) at p. 135. She argues among others, that the first framers of copyright, both in France and in the United States of America sought primarily to encourage the creation of, and investment in works furthering national social goals.

uses the words “reasonableness” and “justifiability”.⁵⁴⁸ It is submitted that this is contradictory in approach: it mixes the quantitative with the qualitative considerations.

Back to the English version (especially since Article 37(1)(c) Berne Convention is not incorporated into TRIPS), it has further been pointed out, basing on a plain meaning of the third step, that the use of the word “unreasonable” in this step clearly shows that some level or degree of prejudice is reasonable.⁵⁴⁹ The question is how to tell that a loss of income is unreasonable. The Panels’ guidance is of little help. For instance, at the national level, should it be assessed in comparison with other national markets? Having ascertained that the loss is unreasonable, how then should the level of prejudice to be kept at reasonable levels? The most plausible suggestion appears to be making the exception subject to some level of compensation while the other is to keep the number of beneficiaries as low as possible. Education however, is a right that should be enjoyed by all. There should be large scale access to available knowledge and hence limiting the number of users may be little different from limiting the number of people accessing other necessities.

However, the framers of the Berne Convention three-step test version were wary of educational exceptions that would allow free photocopying of entire or large parts of books. They maintained that even for educational purposes, this would amount to infringement of copyright.⁵⁵⁰ This raises a number of issues for less developed countries. Firstly, whether there should not be any uncompensated use. Even in the

⁵⁴⁸ Gervais, TRIPS (2008), *ibid*, fn. 28, at p. 241 para. 2.122 (2012 edition available).

⁵⁴⁹ Gervais, Reverse TST, *ibid* fn. 31 at p. 18.

more developed countries notably the United States of America, there exists some free use exceptions. It would thus be unfair for less developed countries to do away with such exceptions. Secondly, which system of compensation should be used- levy system or licensing? It is submitted that the levy system may be the best suited for less developed countries. As a kind of indirect tax, it would have a milder chilling effect on access and utilisation by users. It would not have the same price elasticity effect as a statutory licensing system. The third and final issue is that less developed countries would have to note that provision for compensation is not a licence for passing overly broad educational exceptions because these may not pass the first step or even the second in view of the requirement that the three steps be applied cumulatively.⁵⁵¹ In order to alleviate the impact of the cumulative application of the three-step test, it has been proposed that the three steps should be regarded more as factors to be weighed together by legislators or courts.⁵⁵² This is a welcome proposal that however, needs international endorsement, for instance by the Council for TRIPS or generally, within the current framework of the WIPO Development Agenda.

In final analysis, from a least developed country perspective, the current prevalent narrow interpretation of the three-step test would allow only education for some but not all. While there is room for making it more flexible along the lines of the Declaration on the Three-step test, no amount of flexibility would guarantee the large scale reproduction and access that education for all programmes such as Uganda's UPE and

⁵⁵⁰ Gervais, TRIPS (2008), *ibid.*, fn. 28, at p. 242 para. 2.123; Ricketson and Ginsburg, 2006 (fn 474, above) 776 para. 13.26; WIPO *Analytical document* (2009), *ibid.*, fn. 1, para. 33.

⁵⁵¹ Gervais, TRIPS (2008), *ibid.*, fn. 28, at p. 239 para. 2.121; See WTO Panel report, *ibid.*, fn. 21 para. 6.97; G Dufield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Chaltenham 2008) 94-95; Ricketson and Ginsburg, 2006 (fn 474, above) 763, para. 13.10- referring to the Berne version TST; Lewinski (2008), *ibid.*, fn. 3, at p. 160 para. 5.176.

USE require.⁵⁵³ There is a need to look elsewhere for other provisions that provide wiggle room for considering other national interests including the education as a human right, a means and an end of economic development.

4.5 Other user-friendly provisions in international copyright law

The TRIPS Agreement contains some provisions that if well interpreted could be used to promote a better balance between the rights of authors and those of users of copyrighted works. These provisions are to be found in the preamble as well as Articles 7 and 8 of the TRIPS Agreement. In the more recent international copyright instrument, the WCT, the preamble is even clearer on the public role of copyright.⁵⁵⁴

4.5.1 TRIPS preamble

Despite TRIPS being a trade agreement that is pre-occupied with minimizing distortions in international trade and ensuring maximum economic benefits to right holders, it is not silent about public policy issues of concern to less developed countries. Its preamble allows for consideration of public policy objectives of IPR legislation. One notable objective from a less developed country point of view is the pursuit of education both as an end in itself but more so as a means to attaining economic development. As far as this thesis is concerned, one aspect that would benefit from consideration of public policy objectives is the enactment, interpretation and application of educational exceptions. The preamble could thus be authority for allowing courts and national legislators to take into consideration other legitimate interests, which the narrow framing and construction of the TRIPS Article 13 three-step test omitted. This

⁵⁵² Kamiel J. Koelman, *Fixing the three-step test*, [2006] E.I.P.R. 410: hereafter, “Kamiel J. Koelman (2006)”.

⁵⁵³ On these educational programmes, see Chapter 2 section 2.9.

buttresses recommendations by copyright scholars that other legitimate interests be taken into consideration when applying the three-step test.

4.5.2 Article 8: protection of national public interests in vital sectors

According to Article 8 of the TRIPS Agreement, TRIPS members are allowed to 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.

Article 8 provides as follows:

“1. Members 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.

“2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 8 is directed at the legislative process: it permits legislators while formulating or amending their laws and regulations to comply with the TRIPS Agreement, to adopt measures that respond to national needs such as the need to promote the public interest in vital sectors of the economy. As already explained in Chapter 2, education is a very important sector of any economy but more so in less developed economies. Thus, considering the central and critical role of education in the socio-economic and technological development of any country, this green light was a useful concession

⁵⁵⁴ As mentioned in Chapter 1 and 2, Uganda has not acceded to the WCT.

worn by less developed countries during the Uruguay Round of negotiations. The question that arises however is how much legislative leverage is given by Article 8 of TRIPS to countries to come up with more pro- educational exceptions.

It is reiterated that article 8 TRIPS is in principle authority for enacting less restrictive copyright exceptions intended to facilitate access to educational materials in less developed countries. However, its effect is negated by the proviso that was included at the last stages of the negotiations: *it requires that such measures must be consistent with the provisions of the TRIPS Agreement*. Professor Gervais has argued that because of the proviso, it would be difficult to justify any new broader exception not foreseen under the TRIPS Agreement, unless it is an exception to a right outside of TRIPS or an Agreement incorporated in the TRIPS Agreement, in this case, the Berne Convention.⁵⁵⁵

In other words, the proviso weakens the potential of relying on this article to make public policy friendly provisions for educational exceptions. It is in the national interests of less developed WTO Member countries that this provision is infused with meaning with a view to clarifying the question of access to and utilisation for educational purposes, of works protected by copyright. A leaf should be borrowed from the progress made in the field of patent law and in particular access to medicines for less developed countries. After all, education has a very central role to play in eliminating the problems associated with underdevelopment in less developed countries.⁵⁵⁶In other words, Article 8 may be superfluous in the hands of legislators unless infused with meaning under the WIPO Development Agenda or by a WTO Panel or the TRIPS

⁵⁵⁵ See Gervais/TRIPS, *ibid*, fn. 28, at p. 209 para 2.85.

⁵⁵⁶ Refer to chapter two section 2.3.

Council following the precedent set in the more focused area of public health and access to patented medicines.⁵⁵⁷

4.5.3 TRIPS Article 7-balancing of rights and obligations

Article 7 of the TRIPS Agreement contains a bundle of public policy provisions that unfortunately have not been given the weight they deserve.

Article 7 reads as follows:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The article requires among other things the protection and enforcement of IPRS to contribute to the transfer and dissemination of technology. Further, such protection and enforcement are required to be to the mutual advantage of producers and users and in a manner conducive to social and economic welfare and to a balance of rights and obligations.⁵⁵⁸ In the case of less developed countries, these obligations include the human right obligation to provide education to citizens. Arguably, the ‘obligations’ are to be found both within and outside the TRIPS Agreement. The drafters of the TRIPS Agreement were alive to the need to protect and enforce IPRs in a manner conducive to social and economic development, something that could not entirely be determined by TRIPS, hence the submission that a wider sphere of obligations was contemplated. It

⁵⁵⁷ See generally, H Hestermeyer, *Human rights and the WTO: the case of patents and access to medicines* (Oxford University Press, Oxford 2007).

⁵⁵⁸ Commenting on the Berne Convention, Professor Alan Story is of the strong opinion that the convention is not capable of being balanced at all. In fact he takes issue with the whole notion of

has been argued to the effect that this provision claws back on the need for a maximalist interpretation of rights oblivious of the needs of users.⁵⁵⁹

The exact meaning and usefulness of Article 7 is not clear from a copyright point of view. It has been argued for instance that the provision allows courts to take into account ‘social and economic welfare’,⁵⁶⁰ presumably in the course of implementing intellectual property laws. This interpretative provision should allow for a WTO Panel considering a dispute challenging the three-step test compliance of a copyright exception (such as Uganda’s fair use educational provisions in section 15(1) of CONRA) to put into serious consideration the social benefits of the exceptions and thereby render a less restrictive interpretation.⁵⁶¹ This opportunity must be in the meantime, seized by courts in less developed countries if the provision is to be a good balancing tool in leveraging the interaction between copyright law and fundamental freedoms such as the right to education.

Again, as in the case of Article 8, it is imperative that in the wake of on-going work on the WIPO Development Agenda, the provision along with other similar interpretative provisions, such as Article 8 be infused with meaning from a copyright perspective.

balancing. See A Story, Story A, ‘Burn Berne: why the leading international copyright convention must be repealed’, (2003) 40 *Hous L Rev* 763.

⁵⁵⁹ Ricketson and Ginsburg, 2006 (fn 474, above) 853, para. 13.102.

⁵⁶⁰ Uma Suthersanen, *Public interest rule*, *ibid*, fn. 20, at p. 97; See also Okediji, *International fair use*, *ibid*, fn. 19, at p. 141 who argues that states are responsible for infusing this provision with meaning; Moreover, Gervais notes that the reference to the economic and social welfare and to a balance of rights and obligations is in line with the overall goals of the WTO. See Gervais/TRIPS, *ibid*, fn. 28, at p. 203 para. 2.70.

⁵⁶¹ Okediji, ‘International fair use’, *ibid*, fn. 19 at p. 141 argues for the reading of the article 13 TST in light of article 7 which calls for balancing of interests, etc. see Gervais/TRIPS(2008), *ibid*, fn. 28, at p.207 para. 2.80. Gervais however, points out that article 8 is a “should” provision and not a “shall” provision, hence may not be used to reduce the scope of the latter type of provisions.

This is because the Doha Declaration that has made progress on this matter was focused on access to essential medicines and not access to educational materials. Access to essential educational materials in pursuit of the empowering right to education is critical to the realisation of not only improved healthcare but also other broad development goals of less developed countries. Socio-economic and cultural rights are interdependent. Unless it is argued that the Doha Declaration is flawed, then we should be able to have a more user friendly interpretation of Articles 7 and 8 to copyright law for promoting the right to education in least less developed countries.

The courts could be advised to consider classical utilitarianism that justifies actions that give the greatest good to the greatest number. Unfortunately, WTO Panel jurisprudence is not promising in this regard: it has been noted that the WTO appellate Panel has adopted an approach under which precedence is given to the particular term being interpreted (before other terms) in determining the object and purpose of a treaty provision.⁵⁶² This approach was used in the Panel's findings in the *US-Shrimp dispute* (though it was not about copyright).⁵⁶³

It is submitted that restrictive approaches to interpretation leave little room for reconciling the individual text with the overall objectives of the TRIPS provisions as

⁵⁶² See, for a detailed discussion, Hennig Grosse Ruse-Khan, *Proportionality and balancing within the objectives for intellectual property protection*, in Torremans, IP and human rights (fn 13, above) 161, 180-190: for instance at fn. 100 and at p. 190, he argues convincingly, that WTO jurisprudence is in this regard, is contrary to the wording of Article 31(1) VCLT. It should however, be pointed out that the above provision is applied to TRIPs only because there is consensus that it codified provisions of public international customary law. Technically, the VCLT is itself not applicable to the construction of TRIPs. See also E B Rodrigues Jr, 'The general exception clauses of the TRIPS Agreement: promoting sustainable development, Cambridge University Press, Cambridge 2012) who argues that the TRIPS Agreement does not hinder the establishment of exceptions to promote socio-economic development.

stated in Article 7, thereby rendering the latter redundant and contributing to an internal conflict. This reduces the policy space for less developed countries that need to redesign and interpret their copyright laws to give effect to national needs such as access to and utilization of educational materials, which is otherwise allowed by Article 7. This would be helpful, for instance, in interpreting the three-step test.

To revisit the issue of authority for considering third part interests, Article 30 TRIPS (dealing with patent law) requires taking into consideration the interests of users. In any case, this balancing process should be inherent in all intellectual property systems.⁵⁶⁴ Courts however, cannot play that role if they manifest an attitude similar to that taken in the British case of *Ashdown v. Telegraph Group*⁵⁶⁵ where the court desisted from questioning whether the legislated balance was the “socially desirable balance”. The court took the view that the legislation represented the balance between the rights of copyright owners and those of the public as deemed appropriate by the legislature and thereby declined to delve into any assessment of the propriety of the balance.⁵⁶⁶ Least developed country courts should not similarly abdicate their duty but should take up the mantle and use Articles 7, 8 and the preamble to TRIPS as both a sword and shield in interpreting particularly, the troublesome three-step test. This should allow a maximalist approach to exceptions such as those promoting the right to education.⁵⁶⁷

⁵⁶³ *United States-Import prohibition of certain shrimp and shrimp products*, at p. 114 para.153 (case WT/DS58/AB/R: report of 12 October 1998).

⁵⁶⁴ As earlier noted during the drafting of the TRIPS Agreement. See Gervais/TRIPS (2006).

⁵⁶⁵ [2001] EWCA Civ 1142 . See criticism by Burrell and Coleman (2005), *ibid*, fn. 11, at p. 189. They also attack those who call for maintaining the balance for suggesting that the correct balance had been attained in the past: J.C. Ginsburg on the other hand rebuffs those who argue that the balance has been legislated away.

⁵⁶⁶ Arguably, the court was relying on the doctrine of Parliamentary sovereignty.

⁵⁶⁷ Ricketson and Ginsburg, 2006 (fn 474, above) 853 para. 13.102; Okediji, *International fair use*, *ibid*, fn. 19, at pp. 140-141. See also p. 167; See Hennig Grosse Ruse-Khan, ‘Proportionality and balancing

4.5.4 The WIPO Copyright Treaty (WCT) preamble: a new light?

The preamble to the WIPO Copyright Treaty, a special Agreement under Article 20 of the Berne Convention,⁵⁶⁸ contains a recital recognizing the need to maintain a balance between the rights of authors and the larger public interest particularly *education, research and access to information, as reflected in the Berne Convention* (emphasis added).⁵⁶⁹ Arguably, this provision went a long way in clarifying the public role of copyright. According to one commentator, the provision resolved the tension between the natural law theory of copyright, favoured in Europe, as a legal regime whose purpose is to protect creators and copyright owners and enable them to exploit their rights on the one hand, and the United States conception that the traditional goal of copyright is to enhance learning, culture and science.⁵⁷⁰ This has been hailed as a welcome break to the traditional dominance of the author's rights tradition on the international copyright system.

It is commendable that the WCT points out that the public interest is larger than the interests of owners of copyrighted works. This observation cannot be more relevant anywhere else than in less developed countries that are on the disadvantaged side of the

within the objectives for intellectual property protection', in Torremans, IP and human rights (fn 13, above) 161 and 186.

⁵⁶⁸ Article 1(1) WCT, adopted in Geneva 20 December 1996, available at: <http://www.wipo.int/treaties/en/text.jsp?file_id=295166> (last accessed 10 March 2014).

⁵⁶⁹ Recital No. 5 in the preamble; Contrast the reference to the Berne Convention in the WCT preamble with a comment in G Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Cheltenham 2008) 96 to the effect that the Berne Convention, unlike article 7 and 8 of TRIPS, is solely concerned with protection of the rights of authors without any reference to other competing objects. See Ricketson, *Boundaries of copyright* (1999), fn. 11 at p. 62.

⁵⁷⁰ A. Mason, 'Developments in the law of copyright and public access to information', E.I.P.R. 1997, 19(11) 636-643, at p. 637. It is however disputed that the USA approach has been applied in any friendlier way to the needs of users in least developed countries like it was applied domestically during the earlier days of that country's transition to a developed country. See generally, B Z Khan, *The democratization of invention: patents and copyrights in American economic development, 1790-1920*, (Cambridge University press, New York 2005).

knowledge and development divides. However, though this is said to have a more utilitarian approach, I explained in Chapter 1 and 2 that the Anglo-American utilitarian views have tended to consider creation of works as an end in itself without due regard to the greatest good of the greatest number, who are users that need access and utilisation. Moreover, by referring back to the Berne Convention, the framers of the WCT seem to suggest that they were not taking the issue as much further than the Berne Convention that they were updating was concerned. They were simply making those ideas relevant in view of the advances Information and communication technologies (ICTs) post Berne 1971.

4.6 Some reflections

The key research question that this chapter was intended to attempt to resolve was: How, if possible, should the three-step test be interpreted to meet the educational and development needs of less developed countries? This could not be done without giving a brief background to the three-step test as it started under the Berne Convention and later got into the TRIPS Agreement but with a slightly different wording to that in the Berne Convention and also in different TRIPS versions for copyright and industrial property like trademarks and patents. The chapter found that indeed the three-step test is controversial with questions being asked not only about the meaning of its vague language, its primary purpose, to whom it is addressed and whether it is incurably defective to serve a meaningful purpose in copyright law. By reviewing various commentators and analysing the provisions, this chapter dealt with these key issues. For instance, it was found that in Uganda, our case study, the primary duty of implementing the three-step test would be on the legislature and not the courts. It was conceded that

the courts would have a secondary duty to implement the test once it is incorporated into Uganda law.

On the question whether the test is incurably defective, our analysis shows that positive steps have been made towards a proper interpretation of the test by looking at the legitimate interests of users of copyrighted material. The calls by copyright experts to have a less straight-jacket application of the test resonate well with our deployment of the Benthamite utilitarianism that is concerned with interpreting the law in a way as to do the greatest good to the world's greatest number. Having explained that the utility should be interpreted in terms of human welfare and that the greatest good is the realisation of economic development of the world majority living in less developed countries, it was no doubt possible to justify the teleological interpretation called for by the group of copyright experts who signed a declaration on a balanced interpretation of the three-step test.

Such an interpretation along the lines of the Declaration should help less developed country legislatures come up with copyright exceptions that can contribute to enhancement of education through facilitating access and utilisation of copyrighted educational materials. This chapter found in section 4.3.6 that indeed the three-step test had a dual role of allowing exceptions while at the same time attempting to limit their contours.

Again in line with Benthamite utilitarianism, I have argued for consideration of needs of users of copyrighted educational materials even though the test is silent on the matter, unlike its sister versions in industrial property. This chapter argued that even without

using the teleological approach to interpretation, it cannot be denied that users of copyright material including for educational purpose, were had in mind if not focused on during the negotiations that ushered in the three-step test. The chapter pointed out however, that clarity in the interests of users would require legislative reform, whether at national, regional or international level. Reform along the lines suggested by Jonathan in the form of a pronouncement say by a regional court would not ultimately solve the problem even though it would help to alleviate it. The chapter raised the question of less developed countries taking a 'test complaint' filed before the WTO with a view to having a rethink about contours of the test.

On the individual steps, this chapter found in section 4.4.1 that the WTO Panel did not reject public interest considerations but rather, was of the view that they are not a pre-requisite for exceptions to pass the first step of the test. The chapter thus concluded that educational exceptions should pass the first step of the three-step test since such exceptions are rooted in public policy. However, according to the Panel's interpretation, the educational exceptions would have not to be too broad. This chapter thus found that for educational purposes, there is need to delimit the educational activities or modes of utilization that are excepted rather than simply exempting all educational uses. How did would fit with an exception that encourages the human right, say to education, would depend on the wording and context of the exception. What seems to be proscribed is a wholesale exemption of educational uses.

In analysing the second step of the test, this chapter found that the WTO panel in the US Section 110(2) US Copyright dispute gave a wide definition of normal exploitation to include current and even potential future uses. This construction could weaken the 'false

conflict' paradigm put forward by Sharon Forster and Professor Uma Suthersanen who cite the present lack of purchasing power in less developed countries to say there would be no loss in real sense. By situating the test in both the present and future, this may narrow the exceptions that can pass this test. What this chapter found even more disturbing is the interpretation of normal exploitation when applied to educational works with which this study is concerned. Textbooks are indeed to be exploited in educational settings and hence this would mean educational exceptions could pass the second test with regard to textbooks since that would be the normal exploitation. Without invoking the false conflict paradigm, an exception would not be likely to pass the second step. In line with the Benthamite utilitarian theory, the proposal by the Declaration on a balanced interpretation of the three-step test would be helpful. The proposal was that the assessment for purposes of the second step of the three-step test should take into consideration the presence of competing interests such as human rights.

Yet another key conclusion of this present chapter is that Professor Daniel J Gervais's suggestion based on the authentic French version of the test would help displace economic considerations and instead give room for considerations of public policy. This chapter found that the authentic French version, as reported by Professor Gervais uses the phrase 'prejudicé injustifié' rather than 'unreasonable prejudice'. It is then easier to give justifications for a prejudice while unreasonable seems too slippery a term. While this could help educational exceptions to pass the third step, this researcher however wonders how such a user-friendly formulation would sit in with the French way of treating copyright as nearly sacrosanct.

This researcher therefore suggested in this chapter that to have exceptions that pass the 3rd step, it may be better to factor in a system of compensation using a levy system but not licensing. It was suggested that a levy system like that in continental Europe may be the best suited for less developed countries since it is a kind of indirect tax. That it would have a milder impact on access and utilisation by users. Moreover, this chapter cautioned that the present preferred narrow interpretation of the test means that even with provision for compensation to right holders, this would not be a licence for enacting overly broad educational exceptions because these may not pass the first step or even the second applied cumulatively. The proposal to discard cumulative application of the steps was also welcomed.

Section 4.5.6 of the chapter addressed other user-friendly provisions in the TRIPS Agreement and even the WCT. Articles 7 and 8 as well as the preambles to TRIPS and more so to the WCT provide justification for a Doha like approach copyright law. The chapter however found that the provisos in these provisions tend and were intended to take away the practical effect of the user friendly provisions. On the basis that the Doha Declaration on Public health set a good precedent, this chapter argued in section 4.5.7 that the Doha Declaration example should be followed when dealing with Articles 7 and 8 and the preamble to TRIPS. After all, education is important to realisation of health and other rights.

4.7 Conclusion

In final conclusion, the three-step test has particular relevance to the way countries manipulate their copyright laws to serve users' interests such as promotion of education

as a human right, a means and an end of economic development. This is because, in our view, the three-step test governs the way countries are to make and interpret exceptions and limitations to the rights of authors. However, the three-step test has been interpreted and applied restrictively with regard to the needs of users thereby implying narrow exceptions. This has further tripped the traditional inbuilt mechanism for balancing the interests of right-holders against those of the wider public, where there is conflict.⁵⁷¹ This has negative implications on access to educational materials since exceptions play an important role in guaranteeing access and utilization especially in a less developed country. This current interpretation of the three-step test is flawed and should be rejected especially by less developed countries. Fortunately, these countries are not bound by the WTO Panel decision.⁵⁷² Less developed countries need to take advantage of the current uncertainty and ambiguity surrounding the interpretation of the three-step test to develop pro- educational exceptions without paying too much attention to the restrictive approach taken by the WTO Panel in the *US section 110(2) Copyright Act case*.⁵⁷³ In other words, they should use this controversy to justify a maximalist approach to educational exceptions to copyright. Uganda that adopted a US-style fair use defence is better placed to expediently take advantage of the prevailing lack of clarity in order to ensure maximum utilisation of available educational materials.

⁵⁷¹ See Guido Westkamp, *The “three-step test”*, *ibid*, fn. 81 at p.33; However, the two interests sometimes reinforce each other as creativity and dissemination is not an end in itself and need without access and utilisation while the latter cannot exist absent creation of works and their dissemination.

⁵⁷² UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press 2005) p. 190 para. 3.1. A panel decision has the effect only between the parties to the dispute. Other weaknesses with the WTO Panel report in the section 110(5) US Copyright Act case include the fact that the decision did not go on appeal, which leaves open a possibility that the WTO Appellate Body could have arrived at a different decision: See also Senftleben 2004, (fn 207) 107-110 for a discussion on why the WTO panel decision in the section 110(5) USA Copyright case may not have much impact on the interpretation of the three-step test. Senftleben however, misses the weaknesses involving the non-binding nature of WTO dispute settlement Panel decisions. He however, uses other reasoning, such as the subsequent agreement test and arrives at the same conclusion.

⁵⁷³ Uma Suthersanen, *Stakeholder analysis*, *ibid*, fn. 7, at p. 5; Guido Westkamp, *The “three-step test”*, *ibid*, fn. 81, at p. 51.

Accordingly, in the next chapter, Uganda's fair use defence will be analysed and investigated to determine how educational friendly it is.

Chapter 5: Constructing an educational-friendly copyright regime within Ugandan copyright law

5.1 Introduction

Among the obligations of governments especially of less developed countries is the obligation to protect, promote and fulfil the right to education. This among others requires that the four ‘As’ of the right to education are realised namely, accessibility, acceptability and adaptability (as discussed in chapter 2). One way of doing this is to ensure access to and utilisation of educational materials (mainly textbooks) to ensure education is of acceptable quality, adaptable to enhance the learning process through local editions of books, and accessible through translated versions of books. However, as pointed out in chapter 1-3, the exclusive rights protected by copyright inherently affect the ability of less developed country governments to ensure access to and utilisation of copyrighted educational materials. Though copyright law a mechanism of exceptions and flexibilities that were discussed in chapter 3, not only are these not enough to serve the needs of education but they are also encumbered by the requirements of the three-step test (discussed in Chapter 4). One of the ways of ensuring access and utilisation of copyrighted educational materials is by enacting specific exceptions to copyright law.

In this chapter, I therefore will analyse attempts by the Ugandan legislature to construct educational user-friendly provisions to enable access and use of copyrighted materials is very important to the protection and promotion of the right to education as an end of and a tool for promoting economic development. This chapter therefore builds on the discussion in previous chapters (Chapters 1–4). In chapter 2 I attempted to locate

copyright within the right to education by examining the linkage between copyright on the one hand, and access and use of educational materials for economic development on the other. In chapter 3 I critiqued the regime of educational exceptions available within the international copyright framework with the objective of determining whether those exceptions can allow for an optimal copyright regime that supports the right to quality, adaptable and accessible education in Uganda and other less developed countries. This was because the international copyright framework contained in the Berne Convention and TRIPS sets the limits within which national legislatures can provide for exceptions to exclusive rights of authors. The study found that the framework is very restrictive because it is minimalist in nature and pointed out that the best course of action for less developed countries would be to make maximal use of the limited manoeuvring space.

In Chapter 4, I examined the doctrine of the three-step test which has been narrowly interpreted by WTO dispute resolution panels poses a serious obstacle to the construction of exceptions at the national level for promoting the human right to education. I found that unless less stringent ways of interpreting the test are adopted, for instance along the lines suggested by the Group of international copyright experts, the exceptions will remain narrowly construed and incapable of robustly supporting big education drives in less developed countries. However, I recommended that rather than delay the fulfilment of their international human rights obligations and development goals by waiting for reforms at the international level, less developed countries like Uganda should ensure their laws optimally use the available policy space through a maximalist approach to exceptions and flexibilities. I argued also that this would be in line with the guidance in Articles 7 and 8 and the preambles to TRIPS and the WCT. I further argued that a teleological approach to exceptions would be in accord with the

progress made in the area of access to medicines (the Doha Declaration on access to essential medicines).

The present chapter therefore will examine the extent to which Uganda managed to construct an educational friendly regime of copyright exceptions. As pointed out in chapters 1 and 2, CONRA, Uganda's copyright legislation enacted in 2006 is relatively new and untested. Did the the Ugandan legislature make maximum use of the 'wiggle room' available under the Berne Convention and TRIPS Agreement? Moreover, what is are Uganda's educational exceptions compliant with the Berne Convention and TRIPS Agreement and in particular, the three-step test? In short, I intend to examine whether the exceptions exceeded, maximally utilised or underutilised the available 'wiggle room'.

As mentioned in Chapters 1 and 2, Uganda adopted a new copyright law in 2006, the Copyright and Neighbouring Rights Act (CONRA). CONRA among other things adopted a US-style fair use defence and hence this chapter investigates Uganda's fair use educational exceptions and attempts to see how widely they may be utilised by educational users and interpreted by the courts. Since CONRA is relatively new and largely untested, I make reference to decided cases from the United States of America that has interpreted and applied the fair use provisions contained in section 107 of the USA Copyright Act 1976. Reference is also made to some educational exceptions from other more developed countries notably the United Kingdom, Australia, Germany and France as well as from less developed countries such as South Africa and Kenya.

5.2 Brief background

Uganda moved from a 1956 style United Kingdom fair dealing exception to a “United States style fair use” exception.⁵⁷⁴ The pre-2006 copyright legislation provided for a fair dealing defence that stipulated a very limited number of situations where educational use of works protected by copyright did not require the consent of the author or other right owner.⁵⁷⁵ The exceptions were narrow in scope and in the definition of exempted educational activities. They were a recipe for conflict between copyright and the right education. Put another way, up to 2006, Uganda’s pre-2006 legislation had far much narrower exceptions than those of most developed countries. Unfortunately some less developed countries like Kenya still have the same style of exceptions.⁵⁷⁶

⁵⁷⁴ Uganda’s fair use defence, is however, better described as a mosaic of fair dealing and fair use, or even more appropriately, a cross-breed of exceptions from various countries but drafted in a peculiar way with the help of a United States copyright consultant. Ugandan courts are likely to be constrained in interpreting the fair use defence contained in section 15 of CONRA with the fairness and flexibility that it should possess. For a confirmatory view about the uncertainty regarding the meaning and remit of copyright exception provisions in 8 African countries, including Uganda, see the ACA2K June 2009, *ibid*, fn. 49.

⁵⁷⁵ Uganda’s fair dealing provision was actually very different from the present United Kingdom one (under the CDP 1988). It was very narrow in scope. See para. 5.5 below discussing section 7(2) of the repealed Copyright Act 1964. For a criticism of the United Kingdom fair dealing provisions with respect to educational uses, see Uma Suthersanen, ‘Copyright and educational policies: a stakeholder analysis’ [2003] OJLS 585, 589-591. For a general commentary, see, S Ricketson and JC Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, (2nd ed. Oxford University Press, 2006); hereafter “Ricketson and Ginsburg, 2006”.

⁵⁷⁶ See Section 26(1)(a) and (d) of the Kenya Copyright Act 2001, available at < http://www.wipo.int/wipolex/en/text.jsp?file_id=202207>; (last accessed 20 June 2014).

The only educational exceptions included in the repealed copyright Act were:

- inclusion of not more than two passages of a protected work in a collection for educational purposes;⁵⁷⁷
- broadcasts intended to be used for instruction in educational institutions;⁵⁷⁸
- and, a one paragraph fair dealing provision allowing the doing of any of the prohibited acts by way of fair dealing for purposes of criticism or review.⁵⁷⁹

These exceptions were stringent and had they been strictly enforced, would have had a serious negative impact on the right to education in Uganda. The legislation promoted more conflict than convergence between copyright and the right to education. It shows that if copyright law in Uganda had been strictly enforced, it would have negatively impacted access and utilisation of educational materials in Uganda. Laxity in enforcement of copyright can be seen in part from the limited number of decided cases on copyright (both reported and unreported). One leading case that is cited is *John Murray (Publishers) Ltd and Others v George William Senkindu and Another*.⁵⁸⁰ This case involved a bookshop that was found to be reproducing and selling copies of the John Murray's commonly used textbook, *Introduction to biology*, without the authorisation of the copyright owners. The High Court found that under section 2(a) of the Copyright Act 1964 (now repealed), the plaintiff author had copyright protection in

⁵⁷⁷ Section 7(2) (e) of the repealed Copyright Act. By 2011, Kenya still has this type of exceptions prompting a call for reform by the ACA2K Project. Report available at: http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf, last accessed 23 March 2014).

⁵⁷⁸ Section 7(2)(f), *ibid*.

⁵⁷⁹ Section 7(2), *ibid*, provided that "A copyright under sub section (1) shall not include the right to control—

(a) the doing of any of the acts set out in subsection (1) by way of fair dealing for purposes of criticism or review, or the reporting of current events, if any public use of the work is accompanied by an acknowledgment of its title and authorship except where the work is incidentally included in a broadcast.

Uganda and further that under section 11(2), the liability for copyright infringement was strict in the sense that the plaintiffs did not have to that the defendants had knowledge of the infringement. The award of damages led to the closure of the bookshop. The other reported case was *Uganda Performing Rights Society Limited v Fred Mukubira*⁵⁸¹ where the Commercial Division of the High Court was keen to grant a search and seizure order against an alleged music copyright infringer to send out a clear message that copyright infringement would not be tolerated.⁵⁸² The laxity in enforcement may soon be a thing of the past with the introduction of an author's collective society office in Uganda. However, there is still reported widespread infringement of copyright in Uganda especially in higher institutions of learning (universities).⁵⁸³

Against this background, the reform process that led to the enactment of CONRA presented a grand opportunity to draft better user friendly educational exceptions CONRA indeed made a fundamental change in Ugandan copyright law by adopting a detailed regime of fair use exceptions based on the United States-style fair use defence.⁵⁸⁴ The nature of these exceptions is the centrepiece of this chapter.

⁵⁸¹ Misc. Application 818 of 2003 (Arising from High Court Civil Suit 842 of 2003), reported in Uganda Commercial Law Reports 2002-2004 (2005) at 476.

⁵⁸² See also *Attorney General v Sanyu Television* High Court Civil Suit No. 614 of 1998, reported in *Uganda Commercial Law Reports 1997-2001*(2005) 184-190, Blackhall Publishing, Dublin, Ireland that involved an allegation of broadcasting rights assigned to the Government television station for the 1998 World Cup Football. The defendants who raised only a technical objection later admitted the facts and apologised; an injunction was granted prohibiting further infringement.

⁵⁸³ See generally, ACA2K Project, Uganda Country Report.

⁵⁸⁴ The United States-style fair use defence has been described as a privilege in others to use the copyright owner's work in a reasonable manner without his consent, notwithstanding the monopoly granted to the copyright owner. Section 107 of the Copyright Act 1976 of the United States of America, which attempted to codify the judicial doctrine of fair use, is expressly stated to be notwithstanding the exclusive rights contained in section 106.A detailed discussion of this defence is outside the purview of this work. But see generally, WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994).

5.3 Fair use exceptions in Uganda: preliminary comments

The Ugandan fair use defence is actually a unique defence: section 15 of CONRA is the only provision in the whole Act that stipulates exceptions (in the sense of the word, as explained in the introduction to chapter 1). Therefore, the fair use defence has been created as the overarching defence. This has certain disadvantages and amounts to a less than optimal transposition of Uganda's copyright law. For a use of protected copyright material to be exempted, it must fall within the list of stipulated permitted acts. This is quite bizarre: it affects even use of copyright material for judicial or administrative purposes. To extenuate matters, there are no special exceptions such as those contained in section 107 of the United States Copyright Act.⁵⁸⁵ Section 15(1) of CONRA⁵⁸⁶ stipulates uses that are regarded as fair use: a total of eleven categories of uses are listed, out of which six are relevant to education. The six exceptions considered by this thesis are: private personal use; scholarly quotations; general teaching; communication to the public for teaching; reproduction by public libraries and other institutions; and, transcription into Braille and sign language. These stipulated uses require neither compensation nor consent of the copyright owner.

To get a glimpse of the general layout, it is imperative to look at the wording of at least one of the six exceptions. It provides:

S. 15(1) Fair use of works protected by copyright

The fair use of a protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright where—

(a) the production, translation, adaptation, arrangement or other transformation of the work is for private personal use only;

⁵⁸⁵ See, <http://www.copyright.gov/title17/92chap1.html#107>, (last accessed 14 June 2014).

⁵⁸⁶ Wipolex website, Uganda: The Copyright and Neighbouring Rights Act 2006 < http://www.wipo.int/wipolex/en/text.jsp?file_id=141975>, (last accessed 20 January 2014).

Section 15(2) on the other hand stipulates the four factors to be used in assessing fair use. These factors are drafted in a closed way; contrary to some recent commentary,⁵⁸⁷ these factors are exhaustive. It is submitted that Ugandan courts, unlike their counterparts in the United States of America, cannot consider any other factors. Section 15(3) deals with fair use of unpublished works. On a positive note, however, access and use of educational materials is covered by a number of the stipulated uses that require neither consent nor compensation of the right holders.⁵⁸⁸ A summary of the individual exceptions relevant to education is given in table 5 below.

Table 3: Educational exceptions under CONRA

Exception	Provision
Private personal use	S. 15(1)(a)
Scholarly quotations	S. 15(1)(b)
General teaching	S. 15(1)(c)
Communication to the public for teaching	S. 15(1)(d)
Public libraries and other institutions reproduction	S. 15(1)(j)
Transcription into Braille and sign language	S. 15 (1)(k)

⁵⁸⁷ ACA2K Book (2011) p. 287; available at: < http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf>, (last accessed 12 March 2013) stating that ‘the fair use doctrine is very broad’. This does not seem to recognise that Uganda’s hybrid ‘fair –use’ defence is not as broad as the US one but was possibly comparing the very nature of fair use relative to ‘fair dealing.

⁵⁸⁸ WF Patry, *Copyright law and practice (Vol. I)* (Bureau of National Affairs, Inc., Washington D.C. 1994) 735.

5.4 Private personal use

According to section 15(1)(a) of CONRA, ‘the production, translation, adaptation, arrangement or other transformation of a work for private personal use only does not amount to an infringement of copyright and does not require the consent of the right holder.’⁵⁸⁹ Such uses are to be regarded as fair use. It is submitted that this provision is wide enough to cover the activities of students doing routine reading, preparing for assignments and examinations. It also covers, in my view, preparations by teachers and lecturers in order for them to be able to carry out their duties (excluding reproduction of materials for distribution to students in the classroom use which would not be, strictly speaking, personal use from the point of view of the teacher).⁵⁹⁰ Research students are also covered under this exception as they are thereby entitled to copy a work for their private personal research. The fact that the stipulated educational activities do not need the consent of the copyright owner and are royalty free is a positive contribution to the right to education. It helps to minimise the conflict between copyright and the right to education in a least developed country like Uganda where poverty is rampant and educational users generally lack purchasing power (choosing to pay a levy instead of buying lunch is a difficult choice to make).

Ugandan educational users who can afford to the cost of photocopying do and should take maximum advantage of this exception to promote quality education both as a means for economic development and as an end in itself. However, without other

⁵⁸⁹ For a discussion on the justification of private use, see J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 520 para. 10.03.

⁵⁹⁰ This could however, be what Dr. Guido Westkamp refers to as “indirect benefit by educational institutions” from the private use exception in the EU. See Guido Westkamp *Report on The Implementation of Directive 2001/29/EC in Member States (Part II)* 2007, at p. 32: such purpose is not private.

intervention by Government or other organisations, many users in Uganda would still be unable to afford the costs of doing the acts permitted under the private personal use exception. This is where the Berne Appendix, dismissed by many commentators, remains potentially useful especially to provide large scale access for all inclusive universal education under programmes such as Universal Primary Education and Universal Secondary Education.⁵⁹¹ Private personal use is particularly important at tertiary education level due to the high cost of books at that level yet they are an absolute necessity if higher education students are to realise higher learning outcomes and not simply reproduce lecturers' sometimes outdated notes.

No quantitative restrictions appear on the face of this private personal use exception. However, it has been suggested that private use by its very nature would appear to be confined to single copies.⁵⁹² It has further been suggested that reproduction for private use should be subject to the three-step test as in Article 5(2) (b) of the European Union Information Society Directive.⁵⁹³ However, it should be borne in mind that the unlike personal private use in countries like France⁵⁹⁴ and Germany, the private personal use in Uganda is subject to the requirement of fairness. While in France it is possible to reproduce the whole of a work for private personal use, there is no guarantee that such

⁵⁹¹ The Appendix allows other actors, such as central or local governments, to cause bulk reproduction and translation and the concomitant distribution of copyrighted educational materials for systematic educational activities. This is not possible under the private personal use exception. See chapter 6 for a detailed discussion of the Berne Appendix.

⁵⁹² Ricketson and Ginsburg, 2006 (fn 575, above) 779-780 para 13.33. This would allow making a single copy of a book of 600 pages (which however, many educational users in Uganda cannot afford). For this see, Geller E.P. (ed) *International Copyright Law and Practice*, Lexis Nexis Matthew Bender, New York at p. FRA-117 §8[2][a][i].

⁵⁹³ Ricketson and Ginsburg, 2006 (fn 575, above) 781 para. 13.33.

⁵⁹⁴ André Lucas and Pascal Kamina in 'FRA-117' para. 8[2][1], in *International Copyright Law and Practice* (Paul Edward Geller ed., Lexis Nexis Matthew Bender, New York 2006). They state to the effect that it would be permissible to copy an entire work so long as the copying is for private use. The method used to do the reproduction is equally immaterial. The difference is that in France and Germany, the

action would always be exempted as fair use under CONRA.⁵⁹⁵ For instance, a student who reproduces a textbook containing 20 chapters when their syllabus covers only ten chapters could be challenged on the fairness of their action. While that is plausible, even copying all the ten syllabus chapters may be challenged as unfair if the word “fairness” is interpreted from the copyright owners’ perspective. This is because it may be deemed unfair that such use of the work is in conflict with the normal exploitation of the work by the right holder (see discussion on three-step test in chapter 3).

This private use exception is among others justified by the fact that it is generally difficult to control the private activities of persons. A copyright owner would thus not be able to collect any royalties any way. The difficulty that arises from a copyright owner’s point of view is that in countries like Uganda where books are not only expensive but sometimes scarce, reproduction of a book or substantial parts of it by one student for private use would result in many more students doing the same. This could arguably conflict with the normal exploitation of the work by the author or copyright owner thereby offending the second step of the three-step test. Unlike countries where there is a levy on photocopying machines, no such levy exists in Uganda. The reality though is that such users do not necessarily represent lost sales as not all the people that

exception is not subject to fair use requirements, and is subject to a levy system on the means of reproduction.

⁵⁹⁵ In Germany and France, the reproduction for private use is in fact subject to compensation since there are levies on the reproduction equipment. These levies are used to compensate the authors. See Guido Westkamp, ‘Report on Implementation of Directive 2001/29/EC’, *ibid* at pp. 13, 15 where he mentions that almost all *droit d’auteur* EC Member States operate a private levy system; Geller E.P. *ibid* at § 8(2)(f)(i) GER- 96 where it is pointed out that the private and related copying exceptions in sections 54 including 54a and 54d setting a remuneration regime where levies are imposed on copying devices and on copying operators in certain sectors including schools, universities, research institutions and public libraries; Also Geller EP at § 8[2][e][iii] FRA-144, France has a collective administration scheme for reprography where for instance a University is charged for copies made for students or a copy shop is charged a levy for making copies for the clients. The United Kingdom has a CLARCS scheme for Higher educational institutions. See generally, D.K. Mendis, *Universities and collecting societies* (TMC Asser Press, The Hague, 2009).

photocopy a work have the purchasing power any way.⁵⁹⁶The complication though is that such users do not necessarily represent lost sales as not all the people that photocopy a work have the purchasing power any way.⁵⁹⁷

5.5 Scholarly quotations from published works

CONRA has no specific provision allowing for use of quotations in scholarly work. However, there is a broad quotation provision that allows using a quotation from any publication *in another work* (emphasis added). Section 15(1)(b) provides:

(b) a quotation from a published work is used in another work, including a quotation from a newspaper or periodical in the form of press summary, where—

(i) the quotation is compatible with fair practice; and (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used, and (iii) acknowledgement is given to the work from which the quotation is made;

⁵⁹⁶ A majority of Ugandans live on less than one dollar. The free universal primary and secondary education programmes were introduced to curtail the problem of children unable to attend school due to lack of school fees. Parents of such children would then not have the money to buy a textbook. An Oxford Advanced Learner's Dictionary or Longman's English Dictionary costs 50,000 Uganda shillings, which on average is equivalent to one term's school fees in some rural schools. See World Bank, 'Uganda at a Glance', available at: < http://devdata.worldbank.org/AAG/uga_aag.pdf>, (last accessed 10 January 2014) Stating that 38 percent of Ugandans live below the national poverty line. Many Ugandans in fact live on less than one dollar a day. A detailed exposition is in Chapter 2.

⁵⁹⁷ On this particular point, see ICSTD/UNCTAD, 'Intellectual property rights and sustainable development', (Policy discussion, paper, Geneva, August 2003) 131, where they note that: "As far as teaching or research materials in less developed 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 unauthorised use. On Uganda's socio-economic conditions, see chapters 1 and 2 generally. A majority of Ugandans live on less than one dollar. The free universal primary and secondary education programmes were introduced to curtail the problem of children unable to attend school due to lack of school fees. Parents of such children would then not have the money to buy a textbook. An Oxford Advanced Learner's Dictionary or Longman's English Dictionary costs about 100,000 Uganda shillings, which on average is equivalent to one term's school fees in some rural schools. See World Bank, 'Uganda at a Glance'; available at http://devdata.worldbank.org/AAG/uga_aag.pdf. 38 percent of Ugandans live below the national poverty line. Many Ugandans in fact live on less than one dollar a day.

It is submitted that this provision is wide enough to allow for the use of quotations in scholarly works for educational purposes. After all, this exception was introduced in the Berne Convention because the commonality of making quotations in scholarly works was then acknowledged.⁵⁹⁸ In order for the quotation to amount to fair use, certain conditions, both explicit and implicit, have to be fulfilled. The three explicit conditions are in line with the Berne Convention: ⁵⁹⁹the quotation must be compatible with fair practice; the extent of the quotation must not exceed what is justified for the purpose of the work in which it is quoted; and there must be acknowledgement of the work from which the quotation is made.⁶⁰⁰

5.5.1 Implicit conditions

These conditions are imposed by virtue of the wording of the quotation exception in CONRA. They are not expressly required by the Berne Convention. This means Uganda, a less developed country has exceeded the Berne requirements (by introducing Berne-plus requirements) thereby having a regime that is stricter than the international rules require. This does not augur well for the right to education.

5.5.2 “Availability to the public”

According to CONRA ⁶⁰¹, fair use exception quotations must only be made from published works. The word “published” requires among other things that tangible copies of a work must have been made available to the public *with the consent of the author* (emphasis added) or other owner of copyright.⁶⁰² The wording of this provision promotes only limited access to educational works. In particular, it excludes works

⁵⁹⁸ Ricketson and Ginsburg, 2006 (fn 575, above) 798 para. 13.38.

⁵⁹⁹ For further discussion, see Ricketson and Ginsburg, 2006 (fn 575, above) 783-786 paras. 13.38- 13.41.

⁶⁰⁰ On this, see discussion in chapter 6.

⁶⁰¹ Section 15(1)(b).

made by virtue of compulsory licences provided for under section 17 of CONRA: such works are not made with the consent of the author or copyright owner. Such a requirement vitiates the usability of the works produced under compulsory licence. This therefore undermines the compulsory licence provisions because it would be less attractive to produce or acquire materials which cannot benefit from the fair use quotation for educational purposes exception. Since quoting from other works is a common usage in education, for the purposes of enhancing educational quality, CONRA imposes an unnecessary restriction on access to educational materials. This is another serious manifestation of failure to use a maximalist approach to available exceptions to promote the right to education. This approach was either ill-advised or simply inadvertent due to limited technical knowledge and the failing to heed to the needs of education.⁶⁰³

The relevant provision of the Berne Convention⁶⁰⁴ requires that works must have been *lawfully made available to the public*, not that they must have been published (emphasis mine).⁶⁰⁵ Uganda thus failed to maximally utilise international copyright provisions to by taking a stricter stance.⁶⁰⁶ To quote from a work produced under compulsory licences, one would need a licence. This would result in the increase in the costs of education. In default of this, any quotation could be held to be an infringement of

⁶⁰² See section 2 of CONRA- the definition or interpretation section; however, that definition is not in tandem with the definition in article 3(3) of the Berne Convention.

⁶⁰³ As mentioned earlier, most post TRIPS copyright law reform, whether in developed or less developed countries, has been influenced by the entertainment sector without much heed to the needs of other sectors such as education.

⁶⁰⁴ Article 10(1).

⁶⁰⁵ See Ricketson and Ginsburg, 2006 (fn 575, above) 785 para. 13.41 where they point out that the requirement of “lawful availability” under article 10(1) of the Berne Convention includes works made available by any means and is different from, and wider than, the concept of “published work” under article 3(3) of the Berne Convention where consent of the author is required.

copyright. For less developed countries, this extra cost is unaffordable in light of dwindling educational budgets and overall national resource constraints. Moreover, such uncalled for requirements undermine the value of the robust compulsory licence provisions contained in section 17 of CONRA,⁶⁰⁷ which are intended to promote research, education and scholarship. Uganda therefore did not maximally utilise copyright exceptions intended to promote the right to education.

5.5.3 No limitation of the purpose of quotation

In line with advice by organisations such as Consumers' International, Uganda's quotation exception does not impose any restriction on the purpose for which a quotation should be made in order to qualify as fair use of a work. This is a positive contribution of copyright law to use of educational materials. It is because of the unrestrictive wording of the provision that I have submitted that the quotation exception extends to use for a wide variety of educational purposes including use in scholarly works. This no doubt promotes access to knowledge and helps ensure that quality as a core aspect of the right to education is possible. Additionally, it also promotes scientific research as observed by Professors Ricketson and Ginsburg.⁶⁰⁸

⁶⁰⁶ See Consumers International, 'Report on copyright and access to knowledge', *ibid*, p. 25 where it is advised that a wide interpretation of the concept of "made available to the public" should be adopted in national legislation.

⁶⁰⁷ See chapter 6.

⁶⁰⁸ Ricketson and Ginsburg, 2006 (fn 575, above) 794, para. 13.45 where they note that "... the legitimate interests of scientific research are now adequately served by the broader right of quotation allowed under article 10(1).

5.6 Teaching exception

It is submitted that CONRA has two different but related teaching exceptions. One is the general teaching exception under section 15(1) (c) and the other is what I have referred to as the communication to the public teaching exception. This part of the discussion deals first with the general teaching exception.

5.6.1 General teaching exception

Section 15(1) (c) of CONRA allows as fair use, the use of a published work for teaching purposes by way of illustration. This is what I have termed, a general teaching exception.⁶⁰⁹ The provision states:

A published work is used for teaching purpose to the extent justified for the purpose by way of illustration in a publication, broadcast or sound or visual recording in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;

(d) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional training or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author.

By virtue of, but subject to this provision, educational users may use copyright materials in publications,⁶¹⁰ broadcasts, sound recordings or any other visual recording. There are no restrictions on the types and forms of use. Indeed, the Act is progressive enough to allow for the use of modern technology in teaching. For instance, the provision is

⁶⁰⁹The specific teaching exception dealt with here is in relation to the communication to the public right. Discussed below.

drafted in such a way that any other type of visual recordings can be used. Arguably, this is wide enough to include even the use of multimedia works for teaching purposes. This goes a long way in promoting access and use of educational materials and in ensuring that the right to education can be delivered to as many people as possible. Use of modern learning aids including digitised works has the potential to offset the problems of unavailable, expensive-to-import hard copies of printed educational materials.⁶¹¹ The only conditions attached to this teaching exception are that the use must be to the extent justified for the purpose.⁶¹² In other words, it must be fair.⁶¹³

5.6.2 Quantitative restrictions

The teaching exception therefore is quite restrictive and calls for due diligence on the part of the teachers to ensure that they do not exceed the “illustrative limits”. The quantity of a work used must be justified relative to the purpose. In other words, it must not exceed what is relevant for the particular publication, broadcast or other allowed teaching activity. Moreover, it must be for illustration only.⁶¹⁴

⁶¹⁰ This in our view is what is referred to as anthologies in the International copyright instruments and the United Kingdom CDPA 1988 section 33.

⁶¹¹ Dick Kawooya, ‘Copyright and access to e-Resources in Africa's education and research contexts: the case of selected Ugandan institutions’, 2006-2007 at p. 3 at http://www.policy.hu/kawooya/documents/Kawooya_IPF_Study2006Final.pdf, (last accessed on 27/01/2014).

⁶¹² The Act uses the words “compatible with fair practice”. These have been defined to mean being fair. Refer to K Garnet, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, (15 Ed. Sweet and Maxwell, London 2005) 497 para. 9-53.

⁶¹³ K Garnet, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, (15 Ed. Sweet and Maxwell, London 2005).

⁶¹⁴ Ricketson and Ginsburg, 2006 (fn 575, above) 794. The learned authors give examples of exceeding the illustration requirement. For instance, they point out that “course packs” consisting of chapters taken from various books about a subject to be covered may not qualify as illustrative use. They advise that licences should be sought in such cases. See further, *Universities UK v. Copyright Licensing Agency* [2002] EMLR 693; See S Picciotto ‘Copyright Licensing: the case of higher education photocopying in the United Kingdom’ (2002)24(9) E.I.P.R. 24(9) 438. See also US case of *Basic Books, Inc. v. Kinko's Graphics Corporation* 758 F. Supp.1522, 1529 (S.D.N.Y. 1991).

Accordingly, the whole of a work, such as a short poem, may be used in a publication, broadcast, visual or sound recording. Such uses when targeting students in higher education may require that a bigger proportion of a work is used than would be the case with materials targeting primary school pupils. It is submitted that there is no hard and fast rule for resolving this issue: the quantity will therefore have to be determined depending on the peculiarities of each case but in line with the broad guideline stated above. For clarity purposes, the issue of how much of a work should be used under the teaching exception is different from the issue of the number of copies that can be made under the exception. This is dealt with below.

5.6.3 Number of copies

Uganda's legislation is silent on the number of copies that may be made pursuant to the general teaching exception. Consequently, it is open to argue for instance, that a teacher may make as many copies as there are students. This kind of interpretation is good for promoting access to educational materials, which in turn promotes the right to education by ensuring that quality education is delivered. It is submitted however, that a television station seeking to make copies of a work for teaching would not be justified to make multiple copies. It may only need to make one copy and one or two back-up copies. To do otherwise would not be justified for the purpose as to be fair.

On the whole, it can be concluded that the teaching exceptions under section 15(1) (c) and (d) of CONRA go a long way in facilitating access and use of educational materials especially in a least developed country like Uganda where resources are scarce. The teaching exception has been drafted in wide enough terms to circumvent restrictions that

are causing some concern in the developed world.⁶¹⁵ Caution however has to be taken to ensure that educational users operate within the confines of that exception. Educationists therefore have to look into this matter or else they may incur liability for copyright infringement. Courts will need to use a maximalist approach to interpretation of the fair use exceptions for education.

⁶¹⁵ McGeeveran, William and Fisher, William W. *The digital learning challenge: obstacles to educational uses of copyrighted material in the digital age* August 2006, Berkman Center Research Publication No. 2006-09. Available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/BerkmanWhitePaper_08-10-2006.pdf.

5.7 Communication to the public for teaching exception

This is a new exception contained in section 15(1) (d) of CONRA. The provision states:

(d) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional training or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;

Arguably, it was necessary since CONRA introduced a communication to the public right in Ugandan copyright law.⁶¹⁶ It exempts communications to the public for teaching purposes. All levels and types of educational activities are covered by the fair use teaching exception since the provision is silent on any such restrictions. Accordingly, even adult literacy programmes can be accommodated under this exception.⁶¹⁷ This promotes the use of educational materials by minimising the legal restrictions to use of such works. The exception is a welcome key to the use for educational purposes of digitised educational resources in less developed countries. E-learning (involving digitised educational materials) is touted as a key to improving the quality of education in less developed countries by among others facilitating access to works.⁶¹⁸ Various initiatives are on to encourage e-learning in Africa.⁶¹⁹

⁶¹⁶ Section 9 (e) of CONRA. The C2P right was introduced despite Uganda not being bound by the WCT.

⁶¹⁷ Contrast with Ricketson and Ginsburg, 2006 (fn 575, above) 792-793 para. 13.45 where they quote the opinion of the Main Committee I of the Stockholm Berne Revision conference where it was stated that general education to the public was to be excluded from the definition of 'teaching'. The authors then point out and rightly so, that this restrictive interpretation clearly restricts utilization of works in adult education.

⁶¹⁸ There are limitations to the viability of e-learning or heavy utilisation of copyrighted materials.

⁶¹⁹ See the increasing success and popularity of E-learning in Africa annual conferences that have been held since 2006. See: < <http://www.elearning-africa.com> > (last accessed 10 January 2014).

5.7.1 Imposed conditions

With one exception, the conditions for the communication to the public teaching exception under section 15(1) (d) are the same as those for the general teaching exception under sub section (c). While under subsection (c), the use for teaching must be *by way of illustration*, subsection (d) imposes no such condition. This implies that the communication to the public teaching exception allows user of larger volumes of a work. The illustration requirement for the general teaching exception was intended to point to the need to restrain how much of a work is utilised. The absence of such a limitation minimises the conflict between copyright and the right to education by paving way for easier electronic sharing of digitised materials.⁶²⁰ The applicable conditions therefore are that compatibility with fair practice and acknowledgement being given to the work and the author. Since many academics write mainly for honour and for purposes of advancing their careers by way of promotion and recognition in their respective fields, these conditions play the instrumentalist role of providing the necessary incentive to create and publish works while knowing that users are obliged by law to acknowledge the work and the author.⁶²¹ This can ensure that more works are created and with the available exceptions, can be accessed and utilised.

By virtue of this exception, educational institutions in Uganda have thus been enabled to utilise modern Information and Communication Technology (ICT) for teaching. It paves the way for online distance digital education which entails uploading, storing of material on websites of educational institutions and other public education providers for subsequent downloading. To be compliant with the three-step test, the fair use

⁶²⁰ For a detailed discussion of the advantages of having an exception to the C2P right, see Chapter 3.

⁶²¹ The view is that many academic authors write not for economic reasons but for reasons such as receiving recognition as authorities in their respective fields or for promotion.

assessment may not be sufficient to establish the level of certainty required by educational users. There is need for to put in place extra measures by way of a statutory instrument, to introduce requirements for access control measures such as use of passwords, control on downloading and keeping of copies can be deployed to ensure that the electronic utilisation of works does not unreasonably prejudice the interests of the authors and other rights owners.⁶²²

Currently, no statutory instrument has yet been made to put this exception into operation as envisaged by CONRA. A statutory instrument detailing how this exception can be practically utilized will be needed. For instance, what quantitative restrictions should be imposed in view of the requirement of “fair practice” that is inbuilt into the exception? In sum, though Uganda was under no obligation to transpose the provisions of the WCT, in particular, with respect to the communication to the public right, the fact that this right is balanced with an exception for educational purposes is a great step forward. What remains in Uganda’s case is to give more guidance by way of a statutory instrument. The issues on which guidance is required include: the quantum of a work that can be utilized in order to be compliant with the requirement of fair practice; the target beneficiaries; restrictions on access such as password protection requirements; whether access will be on “dumb terminals”⁶²³ to ensure no downloading or onward

⁶²² UNCTAD, ‘Development dimensions of intellectual property in Uganda: transfer of technology, access to medicines and textbooks’ (UNCTAD/PCB/2009/13 (Overview),) <http://unctad.org/es/Docs/diaepcb200913overview_en.pdf> (last accessed 08 March 2013).

⁶²³ Xalabarder, *Study on Copyright and digital distance education (CDDE): the use of pre-existing works in distance education through the Internet* (2002-2003) 167 for other possible suggestions. We believe ‘dumb terminals’ refers to computer terminals that do not allow communication to any other computer or electronic gadget such as a USB device for communicating, transferring, downloading or printing. The aim would be to avoid downstream infringing copies made by students or researchers.

transmission by the users;⁶²⁴ and to generally ensure compliance with the three-step test, albeit not with its currently narrow construction.⁶²⁵ These conditions must be carved out carefully in order not to dilute the importance of the exception.

5.8 The public libraries and other entities reproduction exception

CONRA contains an exception under section 15(1) (j) that addresses the needs of libraries, educational and scientific institutions. It is expressly provided that:

Subject to conditions prescribed by the Minister, a reproduction of a literary, artistic or scientific work by a public library, a non-commercial documentation centre, a scientific institution or an educational institute if the reproduction and the copies made—

- (i) do not conflict with the normal exploitation of the work reproduced;
- ii) do not unreasonably affect the right of the author in the work; and

These institutions are allowed to reproduce works under the fair use exception. Added to the above list of beneficiary institutions is what is described as non-commercial documentation centres. There is no definition be it under the Act or the 2010 Regulations⁶²⁶ of what is meant by non-commercial documentation centres. However, the reference to “non-commercial” suggests that charitable organizations or other non-profit motivated institutions engaged in the production of educational materials would

⁶²⁴ Along the lines of section 49(5A) of the Australia Copyright Act 1968, as amended. See Raquel Xalabarder, et al *Study on Copyright and digital distance education (CDDE): the use of pre-existing works in distance education through the Internet* (2002-2003). Study covered 11 countries. Report available at: <<http://www.uoc.edu/in3/dt/eng/20418/Questionnaires.pdf>>, (last accessed 20 June 2014).

⁶²⁵ For a preferred interpretation of the three-step test, see Declaration on a balanced interpretation of the three-step Test and also the discussion above at p. 165ff.

⁶²⁶ Statutory Instrument available on file with author.

be likely candidates for this protection. I assert that this exception is based on the so-called “library exception” of the Tunis Model law for developing countries.

The provision is also silent on the purposes for which the reproduction must be made. It is however, logical to anticipate that that will be stipulated in the conditions to be made by the Minister as required by the subsection. Since the reproduction should be for non-commercial purposes, research institutions like the Fisheries Resources Research Institute and those under the National Agricultural Research Organisation (NARO) such as Kawanda Agricultural Research Institute will be able to invoke this provision. Other beneficiaries will include various medical research organizations such as those carrying on research including HIV/AIDS research. What is more serious is the silence on other concomitant rights that go with reproduction, notably, the distribution right. Only allowing institutions to reproduce leaves uncertainty as to whether they can distribute what they reproduce. This would be self-defeating and yet it is the kind of interpretation one would get under a personalist system that requires strict interpretation of exceptions. Such an omission is indeed not only to be found in CONRA but has been a pathetic feature of the international copyright regime that focused less on user interests.⁶²⁷ However, going by the EUCD example, such distribution should go hand in hand with the reproduction; otherwise the exception would be redundant.

⁶²⁷ See chapter 3.

The provision to some extent addresses some of the legal issues canvassed in the seminal American cases of *Basic Books v. Kinko's Reprographics*⁶²⁸ and *Williams and Wilkins Co. v. United States*.⁶²⁹ It is possible that the drafts person had these cases in mind when drafting section 15(1) (j) of CONRA.⁶³⁰

5.8.1 Imposed conditions

The exception is subject to a regime of three sets of rules. Firstly, there has to be regulations made by the Minister of Justice and Constitutional Affairs. These regulations must ensure that the work complies with the three-step test. In particular, the regulations will have to ensure that the work is in line with steps two and three of the three-step test. The said steps have been directly incorporated into the provision, just like under Article 5 of the European Union Copyright Directive (EUCD). It is submitted that step one is deemed satisfied by the very nature of the beneficiary institutions and the limited modes of utilisation, which is only restricted to reproduction. The third regime of hurdles is contained in the opening sentences of section 15 (1) that is to say, passing the fair use test. Section 15(2), prescribes what reproduction of a work by an “entitled institution” amounts to fair use: according to this provision, the four factors of fair use must be used.

⁶²⁸ 758 F. Supp.1522, 1529 (S.D.N.Y. 1991): The case involved reproduction of educational materials by a commercial documentation centre for use by University students as “course packs”. The fair use defence plea was not upheld mainly because of the commercial nature of the defendant.

⁶²⁹ 293 F. Supp 130 (S.D.N.Y. 1968). The case involved the reproduction of scientific journals by a government medical research centre for non-commercial purposes. Action held to be fair use.

⁶³⁰ It should be recalled that an American expert was involved at some stage of the drafting. See Uganda Law Reform Commission (ULRC), ‘A study report on copyright and neighbouring rights law’, (ULRC Publication 9, Kampala, Uganda 2004) (report, on file with author).

In line with the opening provisions of subsection 1, section 15(2) of CONRA requires that a four-factor assessment akin to the United States' "fair use" assessment be done. This has various implications. Firstly, with this Americanisation of Ugandan copyright law, Ugandan courts will for this purpose have to depart from the tradition of citing and relying mainly on English cases, and rely on United States of America decisions on fair use. More significantly, fortifying the fair use defence with the three-step test creates a formidable hurdle that may be difficult for users to surmount and for courts to interpret. At a time when various commentators suggest that the adoption of the US style fair use defence could be the solution to the vague nature of the three-step test, it is disturbing that the Ugandan legislature chose to require both tests to be passed cumulatively. It is difficult enough to cumulatively pass the three steps of the three-step test and much harder to additionally have to pass the fair use test.

A question arises as to which assessment will have to be done first, the three-step test or fair use test? Our submission is that the draftsman dictated that the three-step test has to precede the fair use one. In other words, in order for the reproduction to be assessed for fairness, the defence must comply with the second and third steps of the three-step test. However, that amounts to double assessment in some respects since the three-step test steps also involve some findings of fairness.

5.8.2 Interaction between the three-step test and the fair use test

The issue here is whether it is possible under Ugandan copyright law for an exception to pass the three-step test but fail the fair use test? Theoretically this should be possible: a contrary interpretation would render section 15(2) redundant. Practically, however, this

should not be possible. The fair use defence is perceived to be wider than the three-step test (as currently interpreted), and hence utilization that passes the three-step test should be able to pass the fair use test. This double assessment is thus bound to cause problems to educational users unless the rules to be made by the Minister come out clearly to iron out the possible rigours.

The Minister for Justice is yet to prescribe the conditions under which section 15(1) (j) is to be put into operation. The Copyright Regulations of 2010 did not deal with this matter; a further confirmation that educational needs are not a driving force behind copyright reforms in Uganda just like in other parts of the world. This is not because there are no copyright issues facing educational users but because of the laxity in administration and enforcement of copyright and the rampant piracy by educational users many of whom regard this as inevitable due to Uganda's economic circumstances.⁶³¹

⁶³¹ Makerere University's IPR policy which had been expected (by some Ugandan copyright commentators such as Dick Kawooya(2006-07) and the ACA2K research team (2009) which included the same Dick Kawooya) to deal with copyright protection issues does not actually address such issues. It is more concerned about how to better protect and exploit IP created by its own staff. For this see, D Bakibinga, 'Intellectual property rights in Uganda: reform and institutional management policy formulation', (Paper delivered at the Network of Academies of Sciences in the Organisation of Islamic Countries (NASIC), International Seminar on "Intellectual property and Innovation: Value Creation in the Knowledge Economy" Islamabad, Pakistan, 12-14 December 2006); <<http://dspace3.mak.ac.ug/xmlui/bitstream/handle/10570/662/bakibinga-david-J-law-conf.pdf?sequence=1>>, (last accessed 10 March 2013) 15-17. For Kawooya's report, see Dick Kawooya, 'Copyright and Access to e-Resources in Africa's Education and Research Contexts: the case of selected Ugandan Institutions', (2006-2007) <http://www.policy.hu/kawooya/documents/issue_paper.pdf> last accessed 10 March 2014. For the ACA2K Report on Uganda, see D Kawooya, R Kakungulu and J Akubu, 'ACA2K Country Report: Uganda, May 2009; <http://www.aca2k.org/attachments/154_Uganda_Country_Report.pdf> (last accessed 10 March 2014).

The conflict between copyright and the right to education has not been taken seriously just because the enforcement has been lax and hence the chilling effect has not been felt. But as pointed out, with the RRO poised to start operations in Uganda, the situation is likely to change. Moreover, since the grace period for implementing copyright reforms under the WTO is scheduled to expire at the end of June 2013, the country may come under increasing pressure to strengthen copyright enforcement.⁶³² The case filed against the University of New Delhi by leading publishers may be a wake-up call for educational institutions in less developed countries. That is when it will be realised that sloppy and inconsistent drafting of CONRA and particularly the fair use provisions has a negative effect on access to and utilisation of educational materials. For instance, when describing the work to which fair use applies, some provisions refer to ‘lawfully published’ and others to the preferable wider formulation of ‘made available to the public’.⁶³³ Accordingly, this provision is yet to be operational in Ugandan copyright law. Suffice it to reiterate that the yet to be prescribed conditions will have to bring out the fact that the exception is only available in certain special cases (see detailed discussion of the three-step test in Chapter 4).⁶³⁴

The public libraries, non-commercial documentation centres, scientific institutions and educational institute reproduction exception is the only exception that is expressly subject to the three-step test. However, only the last two steps are stipulated in section 15(1)(j) of CONRA. It is our submission that the fact that conditions have to be

⁶³² UNCTAD, ‘Development dimensions of intellectual property in Uganda: transfer of technology, access to medicines and textbooks (overview) (UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development, UNCTAD/PCB/2009/13), <http://unctad.org/en/Docs/diaepcb200913overview_en.pdf>, (last accessed 23 March 2014) 29.

⁶³³ See discussion in Chapter Four.

⁶³⁴ Refer to the WTO Appellate Body Report in *United States - Section 110(5) of The Us Copyright Act*: filed by the European Communities (WT/DS160/18/ADD.16).

prescribed by the Minister coupled with the fact that attempts were made to restrict the test to only the reproduction right and the distribution right, which was deemed to be implicit in the reproduction right are qualitatively restrictions that contribute to the exception being a ‘special case as required by step 1 of the three-step test.’⁶³⁵ Finally, confining the exception to a few designated beneficiary institutions is another factor that makes the exception to comply with the first step of the three-step test requiring exceptions to be restricted to certain special cases.⁶³⁶

Another issue worthy pointing out is that section 15(1) (j) leaves out other educational service providers that are not in the mainstream education sector such as those conducting adult literacy programmes in Uganda. Could their organizations fall under the definition of ‘non-commercial document centre’? This can and should be clarified by the Minister when relevant subsidiary legislation is made pursuant to the requirements of section 15(1) (j) of CONRA. A definition that takes on board all types of educational activities should be adopted. Further, the decision to limit the exception to only scientific research was ill advised.⁶³⁷ For purposes of complying with the three-step test, emphasis should be put on limiting the circumstances under which the reproduction can be done.⁶³⁸

⁶³⁵ It has been stated that the drafts Committee of the Tunis Model Law were of the view that the distribution right is implicit in the right of reproduction. See, UNESCO, Commentary on the Tunis Model Copyright law for less developed countries, para. available at www.unesco.org; with hindsight, such a view was arguably ill- advised and only confirmed the pre-occupation of WIPO to expand the scope of copyright.

⁶³⁶ WTO Panel Report on US Section 110(5) Copyright Act, *ibid*, para. 6.109 where it was held to the effect that an exception meeting the first step must be quantitatively and qualitatively limited in scope. See discussion in chapter 4. See also J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 530-534 para. 10.14; See also E B Rodrigues Jr, ‘The general exception clauses of the TRIPS Agreement: promoting sustainable development (Cambridge University Press, Cambridge 2012) p.121-122.

⁶³⁷ The example of section 29 of the United Kingdom CDPA 1988 allowing reproduction for non-commercial research should have been followed.

⁶³⁸ Just like the provisions of section 15(1)(d) of CONRA that cover all types of education.

Section 15(1) (j) of CONRA is likely to play an important role in ensuring access and use of educational works in Uganda. It is in line with the TRIPS Agreement that allows member countries to take into consideration their national interests when enacting laws to comply with their international obligations.⁶³⁹ In any case, being modelled on the Tunis Model law, which was developed by the African Group of Experts with joint support of WIPO and UNESCO Secretariats, it should not cause much alarm for copyright exporting countries that export educational materials to Uganda.

Unlike the United States of America, CONRA's is not a stand-alone independent exception but only one of the instances of fair use. Consequently, all exceptions under Ugandan copyright law must fall under the fair use exception as outlined in section 15(1).

5.9 Transcription into Braille or sign language

It should be recalled that Uganda has a unique economic right⁶⁴⁰ that reserves unto authors the right to transcribe their works into Braille format for use by visually challenged persons. It was therefore only fitting that an exception was explicitly created to facilitate education, among others. Section 15(1) (k) of CONRA balances the new

⁶³⁹ Article 8(1) of allows the taking into consideration the public interest in sectors of vital importance for socio-economic and technological development. Available at http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm visited on January 22, 2009. In Uganda's case, it is beyond doubt that promotion of education is necessary for socio-economic and technological development; The preamble to TRIPs recognizes underlying public policy objectives; Even more relevant to this thesis is the recognition of the national interests contained in the preamble to the World Intellectual Property Organisation Copyright Treaty 1996 (WCT) that recognizes the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention. Available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html - preamble. A detailed discussion of relevant international copyright treaty provisions is done in Chapter 4.

⁶⁴⁰ Section 9(k) of CONRA.

exclusive right contained in section 9(k) CONRA.⁶⁴¹ The exception provides that ‘...any work is transcribed into Braille or sign language for educational purpose of persons with disabilities.’

The exception allows the transcription, without the consent or licence of the owner of the right of transcription, of a copyright work into a Braille or sign language format for people with disabilities.⁶⁴² Presumably, this can be for any activity including education. The inclusion of this exception promotes access and use of copyrighted educational materials for people with disabilities. This is something that the international community is currently debating under the auspices of WIPO.⁶⁴³ The exception takes this further by providing not only for making accessible copies for the persons who are visually challenged but also those with hearing or speech impairment. Further, it provides for converting a copyrighted work to a format accessible to persons who are deaf or mute (or both deaf and mute) even though the transcription right does not itself mention the making of works for deaf or mute persons.⁶⁴⁴ This is not a problem since many laws⁶⁴⁵ do provide for this type of exception without creating the right. In such

⁶⁴¹ S. 9(K) CONRA reserves to authors a unique new exclusive right of authorising the transcription of their works into Braille format. The African Access to Knowledge Project (ACA2KP) book notes that a number of countries did not have specific exceptions for the visually impaired. See, ACA2K Book at <http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf> (last accessed 20 June 2014).

⁶⁴² (k) any work is transcribed into Braille or sign language for educational purpose of persons with disabilities...; The Copy/South Dossier quotes a specialist from the World Blind Union who stated that he did not know of even a single country in the global South who had implemented even a narrow exception for the blind. Uganda therefore could be a leader in this.

⁶⁴³ See WIPO, a diplomatic conference is due to be held in Morocco to adopt a treaty governing exceptions for visually impaired persons.

⁶⁴⁴ The phrase making a “derivative work” is used instead of making an “adaptation of the work” as a result of the “Americanisation” of some provisions of Ugandan copyright law”. The Americanisation process however, started with the Tunis Model Law on Copyright for less developed Countries which uses the same term. Consequently, it is the American phrase of making a “derivative work” that is adopted in CONRA and not the language of section 15(1)(a) of the United Kingdom CDPA 1988.

⁶⁴⁵ Copyright (Visually Impaired Persons) Act 2002 of the United Kingdom that introduced section 31A-F. of the CDPA 1988 available at <http://www.opsi.gov.uk/ACTS/acts2002/ukpga_20020033_en_1-11g1>(last accessed 14 March 2014).

countries, the transcription is regarded as part of the adaptation right or the right to make derivative works.⁶⁴⁶

A striking attribute of the fair use exception for people with disabilities is that there is no rule specifying whether the transcription into Braille or sign language format has to be done by a not-for-profit organisation. Is it possible therefore, for a for-profit organisation, or to employ the commonly used expression in Uganda, a profit-motivated organisation, to successfully plead fair use where it transcribes copyrighted materials for use by the blind or deaf mute albeit on commercial terms? The answer to this question lies in section 15(2) which lays down the four factors to be considered in making an assessment as to whether a use of a work is fair or not.⁶⁴⁷ It is our considered opinion that the courts in Uganda may take the same position as that taken by the United States courts against reproduction of works by copy shops that are for profit.⁶⁴⁸

Two other issues can be pointed out about Uganda's visually impaired person's exception. The exception is with regard to the visually challenged is technology specific. A technology neutral language would be preferable to allow for use of other existing or future technology other than the Braille format.⁶⁴⁹ Yet another lacuna with CONRA handling of exceptions for persons with disability is that exchange of Braille copies between visually impaired persons on non-commercial terms is not provided for. This is necessary to promote dissemination of educational materials among visually

⁶⁴⁶ Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired', (WIPO < Geneva, 2007): <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf> (last accessed 10 March 2014).

⁶⁴⁷ Individual factors are discussed below.

⁶⁴⁸ The *Kinko's* case being a good reminder of such an approach. See, *Basic Books Inc. v. Kinko's Graphics Corp.* 758 F. Supp. 1522 (S.D.N.Y. 1991). *Princeton University Press v. Michigan Document Services*, 99 F. 3d. 1381 (6th Cir.1996) cert. Denied, 520 U.S. 1156(1997) where court held that there was no fair use where photocopied articles and book chapters were compiled into college "course packs".

⁶⁴⁹ Judith Sullivan, *ibid*, at p. 36 gives examples of other formats such as talking books.

challenged persons. It should not require consent of the right holder to make such an exchange for non- commercial purposes.⁶⁵⁰

5.10 The individual fair use factors under section 15 CONRA

Section 15 of CONRA has three subsections; subsection 1 deals with the various uses of copyrighted works that are classified as fair use while subsection 2 contains the factors that have to be considered when assessing whether a use is fair use or not. Subsection 3 stipulates the fact that even unpublished works can be the subject of fair use. It is imperative that I look at the individual factors to assess whether they allow for a maximalist interpretation to allow optimal access to and use of copyrighted materials to promote education for economic development of Uganda. Section 15(2) of CONRA provides:

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

- (a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes;
- b) the nature of the protected work;
- (c) the amount and substantiality of the portion used in relation to the protected work as a whole; and
- (d) the effect of the use upon the potential market for value of the protected work.

⁶⁵⁰ Such a provision exists in United Kingdom copyright law. Section 3 of the Copyright (Visually Impaired Persons) Act 2002: <http://www.opsi.gov.uk/ACTS/acts2002/ukpga_20020033_en_1>, (last accessed 10 January 2013).

Since these factors are key to the fair use defence, I here examine each one of them. Since vision remains largely untested in Uganda's history, I have analysed these factors with the help of US decided cases. I shall also refer to fair dealing cases from the United Kingdom and other jurisdictions. For purposes of the analysis it is helpful that I set out the US fair use defence contained in section 107 of the Copyright Act 1976. It states:

Notwithstanding the provisions of sections 106 and 106A, 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.⁶⁵¹

⁶⁵¹ This last sentence that the unpublished nature of a work should by itself not lead to a finding of fair use is what was included in CONRA as section 15(3). It provides that 'The fact that a piece of work is not published shall not of itself prejudice the requirement of fair use in accordance with subsection (2).' It is submitted that for purposes of clarity, this provision should also have referred to subsection (1) and not only subsection (2). This is because subsection (1) is the substantive provision giving the instances of use that may be found to be fair. See Nimmer and Geller, *International copyright law and practice*, (Lexis Nexis Matthew Bender, 2007) at p. USA-168 for a view that US courts treat the unpublished nature of the work issue as a 'subfactor' of fair use.

The US provision lists four non-exclusive factors that have to be considered in determining whether a use of a work has been fair or is an infringement of copyright. Unlike the United Kingdom fair dealing defence, the fair use defence of the United States of America does not contain a closed list of purposes. The provision only gives an illustrative and not conclusive list of factors to be considered and hence United States courts can and do find that a defendant's use is fair even where the use in question does not fall within the statutory list.⁶⁵² This was reiterated in the case of *New Era Publications International v. Henry Holdt & Co.*,⁶⁵³ In fact, in the *Kinko's* case, the court has been criticized for adding two factors, not that the court did not have such powers, but that the factors added were not appropriate in the circumstances.⁶⁵⁴

Ugandan courts would have to take into consideration the fact that the fair use factors are to be explored and weighed together, in light of the purposes of copyright in different combinations and permutations.⁶⁵⁵ In particular, they will have to take into consideration the local circumstances of Uganda and in particular the need to promote the human right to education for economic development. It is noted however that in the USA, there is a tendency by the courts to treat the fourth factor as the most significant

⁶⁵² R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005) 249.

⁶⁵³ 873 F. 2d 576, 558 (2d Cir.1989). There are even attempts with varying degrees of success to introduce other factors for determining the fair use defence. For this, refer to Scott M. Martin, 'Photocopying and the doctrine of fair use: the duplication of error' (1992) 39 J. Copr Soc'y U.S.A 345, see endnote 10 referring to Justice Leval's rejection of suggestions of several additional elements of fair use. In the *Kinko's* case (footnote 151), the court actually added two factors, whose appropriateness the commentator strongly disputes (pp. 385-389).

⁶⁵⁴ Scott M. Martin, 'Photocopying and the doctrine of fair use: the duplication of error', *ibid* at p.386-387 where the court's action has been referred to as "grafting" on the reasoning that the factors added were not appropriate.

⁶⁵⁵ Nimmer and Geller, *International copyright law and practice*, (Lexis Nexis Matthew Bender, 2007) USA-168.

as happened for instance in the *Sony Corporation of America v. Universal City Studios*⁶⁵⁶ case and in the *Harper & Row, Publishers, Inc., v. Nation Enterprises*.⁶⁵⁷

However, notwithstanding that practice, the legal position remains that there is no hard and fast rule for assessing the factors in order to determine whether a use was fair or not. The four factors are not to be treated in isolation, one from another, but rather, explored together in light of the purposes of copyright.⁶⁵⁸ The fact that one factor points to or away from a finding of fair use is not dispositive.⁶⁵⁹ Equally important is that each question raising the question of whether there was fair use or not should be decided on its own facts. In other words, a case-by- case approach has to be adopted.⁶⁶⁰ This makes fair use a fact- intensive or fact specific defence and has been known to breed a lot of inconsistency.⁶⁶¹

5.10.1 The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes

By referring to the listed uses that may be used to guide court as to whether a use is fair or not, it can be said that where, for example the criticism, comment or teaching is of a non-commercial nature, there is likely to be a finding that a use is fair. However, since the fair use defence is a flexible defence, the fact that a court finds a defendant's use to be commercial does not rule out the possibility of a finding that the use is fair.

⁶⁵⁶ 464 U.S. 417 (1984).

⁶⁵⁷ 471 U.S. 539,540(1985).

⁶⁵⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

⁶⁵⁹ Scott M. Martin, *Photocopying and the doctrine of fair use: the duplication of error*, J. Copr. Soc'y U.S.A. 345, 349.

⁶⁶⁰ Nimmer and Geller, *International copyright law and practice*, (Lexis Nexis Matthew Bender, 2007) USA-167, footnote 174 quoting a 1976 U.S House of Representatives Report

⁶⁶¹ M M Scott, *Photocopying and the doctrine of fair use: the duplication of error*, J. Copr. Soc'y U.S.A. 345, 349.

Similarly, a determination that a use is of a non-profit educational purpose does not mandate a finding that a use is fair.⁶⁶²

A criticism of the judicial treatment of this factor has been that courts shifted the focus from the commercial nature of the use to existence of any benefit to the user. A case in point is *Harper & Row Publishers, Inc., v. Nation Enterprises*, where it was held that the inquiry under the first factor was not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price. This diminishes the chances of the fair use finding on this factor since students and teachers do certainly derive benefit or value from such use.

5.10.2 Transformative or productive uses

In the *Campbell v. Acuff-Rose Music, Inc.*,⁶⁶³ it was held that the fair use may be more likely to be found where a defendant made a productive or transformative⁶⁶⁴ use of a copyrighted work. This however, was a music parody case where it may be easier to make a finding of transformative use or not just like in fine art. Other leading cases that apply this principle include the *Kinko's case*⁶⁶⁵ and *Universal Studios, Inc., v. Sony Corporation of America*, which was cited in the former case. An example of such use is

⁶⁶² In *Princeton University Press v. Michigan Document Services*, 99 F. 3d. 1381 (6th Cir.1996) cert. Denied , 520 U.S. 1156(1997), court held that there was no fair use where photocopied articles and book chapters were compiled into college “course packs”.

⁶⁶³ 510 U.S. 569, 579(1994).

⁶⁶⁴ This sub test for establishing the nature and character of the use to which a copyright work has been put is sometimes referred to as “the fifth factor”; see J. Griffiths & Uma Suthersanen(eds), at p. 160 para. 7.20

⁶⁶⁵ *Basic Books, Inc., v. Kinko's Graphics Corporation*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) where it was held that the productive value of putting an entire semester's resources in one bound volume required not Kinko's judgment but that of the relevant professors. At p. 1531, the court ruled that while

criticism or review, which fits in well with the work of academics. However, it is contended that mere use of a work for classroom teaching would carry little if any transformative use since there may be no creative contribution by the defendant. It has been explained by the court that such a use is treated as a statutory exception to the case law requirement of transformative use.

The problem with this approach to the first factor is that most educational uses of a work, especially for classroom teaching do not require or involve any creative input. This observation was made in a Harvard University report where it is argued, and rightly so that most educational uses of content are faithful reproductions of original content for purposes of analysis or teaching, and as a result, they would fare poorly in this evaluation.⁶⁶⁶ Guarded optimism therefore has to be sought from the strength of the defence, its flexibility, which allows the court to arrive at different decisions basing on the facts before it. For instance, the case of *Kelly v. Arriba Soft*,⁶⁶⁷ court found that a use could be transformative if it served a different informative purpose than the original content. Similar reasoning was used in the case *Bill Graham Archives v. Dorling Kindersley Ltd.*⁶⁶⁸ This optimism may however, turn into a mirage with regard to works which are actually meant for educational use- it would be hard to find for instance, that classroom “faithful reproductions” of educational copyright materials serve a different purpose.

the student’s use of the packets was educational, the same did not apply to Kinko’s use of the packets which was commercial.

⁶⁶⁶ Harvard University, Digital Media Project, ‘The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age’, (Foundational White Paper 2006) available at: <<http://cyber.law.harvard.edu/media/files/copyrightandeducation.html>> , (last accessed 20 June 2014) it is argued at para. 3.2.2

⁶⁶⁷ 280 F.3d 934 (9th Cir. 2002).

It has been further suggested that optimism should be drawn from the fact that the text of Section 107 of the Copyright Act (both the preamble and in the wording of the first factor) make specific mention of educational uses of a work as deserving particular deference in the fair use calculus.⁶⁶⁹ This optimism is also reduced by the fact that in real practice, courts have rarely used the preamble of section 107 in a fair use evaluation. Moreover, a finding on one factor has to be weighed together with the findings on other factors and in line with the general purposes of copyright as perceived in the United States of America. Hence, after an inquiry on this factor, a court has to turn to the other factors.

5.10.3 The nature of the copyrighted work

Three different aspects of this factor have been noted by the United States courts. These are:

- the informative or creative nature of the work⁶⁷⁰,
- the intended use of the original and the copy and,
- the unavailability of the work, including whether the work is published or unpublished.

The nature of the copyrighted work can also be determined by whether there is an overlap between the intended use of the original and the intended use of the copy. This

⁶⁶⁸ 448 F.3d 605 (2d Cir. 2006).

⁶⁶⁹ Harvard University, Digital Media Project white paper, *ibid*, para 3.2.1

⁶⁷⁰ In the *Kinko's* case, court noted at pp. 1532-1533 that the scope of the fair use defence is greater with respect to factual than non-factual works. The books copied were found to be factual and hence this factor favoured Kinko's. Court relied on the seminal case of *New Era Publications v. Carol Publishing Group*, 904 F. 2d. 152, 158 (2d Cir. 1990) to arrive at the conclusion that works of a factual nature such as

particularly applies to works which are meant for use for the very purpose for which they are photocopied. As the legislative history of the United States of America Copyright 1976 Act reveals, there should be less latitude of finding fair use where textbooks and other materials prepared primarily for the educational market are copied for classroom use.⁶⁷¹ Among the books most needed for improving the quality of education in Uganda are those primarily intended for use in educational settings. This approach to interpreting fair use would thus weigh against Ugandan educational users of educational textbooks just like it did against the defendants in the *Kinko's* case. The solution would be for the Ugandan courts to navigate around this type of interpretation for instance by counterbalancing it against other factors and by relying on Uganda's socio-economic circumstances.

On the aspect of availability of the copyrighted work, if a copyrighted work which is out of print and therefore not available for purchase through normal channels, a user who reproduces it may have more justification for pleading fair use. However, as further proof of the unavailability of such work, court would also consider whether or not there are organizations licensed to provide photocopies of such out-of print works at a reasonable cost.⁶⁷² Put in an economics language, a plea of fair use would be more justified where there is market failure. Looking at Uganda's situation, many of the foreign books that are heavily relied on in education especially at secondary and tertiary level are often unavailable.

biographies, reviews have more public value and that allows copyright law to better tolerate their use as fair use.

⁶⁷¹ M. M Scott, Photocopying and the doctrine of fair use: the duplication of error, *ibid* at p. 350.

⁶⁷² M M Scott, Photocopying and the doctrine of fair use: the duplication of error, *ibid* at p.385.

Yet another aspect of the availability relative to the second factor of fair use (the nature of the copyright work) is the question of whether the work is published or not.⁶⁷³ Bearing in mind that authors have a right to determine when and how to make their work available, which is an integral part of the right of distribution,⁶⁷⁴ the fair use defence would be vitiated where a creator has not yet exercised that right.

The above view is supported both by the legislative history as contained in the relevant Congressional report⁶⁷⁵ and the judicial pronouncement by the Supreme Court in the case of *Harper & Row Publishers, Inc., v. Nation Enterprises*.⁶⁷⁶ In that case, the Supreme Court held that under ordinary circumstances, the copyright owner's right of first publication will outweigh a claim of fair use⁶⁷⁷. The court ruled that the unpublished status of a work is a critical element of its nature⁶⁷⁸ for purposes of the fair use defence.

Subsequent to the Harper decision, other courts took very strict positions with regard to fair use in the case of unpublished works prompting the legislature to insert the provision to the effect that the unpublished nature of a work is not an automatic bar to a finding of fair use basing on consideration of all the four factors. As pointed out this amendment concerning the weight to be attached to the issue of a work being unpublished has been incorporated as section 15(3) of CONRA. The 1996 amendment helped to claw back on the minimalist practice of not finding fair use where the work

⁶⁷³ M M Scott, Photocopying and the doctrine of fair use: the duplication of error, *ibid* at p. 350.

⁶⁷⁴ Section 106(3) of the U.S. Copyright Act.

⁶⁷⁵ Senate Report at p. 64 quoted in M M Scott, Photocopying and the doctrine of fair use: the duplication of error, *ibid* at p. 350 and footnote 19.

⁶⁷⁶ 471 U.S. 539 (1985)

⁶⁷⁷ *Harper & Row Publishers, Inc.*, *ibid*, at p. 555

⁶⁷⁸ *Harper & Row Publishers, Inc.*, *ibid*, at p. 564.

copied had not been published. This is one instance where the legislature can be said to have made a substantial contribution to the development of the doctrine of fair use by clarifying a matter that the courts were minimally applying to the disadvantage of copyright users including educational users. It is submitted that though CONRA has specifically incorporated section 15(3), it is likely not have much impact on educational users since the target is published books.

5.10.4 The amount and substantiality of the portion used in relation to the copyrighted work as a whole

Without prejudice to the need to weigh all the four factors, a claim of fair use is not likely to be sustained where the whole of a work is reproduced. However, even where only a small portion of a work is taken, a defence of fair use may still fail if what has been taken, though quantitatively insubstantial, is qualitatively substantial. This may happen where the court finds that what was copied is the heart of the work as happened in the case of *Harper & Row*.⁶⁷⁹

This qualitative approach to substantiality was also used in the case of *New Era Publications* and was applied in *the Kinko's* case. In the *Kinko's* case, it was held that *Kinko's* had failed both the quantitative and qualitative test. The failure of the qualitative test being on the basis of the finding that the likely reason why those parts of the copyrighted books were chosen by the professors was that they were critical parts of the books in question.⁶⁸⁰

⁶⁷⁹ 471 U.S. 539, 555 (1985). In that case, court found no fair use where the defendant copied only 200 words from a 20, 000 word manuscript because in the opinion of the court, what was copied was “the heart of the book”.

⁶⁸⁰ *Kinko's* case at p. 1533.

Essentially, it can be said that court was using the approach of what is worth copying is worth protecting. This has been criticized as being wrong for creating a new presumption that once a defendant is proved to have reproduced a work, then, prima facie, they must have taken a critical part and there is no need for further inquiry.⁶⁸¹ In the case of *Chicago Board of Education v. Substance, Inc.*,⁶⁸² it was held to the effect that the fair user must copy no more than is reasonably necessary to enable him pursue an aim that the law recognizes as proper, for instance a parody, comment or criticism.

5.10.4 The effect of the use upon the potential market for or value of the copyrighted work

As pointed out above, the courts in the United States including the Supreme Court have tended to regard this fourth factor as the single most important element in fair use⁶⁸³

In the case of *Basic Books, Inc. v. Kinko's Graphics Corporation*⁶⁸⁴, 758 F. Supp.1522, 1529 (S.D.N.Y. 1991) it was held that a nationwide photocopying firm's practice of soliciting lists or required course readings from college professors, reproducing booklets containing those readings, and selling them to students did not fall within the fair use exemption of Section 107, and therefore constituted acts of infringement. The defendant had 200 copy stores nationwide servicing hundreds of colleges and Universities which enrol thousands of students. Court concluded that the defendant's photocopying activities unfavourably impacted on the plaintiffs who derived a significant part of their income from textbook sales, and permission fees especially for out of print books.⁶⁸⁵ In

⁶⁸¹Scott M. Martin, Photocopying and the Doctrine of Fair Use, *ibid* at p.385

⁶⁸² 2003 U.S. App. LEXIS 26451, at *13 (7th Cir. Dec. 31, 2003).

⁶⁸³ Harper & Row Publishers case, *ibid* at p. 566

⁶⁸⁴ 758 F. Supp.1522, 1529 (S.D.N.Y. 1991).

⁶⁸⁵ Court relied on the *Harper & Row Publishers* case, among others.

other words the defendants were doing exactly what the plaintiffs would, used to and had a right to do.

However, because no single factor is conclusive or dispositive of the finding of fair use or lack of it, it would still be possible to have an optimal interpretation that benefits educational users in Uganda. To back this up, in the case of *Princeton University Press v MDS*, the fact that multiple copies were made at some profit resulting from efficiency of using the defendants rather than the university photocopying services was considered. It must be pointed out that due to the non-exhaustive nature of the list of factors, another factor that helped influence the finding of fair use in the Princeton case was the fact that more than one hundred authors had filed declarations to the effect that dissemination of the materials in question was in their interest.⁶⁸⁶ True to the flexible and fact specific nature of the fair use defence as applied by the US courts, in the case of *Marcus v. Rowley*⁶⁸⁷ it was held that the absence of measurable pecuniary damage does not of itself call for a finding of fair use. While this strength is good in the United States, it may work hardship in a country like Uganda with a less developed jurisprudence on fair use.

5.11 A critique of Uganda's version of the fair use defence

The US style fair use defence is touted as a better exception to copyright even by some commentators in the Western countries outside the US.⁶⁸⁸ However, it is submitted that the way Uganda drafted its fair use provision will not yield the optimal exceptions for

⁶⁸⁶ Susan Isiko Štrba, *International copyright law and access to education in less developed countries: exploring multilateral legal and quasi-legal solutions* (Martinus Nijhoff Publishers, Leiden, 2012) 123.

⁶⁸⁷ 695 F. 2d 1171, 1177 (9th Cir. 1983).

⁶⁸⁸ See for instance, Burrell and Coleman; Prof. L. Bently, in response to the Hargreaves Review of Copyright; Jonathan Griffiths.

educational use. Though section 15(2) of CONRA introduces a test akin to the US style so-called four-factor assessment as to what amounts to fair use of a work in order not to require consent of the right owner or to exempt a user from liability, it is the Ugandan provision is significantly different from the United States section 107 of the Copyright Act, which codified the United States judicial doctrine of fair use.

One noteworthy but problematic distinction between section 15(2) CONRA and section 107 is the closed nature of the list of factors to be used in determining fair use. The absence of words suggesting that these factors are not exclusive or determinative has potentially very serious implications since they entrench a minimalist approach to exceptions. This could erode many of the possible advantages that could be gained from the adoption of a broad fair use defence. The provision simply states that “in determining whether the use made of a work in any particular case is fair or not, the following factors shall be considered”. It is strongly submitted that as the provision stands now, the four factors listed are given as determinative, exhaustive or exclusive factors. They are thus the only factors to be considered.⁶⁸⁹ There is nothing in the wording to suggest that these factors were intended to be merely illustrative as is the case under the copyright law of the United States of America whose provisions provides that ‘...In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—’.⁶⁹⁰

⁶⁸⁹ As contrasted with section 107 of the United States of America Copyright Act 1976 which contains a non exhaustive list of factors.

⁶⁹⁰ § 107 USA Copyright Act 1976, second sentence of the opening paragraph. <http://www.wipo.int/wipolex/en/text.jsp?file_id=177374>, (last accessed 08 March 2014).

The framers of CONRA should not have closed the list of factors. Considering Uganda's circumstances need to promote education as an empowering right and as an end in itself, there is need to add a factor that allows courts to consider the national interests of Uganda when assessing fair use. A key consideration would be the promotion of fundamental human rights such as the right to education.⁶⁹¹ A suggested formulation of this factor is given below.

On a positive note, it is clear that fair use has to be determined on a case-by-case basis just like under United States copyright law. This is borne out by the use of the phrase "in any particular case"⁶⁹² as contained in the opening sentence of section 15(2). There is thus room for the necessary flexibility notwithstanding the closed list of factors to be used in assessing fair use.

Another criticism is that by putting all exceptions under the fair use exception, Uganda does not have separate library or educational use exceptions outside the fair use defence.⁶⁹³ This should be contrasted with the position in the United States of America

⁶⁹¹ See J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 529 para. 10.13.

⁶⁹² Opening sentence in subsection 15(2) of the CONRA reproduced above.

⁶⁹³ Suffice it to mention that in the United States, the fair use exception is separate and distinct from the educational and library exceptions. The libraries exception primarily addresses such issues as reproduction of copyrighted works for purposes such as private research and study, preservation and replacement of materials, and document supply and interlibrary lending. Refer to Kenneth Crews *WIPO Study on Copyright Exceptions for Libraries and Archives*, November 2008 available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf (last accessed on 20 June 2014); See also Guido Westkamp, *Report on Implementation of Directive 2001/29/EC in the Member States (Part II)* 2007 at p. 11 for a discussion of the library and archive exceptions in the EC. Further, at p. 26 where he observes that library and archive copying exceptions generally are for making copies in public interest such as preservation, archiving and replacement of existing copies. Importantly, this exception operates without prejudice to the ability of a defendant to rely on the other provisions, such as those in section 108 of the Copyright Act dealing with library exceptions. That serves to enhance access to and use of educational materials;

In the United Kingdom, the fair dealing provisions contained in sections 29 and 30 of the CDPA can be invoked without any prejudice to the educational use provisions contained in sections 32 – 36A of the

and the United Kingdom.⁶⁹⁴ It is suggested that another option for Uganda would be borrowing a leaf from Australia that has toed a middle line by adopting a ‘best of both’ approach.⁶⁹⁵

Copyright, Designs and Patents Act 1988 (CDPA). In addition, the CDPA contains separate library provisions under sections 37-43 as well as provisions for making accessible copies for visually impaired persons under section 31A-F of the CDPA 1988.⁶⁹³ We are mindful that the United Kingdom opted to have a long list of narrowly constructed exceptions. Moreover, countries usually choose to either have a short list of broad exceptions or a long list of narrowly defined ones.

⁶⁹⁴ § 108 of the USA Copyright Act 1976 (as amended at 2009) provides an exception on exclusive rights for purposes of reproduction by libraries and archives. See <http://www.wipo.int/wipolex/en/text.jsp?file_id=177374>. For the United Kingdom, see sections 37-44 of the Copyright, Designs and Patents Act 1988 <http://www.wipo.int/wipolex/en/text.jsp?file_id=127295> (last accessed 08 March 2014).

⁶⁹⁵ Australia by decided not to adopt the fair use defence but this did not deter the country from broadening its fair dealing exceptions and adding special educational and library exceptions. See, Australian Copyright Council Bulletin, B130v01, *Special case exception: education, libraries: a practical guide* (December 2007).

5.12 Is fair use a silver bullet to optimal user friendly copyright law in Uganda?

A warning has been issued by Burrell and Coleman against viewing the fair use defence as a silver bullet.⁶⁹⁶ They submit that the United States fair use defence operates not in isolation but in a complex web of understandings, agreements and policy statements that support the legislative provisions. These are important particularly for institutional users of copyright material such as universities and libraries, since they provide such users with an important degree of certainty around which they can structure their own copyright policies. Most important is the Guidelines for Classroom copying in not-for-profit Educational institutions with respect to books and periodicals.⁶⁹⁷ Additionally, the fair use defence as applied to educational uses is supplemented by specific provisions contained in Section 108 of the Copyright Act. Further legislative efforts to minimize the negative impact of copyright on educational use of works is borne by the fact that the US Congress had to enact the Technology Education and Copyright Harmonization Act of 2002(TEACH) which unfortunately, also has its own limitations.⁶⁹⁸

The reluctance of courts to reject a defence of fair use where there is a demonstrated market for the content being used, has often led educational institutions in the United States to seek licences out of excessive caution even when that is not necessary.⁶⁹⁹ Even in the USA, tension still exists between the needs of educational users of copyrighted

⁶⁹⁶ R Burrell and A Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press 2005). But for an argument to strongly consider the US style fair use defence, see Griffiths J, 'Unsticking the centre-Piece – the liberation of European copyright law?'(2011) *Journal of Intellectual Property Information Technology and e-Commerce Law*, Vol. 87, 2010. Available at SSRN: <http://ssrn.com/abstract=1747177> or <http://dx.doi.org/10.2139/ssrn.1747177>.

⁶⁹⁷ Available online:< <http://www.copyright.gov/circs/circ21.pdf>> (last accessed 10 June 2014).

⁶⁹⁸ Harvard University, Digital Media Project white paper, *ibid*, para 3.1.2. Though this White paper is about copyright and digital learning, the most of the criticisms given about copyright law in theory and practice, are equally relevant in the analogue environment.

material and the interests of copyright owners. The former feel that the law is more tilted towards copyright owners while the copyright owners are determined as ever to resist any attempts to change the status quo. Moreover, any attempts to change the status quo would only lead to even more lobbying from rights holders and may even be counter-productive. A similar thing happened during the process of making the TEACH Act.

5.13 Reform proposals- Fifth fair use factor

A key recommendation of this study is that a fifth fair use factor should be added onto section 15(2) of the Copyright and Neighbouring rights Act 2006. It would be formulated as clause (e) of section 15(2) and hence would read as follows:

(2) In determining whether the use made of a work in any particular case is a fair use the following factors shall be considered—

- (a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes;
 - (b) the nature of the protected work;
 - (c) the amount and substantiality of the portion used in relation to the protected work as a whole; and
 - (d) the effect of the use upon the potential market for value of the protected work.
- (e) whether the nature and purpose of the use is intended or capable of enhancing the realisation of a fundamental human right such as the right to education.

5.14 Some reflections

This chapter set out to answer two of the research questions, firstly: Is Uganda's copyright regime of exceptions and flexibilities an optimal transposition of international

⁶⁹⁹ Harvard University, Digital Media Project white paper, *ibid*, para 5.1

copyright law sufficient to maximise copyright's role in enhancing education? The other question was: Subject to the restrictions imposed by the current international framework, what reforms, if any, are needed for copyright to more effectively contribute to the enhancement of education for economic development of Uganda?

The chapter opened with a brief background to Uganda's relatively new and untested copyright exceptions that provide intrinsic avenues for utilization of works for educational purposes without requiring payment of compensation and seeking consent of the copyright owner. Overall, the analysis has shown that CONRA is much clearer and has more detailed educational exceptions than its predecessor. The chapter found that there are six fair uses defences that are relevant to education under CONRA. Each of these exceptions was analysed with a view to testing its optimality in view of the existing international framework and the need to enhance education for economic development.

A key finding of this chapter was that the Ugandan fair use defence is actually a unique defence: section 15 of CONRA is the only provision in the whole Act that stipulates exceptions (in the sense of the word, as explained in the introduction to chapter 1). Therefore, the fair use defence has been created as the overarching defence. This has certain disadvantages and may in some situations amount to a less than optimal transposition of Uganda's copyright law. Further, it was found that the Uganda fair use exceptions are uncompensated uses requiring neither consent nor compensation of the rights holder. The chapter considered six exceptions, namely: private personal use; scholarly quotations; general teaching; communication to the public for teaching; reproduction by public libraries and other institutions; and Transcription into Braille

and sign language materials. Based on the analysis, private personal use covers students, teachers preparing for a lesson and researchers. This exception is particularly important at tertiary education level due to the high cost of books compared with the low purchasing power. It was instructive to note that there are no quantitative restrictions appear on the face of this private personal use exception but on the other hand, the very nature of the exception would to rule out multiple copies. A concern of this exception from the right holder's point of view is the cumulative effect of various individuals reproducing a single copy. However, it was pointed out that in reality, this exception does not represent lost sales in view of the low purchasing power in Uganda where a good percentage of people live below the poverty line.

The chapter also established that CONRA has two different but related teaching exceptions. One is the general teaching exception under section 15(1) (c) and the other is what I referred to as the 'communication to the public for teaching' exception. These exceptions are fairly technologically neutral and hence allow for a wide range of technological forms may be used. However, the general teaching exception is silent on the number of copies that may be made under it. Consequently, in line with a maximalist approach that I advocate for, it is open to argue, that a teacher may make as many copies as there are students. Arguably, since CONRA introduced a communication to the public right in Ugandan copyright law, a communication to the public teaching exception was imperative to facilitate e-learning.

One interesting policy implication of the US-style fair use exception in Uganda that I found is that Ugandan courts may now have to refer to United States of America

decisions on fair use when deciding cases. Previously, United Kingdom cases would be cited.

This chapter found that fortifying the fair use defence for library reproduction with the need to pass the last two steps of the three-step test creates a formidable hurdle that may be difficult for users to surmount and for courts to interpret. Accordingly, it was recommended that there is need to clarify the relationship between the three-step test and the fair use test in a way that does not render section 15(2) CONRA redundant. Another key finding of this chapter was that the Copyright Regulations of 2010 did not deal with access to education materials; this was a further confirmation that educational needs are not a driving force behind copyright reforms in Uganda just like in other parts of the world. The last exception investigated was the one dealing with visually impaired people. The chapter found that Uganda has a unique economic right that reserves unto authors the right to transcribe their works into Braille format for use by visually challenged persons; it was therefore good to balance this with a fair use exception for the same group.

The chapter could not end without a discussion of the individual fair use factors as stated in section 15(2) of CONRA. Using US jurisprudence, this chapter discussed the likely interpretation of Uganda's fair use factors. This could be of practical help to judicial officers considering the fair use defence in Uganda. A key point to note from the jurisprudence is that in the USA from where the fair use defence was borrowed, no single fair use factor is conclusive or dispositive of the finding of fair use or lack of it. This fact is boosted by the fact that the factors listed in the US copyright Act are not a closed list. The Ugandan's legislature's use of a closed list of factors is not an optimal

use of policy space. It is possible however, that this approach was by design prompted perhaps by criticism that the US defence may not be three-step compliant. But since there has been no challenge to the fair use defence, this should not have been a big problem to necessitate closing the list. To this end, this chapter strongly recommended that another fifth fair use factor be added to give due consideration to human rights issues particularly the right to education. It was suggested that another option Uganda should have considered was following Australia that toed a middle line by adopting a ‘best of both’ approach by not adopting a fair use but opting for broader ‘fair dealing’ defences.

The chapter was also critical of Uganda’s lack of supplementary exceptions such as the stand alone library exception in US law, under section 108 of the Copyright Act; this was arguably a failure to optimally utilise available policy and legislative space. A major highlight of this chapter was a formulation of the recommended fifth fair use factor intended to allow courts to consider the realisation of the right to education. It should be emphasised that this factor would be one of five factors to be considered, as and when need arises. This should deflect from any fears of offending the first step of the three-step test.

5.15 Conclusion

In summary, the analysis highlighted areas where CONRA does and does not optimally transpose all the available exceptions and those where it takes a stricter stance than is required under International copyright instruments. Provisions that do not comply with international copyright instruments were pointed out. In order to minimise the conflict

between copyright and the right to education, it will be important that Uganda's uncompensated use exceptions are deployed in tandem with the compensated use regime established by the Appendix to the Berne Convention. If that were done, it would be possible to use the fair use exceptions sparingly to avoid complaints from rights holders and their powerful Governments. Fortunately, the Appendix regime has been robustly transposed by CONRA and is analysed in chapter 6.

Chapter 6: Extending educational exceptions in Uganda: is the Berne Appendix still relevant?

6.1 Introduction

The previous chapter (5) discussed the efforts to construct an educational friendly copyright regime for Uganda through educational exceptions. It critically examined whether CONRA (Uganda's copyright legislation) maximally transposed copyright exception provisions to provide an optimal environment under the international copyright framework for promoting quality education for economic development of Uganda. I observed that though an attempt was made to maximise the exceptions, there were shortcomings with the way this was done. More importantly, I noted that even with the most maximal transposition of exceptions, the doctrine of the three-step test may provide hurdles besides the inherent limitations of individual exceptions. It was submitted that ultimately no amount of maximal crafting and application of educational exceptions in Uganda would provide the large scale copies needed for a 'big push' educational strategy that is needed to meet national development goals, the Millennium Development Goals and the Education for All goals.

This chapter discusses the relevance of the Berne Appendix for developing countries (hereafter 'the Berne Appendix') as a mechanism for extending educational exceptions to provide large scale access through compulsory licences for reproduction and translation in a developing country like Uganda.⁷⁰⁰ This chapter specifically seeks to address the question whether the Berne Appendix is still relevant within the international copyright framework. Building on the main argument of this thesis, the

⁷⁰⁰ The Appendix was incorporated into the Berne Convention in 1971 and subsequently explicitly incorporated by both the TRIPS Agreement article 9(1) and the WCT article 1(4).

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chapter then examines whether Uganda maximally transposed the Berne Appendix in order to facilitate optimal access to and utilisation of educational materials to promote the education as a human right, an end in itself and as a means to realisation of economic development. As elaborated in Chapters 1-3, one of the key variables for quality education in a least developed country like Uganda is access to and utilisation of educational materials many of which are protected by copyright.

The Berne Appendix for Developing countries is acknowledged, and rightly so, as being the only one of the International copyright instruments with provisions that acknowledge the impact of unreasonably priced items on educational activities.⁷⁰¹ The Berne Appendix has been contentious right from its conception to the present day. After it was concluded, it became a subject of attack by developing countries which felt, and rightly so, that they had been out-manipulated by the developed ones. On the other hand, many commentators especially from the global North cite its non-use by developing countries as a reason to call for its abolition.⁷⁰² Despite the strong criticism,

⁷⁰¹ Refer to Consumers International, 'Copyright and access to knowledge: policy recommendations on flexibilities in copyright law', p. 7, para 7, 20 < www.eifl.net/system/files/201105/ci_report.pdf > (last accessed 20 June 2014). The Appendix was incorporated into the TRIPS Agreement of 1994 via its article 9(1) TRIPS and into the WCT 1996 via its article 1(4); the predecessor of the Appendix, the Stockholm protocol, was introduced at the 1967 Stockholm Revision Conference but was not ratified. The Appendix was later passed at the Paris Revision Conference in 1971 (discussed in chapter 5); Senftleben 2004, (fn 207) 23 who observes that the 1971 Paris Revision Conference sought to react to the needs of less developed countries least developed countries; Ruth Okediji *Toward an international fair use doctrine*, ((2000) 39 Colum. J. Transnat'l L. 75, 106-107): hereafter, "Okediji, International Fair Use". For a general commentary, see, , S Ricketson and JC Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, (2nd ed. Oxford University Press, 2006); hereafter "Ricketson and Ginsburg, 2006".

⁷⁰² Such authors do not question the reasons for non-use. These could range from lack of knowledge, diplomatic pressure from developed country governments acting on lobbying from their publishers, the circumstances of the conclusion which left less developed countries in no doubt that developed countries abhorred it and the fear of stigma that follows such knowledge. Some policies were even put in place to divert less developed countries from utilising the Appendix by some governments. See article by P.G. Altbach (ed), 'The Subtle Inequalities of Copyright' in PG Altbach, *Copyright and development: inequality in the information age* (Bellagio Studies in Publishing 4, Chestnut Hill, Mass.: Bellagio Publishing Network Research and Information Center, 1995); Even by the time of the Uruguay Round negotiations that led to the formation of the WTO, some delegates from developed countries wanted the matter addressed. See generally Daniel J Gervais, *TRIPS Agreement*.

Chapter 6: Extending educational exceptions in Uganda: is the Berne Appendix still relevant?

it is submitted that the Berne Appendix remains the only internationally agreed bulk access mechanism intended to foster the right to education in developing countries.⁷⁰³ This is true for both the compulsory reproduction and compulsory translation licences. Since availability and affordability are key aspects of access in a developing country like Uganda, this chapter will try to show that the Berne Appendix compulsory licence regime has a very important role to play in a multi-pronged approach to minimising the conflict between copyright and the right to education. With the objective of further exposing the minimalist nature of the framework for exceptions to copyright law, this chapter analyses key issues concerning the provisions of the Berne Appendix internationally and as transposed in Uganda's copyright legislation.

After this introduction, the chapter will give a brief historical background to the Berne Appendix regime before investigating whether the Berne Appendix is still relevant (section 6.4). I then analyse the transposition CONRA provisions to evaluate their conformity with the Berne Appendix provisions. All this is done with a view to evaluating whether the provisions were maximally transposed to alleviate or worsen the conflict between copyright and the right to education in a developing country like Uganda.

It should be pointed out that in this chapter, the classification used is of 'developing countries' on the one hand and 'developed countries' on the other as used in the Berne Appendix.

⁷⁰³ Okediji, G Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Chaltenham 2008) 287-288.

6.2 Meaning of a compulsory licence

According to Professor S. Ricketson, ‘compulsory licence’ refers to any mechanism under which third parties can have access to copyright material upon payment of a stipulated fee or royalty.⁷⁰⁴ Professor Sterling proffers a narrower definition as thus: “a licence granted on application to the authority, court, tribunal, etc. specified in the law”. He points out that the distinction between the compulsory licence and the statutory licence lies in the fact that the latter is effective by the mere fulfilment of the statutory conditions, without the necessity of prior application to an authority.⁷⁰⁵

Indeed given the hot debates that preceded and led to the Berne Appendix, the most that developing countries could get was permission to grant compulsory licences rather than statutory licences. Indeed, as shall be seen, the Berne Appendix compulsory licences even require proof of prior notification of the right holder as opposed to a statutory licence that is effective by mere fulfilment of stipulated statutory requirements. Combined with the many pre-conditions and conditions attached to them, the Berne Appendix compulsory licences are arguably a special gene of licence (almost *sui generis*); they can only be granted subject to internationally imposed specific conditions and detailed procedures.

⁷⁰⁴ Sam Ricketson, ‘The boundaries of Copyright: its proper limitations and exceptions: international conventions and treaties’, [1999] I.P.Q.56, 59.
J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008) 1216.

6.3 Brief historical background

According to one commentator, the Berne Appendix for Developing Countries⁷⁰⁶ is probably the only generally accepted bulk access mechanism in international copyright law.⁷⁰⁷ The Berne Appendix was the result of relentless lobbying by developing countries started during preparations for the Stockholm Berne Revision Conference of 1967. Hotly contested negotiations were held all throughout the period between 1963 and 1971. The demands of developing countries were resisted by the more developed countries leading to what has been described as ‘the international copyright crisis’.⁷⁰⁸ A protocol was agreed upon in 1967 (the Stockholm Protocol but this was not ratified by the Governments of the more developed countries. This protocol was replaced by the 1971 Berne Appendix which is more minimalist and more complicated. The Berne Appendix was incorporated into the Berne Convention by its Article 21 that declares the Berne Appendix an integral part of the Berne Convention. In theory, this was a major achievement for developing countries since the Berne Appendix sought to address the key issues of access to affordable bulk copies of works protected by copyright through mass local reproduction and translation of such works. The Berne Appendix gives national legislatures in developing countries the option of providing for compulsory licences to reproduce and translate copyrighted materials generally for education, research and scholarship.⁷⁰⁹

⁷⁰⁶ The term ‘developing countries’ as used in the Berne Appendix includes least-developed countries like Uganda.

⁷⁰⁷ Uma Suthersanen, ‘The future of copyright reform in *developing* countries: teleological interpretation, localized globalism and the “public interest” rule,’ (UNCTAD/ICTSD, 2005) at p. 4 <http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf> (last accessed 16 February 2013).

⁷⁰⁸ J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, London 2008). Ricketson and Ginsburg, 2006 (fn 701, above) 129, para. 3.64. See also, Government of India, ‘Copyright: needs of developing countries’ (New Delhi, 1967).

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The justification for the Berne Appendix was the developmental needs of developing countries particularly in the area of education.⁷¹⁰ The purpose of the Berne Appendix was to make copyrighted works more easily accessible and in circulation in developing countries.⁷¹¹ Unfortunately, as noted by Ricketson, the Berne Appendix provisions are still favourable to copyright owners in the more developed countries.⁷¹² Despite that observation, it has been stated that the Berne Appendix represents an acknowledgement in the international copyright system that copyright has an adverse effect on availability, affordability and usability of works for educational purposes and that this adverse effect is exacerbated by the circumstances of developing countries.⁷¹³ The Berne Appendix was subsequently incorporated into TRIPS via its Article 9(2) and even in the WIPO Copyright Treaty (WCT) via its Article 1(4).⁷¹⁴

Uganda is one of a few countries that robustly transposed the provisions of the Berne Appendix into its Copyright legislation.⁷¹⁵ This chapter will investigate if the Ugandan legislature was able to manoeuvre its way around the web of procedural technicalities imposed by the Berne Appendix. Like in most other developing countries, no Ugandan

⁷⁰⁹ As will be seen, the stipulated purposes for the reproduction licence are worded differently to those for the translation licence.

⁷¹⁰ Sam Ricketson, *ibid*, footnote 173.

⁷¹¹ Ruth L. Okediji, *ibid*, at p. 15; According to one commentator, Kunz-Hallstein, Hans Peter Kunz-Hallstein, *Copyright legislation in Developing Countries (1982) 13 IIC 689,695*, the thrust of the Berne Appendix was to give developing countries, in the field of copyright, an easier access to protected works of foreign origin for the purposes of cultural, economic and social development. He quotes Masouyé, who gives a summary of the provisions of the Appendix as follows: “*That under the system, a developing country which wishes to do so, may provide for a system of compulsory licences carrying an obligation to make fair payment to the copyright owner, to translate and /or reproduce works protected by the Convention, exclusively for systematic instructional activities or for teaching, scholarship, and research...*”

⁷¹² See detailed discussion below.

⁷¹³ Consumers International, *Copyright and access to knowledge, ibid*, footnote 66 at p. 25.

⁷¹⁴ The technical problem however, is that Uganda is not a member of the Berne Union. The TRIPS ‘Berne-plus’ approach is not enough to avoid doctrinal problems arising for a country like Uganda that is a signatory to TRIPS but is not a member of the Berne Union. See discussion below in paragraph 6.16.

⁷¹⁵ India that was the de facto leader of less developed countries during the negotiations did not declare its intention to avail itself of the Berne Appendix provisions until 1984, 13 years after the 1971 Paris Revision Conference that adopted the Berne Appendix for less developed countries. See India’s declaration at: <www.wipo.int/treaties/en/notifications/berne/treaty_berne_108.html>, (last accessed 20 June 2014).

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national (legal or natural) has invoked the Berne Appendix provisions yet. However, looking at the manifestation of the conflict as discussed in the preceding chapters of the thesis (but especially in chapters 1 and 4), large –scale access is needed to solve the problem of availability and affordability of educational materials.⁷¹⁶ This problem cannot be sufficiently solved by the fair use exception. This strong view is supported by the concerns of a leading educational publisher in neighbouring Kenya.⁷¹⁷ In view of such concerns, the provisions of CONRA arguably go a long way in redressing the problems publishers face in securing local reprinting rights from their counterparts in the more developed countries. The robust Ugandan transposition is a better tool for leveraging negotiations for licences than under a *laissez faire* (unregulated) system.

6.4 Is there still need for the Berne Appendix compulsory licences?

Against the criticisms and evidence on non-utilisation by developing countries, it is important to answer the question whether the Berne Appendix is still relevant. The Berne Appendix, if put in operation is capable of solving the twin problems of availability and affordability in a least developed country like Uganda.⁷¹⁸ Indirectly, and in combination with other factors, it is capable of stimulating creation of local materials since new authors build on what others have written.⁷¹⁹ It is even capable of generating demand for other cultural copyrighted works from the more developed countries such entertainment works, trade books⁷²⁰ and even higher education and research works. It is

⁷¹⁶ On the 4As of education, see Chapter 2 section 2.5.2.

⁷¹⁷ HM Chakava, 'International copyright and Africa: the unequal exchange' in PG Altbach (ed), *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass 1995) 9.

⁷¹⁸ For these problems, see chapter 1- problem review.

⁷¹⁹ See discussion on idea-expression dichotomy in Chapter 3 section 3.5.1.

⁷²⁰ 'Trade books' refers to books for general reading as opposed to educational or other specific purposes.

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not surprising therefore that despite its non-utilisation, the Berne Appendix is still a source of concern to some rights holders in the more developed countries.⁷²¹

Some commentators have argued that the Berne Appendix is no longer relevant mainly due to non-use. Others cite alternative efforts to provide educational materials through differential pricing by publishers and through development aid by governments of more developed countries and other development agencies such as the World Bank.⁷²² Moreover, it is possible to argue that only the reproduction licence is necessary to facilitate large scale reproduction since the main language of instruction in Uganda is English. As pointed out in chapter 2,⁷²³ Uganda introduced the thematic education curriculum in line with current international thinking backed by UNESCO about the importance of mother tongue education in enhancing learning outcomes thereby leading to quality education as an end in itself and a means to economic development. Is there any proof that use of mother tongue or local languages in teaching enhances the quality of education? Is there some empirical evidence to support this?

According to UNESCO commissioned research conducted in 4 countries including Mali, a developing African country, learners who were taught in local languages under a Ministry of Education programme called *Pédagogie convergente* had higher overall

⁷²¹ For instance, during the Uruguay Round of Trade Negotiations that eventually culminated in the formation of the WTO in 1990, a proposal was raised to put further restrictions on the faculties afforded by the Berne Appendix. Fortunately, with increasing vigilance by developing countries, the proposal was resisted and rejected, UNCTAD-ICTSD, *Resource book on TRIPS and development*, (Cambridge University Press 2005) 189 para. 2.2.1.

⁷²² Lynette Owen, 'Copyright - Benefit or obstacle?' in PG Altbach (ed), *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass 1995) p.79, 82.

⁷²³ Section 2.9.1.

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average scores than those who were taught in monolingual French language schools.⁷²⁴

To elaborate this point, I have extracted two tables from the Mali country study. Table 6.1⁷²⁵ shows the results for one administrative region (Ségou) while Table 6.2 shows the nationwide results.

It can be concluded from table 4 below that on the whole, teaching people in their mother tongues enhances cognitive skills leading to better performance. This is therefore calls for translation of educational materials into local languages to support such teaching. This can only be legally possible under the large scale translation mechanism allowed by the Berne Appendix. It would not be possible to attain the required number of copies under the implied translation exception.

Table 4: Average seventh-grade entrance exam scores, Ségou, Mali

1994-2000

Year	Pédagogie convergente schools	French-only schools	Score differential
1994	56.52	40.62	15.90

⁷²⁴ Dörthe Bühmann and Barbara Trudell, 'Mother tongue matters: local language as a key to effective learning' (UNESCO, Paris 2008) < <http://unesdoc.unesco.org/images/0016/001611/161121e.pdf> > (last accessed 17 February 2014).

⁷²⁵ Ibid, p. 10.

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1995	37.64	42.34	- 4.70
1996	75.75	54.26	21.49
1997	50.00	36.89	13.11
1998	71.95	48.30	23.65
1999	78.75	49.13	29.62
2000	46.69	45.12	1.57

Original source: Ministry of Education, Mali

The above results are further reinforced by the national results in Table 5 below.

Table 5: Average seventh grade entrance exam scores by region, 2000

Region	Pédagogie convergente schools	Monolingual French schools	Difference in score averages
Kayes	68.10	49.04	19.06
Koulikoro	92.90	61	31.90
Sikasso	65.10	46.03	19.07
Ségou	46.69	45.12	1.57
Mopti	79.22	51.03	28.21
Tombouctou	62.00	62.01	- 0.01
Gao	59.56	53.51	6.05
Bamako	75.54	56.75	18.79
National	68.57	52.34	16.23

*Original source: Ministry of Education, Mali*⁷²⁶

The same report quotes a longitudinal study conducted by Thomas and Collier in the United States of America concerning the effectiveness of bilingual education, which

⁷²⁶ Dörthe Bühmann and Barbara Trudell (2008) 'Mother tongue matters: local language as a key to effective learning', (UNESCO, Paris), < <http://unesdoc.unesco.org/images/0016/001611/161121e.pdf>> (last accessed 17 February 2014)11.

concluded that: ‘the strongest predictor of learner success at upper secondary levels in the dominant language (English) education system was the number of early years of instruction the learners had received in their mother tongue. Children who had the first six years or more of formal instruction in their own language fared the best in later academic achievement.’⁷²⁷ Noting that bilingual education has been practised in the United States of America since the 18th century, the researchers underscore the importance of bilingual education in enhancing learning quality. It is noted that bilingual education has various objectives including cultural maintenance (preservation), which in itself is an aspect of the multidimensional phenomenon that is economic development.

By contrast, a country where bilingual education did not yield very good results was Peru. It is instructive to note that one of the explanations for the relatively lower success rate in Peru was actually lack of educational resources (educational materials) due to low levels of financial support. The report notes:

“The success of bilingual intercultural education in Peru has been limited by insufficient results and low learning outcomes due to the lack of adequate educational methods and materials, and insufficient teacher training. This problem is linked to the low levels of financial support being provided to the programme. *National policy has to be backed by the necessary resources in order to produce and review educational materials*, to provide training for teachers, planners and researchers, and to improve teaching methods, especially for first language teaching and second language acquisition”(emphasis added).

⁷²⁷ Dörthe Bühmann and Barbara Trudell (2008) ‘Mother tongue matters: local language as a key to effective learning’,(UNESCO, Paris,) < <http://unesdoc.unesco.org/images/0016/001611/161121e.pdf>> (last accessed 17 February 2014) 30.

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From this it is to be concluded that for Uganda, our case study, that introduced the thematic education curriculum that among others uses local language instruction in lower primary school education, but which programme is too recent to have its success assessed, there are lessons to be learned from this UNESCO study and in particular, the cases studies of Mali, Peru and even the United States of America. From Mali, we get the reassurance that Uganda did the right thing in introducing local language instruction in schools. From the United States of America, the reassurance is that bi-lingual education is not a backward but progressive policy pursued even in more developed countries is got. Most relevant to this study is the lesson from Peru regarding the need for educational resources to go hand in hand with the local language instruction policy. This is where the need for translation comes in- it is where copyright has to be examined to determine if it can support access and utilisation of educational materials.

As discussed in chapters 4 and 5, developing countries have very limited space to stretch the implied exception to the translation right under the Berne *acquis*; accordingly, the Berne Appendix compulsory translation licence regime is the only one that can ensure large scale supply of translated educational materials for use in Uganda's thematic education curriculum programme. Further, translation of educational materials from the English language to local Ugandan languages would facilitate greater enlightenment for people who are literate in mother tongue languages like Lunyole, Luganda, Luo, Runyakitara and Ateso but do not have materials to read on international awareness subjects such as the World Wars, the Holocaust, the French Revolution, human rights, gender equality, the role and work of the United nations or the economic success stories of the Asian Tigers and BRIC countries. UNESCO expert linguist Dr. Colette Grinevald, of the University of Lyon has observed that one should not see

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illiterate people as ignorant people, in that same vein, people who are literate only in local languages should not be seen as ignorant people and should not be starved of access to educational materials with a wider coverage that would enable them to participate more in national socio-economic development and to become better global or cosmopolitan citizens in a globalised world.⁷²⁸ The only way to guarantee access for such people in countries like Uganda of such works is to have large scale translation of the necessary works. Such people do exist because up to the 1970s in Uganda, it was common to study in so-called vernacular languages in primary 1 and 2.

It has been observed that one of the problems with educational systems that abandon the local language at an early age is to make some learners lose interest in education and drop out. Many of those who remain struggle throughout and end up with low cognitive skills, which is one of the key indicators of poor quality education.⁷²⁹ By catering to the needs of such people, the educational system would be more inclusive and there would be higher chances of minimising income inequality and avoiding what I would call ‘educational dualism-where the formally educated exist side by side with the formally uneducated.’⁷³⁰

⁷²⁸ UNESCO, Colette Grinevald: “Speaking your mother tongue is not a disability!” <http://www.unesco.org/new/en/education/resources/online-materials/single-view/news/colette_grinevald_speaking_your_mother_tongue_is_not_a_disability/> (last accessed 17 June 2014).

⁷²⁹ On measures of education quality, see chapter 2. On the lack of interest leading to dropping out of school due to inability to comprehend foreign dominant languages of instruction, see generally, Dörthe Bühmann and Barbara Trudell (2008) ‘Mother tongue matters: local language as a key to effective learning’, UNESCO, Paris, <<http://unesdoc.unesco.org/images/0016/001611/161121e.pdf>>, (last accessed 17 June 2014).

⁷³⁰ Dualism is a negative characteristic of under developed economies. On this, see chapter 2 discussion on the concept of economic development.

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In sum, since quality education requires large scale access to educational materials in accessible local languages, and since these cannot be produced on a large scale (due to copyright restrictions imposed by the translation rights) even with the most maximalist transposition and application of the exceptions to the translation right (as argued in chapters 4 and 5), the Berne Appendix compulsory translation and reproduction licences are imperative for a resource- constrained least developed country like Uganda. Our answer to the question of whether the Berne Appendix is still relevant is therefore in the affirmative. Accordingly, having so concluded, the complex provisions of the Berne Appendix and how they have been transposed in CONRA should then be analysed to evaluate if a maximalist approach was used and whether and how the Appendix can be utilised in real practice.

6.5 The international legislative framework

Article III of the Berne Appendix provides for the grant of compulsory reproduction licences subject also to conditions and procedures stipulated in that article and in Article IV. The grant has to be made by the competent authority in the country⁷³¹. Generally, the compulsory licence regime created is subject to a large number of cumbersome pre-conditions and conditions which are summarised in table 6.3 below. It is submitted that despite its shortcomings and limited usage, the Berne Appendix i needs revision rather than excision from the international copyright framework.

⁷³¹ According to section 17(1) of CONRA, the relevant authority is the Minister. According to section 2, Minister refers to the Minister responsible for Justice. The Appendix also provides for broadcasting compulsory licences, which we do not discuss here.

6.6 Immunity from retaliatory treatment

According to Article I (6) of the Berne Appendix, the fact that a country⁷³² avails itself of the Berne Appendix provisions does not permit another country to give less protection to works of authors of that country. By so providing, this provision becomes the *cornerstone* of the operation of the Berne Appendix in that it entrenches within the Berne Convention a system of special provisions intended to promote access to educational and research materials for developing countries without attracting retaliatory action such as withdrawal of national treatment by other TRIPS Member States.⁷³³ Arguably, Article I(6) of the Berne Appendix is the central foundation of the faculties availed because it creates a derogation from the rights and obligations under Articles 8 and 9 of the Berne Convention 1971.

6.7 Uganda's compulsory licence provisions

6.7.1 General comments

The relevant provisions are sections 17 and 18 of CONRA. They supplement the fair use exceptions in section 15, most, if not all of which do not require compensation.⁷³⁴ It is deemed necessary to focus on this linkage between CONRA and the Berne Appendix since the latter was concluded to address the very crux of this thesis-the question of access and use of educational materials by developing countries. This is pertinent because the Berne Appendix has been written off as a failure since it is yet to be fully implemented in any less developed country.⁷³⁵ Uganda,⁷³⁶ India⁷³⁷ and Thailand⁷³⁸ are

⁷³² Though the Berne Appendix provisions use the phrase 'any country', arguably, this is a reference to any country that is a member state of the Berne Union and hence does not refer to countries like Uganda which are outside the Union. This causes doctrinal problems examined below.

⁷³³ Under the TRIPS and overall WTO regime, sanctions can be imposed against a member not complying with the TRIPS provisions. The protection granted by Article I(6) of the Appendix is thus very important.

⁷³⁴ Section 15(1)(j) is not fully implemented pending making of conditions by the minister. It is possible but not required that the minister may provide for payment of compensation. It would be legal to do so though it would be contrary to the general spirit of section 15 that deals with free use exceptions.

⁷³⁵ Many commentators have written off the Berne Appendix as a failure.

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among some of the few⁷³⁹ developing countries that have extensively transposed the Berne Appendix into their national copyright laws. Of the three, Uganda's provisions are more extensive while the Thailand provisions are the least detailed. Reference will be made to some of the provisions from Thailand and India. South Africa and Kenya are examples of developing countries that are yet to transpose the Berne Appendix provisions in their national copyright laws.⁷⁴⁰

As shall be shown in the ensuing discussion, CONRA unlike the Berne Appendix in many respects does not draw a clear distinction between the compulsory reproduction licence and the compulsory translation licence. Both are handled jointly in sections 17 and 18 of CONRA. In fact, all the three types of compulsory licences (translation, reproduction and broadcasting) are provided for by these provisions but our concern is

See Ruth L Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Less developed Countries in the Digital Environment* ICSTD 2005 available at <<http://ictsd.net/i/publications/11725/?view=document>> (last accessed 20 June 2014) at p. 15, where she states that by all accounts, the Berne Appendix is a failure; see also Ricketson and Ginsburg, 2006 (fn 710, above) 957 para 14.106; Silke von Lewinski, *International Copyright Law and Policy*, Oxford University Press, New York, 2008 at p. 179 para. 5.23; Hans Peter Kunz-Hallstein 'Copyright Legislation in Less developed Countries' (1982) 13 IIC 689, 697 citing research by Dr Adolf Dietz. He goes on to argue that less developed countries appear to have realized that the philosophy behind the Appendix provisions could be counterproductive by among others perpetuating foreign ideologies as a result of mass inflow of foreign works; Alan Story, et al (eds.) 'Copy/South Dossier: Issues in the economics, politics, and ideology of copyright in the global South' (May 2006) has no kind words for the Berne Appendix which is described as "... a distraction from the real struggle to win better access rights for the South; it is a mere table scrap, a tactical cul de sac, a legal nightmare.", see page 139. Dossier available online at <http://www.copysouth.org/>.

⁷³⁶ Available at http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=3922.

⁷³⁷ Indian Copyright Act is available at http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=2396. Sections 32 and 32A of the Act; Brief discussion available in S. Ramaiah, Geller E. P. *International Copyright Law and Practice*, Lexis Nexis Matthew Bender, New York 2007 at p. IND-§49 8[2][d].

⁷³⁸ The Thailand Copyright Act 1994 cited as B.E. 2537, section 54 thereof available at http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=3801. The provision only deals with compulsory licence for translation or reproduction of a translation. The Act does not deal with reproduction licences and broadcasting licences. The Act provides for exclusive licences contrary to the Berne Appendix.

⁷³⁹ Ricketson and Ginsburg, 2006 (fn 701, above) 957 para. 14.106; Sam Ricketson, *The boundaries of copyright: its proper limitations and exceptions: international conventions and treaties* [1999] I.P.Q. 56, 79.

⁷⁴⁰ African Copyright and Access to Knowledge, Report (2009), available at: <http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf> (last accessed 10 January 2014).

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the compulsory translation licences (CTL) and the Compulsory Reproduction licence (CRL), which as explained above are very useful for addressing the problem of availability, affordability and accessibility (in terms of language) of educational materials- be they recommended textbooks, reference materials or story books.⁷⁴¹ Section 18 in particular while using Berne Appendix language, jointly deals with the purposes for which both a reproduction and translation licence may be issued. The legal effect of this has been that all types of compulsory licences under CONRA are for teaching, scholarship or research. The phrase ‘systematic instructional activities’ is used in the Berne Appendix in reference to the purpose of the compulsory translation licence and not ‘teaching, scholarship or research’.⁷⁴²

Arguably, Uganda’s transposition that in some respects steers clear of undue vagueness is good for promoting the right to quality and adaptable education. After all, the term ‘systematic instructional activities’ is ambiguous. Secondly that term is restrictive since it leaves out research activities which are very important educational activities for

⁷⁴¹ A detailed but by no means exhaustive list of required educational materials was discussed in chapter 1.

⁷⁴² Section 18(3)(c) CONRA uses the term with regard to termination (presumably) of a reproduction licence. The Appendix has two separate provisions that spell out the purposes of the individual licences. Article II (5) dealing with translation licence refers to teaching, scholarship and research while article III (2)(a) and (b), article III (6) and article III (7)(b) dealing with the compulsory reproduction licence refer to *systematic instructional activities*. Clearly, “instruction”, which is a reference to teaching activity, is narrower than “teaching, scholarship or research”. Even with the interpretation derived from the Universal Copyright Revision Conference 1971 Report, which contains the same wording, and is to the effect that “systematic instructional activities” refers to the formal and informal curriculum of an educational institution as well as systematic out-of-school education would not make this wider than the phrase “teaching, scholarship and research”. It is problematic that the Appendix uses different wording when describing the purposes for which the reproduction and translation compulsory licences may be granted. With regard to the reproduction licence, it can only be issued for “systematic instructional activities” (Article III (2)(a) of the Berne Appendix). The translation licence on the other hand can only be issued for “research, education and scholarship”. The definition of these phrases is not settled. *Potentially, this worsens* the reluctance to utilise the provisions of the Appendix which in turn plays into the hands of copyright intermediaries in the global North, such as publishing corporations, who are quick to point to the non-utilisation as proof that the provisions were not necessary in the first place. By implication, reproduction of works under the Appendix regime can only benefit teaching but not research since that would not qualify as systematic instructional activities.

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replenishing and advancing knowledge. Under the Berne Appendix, the reproduction licence must be for “use in connection with systematic instructional activities”.⁷⁴³ As will be seen in the following discussion of individual selected aspects of the compulsory licence regime, Uganda’s transposition being in some respects inconsistent with the Berne Appendix may however, be challenged at the international level. Table 6.3 below gives a non-exhaustive outline of key requirements of the compulsory licence regime as enacted into Uganda’s copyright legislation.

⁷⁴³ Article II (5) of the Berne Appendix. For guidance on the meaning of the term ‘systematic instructional activities’, we have to resort to the general report of the Universal Copyright Convention Revision Conference. This was concurrently held with the Berne Convention Paris Revision Conference, 1971. According to that report, ‘systematic instructional activities’ was “intended to include activities related with formal and informal curriculum of an educational institution, as well as systematic out-of-school education”. As referred to and quoted in Ricketson and Ginsburg, 2006 (fn 701, above) 945 para. 14.86; On the other hand, ‘research, education and scholarship’ are to be given their literal meaning. However, given the rights holders’ push for a minimalist construction of exceptions to copyright, this still leaves some issues unanswered: for instance, what level of education is envisaged? One absurd effect is that the reproduction licence under the Berne Appendix cannot be invoked to reproduce works for scholarship and research. This however, should be hardly surprising considering that the Appendix was a hard fought bargain that less developed countries managed to squeeze out of the then tightly fistled hands of copyright exporting country negotiators. Ricketson and Ginsburg, 2006 (fn 710, above) confirm this bizarre situation.

Table 6: Table summary of key compulsory licence requirements

Requirement	CONRA provision	Berne Appendix provision
Provision for translation licence	S. 17(1)(a)	Art. II(I)
Provision for reproduction licence	s. 17(1)(b)	Art. III(1)
I year general Immunity period prior to CTL application	S. 17(2)	Art. II (2)(a)- Uganda's provision is contrary to this.
Immunity periods prior to CRL application	s. 17(4)	
Effect of withdrawal of copies before CTL issue	s. 17(3)	Art. II(8)
Effect of withdrawal of copies before CRL issue	s. 17(3)	Art. II(d)
3 year immunity period for CRL for works of natural or physical sciences including mathematics	s. 17(4)(a)(i)	Art. III(2)
Payment of just compensation/royalty	s. 17(5)	Art.IV (6)
Respect of moral right of paternity	s. 17(6)(a)	Art. IV (3)& (5); art. IV(6)(b)
Inclusion of moral rights notice	s. 17(6)(c)	Art. IV (3)-paternity; art. IV(6)(b)-integrity
Non exclusivity of translation compulsory licence	s. 18(1)(a)	Art. II(1)
Non exclusivity of reproduction compulsory licence	s. 18(1)(b)	Art. III(1)
Requirement	CONRA provision	Berne Appendix provision
Translation licence purpose-for teaching, scholarship or research	s. 18(1)(c)	Art. II(1)
Reproduction licence purpose-for teaching, scholarship or research	s. 18(1)(c)	Incompatible with art. III(2)(a)(ii) & art. III(2)(b)- <i>systematic instructional activities</i>
Non transferability of licences	s. 18(1)(d)	Art. II(1) and art. III(1)
General rule prohibiting export of translated copies	s. 18 (1)(e)-	Art. IV(4)(a)
Exception to export prohibition	Silent	Art. IV(4)(c)

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Pre-condition for issue of CTL- none ever issued or issued editions out of print	s. 18(2)(a)	Art. II(2)(a)
Pre-condition for CRL issue- if no sale or distribution by right holder within preceding 6 months	s. 18(2)(b)	Art. III(2)(b)
Prior request made to owner and refusal by owner of translation and reproduction rights	s. 18(2)(c)	Art. IV(1)
Notice must have been sent to publisher or Int. Copyright Information Centre	s. 18(2)(d)	Not required unless author cannot be found (see art. IV(2))
If author cannot be found, notice must be sent to publisher or Int. Copyright Information Centre	s. 18(2)(e)	Art. IV(2)
Termination of both CTL and CRL if copies of work are distributed to general Ugandan public	s. 18(3)(a)	Art. III(6)- termination by general distribution only applies to CRL (see below)
Termination of CTL where right holder or agent publishes translation at reasonable price	s. 18(3)(b)	Art. II(6)
Termination of CRL where right holder distributes copies for systematic instructional activities at reasonable price	s. 18(3)(c)	Art. III(6)
Distribution of stock published under CTL upon termination of licence by right holder action	s. 18(3)(b)	Art. II(6)
Continued distribution of stock published under CRL upon termination of licence by right holder	s. 18(3)(c)	Art. III(6)

6.7.2 Eligible works: are digital works covered?

6.7.2.1 Position under CONRA

This issue is important because of the potential for using electronic copies of works in promoting quality education notwithstanding the currently low levels of computer literacy and small number of people with access to computers in Uganda. According to CONRA, works that can be the subject of compulsory licences must have been published in a material form (emphasis added). This submission is derived from the wording of section 17(2) of CONRA. According to that provision, the immunity period-time that must expire before an application for a compulsory licence can be made (see discussion below) is computed from the date when the work was first published *in material form* (emphasis mine). Similarly, the wording of section 17(1) (b) and section 17(4) of CONRA dealing with the immunity periods in respect of compulsory reproduction licences also uses the same words. Material form could be electronic format or hard copies of books. Does the Appendix or WIPO provide any further guidance to the contrary?

6.7.2.2 Berne Appendix

This matter is dealt with by Article II (1), (2)(a) and (9) for the translation right and Article III(7)(a) of the Berne Appendix for the reproduction licence. Article II (1) provides among other things that: ‘...Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published *in printed or analogous forms of reproduction* are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses (emphasis added). Article III (7)(a) dealing with compulsory

reproduction licences is more explicit. It provides that: ‘Subject to subparagraph (b), the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.’ Accordingly, under the Appendix compulsory translation and reproduction licences can only be applied for in respect of works in print or print analogous form.

6.7.2.3 Implications for educational exceptions

The position under CONRA requiring that works to be translated or reproduced be in material form should be juxtaposed with that under the Berne Appendix which requires that works be in printed or analogous forms of reproduction. The issue then is whether electronic or digital reproduction of works is analogous to reproduction by printing. One dictionary meaning of the adjective “analogous” is that: “two things of a similar function but different origin”.⁷⁴⁴ Printed books and digitized versions of the books are of a similar function but can be said to be of a different origin. . I would therefore differ with Ricketson and Ginsburg who state that works in electronic form would not be covered.⁷⁴⁵ This is because such works can actually be read using the right machinery.

⁷⁴⁴ Analogous as an adjective means “similar in function but not in structure and evolutionary origin.” See online dictionary at <<http://dictionary.reference.com/browse/analogous>> (last accessed 20 June 2014).

⁷⁴⁵ Ricketson and Ginsburg, 2006 (fn 701, above) 930 quoting M. Ficsor in footnote 297. But see S Ricketson and JC Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, (2nd ed. Oxford University Press, Oxford 2006) 941 para. 14.82 where the learned authors argue that the distribution requirement or criterion could be satisfied by supply of digital copies: a corresponding argument could then be made that a reproduction licence could also be available where the works are available only in digital form. In relation to this, the authors however, raise a concern that this would raise the issue of determining what the normal price of such digitally available works would be. In the digital world, the issue of comparable works may not arise as there might instead be an abundance of such works and neither should the issue of the normal price because if the works being compared are all commercial works, then they would have price tags. But the authors also refer to the work of Ficsor who they state argues that reproduction through digital transmissions might hardly be regarded as analogous to printing (see footnote 941 on that page).

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It is true that the Berne Appendix pre-dates the era of digitization.⁷⁴⁶ Indeed Professor Alan Story has described the Berne Convention as “technologically anachronistic”⁷⁴⁷ since it was made for the era of print technology. The Appendix thus only provides for reproduction or translation licences in respect of works in print or print analogous form, which I submit includes digital formats, provided there is a mechanism for such works to be read by the human eye.⁷⁴⁸ According to Ficsor it is highly doubted if works in electronic format would qualify as works in print analogous form in order to be the subject of compulsory licences under the Berne Appendix. This, it is submitted, is in line with the plain meaning of the words. From the wording, it is clear that the drafting team contemplated other forms of reproduction. However, this was limited by the requirement that such forms be analogous to printed forms.

In disagreement with Dr. Ficsor therefore, I would submit that digital format is actually analogous to printed forms. This certainly raises good prospects considering that we

⁷⁴⁶ Ricketson and Ginsburg, 2006 (fn 701, above) observe that the Appendix is based on traditional printing technologies. They even argue that this could be another reason why it has not been implemented; The Copy/South Dossier, Issues in the economics, politics and ideology of copyright in the global South, describes the Berne Appendix as “a technological anachronism” available at <<http://www.copysouth.org/>> (last accessed 17 June 2014).

⁷⁴⁷ Story, Alan, ‘Burn Berne: Why the Leading International Copyright Convention Must Be Repealed’, 40 Hous. L. Rev. 763 (2003) 52.

⁷⁴⁸ See article II(1), (2)(a) and (9) for the translation right and article III(7)(a) of the Berne Appendix for the reproduction licence. But see Ricketson and Ginsburg, 2006 (fn 701, above) 941 para. 14.82 where the learned authors argue that the distribution requirement or criterion could be satisfied by supply of digital copies: a corresponding argument could then be made that a reproduction licence could also be available where the works are available only in digital form. In relation to this, the authors however, raise a concern that this would raise the issue of determining what the normal price of such digitally available works would be. In the digital world, the issue of comparable works may not arise as there might instead be an abundance of such works and neither should the issue of the normal price because if the works being compared are all commercial works, then they would have price tags. But the authors also refer to the work of Dr. M Ficsor. Ficsor argues that reproduction through digital transmissions might hardly be regarded as analogous to printing (see footnote 941 on that page).

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now live in a digital age and even many publishers are abandoning analogue publishing and opting for electronic publishing because of the marketing models it offers.⁷⁴⁹

In fact, somewhat in support of this view, Ricketson and Ginsburg, have argued that the requirement of publication contained in Article III of the Berne Appendix in default of which the right to issue a compulsory licence can be triggered, can be satisfied if the author or copyright owner can publish their work in digital format. If that were a correct interpretation, then such works should be the subject of compulsory licences for reproduction and translation.⁷⁵⁰

More recently, in a WIPO sponsored study, Professor J. Fometue has offered a new perspective to the discussion. He has argued to the effect that digitized works should be eligible for reproduction and translation under the Berne Appendix.⁷⁵¹ Fometue has indeed argued and I believe, rightly so, that a work viewed on a computer screen (electronic format) is printable rather than printed. But this does not make it unreadable. A flexible interpretation of the Berne Appendix would be good for developing countries in order to bring the berne Appendix in line with current technological developments which promise to better provide means of achieving the greatest good for the world's greatest number.

⁷⁴⁹ Tania Phipps-Rufus, *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information*, (LLM dissertation, Queen Mary, University of London, unpublished 2005); One of the reasons cited for publishers opting to use the online publishing model is the ability to monitor and control use of their works using technological means and to market extracts of works rather than whole works. For instance, charging for use of a journal article and not the entire journal ("pay-per use" or "pay-per article").

⁷⁵⁰ Ricketson and Ginsburg, 2006 (fn 701, above) 941 para. 14.82 expressing the view, rather faintly, that distribution through digital online networks might be sufficient to discharge the publishing requirement; but see at p. 930 para. 14.61 where they conclude that electronic formats are not covered.

⁷⁵¹ J. Fometue, *WIPO study*, *ibid*, at pp. 21- 22.

Critics may ask why this issue is of importance yet most developing countries especially in Africa (Uganda inclusive), remain digitally challenged as earlier discussed in Chapter 2. The explanation is that digitisation has been touted as a silver bullet that presents an opportunity for facilitating cheaper dissemination of educational materials in developing countries. Digitisation of educational materials is seen as very advantageous compared to dealing with hard copies that involves shipping and subsequent transportation for distribution within national borders. The road network in a country like Uganda is not very good and consequently many schools in remote areas would not be adequately covered. Efforts are being made to solve the various problems responsible for the digital divide (such as lack of infrastructure and computer literacy) but this will be rendered worthless if a teleological interpretation is not applied.

If the Berne Appendix were to be revised, as advocated by Professor Okediji,⁷⁵² or pursuant to the proposed treaty on Access to Knowledge treaty⁷⁵³, it should have a sufficiently wide scope of beneficiaries. In fact, the Government of Uganda has decided to supply textbooks to both public (Government owned) and private educational institutions involved in the UPE and USE programmes.⁷⁵⁴

⁷⁵² Okediji, Ruth, L., *International copyright system: limitations, exceptions and public policy considerations for less developed countries*.

⁷⁵³ G Dutfield and Uma Suthersanen, *Global intellectual property law and policy* (Edward Elgar, Chaltenham 2008) 294. Access to educational materials is just one component of the access to knowledge movement's aims. For a broad discussion, see Gaëlle Krikorian and Amy Kapczynski, *Access to Knowledge in the age of intellectual property*, (Zone Books, New York 2010)

⁷⁵⁴ Discussed in chapters 1 and 2.

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This would help improve the “knowledge gap”⁷⁵⁵ by ensuring that developing country students, teachers and researchers can have access to materials only produced in digital form. Electronic journals and materials available on electronic databases would not be beyond reach of the non-rich countries of the global South, as they largely are today, if the Appendix were to be utilised to facilitate access to digitised works.

6.7.3 Can a compulsory licensee produce works in a digital form?

6.7.3.1 CONRA provisions

Another pertinent issue is whether a holder of a compulsory licence could be allowed to reproduce and distribute educational works or translations of them in digital form.

Section 17(1)(b) of CONRA requires that the compulsory licensee must publish the work in a material form.⁷⁵⁶ The phrase material form is not defined by the Act. However, going by the dictionary meaning and the context in which the phrase is used, ‘material form’ refers to physical form. The word “published” under CONRA is defined in terms of tangible copies. Digitised educational works published on the Internet or on any other platform may thus not qualify as works in a material form. By contrast, educational works in the form of CD ROMS and DVDs would fall under the definition of material form.

⁷⁵⁵ The knowledge gap refers to both a disparity in access to information and tools by the poor and to the gap in accessing, recognizing and promoting the creativity of less developed countries. For this definition, see, <http://www.law.yale.edu/intellecualife/7124.htm> (last accessed 10 March 2013).

⁷⁵⁶ Section 17(1)(b) of CONRA.

6.7.3.2 *Berne Appendix*

Article III(2)(a) of the Berne Appendix provides that : ‘...any national of such country may obtain a license to make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.’ The provision therefore is to the effect that the holders of compulsory translation licences must publish the work in printed or analogous forms of reproduction. Article III of the Berne Appendix dealing with compulsory reproduction licences is silent on the matter. However, it can be implied from the provisions governing the creation and operation of the compulsory licences that only print and analogous forms of publishing were envisaged.

For instance, the prohibition of exports (Article IV(4), discussed below) would suggest that only printed copies were intended. On the other hand, developing countries, particularly the least developed ones like Uganda could take advantage of the loophole to allow the compulsory reproduction licencees to produce works in digital form. This would be in line with the maximalist approach to educational exceptions advocated by this thesis. It is the only way to make the most of a minimalist structure in order to facilitate access to educational materials to promote the right to quality education in least developed countries like Uganda. The works would then be communicated to educational institutions all over the country if they can have access to computers. It would particularly benefit those schools that already have computers but the government could also proactively support other educational institutions to have access to the electronic copies.

6.7.4. Eligible Applicants

6.7.4.1 CONRA

Besides the question of whether TRIPS signatories who are not members of the Berne Union can avail themselves of the provisions of the Berne Appendix for developing countries to pursue the right to education, another question is who can invoke the relevant provisions of CONRA. Section 17(1) of CONRA provides that: A person who is a citizen of Uganda or who is ordinarily resident in Uganda may apply to the Minister for a non-exclusive licence. Accordingly, the licence has to be applied for by a person who is citizen of Uganda or a person ordinarily resident in Uganda. The requirement of citizenship would seem to point to a requirement for a ‘natural person’. However, going by the provisions of the Interpretation Act 1976 and the general legal interpretation of the word ‘person’ it can be presumed that Parliament had no such intention to exclude legal entities.⁷⁵⁷ Section 2(uu) of the Interpretation Act 1976 states that: ‘a “person” includes any company or association or body of persons corporate or unincorporated’.

⁷⁵⁷ See Ricketson and Ginsburg, 2006 (fn 701, above) 931 they support this view since they submit that the person or legal entity must be a national of the country in which the application for the licence is made (emphasis added).

6.7.4.2 *Berne Appendix*

Article II(2)(a) of the Berne Appendix dealing with the grant of a compulsory translation licence provides that: “...any national of such country may obtain a license to make a translation of the work in the said language...’. Article III(2)(a)(ii) of the same Appendix , dealing with reproduction licences provides in more less similar terms that: ‘...any national of such country may obtain a license to reproduce and publish such edition..’. From this I can conclude that the framers of Berne Appendix intended that only nationals or citizens of the developing country in question would be eligible to apply. It is for this reason that the Paris Revision Conference of 1971 was concerned about the issue of the publishing capacity of some of the developing countries.

6.7.4.3 *Implications for access to quality education*

One concern here is whether CONRA provisions are Berne Appendix compliant. I submit that yes they are. The other issue is whether multinational book publishing companies with a presence in Uganda are eligible to apply for compulsory licences to benefit developing countries especially where there may be lack of publishing capacity in the developing country in question. CONRA uses the term ‘citizen’ instead of national. It is submitted that they would qualify by virtue of being ordinarily resident in Uganda.⁷⁵⁸ A difficulty that arises is whether the term ‘citizen’ as used in CONRA refers to an entity the majority of whose controlling shares or interest is owned by Ugandan citizens. There is nothing to suggest that this is the case, and indeed, the lawyers’ argument that if the legislature had wanted to mean that, it would have said so,

⁷⁵⁸ Berne Appendix article II (2)(a) uses the words “any national”. This ties in with the requirement that the reproduction or translation must be done within the territory of the less developed country granting the licence. See art. IV (4)(a) of the Berne Appendix.

would be applicable in this case). However, unless national courts steer clear of provisions of other legislation (statutes in *para materia*), particularly in company and land law, they may construe the provision as requiring that the controlling interest in a company should be owned by nationals if the company is to be accepted as a national.⁷⁵⁹ This would mean a foreign company registered or resident in Uganda would be eligible to apply for a licence. To require otherwise would be problematic in developing countries that may not have citizen owned publishing firms with the requisite capacity. Uganda our case study has the publishing capacity as can be evidenced from the fact the World Bank project to supply books uses local book publishers. Moreover, by providing for ‘residence’ as the alternative qualification, I think the Ugandan provisions are maximalist enough to allow for an optimal regime that facilitates access to educational materials even where there is no citizen owned publishing company competent to

6.8 Purpose of the compensated use regime

Different wording is used in the Appendix to describe the purposes for which the two different compulsory licences under discussion can be applied for. Uganda however, took a different approach by providing for only one purpose for both licences.

⁷⁵⁹ Companies Act; Land Act cap. 227, as amended, s. 40(7); and cases decided under the repealed Land Transfer Act 1969.

6.8.1 CONRA

Section 18(1) (c) of CONRA provides that a licence issued under section 17 shall ‘be for the purpose of teaching; scholarship or research only.’ As can be seen from the table above, section 17(1) provides for both the compulsory translation and reproduction licences.

6.8.2 Berne Appendix

According to Article II (5) of the Berne Appendix, a translation licence can only be given for the purpose of *teaching, scholarship or research*. On the other hand, Article III (2)(a) and (b), Article III (6) and Article III (7)(b) dealing with the compulsory reproduction licence refer to *systematic instructional activities* as the purposes for which reproduction licences may be issued.

6.8.3 Analysis- implications for access to educational materials

The Appendix is silent on the meaning of the words ‘teaching, scholarship or research’ and ‘*systematic instructional activities*’. Recourse has to be had to the Report of the UCC 1971 Revision Conference. According to that report, the word “scholarship” has a wide interpretation that covers instructional activities at all levels including primary, secondary, college and universities. The word even covers a wide range of organized educational activities intended for any age group regardless of the subject under study.⁷⁶⁰ As to the scope of the *research* purpose, the UCC general report excluded industrial research or research for commercial purposes. On this basis, it is submitted that government research institutions are covered and can therefore be the intended beneficiaries of such translations. On the other hand, the beneficiary need not be an

official or officially recognized institution.⁷⁶¹ The research however, must not be of a commercial nature.

Regarding the purpose of the compulsory reproduction licences, “instruction”, which is a reference to teaching activity or the act of imparting knowledge, is in our view narrower than “teaching, scholarship or research”.⁷⁶² I contend that instruction does not include scholarship and research from the point of view of the end users of works. Scholarship and research are to be carried out by individual end users not by the instructors. Indeed, a good education that would ensure that Ugandan students have higher learning outcomes including higher cognitive skills is one that allows for scholarship and research in addition to teaching. Even going by the interpretation derived from the Universal Copyright Revision Conference 1971 Report, which contains the same wording as the Appendix, and is to the effect that “systematic instructional activities” refers to the formal and informal curriculum of an educational institution as well as systematic out-of- school education, it would not make the former term wider than the phrase “teaching, scholarship and research”. It is problematic that the Appendix uses different wording when describing the purposes for which the reproduction and translation compulsory licences may be granted. It is then arguable that by combining the two purposes, though not by design, CONRA drafts people took a more maximalist approach when they chose to use the wider term for both compulsory licences. However, some further reading reveals that this effect may have been arrived at due to sloppy or hasty drafting more than anything else. This is borne out by the use

⁷⁶⁰ Ricketson and Ginsburg, 2006 (fn 701, above) 935 para 14.68 and footnote 324.

⁷⁶¹ Ricketson and Ginsburg, 2006 (fn 701, above) 931 para 14.68

⁷⁶² Meaning 2 of the word, available at: < <http://www.thefreedictionary.com/instruction> > (last accessed 20 June 2014).

of the term ‘systematic instructional activities’ in section 18(2)(b) regarding pre-conditions for grant of compulsory reproduction licences. It could even be argued that this provision should be read in conjunction with section 18(1)(c) discussed above.

It is my view that CONRA provisions regarding the purpose of the compulsory translation and compulsory reproduction regimes though not following the scheme of the Berne Appendix should not be strictly speaking, declared in conflict. To do so would be an overstatement of the matter. That said, the CONRA provisions are more maximalist in nature in that they provide for the broader more inclusive activities of teaching, scholarship and research which are all key to the educational process. It is by combining the three that Uganda’s educational system would have improved learning outcomes. Combining the three will better serve the pursuit of quality education as opposed to the past emphasis on quantity.

6.9 Levels of education

CONRA does not stipulate the types or levels of teaching, scholarship or research for which a reproduction licence can be issued. In the absence of any subsidiary legislation or judicial decision on the matter, one has to go by the plain meaning of the words. Accordingly, a maximalist interpretation to cover all educational activities both formal and informal can be accommodated by the provision. Additionally, and more appropriately, the relevant international treaty provisions may have to be relied on.⁷⁶³

⁷⁶³ But see Onoria’s paper on a Ugandan’s court’s position on referring to international treaty texts. Such argument may also extend to travaux preparatoire of such treaties. Under the Appendix, the application for a reproduction licence can be made by any person, be it a natural person or a legal entity. The person or legal entity must be ‘a national’ of the country in which the application for the licence is made.

6.10 Ensuring affordability

CONRA misses one very important aspect available under the Berne Appendix which addresses the central issue of affordability of educational materials. This is the possibility of issuing compulsory reproduction licences even where the copyright owner has published and distributed a work but not at a price reasonably comparable to that of related works.⁷⁶⁴ According to that provision, as long as a period longer than the stipulated periods is provided for by the national legislation, a reproduction licence can be applied for even where books are published and distributed in a country but at prices which are not reasonably comparable to those of related works in the country.⁷⁶⁵ This provision goes beyond mere publication and distribution of copies in a country by addressing the pertinent issue of affordability.⁷⁶⁶ The only condition for this aspect of the exception is that national legislatures must provide for the expiry of a period longer

Ricketson and Ginsburg, 2006 (fn 701, above) 931. This requirement ignores the fact that publishing activities in many less developed countries are undertaken by foreign publishing multinationals. The Appendix does not elaborate on this requirement hence its meaning has to be gleaned from the General Report of the Paris Berne Convention Revision Conference 1971 and from the minutes of the Main Committee of the same conference, see Ricketson and Ginsburg, 2006 (fn 701, above) 930. Read together, the two aids⁷⁶³ to interpreting the Appendix show that the application can be made by both state and non-state entities such as charitable organizations within the country in question. For a discussion on the relevance of extrinsic aids to interpretation of treaties, particularly in International copyright law, refer to Ricketson and Ginsburg, 2006 (fn 701, above), *ibid*; see further Silke Von Lewinski, *International copyright law and policy*, Oxford University Press, 2008.

⁷⁶⁴ Article III (2)(a)(ii) of the Berne Appendix refers to "...a price reasonably related to that normally charged in the country for comparable works."

⁷⁶⁵ Article III of the Berne Appendix; Ricketson and Ginsburg, 2006 (fn 701, above) 941 para. 14.82. According to the learned authors, the main criterion here is not the distribution, but the price at which the published works are distributed.

⁷⁶⁶ Affordability is a major concern to less developed countries. It was one of the main reasons advanced while advocating for special provisions for less developed countries before the Stockholm Berne Revision Diplomatic Conference. It is taken up in the Berne Appendix but still remains a major concern due to low purchasing power. See Andrew Rens, Achal Prabhala and Dick Kawooya, 'Intellectual property, education and access to knowledge in Southern Africa', *ibid*, at p. 3.

than that specified in the relevant article.⁷⁶⁷ Another problem is that there may be no comparable works.

6.11 Mandatory notice to copyright owner

In compliance with the requirements of the Berne Appendix,⁷⁶⁸ section 18(2) (c), (d) and (e) of CONRA are designed to ensure that the owner of the relevant right or rights in a work is informed before a grant of a compulsory licence is made (see table 6. 3 above). CONRA ensures that the owner of the right or agent of such owner is given the opportunity to decide before a compulsory licence can be issued.

It is our suggestion that a refusal to accept a reasonable royalty offer should be construed as unreasonable refusal by the owner of the right of reproduction or translation. This would serve the right to quality education for national economic development of Uganda; it would provide a solution in a situation of deadlock. By converting the exclusive right into a remuneration right, there are increased chances that unreasonable owners of copyright in educational works cannot hold a nation at ransom by standing in the way of access and use of educational materials in pursuit of the fundamental human right to education. The compulsory licence may thus act more as a lever for facilitating negotiations and grant of reproduction by rights holders based in

⁷⁶⁷ Article III (3) of the Berne Appendix. According to Ricketson and Ginsburg, the main criterion here is not the distribution, but the price at which the published works are distributed. Ricketson and Ginsburg, 2006 (fn 701, above) 941-942 para. 14.82. The same interpretation is given by Mara Maija Tocups, 'The Development of Special Provisions in International Copyright Law for the Benefit of Less developed Countries'(1982)29 J. Cop'r Soc'y of USA 402, 418. Such an interpretation is line with the object and purpose of the Appendix since high prices of books was one of the main concerns raised by less developed countries. The other concern was the sheer unavailability of some works in less developed countries.

⁷⁶⁸ Articles II and III of the Berne Appendix are stated to be subject to Article IV of the Appendix. Article IV (I) deals with the preconditions for a grant of both the translation and reproduction licences. Art IV (I) requires proof of refusal to grant authorization while article IV (2) provides for situations where the owner of the right cannot be found. These require proof that the author or the publisher was informed as

the more developed countries of the global North, who hitherto are known to always be reluctant to grant licences.

6.12 Provision of compensation

The Berne Appendix regime requires compensation for any reproduction as opposed to the free use regime. According to section 17(5) of CONRA, the grant of a compulsory licence is contingent upon the provision of just compensation by the licensee to the owner of the right of translation or reproduction, as the case may be. This provision follows the wording of the parent article in the Berne Appendix.⁷⁶⁹ Regarding the quantum of just compensation, the provision adopts the Berne Appendix wording to the effect that the compensation has to be “consistent with standard royalties normally payable in case of freely negotiated licences...” However, the Ugandan legislature excluded the words, “between persons in the two countries concerned”. In our opinion, the draftsman was aware that linking the rate of compensation to local precedents would not be practical as none may exist. This therefore leaves room to seek guidance from any other similar precedents whether local or not and avoid an impasse that would impede the promotion of the right to education.

It is our considered recommendation that the approach taken by Thailand where the Act provides for determination of royalties by the Director General of Copyright in the event of failure by the parties to reach an agreement should have been emulated.⁷⁷⁰ In the interests of having a workable system of compensated uses of educational materials

well as or any International Copyright office designated by the country of origin of the author or publisher. CONRA provides that the UNESCO International Copyright Centre could be used.

⁷⁶⁹ Article IV (6)(i) of the Berne Appendix.

⁷⁷⁰ Section 55 of the Thailand Copyright Act: <http://www.wipo.int/wipolex/en/text.jsp?file_id=129763> (last accessed 29 January 2013).

protected by copyright, it is recommended that subsidiary legislation be made to address the matter of quantum of compensation. A clear mechanism for resolving disagreements over the quantum of payments by an authority that is alert to the need to balance the economic interests of the rights owner as well as the national interests of access and use of the work in question is needed. Such authority must be alert to the need to optimally utilise available exceptions to promote the fundamental and empowering right to education.

6.13 Termination of a reproduction licence

A notable disincentive to work the Berne Appendix is the ease with which compulsory licences can be terminated. This was intentionally made to make things difficult for the developing countries. In line with the Berne Appendix,⁷⁷¹ section 18(3) (c) of CONRA provides for termination of the reproduction licence. Just like under section 18(3) (b), no specific mention is made of the licence that is being dealt with. However, it is implied from the wording that the reproduction licence would terminate when the owner of the right of production (read reproduction) distributes or causes to be distributed copies of the edition of the work at a reasonable price.⁷⁷² The provision is not clear as to whose act of distribution leads to termination of the licence.

The edition distributed by the owner of the right must be in the same language and with substantially the same content as that produced by the licensee. This provision is based

⁷⁷¹ Article II(6) for translation licence and Article II(6) for reproduction licences.

⁷⁷² See Ricketson and Ginsburg, 2006 (fn 701, above) 945 para. 14.88. On a positive note, issues of affordability are seriously taken into consideration when determining whether a distribution by the owner of the reproduction right or with his authorization can terminate a compulsory reproduction licence. This

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on the relevant article of the Berne Appendix⁷⁷³ regarding the termination of the reproduction licence, though it is not an exact replica.

Another flaw with section 18(3) (a) of CONRA is that it does not provide for the distribution of existing stock (produced under the licence) until it is exhausted, where the compulsory licences are terminated on the ground of distribution by the right holder or their agent of a translation and reproduction of the relevant edition of the work. This omission, which can also be attributed to sloppy drafting has serious consequences as it is potentially works injustice for would-be applicants for compulsory licences. In contrast, section 18(3) (b) and (c) provide for the exhaustion of existing stock. In line with a maximalist approach to exceptions, the provision of distributing existing stock by a compulsory licence should have been provided for all instances of termination and not just some. In default of allowing the licensees opportunity to exhaust their existing stock, there would be a lot of uncertainty that could discourage would be applicants for compulsory licences with the attendant consequence that the problem of scarcity and affordability would then go unabated. Powerful multinational publishers would also take advantage of this provision to frustrate local reprints. The right to quality education would thus be affected since educational materials play a key role in promotion of the right to education.

Further, another weakness with both CONRA and the Berne Appendix is the failure to provide for some period of notice to the licensee. India was well advised to break ranks

is good for less developed countries especially the least developed countries where price is a very big determinant of access.

⁷⁷³ Article III (6) of the Berne Appendix.

with the Berne Appendix and fill the lacuna by providing for three months' notice to the licensee.⁷⁷⁴ This should have been emulated by Uganda: it makes the compulsory licences worth the investment. After all, there is nothing in the Berne Appendix prohibiting giving notice to the licence holder. Short of this, utilization of the Berne Appendix provisions would further be discouraged and hence access to educational materials would be negatively affected.

6.14 Potential problems with applying the Berne Appendix in Uganda

6.14.1 Uganda not a signatory to the Berne Convention

As earlier pointed out, with the exception of TRIPS, Uganda is not a signatory to any of the key international copyright instruments including the Berne Convention.⁷⁷⁵ The country therefore stands in a minority position especially with regard to the Berne Convention which has almost universal membership. This brings into issue whether certain provisions of the Berne Convention, though incorporated by the TRIPS Agreement via Article 9(1) of TRIPS are applicable to Uganda.

In particular, Article 2(2) of TRIPS requires members not to derogate from duties owed to each other *under the Berne Convention* (emphasis added). This provision has been interpreted as referring to obligations owed by members of the Berne Union to each other.⁷⁷⁶ In other words, the provision has been interpreted as applying to TRIPS

⁷⁷⁴ Section 32B(1) of the Indian Copyright Act, particularly the proviso. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=128098 (last accessed 20 June 2014).

⁷⁷⁵ Uganda had a copyright law as early as 1915 when it was still a British colony. Why did Uganda take this stance? Why the country, a British protectorate, did not join the Berne Union or the UCC despite having a copyright legislation as early as 1915 (the Copyright Ordinance 1915) modelled on the British Copyright Act of 1911 is discussed in chapter 2 section 2.12.

⁷⁷⁶ See article 1(1) WCT, discussed at next paragraph.

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Members who are also members of the Berne Union. This leaves room for the argument that in principle Article 2(2) does not apply to TRIPS Members (like Uganda) who are not members of Berne Union.⁷⁷⁷

Consequently, going by such interpretation, since Uganda is not a member of the Berne Convention, it has no such duties and is not bound by the non-derogation clause. This interpretation would mean that the country can enjoy rights flowing from the Berne Convention, such as utilizing the Berne Appendix, without incurring certain obligations. This type of interpretation would lead to absurdity for countries in a minority position like that of Uganda. Understandably, Ricketson proceeds on the above premises that the Berne Convention and the TRIPS Agreement have almost attained universal membership.⁷⁷⁸ He thus was only dealing with duties of Berne Union Members who are also members of the WTO and hence contracting parties to the TRIPS Agreement. He did not concern himself with minority situations like that of Uganda.

6.14.2 Berne Appendix vis a vis the three-step test

The issue has been raised as to whether the Berne Appendix needs to be compliant with the Three-Step test and if so, whether it actually is compliant.⁷⁷⁹ The Berne Appendix is justified by the need to consider national public policy concerns. The WTO Panel in the *US Section 110 (5) Copyright Act* dispute found that an exception could pass the first step of the three-step test even without having a public policy value. What that implies is that both public policy and non-public policy based exceptions may pass the first step

⁷⁷⁷ For an explanation of the effect of the non-derogation provisions of Article 2(2) of TRIPS, see Ricketson and Ginsburg, 2006 (fn 701, above) 857 para. 13.108.

⁷⁷⁸ See Ricketson/WIPO study, *ibid*, fn. 3, at p. 45.

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of the test. It was submitted in chapter 4 that the presence of a public policy basis for an exception makes it more likely to pass the first step of the test.⁷⁸⁰ It is nevertheless our argument that the Appendix may be found to meet the first step. Secondly, to disqualify a less developed country's exception crafted under the Berne Appendix would be a breach of Article 9(2) of the TRIPS Agreement that requires giving full effect to the Berne Appendix. In fact, in line with more recent thinking, a better construction of the WTO Panel's interpretation is not that public policy considerations are a disqualifying factor, but rather, that they need not always be present.⁷⁸¹

6.15 Reflections

Having argued in chapter 5 that even the most maximalist approach to exceptions to the reproduction and translation rights by a developing country like Uganda cannot lead to large scale access to required educational materials, it was necessary to investigate if there are other mechanisms for facilitating access and utilisation of educational materials. It was for this reason this chapter had to make an examination of the Berne Appendix for developing countries that was concluded in 1971. This chapter specifically sought to address the question whether the Berne Appendix is still relevant within the international copyright framework. Building on the main argument of this thesis, the chapter then examined whether Uganda maximally transposed the Berne Appendix in order to facilitate optimal access to and utilisation of educational materials to promote the education as a human right, an end in itself and as a means to realisation of economic development. The other point of concern was to find out if the fact that

⁷⁷⁹ Ricketson, *WIPO study*, at p.4; J. Fometeu, *WIPO African exceptions study* 17.

⁷⁸⁰ See Chapter 4 section 4.4.1.

⁷⁸¹ UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, Cambridge University Press 2005 at p. 190 para. 3.1; see also See Ricketson and Ginsburg, 2006 (fn 701, above) chapter 4.

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Uganda is a non-Berne Union country could present doctrinal or practical impediments to implementing the CONRA provisions on compulsory licensing. A solution had to be found as to how to solve the problems.

On the issue of relevance of the Berne Convention, this chapter relied on some empirical studies by UNESCO to show the importance of using mother tongue or local language for teaching especially in the first years of school. Using examples from statistical evidence from Mali and reports from the USA on the effectiveness of bilingual education based on a longitudinal study, the study found that use of mother tongue in teaching plays an important role in contributing to quality education. However, to do this requires having materials in the relevant local languages and this may call for translation of copyrighted materials. This would in turn engage the translation rights and even the reproduction right. The lessons from Peru where mother tongue instruction failed reinforced the need for exceptions to copyright because in that country, the failure was due to lack of materials. This rekindled the same old problem that this thesis is dealing with of lack of acceptable and adaptable educational materials. With Uganda having introduced mother tongue/local language teaching at a time when it is having increased enrolment due to introduction of UPE and USE programmes, the need for more educational materials could not be over emphasised.

This chapter found that the Berne Appendix is the only one of the International copyright instruments with provisions that acknowledge the impact of unreasonably priced items on educational activities. This also establishes the need for the compulsory reproduction licence of the Berne Appendix to reproduce the translated materials and also to reproduce more materials at affordable prices. Chapter 4 and 5 had helped

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establish that no amount of flexible construction of the exceptions would allow large scale reproduction of textbooks for universal primary and secondary education programmes.

Having established the relevance of the Berne Appendix, section 6.6 of this chapter pointed out the fact that Article I(6) of the Berne Appendix is the central foundation of the faculties availed because it allows for a derogation from the rights and obligations under Articles 8 and 9 of the Berne Convention 1971. The chapter also found that only a few countries have extensively transposed the Appendix provisions, Uganda being one of them.

On examining the CONRA provisions for Berne Appendix compliance as well as their optimality, this chapter found that under CONRA, both the reproduction and translation licence are for teaching, scholarship or research. CONRA though not following the line of the Berne Appendix, is more maximalist with regard to the purpose of the licences since it provides for: “teaching, scholarship and research’ for both compulsory reproduction and translation lice. The Act does not use the phrase ‘systematic instructional activities’ as in the Berne Appendix in reference to the purpose of the compulsory translation licence. This researcher found that strictly speaking that may amount to a conflict with the Berne Appendix.

This chapter also found that there is a wide range of procedural requirements under both the Berne Appendix and the CONRA provisions. Table 6.3 was prepared as a summary

Chapter 6: Extending educational exceptions in Uganda: is the Berne Appendix still relevant?

of procedural requirements, even though it is by no means exhaustive. This long list of requirements and technicalities is the greatest weakness of the Berne Appendix, and the one that has prompted calls for its reform.

Another key finding of this chapter was the fact that section 17(4) of CONRA that provides the time period to expire before a work in material form of technology, natural or physical sciences, musical or related works, and works of fiction, poetry, drama or books of art is silent about works of social sciences subjects such as economics, sociology and management. This goes against the reality of the importance of these works. It was concluded that the Act will need to be amended or subsidiary legislation will be needed. This chapter found that what amounts to unreasonable refusal by the owner of the right of reproduction or translation reasonable to grant a compulsory licence is not define by CONRA. It was suggested that declining a reasonable offer of royalties should be classified as a refusal that triggers the intending applicant to apply to the relevant authority.

As part of suggestions to make the compulsory licence regime workable, a mechanism for determining the amount of compensation should be put in place using subsidiary legislation. Further, this chapter found that CONRA section 18(3) (a) does not provide for the distribution of existing stock (produced under the licence) until it is exhausted, where the compulsory licences are terminated. This too needs to be addressed as it may discourage potential applicants. Moreover, I also found that both CONRA and the Berne Appendix fail to provide for some period of notice to the licensee before

termination of their licence. To stem this, the example of India Copyright Act section 32B should be used to amend the law. Since the Appendix is silent on this matter, that would not amount to a conflict.

6.17 Conclusion

In all, this chapter argued that the Berne Appendix is still relevant for ensuring inclusive quality education as an end in itself and as a means for attaining the broad goals of economic development, which is the greatest good of the greatest number. It provides a needed additional route for maximising the exceptions to copyright to promote economic development as the greatest good of the greatest number. Uganda's fair use exceptions cannot be stretched wide enough to accommodate large scale reproduction and translation of educational materials. This is because the exceptions are inherently minimalist, were not maximally transposed and thirdly because of the vexed question of the three-step test (discussed in chapter 4). If the publishers (preferably with Government of Uganda support) were to reproduce and translate works on a large scale, educational materials for quality education will be more available and more affordable. Governments would in turn be able to purchase the materials and supply to educational institutions.

The Berne Appendix was deliberately designed to be complicated in order to discourage its use. The Ugandan legislature however managed in some respects to weave its way through some of the technicalities as has been pointed out in this chapter. Uganda rightly ignored and in some cases took advantage of the equivocal nature of the Berne Appendix thereby catching the right holders at their very game.

While submitting that the Berne Appendix is still relevant and should be utilised, I found that for Uganda, our case study, there are other problems (unique to Uganda) that may hinder her application of the Berne Appendix. These include doctrinal and procedural issues that need to be urgently addressed before the compulsory reproduction licence regime can be activated in Uganda. A key potential bottleneck is the issue of Uganda's not being a Berne Union member. Uganda needs to accede to the Berne Convention. When these are addressed, there will be need to proactively encourage and support publishers to take advantage of the compulsory licence regime.

Chapter 7: Final conclusions and recommendations

This research was aimed at investigating the role that copyright law can play in promoting the economic development of less developed countries. This was to be done by examining the potential of copyright's potential impact on the human right to education. The study was aimed at examining the increasingly vexed question of the role that the exclusive rights guaranteed to authors by copyright law as "balanced" by the mechanism of exceptions and flexibilities play in the realisation of the right to education and how that in turn affects the realisation of economic development by those countries that presently lag behind the developed world. The study demonstrated that education is both a fundamental human right, a tool for and an end of economic development. In other words, there is a causal linkage between education and economic development goals.

The bundle of exclusive rights protected by copyright in favour of copyright owners has unfortunately been increasing, both in scope and strength, right from the time of the enactment of the world's first copyright Act, the Statute of Anne of 1710 followed by the subsequent enactment of the first most influential multilateral copyright Agreement, the Berne Convention for the Protection of Literary and Artistic Works of 1886. This widening scope and strength of copyright has led a number of commentators to state that it has resulted in an imbalance that has adverse effects both in the developed and world. This has aggravated the earlier largely ignored concerns from countries that aspects of international copyright laws were not responsive to their needs considering their levels of development. This work has argued that the adverse effects, however, are

no doubt more pronounced in the less developed world, and more so in the least developed of such countries, of which Uganda, our case study is one.

On the issue of the conflict between copyright and the right to education, I endeavoured in this thesis to show that there is both convergence and conflict between copyright and the right to education. I acknowledged the convergence and cooperation between copyright and the fundamental right to education. I found that this relationship can indeed be what the UK Copyright Tribunal referred to as the “symbiotic relationship”. Thus, I did not argue that copyright needs to be abolished. I however, dwelt more on the conflict copyright rather than the convergence, because the former has been less focused on. The warnings sounded by Lord Macaulay were ignored as time went on especially as the copyright industry became big business as exemplified by present day MNCs in the publishing sector. I have used access to and utilization of educational materials as the proxy factor for discussing the possible conflict.

The conflict has been approached from the perspective of less developed countries. This was not to state that there is no conflict in the more developed countries. However, it was our contention that meeting the international goals of the right to education is more of a concern for less developed countries than for the developed countries. It has been shown that the negative implications of the interaction between copyright and the right to education manifest themselves in an aggravated way in the countries of the global South that are characterized by underdevelopment and all the negative consequences that it brings.

Most less developed countries are dependent on a Western style of education; consequently most of the educational materials that are used in these countries is owned by authors and other right holders in the more developed countries. Using the widened scope of the bundle of exclusive rights protected by copyright, copyright owners in the more developed countries are in principle able to determine not only when but also if, users in less developed countries can have access to these materials. Access, as seen in this paper, has two facets: one being availability and the other affordability. Without affordability, there is no effective access. Only a few citizens are likely to afford these materials and hence there will be no equality in the quality of education delivered to the haves and have-nots. Governments in less developed countries have had to step in and supply educational materials. These supplies, at least in Uganda, have been limited and many educational institutions remain either not supplied or under supplied with relevant textbooks and other printed materials. Those that have often have outdated editions of books. The high student to textbook ratio that I proved using empirical studies from the World Bank means that many students cannot have access. In many instances, the few available copies are preserved under lock and key beyond the reach of users rather than served out to students.

Moreover, having effective access does not mean that educational users can do all they want with a copyrighted material. Some of the exclusive rights protected by copyright govern how educational works are utilized for educational purposes be it teaching or other educational uses. For example, without appropriate exceptions, permission is needed from the copyright owner in order to reproduce or distribute copies. The chances of utilizing these works using modern ICTs have been diminished by the new communication to the public right that affects dissemination of electronic or digitized

works on intranets or over the Internet, without an appropriate exception or authorization from the right holder or compulsory licence. Where an educational use does not fall into any of the above, it may amount to infringement of copyright that attracts both civil and criminal sanctions. Owing to an aggressive enforcement system in more developed countries, copyright has had and will increasingly have a chilling effect on some educational activities.

Less developed countries have not yet experienced this chilling effect only because of a hitherto lax enforcement of copyright. This trend is however, changing, with pressure being mounted from the copyright exporting countries who unfortunately also double as the grantors of development aid to less developed countries.⁷⁸² This is being buttressed by the gradual introduction of collecting societies in countries like Uganda to collect royalties, mainly for the benefit of copyright owners from the more developed countries. This is because there is presently little South to North or even South to South export of educational materials. The quality of education is thus likely to be further affected for instance through the worsening of the student to textbook ratios at a time of increased pupil/student enrolment that is coinciding with more aggressive enforcement of copyright.

The solution, as advocated in this thesis is to demand for an increased focus on this conflict. Efforts are already under way at the international level under the WIPO

⁷⁸² Educational institutions in China are targeted by right holders who put pressure on authorities to make various inspections. The USTR 2007 Special 301 captured this in its report of 2007 citing Universities as 'magnets for textbook piracy'. See http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf (last accessed 13 June 2014). If this happens in Uganda, where research has shown that there is massive infringement at Universities, then

Development Agenda. However, in view of the slow and acrimonious nature of copyright law reform at the international level, it is likely to take time.

This would affect the realization of the MDGs by the set target of 2015. The solution in the meantime is to make maximum use of available flexibilities by ensuring that less developed countries do not only avoid enacting *TRIPS plus* copyright laws but also *Berne and TRIPs minus* ones. Instances have been shown in this work where less developed countries have either exceeded the existing requirements (*TRIPS plus*) or even made more restrictive laws than they are allowed to (*TRIPS minus*). This requires law reform in those countries to ensure that the copyright laws that are enacted prioritise the sooner realization of national interests of TRIPS implementing less developed countries. Interpretation of the laws is the other obstacle to maximum utilization of available exceptions. A current notorious obstacle is the construction of the three-step test that governs the enactment of educational exceptions to copyright. The narrow interpretation of this provision by the WTO Appellate Body coupled with general reluctance at the international level, to infuse user-friendly TRIPS provisions such as Articles 7 and 8 with meaning, have been a disservice to addressing the conflict between the human right to education and copyright.

An immediate ray of hope exists in the option of less developed countries adopting a US-style fair use defence and ensuring that the courts flexibly interpret the fair use defence. Flexibility should also extend to application of the defence by policy makers and educational administrators in the same way that this defence has been interpreted in

the chilling effect on education will be experienced and the quality of education will reduce even much

the United States of America in cases where the national interests of that country have been at stake. Of particular value would be cases during the early take-off stages of that country's economic development and where other fundamental human rights, such as freedom of speech, have been implicated. Uganda has already taken advantage of this option by adopting the fair use defence in her Copyright and Neighbouring Rights Act of 2006.

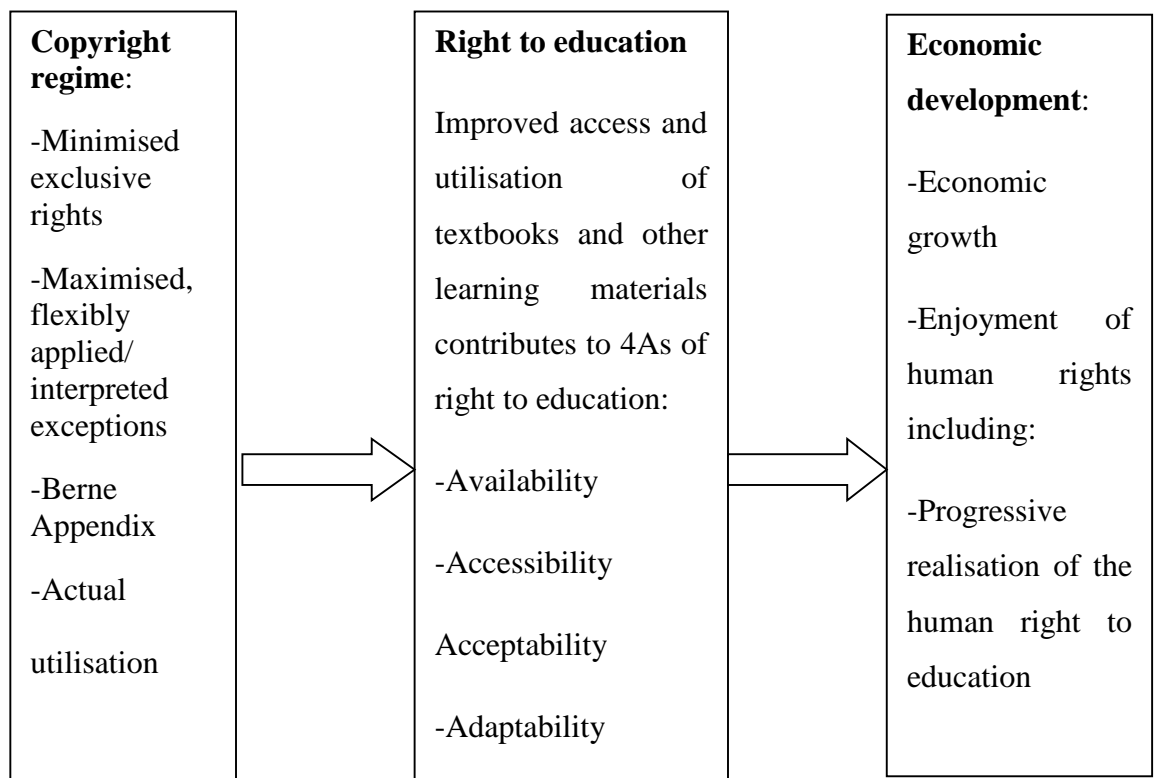
In Uganda's national interests of promoting the right to education, there is a need to reform the fair use defence by among others, introducing a fifth fair use factor. In assessing for fair use, courts should be required to take into specific consideration whether the use in question promotes the right to education or not. The relevant provisions should address education and not simply teaching which is only one aspect of education. To this end, I submit that section 15(2)(d) of CONRA should be inserted as suggested in chapter 5. The part in section 15(2)(a) that states 'or is for non-profit educational purposes' should be deleted from that subsection to allow for a standalone education factor. The fifth fair use factor should read:., “ (e) whether the nature and purpose of the use is intended or capable of enhancing the realisation of a fundamental human right such as the right to education.

Additionally, it will be important to do legislative surgery on the Berne Appendix to remove those aspects of it that are cumbersome and a pain. Without other international reforms aimed at promoting the right to education, the Berne Appendix itself should not be cut off but should be revised and made to remain part of the international copyright

further.

morphology. Even in its current flawed form, the Berne Appendix's use by less developed countries should be aggressively encouraged. Countries that use underhand diplomatic pressures to dissuade less developed countries from utilizing the Berne Appendix should be named and shamed, for instance, by UNESCO. It is however, hoped that ultimately, the current reforms will lead to some kind of *Doha Declaration-like* solution to the problem of access to and utilization of educational materials in order to promote the right to education that is after all, key to the enjoyment of many other rights. I believe that the relationship between copyright, education and economic development can be summarised as in the figure below.

Figure 5: Relationship between copyright, education and economic development



It is for this reason that I chose the classical utilitarianism/ Benthamite utilitarianism as philosophical foundation for the greatest good of the world's greatest number in Least

developed countries like Uganda. The reforms are needed to contribute to realization of the right to education, which is a master key to economic development and to the enjoyment of many other human rights. The access and utilization needs of less developed countries need to be addressed *now* and not in the distant future when copyright in respective works expires after the death of an author.

Should it be difficult to get reforms at the international level, and should the USA fair use defence, or any of the new versions such as Uganda's version be successfully challenged before the WTO, then, it will be important to resort to the authors' rights (*droit d'auteur*) country style of user levies, which, as a kind of indirect tax, may be less burdensome to poor country educational users of imported educational materials. This should also be acceptable to copyright exporting countries and their copyright-owning MNCs in the publishing industry. After all, this system is used in countries like France and Germany, where authors' rights are regarded as almost sacred. Such an approach, I assert, will help to bring copyright nearer to what Article 15(2)(c) of the ICESCR guarantees. It will help to ensure that the IPRs including copyright serve to enhance the universality, indivisibility, interdependence and interrelatedness of all human rights.⁷⁸³

⁷⁸³ See Limburg, *Principles on the implementation of the ICESCR*, Maastricht, The Netherlands, 2-6 June 1986, see para. 3.

Appendix 1: Professor Amartya Sen's letter to Oxford University Press

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September 17, 2012

To Oxford University Press
Delhi, India

Dear OUP,

I have been told about a recent problem that has arisen about the use of sections of OUP books for the purpose of teaching in Indian universities in general, and in Delhi University in particular. As in American universities, some Indian universities too tend to use “course packs” made of bits and pieces of different books.

I understand that due to some legal changes such course packs could be described as “illegal”, involving violations of copyrights laws.

I do recognise that copyright is an important issue, and must be of specific interest to publishers. On the other hand, the use of sections of books for teaching purposes through “course packs” has enormous educational value, particularly because of problems of affordability on the part of students. As an OUP author I would like to urge my publisher to not draw on the full force of law to make these “course packs” impossible to generate and use. Educational publishers have to balance various interests, and the cause of education must surely be a very important one.

In fact, the introduction the students get through these course packs must tend to be favorable to the sale of books in the future when the existence and the quality of arguments presented in particular books become more familiar to the next generation of earning adults, through their training during their own education.

May I urge you to reconsider this question in the light of both the importance of high quality education for students, and enlightened self-interest in promoting books published by the OUP?

With anticipation and appreciation of your reasonableness,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Amartya Sen', with a stylized flourish at the end.

Amartya Sen

Appendix 2

THE COPYRIGHT AND NEIGHBOURING RIGHTS ACT, 2006

ARRANGEMENT OF SECTIONS.

Section.

PART I—PRELIMINARY

1. Short title
2. Interpretation
3. Application of the Act

PART II—COPYRIGHT PROTECTION AND RIGHTS

4. Author entitled to copyright protection
5. Work eligible for copyright
6. Ideas not protected
7. Public benefit works not protected
8. Employed authors and works for Government or international bodies
9. Economic rights of author
10. Moral rights of author
11. Co-author's right
2. Fine art works to have inalienable right in proceeds of sale
- 1

PART III—DURATION OF COPYRIGHT AND AUTHORIZED USES OF PROTECTED WORKS

13. Duration of copyright protection
14. Assignment of licence or transfer of a copyright
15. Fair use of works protected by copyright
16. Ephemeral recording
17. Non-exclusive licence
18. Scope and condition of non-exclusive licence
19. Translation for broadcasting
20. Records of copyright centres

PART IV—NEIGHBOURING RIGHTS

21. Neighbouring rights and persons entitled
22. Rights of a performer

Section.

23. Moral rights of a performer
24. Action not authorized without a specific provision in a contract
25. Authorization in a co-performance
26. Duration of protection of performer
27. Rights of Director
28. Rights of producer
29. Duty to indicate moral right information
30. Notice of protection of producer's rights
31. Remuneration for broadcasting
32. Rights of a broadcasting company
33. Producers of programme carrying signals.
4. Limitation on neighbouring rights.

3

PART V—CONTRACTS RELATING TO THE EXPLOITATIONS
OF AUTHOR'S RIGHTS.

- 35. Contracts to be in writing
- 36. Publishing contracts
- 37. Public performance contracts
- 38. Broadcasting contracts
- 39. Voidable contracts
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PART VI—GENERAL PROVISIONS RELATING TO
ADMINISTRATION OF COPYRIGHT

- 41. Registrar of copyright and other officers
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- 43. Registration of rights
- 44. Users of work to apply for licence
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- 46. Infringements of copyright
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- 60. Application for registration
- 61. Registration of a society on probation
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6

Financial Provisions relating to Societies

- 69. Audit, annual returns and accounts
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Supervision of Societies

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PART VIII—GENERAL PROVISIONS

79. Settlement of disputes
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THE COPYRIGHT AND NEIGHBOURING RIGHTS ACT, 2006

An Act to repeal and replace the Copyright Act, and to provide for the protection of literary, scientific and artistic intellectual works and their neighbouring rights; and to provide for other related matters.

DATE OF ASSENT: 31st May, 2006.

Date of Commencement: 4th August, 2006.

BE IT ENACTED by Parliament as follows:

PART I—PRELIMINARY.

1. Short title

This Act may be cited as the Copyright and Neighbouring Rights Act, 2006.

2. Interpretation

In this Act, unless the context otherwise requires—

“audio visual fixation” means work consisting of a series of related images which impart the impression motion, with or without accompanying sounds, susceptible of being made visible and where accompanied by sound, susceptible of being audible such as cinema, television or video films;

“author” means the physical person who created or creates work protected under section 5 and includes a person or authority commissioning work or employing a person making work in the course of employment;

“Braille” means writing of the blind consisting of raised dots which are read by touching;

“broadcast” has the same meaning assigned to under the Uganda Communications Act;

“broadcasting company” means a company which—

- (a) communicates or carries on transmission or broadcasts programmes of sound, video or data intended for simultaneous reception by the public; or
- (b) provides or supplies audio-visual fixation rental communication or library services;
- (c) provides services by wire or wireless means in such a way that members of the public access the fixation from a place and at a time individually chosen by them;

“choreography” means steps and movements of a dance and “choreographic work” includes any form of dance or body movement communication whether in a dramatic form or not;

“communication to the public” means the operation by which sounds or images or both sounds and images are transmitted to the public whether through broadcast, performance or other means and “public” excludes a family setting or function;

“computer programme” means a set of instructions expressed in any language, code or notation, intended to cause the device having an information processing capacity to indicate, perform or achieve a particular function, task or result;

“copy” means a production of a work in a written, recorded or fixation form or in any other material form, but an object shall not be taken to be a copy of an architectural work unless the object is a building or a model;

“currency point” has the value specified in the 1st Schedule;

“derivative work” means work resulting from adaptation, translation or other transformation of an original work but which constitutes an independent creation in itself;

“economic rights” means the rights specified under section 9;

“fixation” means the embodiment of images or sound or both images and sound in a material form sufficiently stable or permanent, to permit them to be perceived, reproduced or otherwise communicated through a device during a period of more than transitory duration;

“literary work” includes—

- (a) novels, stories or poetic work;
- (b) plays, stage directions, audio-visual scenarios or broadcasting scripts;
- (c) textbooks, histories, biographies, essays or articles;
- (d) encyclopaedias, dictionaries, directories or anthologies;
- (e) letters, reports or memoranda;
- (f) lectures, addresses or sermons; and
- (g) any other work of literature;

“Minister” means the Minister responsible for justice;

“moral right” means the right to claim authorship or performance as is provided in sections 10 and 23;

“moral rights information” means information which identifies the author of the work or performer, the title of the work, the producer of the sound recording or audio-visual fixation, the owner of any right in the work or information about the terms and conditions of use of the work;

“neighbouring rights” include rights of performing artistes in their performances, rights of producers and music publishers and rights of broadcasting companies in their programmes and others as is provided under Part IV;

“performance” means the presentation of a work by actions such as dancing, acting, playing, reciting, singing, delivering, declaiming or projecting to listeners or spectators;

“performer” includes an actor or actress, singer, musician, dancer or other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

“producer” means a person who organises and finances the production of an audio visual fixation or sound recording;

“pseudonym” means the fictitious name adopted by an author;

“publication” means the lawful reproduction of a work or of an audio-visual or audio visual sound recording, fixation or of sound recording for availability to the public; and includes public performances and making available of a work on the internet;

“published” means a work or sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies, provided that, in the case of work the making available to the public took place with the consent of the author or other owner

of copyright, and in the case of a sound recording, with the consent in writing of the producer of the phonogram or his or her successor in title;

“public performance” means a performance of work which is presented to listeners or spectators not restricted to specific persons belonging to a private group and which exceeds the limits or normal domestic representations;

“programme-carrying signals” means electronically generated carriers transmitting live or recorded material consisting of images, sounds, or both images and sounds in their original, form or any form recognisably derived from the original and emitted to or passing through a satellite situated in extra-territorial space;

“public place” means any building, or conveyance to which for the time being the public are entitled or permitted to have access, with or without payment which may include cinema, concert, dance or video halls, bars, clubs, sports grounds, holiday resorts, circuses, restaurants, counter vehicles, banks or other commercial establishments;

“Registrar” means the Registrar of copyright appointed under section 41;

“reproduction” means the making of one or more copies of a work or sound recording in any manner or form including any permanent or temporary storage of the work or sound recording in electronic form.

“sound recording” means any exclusively aural fixation of sound in a material carrier such as a tape, disc or other similar material but does not include audio visual work including sound.

3. Application of the Act.

This Act applies to any work, including work, created or published before the commencement of this Act, which has not yet fallen into the public domain where the work is—

- (a) created by a citizen of Uganda or a person resident in Uganda;
- (b) first published in Uganda, irrespective of the nationality or residence of the author;
- (c) created by a person who is a national of or resident in a country referred to in section 81 or;
- (d) first published in a country referred to in section 81.

PART II—COPYRIGHT PROTECTION AND RIGHTS

4. Author entitled to copyright protection.

(1) The author of any work specified in section 5 shall have a right of protection of the work, where work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which it is created.

(2) The protection of the author’s work under subsection (1) shall not be subject to any formality.

(3) For the purpose of this section, a work is original if it is the product of the independent efforts of the author.

5. Work eligible for copyright.

(1) The following literary, scientific and artistic works are eligible for copyright—

(a) articles, books, pamphlets, lectures, addresses, sermons and other works of a similar nature;

(b) dramatic, dramatic-musical and musical works;

(c) audio-visual works and sound recording, including cinematographic works and other work of a similar nature;

(d) choreographic works and pantomimes;

(e) computer programmes and electronic data banks and other accompanying materials;

(f) works of drawing, painting, photography, typography, mosaic, architecture, sculpture, engraving, lithography and tapestry;

- (g) works of applied art, whether handicraft or produced on industrial scale, and works of all types of designing;
- (h) illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science;
- (i) derivative work which by selection and arrangement of its content, constitute original work;
- (j) any other work in the field of literature, traditional folklore and knowledge, science and art in whatever manner delivered, known or to be known in the future.

(2) Derivative works such as—

(a) translations, adaptations and other transformations of pre-existing works under subsection (1); and

(b) collections of pre-existing works like encyclopaedia and anthologies;

which by selection and arrangement of their contents constitute original works, shall be protected under this Act as original works.

(3) The protection of a derivative work under subsection (2) shall not affect the protection of the pre-existing work used by a person for derivation purposes.

6. Ideas not protected.

Ideas, concepts, procedures, methods or other things of a similar nature shall not be protected by copyright under this Act.

7. Public benefit works not protected.

(1) The right to protection of copyrights under this Act shall not extend to the following works—

(a) an enactment including an Act, Statute, Decree, statutory instruments or other law made by the Legislature or other authorised body;

(b) decree, order or other decision by a court of law for the administration of justice and any official translations from them;

(c) a report made by a committee or commission of inquiry appointed by Government or any agency of Government;

(d) news of the day namely reports of fresh events or current information by the media whether published in a written form, broadcast, internet or communicated to the public by any other means.

(2) The Government shall be the trustee for the public benefit of the works specified in subsection (1).

8. Employed authors and works for Government or international bodies.

(1) Where a person creates a work—

(a) in the course of employment by another person;

(b) on commission by another person or body;

then in the absence of a contract to the contrary, the copyright in respect of that work shall vest in the employer or the person or body that commissioned the work.

(2) Where a person creates work under the direction or control of the Government or a prescribed international body, unless agreed otherwise, the copyright in respect of that work shall vest in the Government or international body.

(3) Vesting of copyright referred to in (1) and (2) above shall apply only to work created within the stipulated schedule of work of an employee.

(4) The moral right in a work made under this section shall always remain with the actual author of the work.

9. Economic rights of author.

The owner of a protected work shall have, in relation to that work, the exclusive right to do or authorise other persons to do the following—

- (a) to publish, produce or reproduce the work;
 - (b) to distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership;
 - (c) to perform the work in public;
 - d) to broadcast the work;
 - (e) to communicate the work to the public by wire or wireless means or through any known means or means to be known in the future, including making the work available to the public through the internet or in such a way that members of the public may access the work from a place and at a time individually chosen by them;
 - (f) where the work is a pre-existing work, to make a derivative work;
- (g) to commercially rent or sell the original or copies of the work;
 - (h) to do, in relation to that work any act known or to be known in the future;
 - (i) to reproduce transcription into Braille which is accessible to blind persons.

10. Moral rights of author

- (1) The author of any work protected by copyright shall have a moral right—
- (a) to claim authorship of that work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means;
 - (b) to have the author's name or pseudonym mentioned or acknowledged each time the work is used or whenever any of the acts under section 9 is done in relation to that work, except where it is not practicable to do so; and
 - (c) to object to, and seek relief in connection with any distortion, mutilation, alteration or modification of the work.
- (2) The author of a work has a right to withdraw the work from circulation if it no longer reflects the author's convictions or intellectual concepts; and if the author does so, shall indemnify any authorised user of that work who might, in any material way, be affected by the withdrawal.
- (3) The moral right under subsection (1) is not assignable to any person, except for purposes of its enforcement.

11. Co-author's right.

Where work is created by more than one person and no particular part of the work is identified to have been made by each person, such that the work is indistinguishable, all the authors shall be co-owners of the economic rights and the moral rights relating to that work and the co-owners shall have equal rights in that work.

12. Fine art works to have inalienable right in proceeds of sale.

- (1) The author of an applied or fine art work shall have an inalienable right to share in the proceeds of each sale of that work by public auction, through a dealer or by whatever means.
- (2) The right to share in the proceeds referred to in subsection (1) shall not include auction for fundraising purposes.

PART III—DURATION OF COPYRIGHT AND AUTHORIZED USES OF PROTECTED WORKS

13. Duration of copyright protection

- (1) The economic rights of an author in relation to a work are protected during the life of the author and fifty years after the death of the author.
- (2) The economic rights of the author where the work is of joint authorship, are protected during the life of the last surviving author and fifty years after the death of the last surviving author.
- (3) Where the economic rights in a work are owned by a corporation or other body, the term of protection shall be fifty years from the date of the first publication of the work.

(4) Where the work is published anonymously or under a pseudonym, the economic rights of the author are protected for a term of fifty years from the date of its first publication; but where before the expiration of the fifty years the identity of the author is known or is no longer in doubt the economic right shall be protected during the life time of the author and fifty years after the death of that author.

(5) In the case of audio-visual work, sound recording or broadcast, the economic rights of the author are protected until the expiration of fifty years commencing from the date of making the work or from the date the work is made available to the public with the consent of the author.

(6) In the case of a computer program the economic right of the author are protected for fifty years from the date of making the program available to the public.

(7) In the case of photographic work, the economic rights of the author are protected for fifty years from the date of making the work.

(8) The moral rights of an author exist in perpetuity whether the economic rights are still protected or not and that moral right is enforceable by the author or after death his or her successors.

14. Assignment of licence or transfer of a copyright.

(1) The owner of a copyright may, as if it were movable property—
or her economic rights in a copyright to another person;

(a) assign his

(b) licence another person to use the economic rights in a copyright;

(c) transfer to another person or bequeath the economic rights in a copyright in whole or in parts;

(d) transfer to any Braille production unit in Uganda the economic rights in the Braille translation.

(2) The assignment, licence or transfer of the economic rights in whole or in part under subsection (1) shall not include or imply the assignment, licence or transfer of the moral right.

(3) An assignment or transfer of the economic right under subsection (1) shall be in writing and signed by the owner of the right or by the owner's agent and by the person to whom the rights are being assigned or transferred.

(4) A licence to do an act falling within a copyright may be oral, written or inferred from conduct or circumstances.

(5) An assignment or transfer of the economic right shall be limited to the use, period and country provided in the contract under subsection (3).

(6) Where the ownership of the only copy of one of several copies of a work is assigned, the economic rights relating to the work shall, unless the contrary is stated in writing, not be assigned.

(7) Where a person is entitled, under will, to any original literary, dramatic, musical or artistic work in a material form, but which work was not published before the death of the testator, the economic rights in the work shall, on publication of the work, belong to the person to whom the work is bequeathed unless the contrary is indicated in the will.

15. Fair use of works protected by copyright

(1) The fair use of a protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright where—

(a) the production, translation, adaptation, arrangement or other transformation of the work is for private personal use only;

(b) a quotation from a published work is used in another work, including a quotation from a newspaper or periodical in the form of press summary, where—

- (i) the quotation is compatible with fair practice; and
 - (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used, and
 - (iii) acknowledgement is given to the work from which the quotation is made;
- (c) a published work is used for teaching purpose to the extent justified for the purpose by way of illustration in a publication, broadcast or sound or visual recording in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;
- (d) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional training or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;
- (e) the work is reproduced, broadcast or communicated to the public with acknowledgement of the work, in any article printed in a news paper, periodical or work broadcast on current economic, social, political or religious topic unless the article or work expressly prohibits its reproduction, broadcast or communication to the public;
- (f) any work that can be seen or heard is reproduced or communicated to the public by means of photograph, audio-visual work or broadcast to the extent justified for the purpose when reporting on current events;
- (g) any work of art or architecture in a photograph or an audio-visual or television broadcast is reproduced and communicated to the public where the work is permanently located in a public place or is included by way of background or is otherwise incidental to the main object represented in the photograph or audio-visual work or television broadcast;
- (h) for the purposes of current information, a reproduction in the press, broadcast or communication to the public is made to—
- (i) a political speech or a speech delivered during any judicial proceeding; or
 - (ii) an address, lecture, sermon or other work of a similar nature delivered in public;
- (i) for the purpose of a judicial proceeding, work is reproduced;
- (j) subject to conditions prescribed by the Minister, a reproduction of a literary, artistic or scientific work by a public library, a non-commercial documentation centre, a scientific institution or an educational institute if the reproduction and the copies made—
- (i) do not conflict with the normal exploitation of the work reproduced;
 - (ii) do not unreasonably affect the right of the author in the work; and

(k) any work is transcribed into Braille or sign language for educational purpose of persons with disabilities.

(2) In determining whether the use made of a work in any particular case is a fair use the following factors shall be considered—

- (a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes;
- b) the nature of the protected work;

(c) the amount and substantiality of the portion used in relation to the protected work as a whole; and

(d) the effect of the use upon the potential market for value of the protected work.

(3) The fact that a piece of work is not published shall not of itself prejudice the requirement of fair use in accordance with subsection(2).

16. Ephemeral recording

(1) A broadcasting company may, for the purpose of its own broadcast and by means of its own facilities, make an ephemeral recording of the broadcast, in one or several copies of any work which it is authorised to broadcast.

(2) No copyright shall exist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast.

(3) Subject to subsection (4) all copies of the ephemeral recording shall be destroyed within a period of six months or longer period as may be authorised by the copyright owner.

(4) Where a recording under subsection (1) is of exceptional documentary character, a copy of the recording may be preserved for the National Archives.

(5) The preservation of a copy under subsection (4) does not affect, in any way, the rights of the author in the work that was broadcast.

(6) Whether the recording of a broadcast under subsection(1) is of an exceptional documentary character is a question of fact to be determined having regard to all the circumstances and in particular to the need for the enhancement of the historical or social aspect of life in Uganda.

17. Non-exclusive licence

(1) A person who is a citizen of Uganda or who is ordinarily resident in Uganda may apply to the Minister for a non-exclusive licence—

(a) to make and publish or to cause to make and publish a translation of a work into the English, Swahili or any Ugandan language and to produce or cause to produce copies from them;

(b) to reproduce or cause to be reproduced a work which is published, and to publish or cause to be published in a material form the work reproduced.

(2) An application for translation shall not be issued under paragraph (a) of subsection (1) until one year has expired from the date of the publication of the work in a material form.

(3) Where the author of the work has withdrawn all copies of the work from circulation, no licence under paragraph (a) of subsection (1) shall be granted by the Minister in respect of that work.

(4) The Minister shall not grant a licence under paragraph (b) of subsection (1)—

(a) until the following period commencing from the date of first publication of the work in a material form, has expired—

(i) three years in the case of work in a material form of technology or natural or physical science including mathematics;

(ii) five years in the case of music or any other related work;

(iii) seven years in the case of work of fiction, poetry, drama or for a book of

art;

(iv) seven years in the case of an audio-visual fixation.

(5) The licensee under this section shall provide just compensation consistent with standards of royalties normally payable in the case of a licence freely negotiated between any person and the owner of the right, which shall be paid to the owner or owner's agent and if the owner is not known or cannot be found shall be paid to the Registrar who shall avail it to the owner if found.

(6) Where a licence is granted under this section the licensee shall ensure that the translation or reproduction of the work is correct and the published copies include—

(a) the original title and the name of the author of the work;

(b) a notice in the language of the translation or reproduction that the copies of the work are for distribution in Uganda and are not for export from Uganda; and

(c) a reprint of the copyright notice, that is, the symbol © accompanied by the name of the owner of the copyright and the year of first publication, where the work from which the translation or reproduction is made is published with a copyright notice.

18. Scope and condition of non-exclusive licence

(1) A licence issued under section 17 shall—

- (a) be limited to a non-exclusive right to translate the work into the language in respect of which it is granted;
- (b) be limited to non-exclusive right to reproduce the work as provided in the licence;
- (c) be for the purpose of teaching; scholarship or research only;
- (d) not be transferable by the licensee;
- (e) not extend to the export of copies of the work translated under the licence.

(2) The Minister shall not issue a licence under section 17 unless—

(a) the Minister is satisfied that no translation of that work into the language in question has ever been published in a material form by, or under the authority of the owner of the right of translation or that all previous editions in that language are out of print.

(b) there has never been a sale or other distribution, authorised by the owner or the owner's agent of the reproduction right, of copies of the particular edition in Uganda to the public or in connection with systematic instructional activities, or that there has been no sale or other distribution during the immediately preceding six months;

(c) the applicant has requested from the owner of the rights or the owner's agent for the authorisation to reproduce or translate and has been refused unreasonably or in spite of genuine efforts made by the applicant it has not been possible to locate the owner or the owner's agent;

(d) the applicant has at the time of making the application, sent a notice of the application to the International Copyright Information Centre at the UNESCO, or a national or regional copyright information centre officially designated to that organisation by the government of the country where the author or publisher is believed to have his or her principal place of business;

(e) where the applicant cannot locate the owner of the rights or the owner's agent the applicant has by registered mail sent copies of the application to the author or publisher whose name appears on the work and also to the national or regional copyright information centre or in the absence of such a centre, has sent a copy of the application to the International Copyright Information Centre of UNESCO.

(3) A licence issued under section 17 shall terminate—

(a) where copies of an edition of the work translated or reproduced are distributed to the general public in Uganda; or

(b) translation of the work in the same language and with substantially the same content as the edition for which the licence was granted is published in Uganda by or under the authority of the owner of the right of translation, at a reasonable price; and any copies produced before the termination of the licence may be distributed until the stock is exhausted.

(c) where copies of the edition of the work are distributed in Uganda in connection with systematic instructional activities, by the owner of the right of production or the owner's agent at a reasonable price if that edition is in the same language and substantially the same in content as the edition published under the licence, and any copies already made before the licence is terminated may continue to be distributed until the stock is exhausted.

34. Limitation on neighbouring rights

The provisions of sections 24, 27, 28, 29, 30, 33 shall not apply where the acts done are for—

- (a) private use;
- (b) the reporting of current event, except that no more than short excerpts of a performance, sound recording or audio-visual performance fixation or broadcast are used;
- (c) teaching science, or
- (d) quotations in the form of short excerpts of a performance, sound recording, audio-visual fixation or fixation or broadcast, which are compatible with fair use and are justified by the informative purpose of the quotations.

43. Registration of rights**44. Users of work to apply for licence**

(1) Any person who wishes to use or perform another person's work or who causes work to be performed in public for gain shall apply to the owner or the owner's agent for a licence to do so.

(2) The owner or agent may grant a licence and shall in respect of any grant, charge such royalties as the owner or owner's agent may determine to be appropriate.

(3) A licence granted under this section shall be in force for one year but may be renewed each time it expires.

b

(4) Any person who, after the expiration of a licence continues to use, perform or cause to perform in public for gain any work, without renewing the licence commits an offence and is liable, in addition to any other punishment under this Act, to pay not less than fifty percent of the royalties charged in respect of that work in addition to the royalties due for that particular use.

(5) The form of application and licence under this section shall be as prescribed by the Minister.

(6) A licence by an agent shall not affect the rights of the owner of the work under section 9 but where a person is licensed by an agent the owner shall not impose extra conditions and similarly where the owner exercises his or her rights under section 9, the agent shall not impose conditions other than those agreed upon between the owner and the user of the work if the agreement is in conformity with this Act.

45. Civil remedies

(1) Any person whose rights under this Act are in imminent danger of being infringed or are being infringed may institute civil proceedings in the Commercial Court for an injunction to prevent the infringement or to prohibit the continuation of the infringement.

(2) Upon an ex-parte application by a right owner, the court may in chambers make an order for the inspection of or removal from the infringing person's premises, of the copyright infringing materials which constitute evidence of infringement by that person.

(3) The grant of an injunction under subsection (1) shall not affect the author's claim for damages in respect of loss sustained by him or her as a result of the infringement of the rights under this Act.

(4) A person who sustains any damage because of the infringement of his or her rights under this Act may claim damages against the person responsible for the infringement whether or not that person has been successfully prosecuted.

(5) Infringement is not actionable unless the infringement involves the whole piece of work or a substantial part of the work.

46. Infringements of copyright

(1) Infringement of copyright or neighbouring right occurs where, without a valid transfer, licence, assignment or other authorisation under this Act a person deals with any work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to—

- (a) reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;
- (b) distribute in Uganda by way of sale, hire, rental or like manner; or
- (c) exhibit to the public for commercial purposes by way of broadcast, public performance or otherwise.

(2) The use of a piece of work in a manner prejudicial to the honour or reputation of the author shall be deemed an infringement of the right of the owner of the right.

47. Offences and penalty

(1) A person who, without the authorisation of or licence from the rights owner or his or her agent—

- (a) publishes, distributes or reproduces the work;
 - (b) performs the work in public;
 - (c) broadcasts the work;
 - (d) communicates the work to the public; or
 - (e) imports any work and uses it in a manner which, were it work made in Uganda, would constitute an infringement of copyright;
- commits an offence and is liable on conviction, to a fine not exceeding one hundred currency points or imprisonment not exceeding four years or both.

(2) A person who contravenes the rights of a producer of sound recording or audio-visual fixation, a broadcasting company or a producer of programme carrying signals commits an offence and is liable on conviction to a fine not exceeding twenty five currency points or imprisonment not exceeding one year or both.

(3) Where a work is communicated to the public on the premises of an occupier or by the operation of any apparatus which is provided by or with any consent of the occupier of those premises, the occupier shall be deemed to be the person communicating the work to the public whether or not he or she operates the apparatus.

(4) A person who sells or buys in the course of trade or imports any apparatus, article, machine or thing, knowing that it is to be used for making infringing copies of work, commits an offence and is liable on conviction, to a fine not exceeding fifty currency points or imprisonment not exceeding one year or both.

(5) In addition to the punishment prescribed by subsection (4) the Court shall, where an offence is committed under that subsection, order the forfeiture of the apparatus, article or thing which is the subject matter of the offence or which is used in connection with the commission of the offence.

(6) Any person who does any act to make other people believe that he or she is the author or performer of a piece of work, whether that act is—

- (a) by words or writing;
 - (b) through conduct or fraudulent tricks; or
 - (c) the use of electronic or other device;
- commits an offence.

(7) A person commits an offence who, having reasonable grounds to know or suspect that the act will induce, enable, facilitate or conceal an infringement of a copyright or a neighbouring right, does the following—

- (a) removes or alters any electronic moral rights information without lawful authority to do so;

(b) distributes, imports for distribution, broadcasts, communicates or makes available to the public any pirated work;

(c) without lawful authority, distributes, imports for distribution, broadcasts, communicates or makes available to the public, any performance, copy of a sound recording or audio-visual fixation knowing that the moral rights information has been unlawfully removed or altered.

(8) Where a work is communicated to the public on the premises of an occupier by live performance without the authority of the owner of the copyright or neighbouring right or agent, the occupier of the premises shall be deemed to have communicated the work to the public.

50. Penalties and compensation

(1) A person convicted of an offence under this Act, for which no other punishment is provided, is liable to a fine not exceeding fifty currency points or imprisonment not exceeding one year or both.

(2) In addition to any other punishment that may be imposed by the court under this Act, the court may order—

(a) that all sums of money arising out of the offence and received by the offender be accounted for by the offender and paid to the person entitled to the economic rights under this Act; and

(b) that all reproductions, duplication, translation, extracts, imitations and all other materials involved in the infringement be forfeited and disposed of as the court may direct.

51. Proof of facts

52. Staff of collecting society etc to act as inspector

In addition to inspectors appointed under section 41 the Registrar may authorise any member from the Uganda Registration Service Bureau or any staff of a collecting society to perform the functions of an inspector under this Act.

53. Entry into premises

Subject to the provisions of this section, an inspector may, at any reasonable time and on production of the certificate of authority enter any premises, ship, aircraft or vehicle for the purpose of ascertaining whether there is or has been, on or in connection with those premises, ship, aircraft or vehicle any contravention of this Act.

PART VII—GENERAL PROVISIONS RELATING TO COLLECTING SOCIETIES.

57. Collecting Societies to be registered

(1) No collecting society shall operate in Uganda without a registration certificate issued by the Registrar of Companies.

(2) The Registrar of Companies shall not register another society in respect of the same bundle of rights and category of works if there exists another society that has already been licensed and functions to the satisfaction of its members.

(3) Any person operating as a collecting society or causing any society or body to operate as a collecting society without a registration certificate commits an offence and is liable on conviction to a fine not exceeding one hundred currency points or to a term of imprisonment not exceeding two years or to both the fine and imprisonment.

PART VIII—GENERAL PROVISIONS

82. Regulations

(1) The Minister may, on the recommendation of the Registrar, and after consultation with the collecting societies, make regulations generally for the better carrying into

effect of the, provisions of this Act and to prescribed or provide for anything required or authorised to be prescribed or provided under this Act.

(3) Regulations made under this section may prescribe as penalties for the contravention of the regulations any fine not exceeding twenty currency points or any term of imprisonment not exceeding six months or both.

PART IX—TRANSITION PROVISIONS

84. Repeal and Saving

(1) The Copyright Act, is repealed.

(2) The repeal under subsection (1) shall not affect any copyright or other rights that existed immediately before the repeal of the Act and all such rights shall be enforceable under this Act, as if this Act was in force at the time of the creation of that work.

FIRST SCHEDULE
CURRENCY POINT

Section 2

One Currency point is equivalent to twenty thousand shillings

SECOND SCHEDULE

Sections 3 and 81

PART I—ORGANISATIONS

1. World Intellectual Property Organisation (WIPO)
2. Africa Region Intellectual Property Organisation (ARIPO)
3. The United Nations Educational Scientific and Cultural Organisation (UNESCO)
4. The World Trade Organisation.

PART II—INTERNATIONAL CONVENTIONS

1. The Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement).

Cross references









Arbitration and Conciliation Act, Cap. 4

Uganda Communications Act, Cap. 106

Companies Act, Cap. 110

Copyright Act, Cap. 215

Appendix 3: The Millennium Development Goals

	<p>Goal 1: Eradicate extreme poverty and hunger</p> <p>Target 1a: Reduce by half the proportion of people living on less than a dollar a day Target 1b: Achieve full and productive employment and decent work for all, including women and young people Target 1c: Reduce by half the proportion of people who suffer from hunger</p>
	<p>Goal 2: Achieve universal primary education</p> <p>Target 2a: Ensure that all boys and girls complete a full course of primary schooling</p>
	<p>Goal 3: Promote gender equality and empower women</p> <p>Target 3a: Eliminate gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015</p>
	<p>Goal 4: Reduce child mortality</p> <p>Target 4a: Reduce by two thirds the mortality rate among children under five</p>
	<p>Goal 5: Improve maternal health</p> <p>Target 5a: Reduce by three quarters the maternal mortality ratio Target 5b: Achieve, by 2015, universal access to reproductive health</p>
	<p>Goal 6: Combat HIV/AIDS, malaria and other diseases</p> <p>Target 6a: Halt and begin to reverse the spread of HIV/AIDS Target 6b: Achieve, by 2010, universal access to treatment for HIV/AIDS for all those who need it Target 6c: Halt and begin to reverse the incidence of malaria and other major diseases</p>
	<p>Goal 7: Ensure environmental sustainability</p> <p>Target 7a: Integrate the principles of sustainable development into country policies and programmes; reverse loss of environmental resources Target 7b: Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss Target 7c: Reduce by half the proportion of people without sustainable access to safe drinking water and basic sanitation Target 7d: Achieve significant improvement in lives of at least 100 million slum dwellers, by 2020</p>
	<p>Goal 8: Develop a Global Partnership for Development</p> <p>Target 8a: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system Target 8b: Address the special needs of the least developed countries Target 8c: Address the special needs of landlocked less developed countries⁷⁸⁴ and small island less developed States Target 8d: Deal comprehensively with the debt problems of less developed countries Target 8e: In cooperation with pharmaceutical companies, provide access to affordable essential drugs in less developed countries Target 8f: In cooperation with the private sector, make available the benefits of new technologies, especially information and communications</p>

⁷⁸⁴ As in the Berne Appendix and in most of the thesis, the term ‘less developed countries’ is here used to include least developed countries.

Appendix 4: Education For All Goals

Education for All Goals

Six internationally agreed education goals aim to meet the learning needs of all children, youth and adults by 2015.

Goal 1

Expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children.

Goal 2

Ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to, and complete, free and compulsory primary education of *good quality*(*emphasis added*).

Goal 3

Ensuring that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programmes.

Goal 4

Achieving a 50 per cent improvement in levels of adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults.

Goal 5

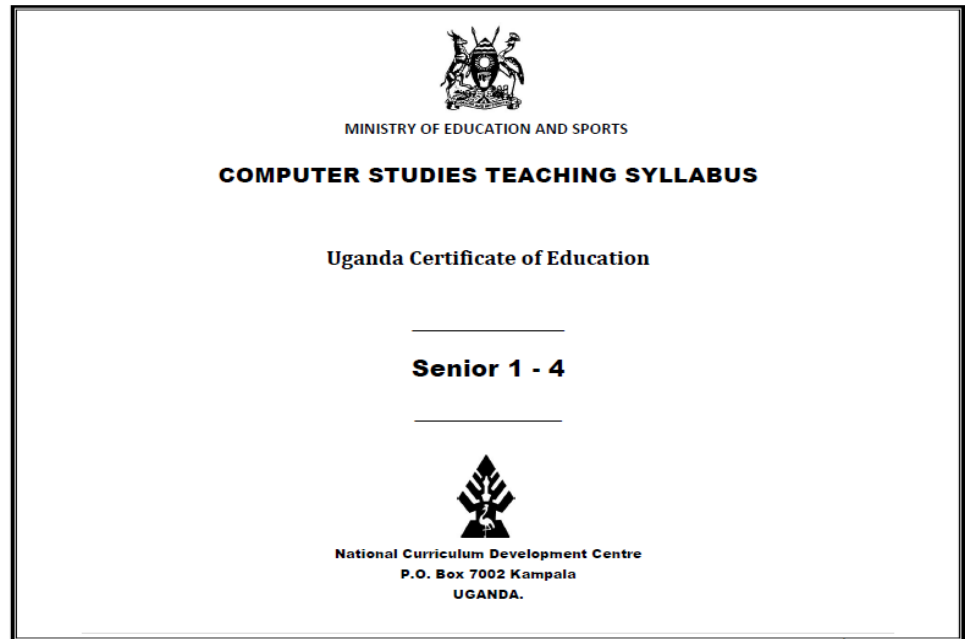
Eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality.

Goal 6

Improving all aspects of the quality of education and ensuring excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills (emphasis added).

Appendix 5: Extracts from Uganda Certificate of Education (O Levels) Computer Studies Syllabus showing recommended reference books

Appendix 5: Extracts from Uganda Certificate of Education (O Levels) Computer Studies Syllabus showing recommended reference books



COMPUTER STUDIES REFERENCE BOOKS

1. Cox Joyce and Bellevue (2003) Quick Course in Microsoft Access 2003, Microsoft Press, Washington. (Latest: Microsoft Access 2007)
2. Favro, B (2003) Off to Work with Office 2003, Labyrinth Publications, El Sobrante, C.A. (Latest: Office 2007)
3. Freeze J. T (1998) Teach Yourself Computer Basics in 24 Hours, 1st Edition, Macmillan Computer Publishing, Indianapolis, U.S.A.
4. Gralla P. (1998) How the Internet Works, 4th Edition, Macmillan Computer Publishing, Indianapolis, U.S.A.
5. Hutchinson, S. And Coulthard, G (2004) Microsoft Office 2003 Professional, Boston, MA McGraw-Hill, Boston. (Latest: Microsoft Office 2007 Professional)
6. Kulcullen John (2003), Teach Yourself Microsoft PowerPoint 2003, IDG Books Worldwide, Inc., Foster City, C.A. (Latest: Microsoft PowerPoint 2007)
7. Maran, R (2004) Office 2003 Simplified, 4th Edition. IDG Book Worldwide, Inc., Foster City, C.A. (Latest: Office 2007)
8. Oxford Computer Training, (2002) Teach Yourself Windows XP, Hodder & Stoughton, London, Great Britain. (Latest: Windows Vista)
9. Oxford Computer Training, (2003) Teach Yourself PowerPoint 2003, Hodder & Stoughton, London, Great Britain. (Latest: Microsoft PowerPoint 2007)

Appendix 5: Extracts from Uganda Certificate of Education (O Levels) Computer Studies Syllabus showing recommended reference books

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10. Oxford Computer Training, (2003) Teach Yourself Excel 2003, Hodder & Stoughton, London, Great Britain. (Latest: Microsoft Excel 2007)
11. Oxford Computer Training, (2003) Teach Yourself Word 2003, Hodder & Stoughton, London, Great Britain. (Latest: Microsoft Word 2007)
12. Oxford Computer Training, (2003) Teach Yourself Access, Hodder & Stoughton, London, Great Britain. (Latest: Microsoft Access 2007)
13. Perry G. (1999) Teach Yourself PCs, in 24 Hrs, 2nd Edition. Macmillan Computer Publishing, Indianapolis, U.S.A.
14. Shelley O'Hara, Denise B. Vega & Julia Kelly (2003) Discover Office 2003, Foster City, CA: IDG Books Worldwide. (Latest: Office 2007)
15. Snell N. (1999) Teach Yourself Internet in 24 Hrs, 2nd Edition. Macmillan Computer Publishing, Indianapolis, U.S.A.
16. Snell N. (1999) Teach Yourself to Create WebPages in 24 Hrs, 2nd Edition, Macmillan Computer Publishing, Indianapolis, U.S.A.
17. Whitehead P. and Maran R. Teach Yourself the Internet and the World Wide Web, 1st Edition, IDG Books Worldwide, Foster City, C.A.
18. White R. How Computers Work, 4th Edition, Indianapolis, Macmillan Computer Publishing, U.S.A.
19. Brendan Munnely and Paul Holden ECDL: The Complete Coursebook, Pearson.
20. Sarah E. Hutchinson and Stacey C. Sawyer Computers, Communication and Information, 7th Edition, McGraw Hill (www.mhhe.com/it)

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Australian Copyright Council, 'Fair dealing in the digital age' (Bulletin 92(1996))

Australian Copyright Council, 'Special case exception: education, libraries: a practical guide' (December Bulletin B130v01 (2007))

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Band J, 'The Google Print Library Project: a copyright analysis' (available online at <http://www.policybandwidth.com/doc/googleprint.pdf> , undated).

Barker R., *Photocopying practices in the United Kingdom* (Faber and Faber, London 1970)

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