

**Human Rights Council****Twenty-eighth session**

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Report of the Special Rapporteur in the field of cultural
rights, Farida Shaheed*****Copyright policy and the right to science and culture***Summary*

The Special Rapporteur in the field of cultural rights, Farida Shaheed, submits the present report in accordance with Human Rights Council resolution 19/6.

In the present report, the Special Rapporteur examines copyright law and policy from the perspective of the right to science and culture, emphasizing both the need for protection of authorship and expanding opportunities for participation in cultural life.

Recalling that protection of authorship differs from copyright protection, the Special Rapporteur proposes several tools to advance the human rights interests of authors.

The Special Rapporteur also proposes to expand copyright exceptions and limitations to empower new creativity, enhance rewards to authors, increase educational opportunities, preserve space for non-commercial culture and promote inclusion and access to cultural works.

An equally important recommendation is to promote cultural and scientific participation by encouraging the use of open licences, such as those offered by Creative Commons.

* The annex to the present report is circulated as received.



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I. Introduction

1. Science and culture are not only of great importance to the knowledge economy;¹ they are also fundamental to human dignity and autonomy.

2. In that area, two influential paradigms of international law — intellectual property and human rights — have evolved largely separately.

3. Recent developments, however, have rendered the interface of those two regimes more salient. Since the 1990s, a new wave of international intellectual property treaties has increased the tension between intellectual property and human rights standards. In 2000, the Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution on intellectual property and human rights calling for the primacy of human rights over trade law (resolution 2000/7). Since then, public interest groups and developing countries have gradually aligned in an “access to knowledge” movement seeking to rebalance international intellectual property governance.² Asserting that “humanity faces a global crisis in the governance of knowledge, technology and culture,” the 2005 Geneva Declaration on the Future of the World Intellectual Property Organization (WIPO) called for renewed attention to alternative policy approaches to promote innovation and creativity without the social costs of privatization.³ Increasing attention given to the rights of indigenous peoples has also provided impetus to approaching intellectual property policy from a human rights perspective.⁴

4. Significant uncertainty remains, nonetheless, on how to resolve the potential tensions between intellectual property laws and human rights. The right to science and culture — understood as encompassing the right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author — offers a particularly promising framework for reconciliation.⁵ Both intellectual property systems and the right to science and culture obligate governments “to recognize and reward human creativity and innovation and, at the same time, to ensure public access to the fruits of those endeavours. Striking the appropriate balance between these two goals is the central challenge that both regimes share”.⁶ Moreover and importantly, both cultural participation and protection of authorship are human rights principles designed to work in tandem.

5. The Special Rapporteur organized an open consultation on 6 June 2014 to elicit the views of States and other stakeholders on the impact of intellectual property regimes on the enjoyment of the right to science and culture. She also convened experts’ meetings on 10 and 11 June 2014 in Geneva, Switzerland, and 28 October 2014 at New York University, United States of America (see annex). Numerous contributions were also received from States and stakeholders and are available online. The Special Rapporteur is grateful to all those who contributed.

¹ Meaning an economy based on creating, evaluating and trading knowledge.

² Amy Kapczynski, “The Access to Knowledge Mobilization and the New Politics of Intellectual Property”, *Yale Law Journal*, No. 117 (January 2008), p. 804.

³ Available from www.cptech.org/ip/wipo/futureofwipodeclaration.pdf.

⁴ Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011), pp. 33–64.

⁵ Lea Shaver, “The Right to Science and Culture”, *Wisconsin Law Review*, No. 1 (2010), p. 121. Available from <http://ssrn.com/abstract=1354788>.

⁶ Helfer and Austin, *Human Rights and Intellectual Property*, p. 507.

6. The present report is the first of two consecutive studies by the Special Rapporteur on intellectual property policy as it relates to the right to science and culture. This first report focuses on the interface of copyright policy with the protection of authors' moral and material interests and the public's right to benefit from scientific and cultural creativity. A second report, to be submitted to the General Assembly in 2015, will examine the connection between the right to science and culture and patent policy.

II. International and national legal framework

A. The right to science and culture

7. The right to science and culture is recognized in various human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

8. Article 27 of the Universal Declaration provides for everyone's right (1) "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits," and to (2) "the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

9. These dual aspects of cultural participation and protection of authorship are included in all later articulations of the right to science and culture, including article 15, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. The Covenant further echoes the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), highlighting the touchstone principles of conservation, development and diffusion of science and culture, freedom as an essential precondition for the realization of the right to science and culture and the importance of international cooperation to achieve that right (art. 15, paras. 2, 3 and 4).

10. The right to science and culture is also enshrined in several regional human rights conventions and in many national constitutions, often alongside a commitment to the protection of intellectual property.

11. The Committee on Economic, Social and Cultural Rights has drawn up interpretive guidance pertaining to some aspects of the right to science and culture.

12. Protection of authorship is the subject of the Committee's 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 or she is the author, which distinguishes between intellectual property rights and human rights, emphasizing that the moral and material interests of authors do not necessarily coincide with the prevailing approach to intellectual property law. The Comment ties the "material interests" of authors to the ability of creators to enjoy an adequate standard of living and emphasizes that authors' rights should be protected in ways that do not unduly burden cultural participation.

13. Addressing cultural participation, the Committee's general comment No. 21 (2009) on the right of everyone to take part in cultural life emphasizes the importance of cultural diversity and being able to engage with and contribute to the cultural life of the broader community.

14. The right of everyone to enjoy the benefits of scientific progress and its applications has not yet been the subject of a general comment. However, the Special Rapporteur's 2012 thematic report to the Human Rights Council (A/HRC/20/26) addressed the tensions between the right to benefit from scientific progress and its applications and intellectual

property regimes. This report emphasizes human knowledge as a global public good and recommends that States should guard against promoting the privatization of knowledge to an extent that deprives individuals of opportunities to take part in cultural life and enjoy the fruits of scientific progress (*ibid.*, para. 65).

B. International regulation of copyright

15. “Intellectual property” is an umbrella term encompassing a number of distinct legal regimes that create private property rights related to intangible assets. Specific legal regimes pertaining to copyrights, patents, trademarks, industrial designs, trade secrets, etc., each regulate different forms of intellectual property, defining the types of creations it applies to, the rules for determining whether specific material qualifies for legal protection and which types of conduct will be considered to infringe the owner’s exclusive rights, and establishing the legal penalties for such acts.

16. Legal protection of copyright interests originated in Europe centuries ago at the municipal and national levels. Because printing press technology enabled mass reproduction of written materials, those laws originally related to the reprinting of books and sheet music. As technology advanced, other genres such as visual art and musical performances, came to be included.

17. Bilateral agreements between European States constitute the first supranational law-making on copyright. The 1886 multilateral Berne Convention for the Protection of Literary and Artistic Works was initially signed by fewer than a dozen countries; nevertheless, its geographic sweep was significant as it also applied to the colonies of signatory nations. Today, the Berne Convention has 168 contracting parties. In 1994, the World Trade Organization (WTO) announced its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Incorporating most elements of the Berne Convention by reference, the TRIPS Agreement establishes a new enforcement mechanism based on international dispute resolution and trade sanctions. It applies to all WTO members, although least developed countries have until at least 2021 to comply.

18. The Berne Convention and TRIPS Agreement are supplemented by several international conventions regulating copyright and related rights, administered by WIPO. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was agreed in 1961; the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, jointly known as the Internet Treaties, in 1996. International law-making on the topic of copyright continues within WIPO, as well as through bilateral and multilateral trade agreements.

19. Considerable concern is expressed today about an apparent democratic deficit in international policymaking on copyright. Of particular concern is the tendency for trade negotiations to be conducted amid great secrecy, with substantial corporate participation but without an equivalent participation of elected officials and other public interest voices. For example, the recent negotiations around the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership have involved a few countries negotiating substantial commitments on copyright policy, without the benefit of public participation and debate. In contrast, treaty negotiations in WIPO forums are characterized by greater openness, participation, and consensus-building. Regardless of the forum, concern is often expressed that powerful parties may use international rule-making to restrict domestic policy options, advancing private interests at the expense of public welfare or human rights.

C. Overview of domestic copyright laws

20. Within the boundaries set by international treaties, States retain the discretion to adopt their own copyright laws. The present section summarizes the basic common points found in national copyright regimes.

21. Copyright or “authors’ rights”⁷ applies to all literary, artistic and scientific works: from newspapers to books, blogs, music, dance, paintings, sculptures, movies, scientific articles and computer software. Copyright restricts the ability of third parties to use copyrighted works without securing permission from the copyright holder. Of note, copyright does not provide any ownership over facts, ideas and news, although a unique expression of such material would enjoy protection from copying of its unique expressive elements. Because a copyright may be bought and sold, the copyright holder may be a party other than the original author, such as a publisher. Copyright protection is thus fundamental to the system of licensing and payment for access to creative works that drive various cultural industries.

22. Copyright laws prohibit much more than literal copying. It is generally also illegal to translate, publicly perform, distribute, adapt or modify a copyrighted work without permission. For example, rearranging a piece of music in a new style, translating a poem into a new language, or converting a book into a play, would all be considered copyright infringements. Even when the second author contributes substantial new creativity, the reuse or adaptation of a prior work generally requires a licence from the copyright holder. The broad scope of those laws enables copyright holders to monetize a wide variety of uses and to prevent adaptations they find objectionable. Consequently, the creative freedom of other artists to build upon and adapt existing cultural works may become dependent upon their ability to pay a licensing fee.

23. Partly in response to that concern, copyright laws also incorporate exceptions and limitations, which preserve the freedom of other artists and the general public to use copyrighted works in certain ways without the copyright holder’s permission. National practices regarding copyright exceptions and limitations vary significantly. Nearly every country utilizes a list of specific, narrowly defined exceptions and limitations. The most common example is an exception or limitation permitting an author or publisher to quote small portions of another work in commentaries. Other examples may include permitting consumers to make a backup copy of personal software, permitting teachers to make copies of material for classroom use or permitting libraries to make copies for archiving and preservation. In addition to specifically defined exceptions, some common-law countries also employ a broad and flexible exception, which may be known as “fair use.”

24. Copyright protection applies automatically, as soon as an author creates a work, with duration varying in different countries and according to the type of work. International treaties generally require member States to guarantee the duration of copyright protection for *at least* the author’s lifetime plus an additional 50 years after his/her death to the benefit of the author’s heirs or the purchaser of the copyright.⁸ Some countries have accorded copyright protection for 70, 80 or even 99 years after the creator’s demise. Consequently, copyright protection often adheres for more than a century. Once that period expires, the creative work enters the public domain for use by anyone without a licence.

⁷ The present report follows the usage of the TRIPS Agreement in using the term “copyright” to encompass all such national regimes, regardless of their domestic labels.

⁸ Berne Convention, art. 7; TRIPS Agreement, arts. 9, para. 1, and 12.

25. To protect authors' interests in their reputations and the integrity of their creations, copyright laws often impose certain obligations on publishers and other secondary rights holders, which cannot be waived by contract. The scope and breadth of these "moral rights" varies significantly from country to country. The Berne Convention establishes a minimum floor requiring member States to protect certain moral rights of authors, but no particular approach is mandated by the TRIPS Agreement.

III. Copyright policy and protection of authorship

26. It is sometimes claimed that intellectual property rights are human rights, or that article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights recognizes a human right to protection of intellectual property along the lines set out by the TRIPS Agreement and other intellectual property treaties. The Committee on Economic, Social and Cultural Rights has stressed that this equation is false and misleading.⁹ Some elements of intellectual property protection are indeed required — or at least strongly encouraged — by reference to the right to science and culture. Other elements of contemporary intellectual property laws go beyond what the right to protection of authorship requires, and may even be incompatible with the right to science and culture.

27. Protection of authorship requires States to respect and protect the moral and material interests resulting from any scientific, artistic or literary production of which a person is the author. The term "author" has a particular meaning, borrowed by human rights documents from copyright law. "Author" refers to the creator of any work eligible for copyright protection. Thus, writers, painters, photographers, composers, choreographers, storytellers, graphic designers, scholars, bloggers and computer software designers will all be considered as "authors" under copyright law. From the human rights perspective, the term "author" is to be understood as including individuals, groups or communities that have created a work, even where that work may not be protected by copyright. Within both the human rights and the copyright framework, both professional and amateur authors/artists may qualify for recognition as an author.

28. The moral and material interests of authors are deeply affected by copyright policy, which in some ways falls short of adequately protecting authorship. In other ways, copyright laws often go too far, unnecessarily limiting cultural freedom and participation. Unlike copyrights, the human right to protection of authorship is non-transferable, grounded on the concept of human dignity, and may be claimed only by the human creator, "whether man or woman, individual or group of individuals".¹⁰ Even when an author sells their copyright interest to a corporate publisher or distributor, the right to protection of authorship remains with the human author(s) whose creative vision gave expression to the work.

29. The human right to protection of authorship is thus not simply a synonym for, or reference to, copyright protection, but a related concept against which copyright law should be judged. Protection of authorship as a human right requires in some ways more and in other ways less than what is currently found in the copyright laws of most countries.

⁹ General comment No. 17, paras. 1–3.

¹⁰ *Ibid.*, para. 7.

A. The roots of “moral and material interests” of authors in copyright law

30. During the drafting of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, the language referring to the protection of the moral and material interests of authors was included only after considerable debate.¹¹ Partly, the disagreement stemmed from two divergent traditions of philosophical justification for copyright protection.

31. The “moral rights” tradition emphasizes the nature of creative work as an expression of its author’s personality and as a product of uniquely personal labour. According to that view, the exclusive right of authors to control the use of their creative works extends from the duty to respect the author. The moral rights philosophy is strongly associated with German law and the French tradition of *droit d’auteur* that greatly influenced continental Europe, Latin America and former French colonies.

32. In contrast, the “utilitarian” view approaches copyright protection as a form of commercial regulation, aimed at encouraging greater production and dissemination of creative works. The utilitarian view is strongly associated with the United Kingdom of Great Britain and Northern Ireland and its former colonies.

33. In practice, copyright protection in all countries reflects a mixture of both approaches. The moral rights philosophy, however, is essential to understanding the status acquired by moral and material interests of creators in human rights law.

B. Protecting and promoting the moral interests of authors

34. While the author’s material or property interest in their work is of limited duration and may be alienated by contract, a common thread among moral rights provisions is that those rights may not be waived by contract because of the unique link between an author and their work, and/or of the mark of the author’s personality in that work. Moral rights are often invoked to protect authors from abuses by publishers, distributors or collectors.

35. The Berne Convention specifies that States should protect the inalienable right of authors to claim authorship of the work (the right to attribution) and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to the author’s honour or reputation (the right to integrity) (art. 6 bis). The Committee on Economic, Social and Cultural Rights has interpreted those rights of attribution and integrity to form part of the moral interests referred to in human rights law.¹² In some countries, copyright laws recognize additional moral rights beyond those two basic ones.

36. The moral right to object to distortions or modifications of a work must be interpreted in balance with the right of others to reinterpret cultural inheritance and exercise their own creativity. The destruction of an artistic work most clearly illustrates a violation of the creator’s right of integrity. Moral rights may also require the preservation of certain works, as the sale of a painting or statue does not extinguish the artist’s moral rights. In contrast, a parody of a work should typically not be understood as a derogatory action. Indeed, many countries specifically allow for parody even without the permission of the original author, recognizing the expressive and creative value of this form of artistic

¹¹ See Peter Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework”, *U.C. Davis Law Review*, No. 40 (2007), p. 1051–1058; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999), p. 222.

¹² General comment No. 17, para. 7.

reinterpretation. Hence, the moral interests of authors in objecting to modifications of their works are interpreted in conjunction with the moral interest of other authors' creative licence.

37. One recent attempt to strike that balance is the opinion of the Court of Justice of the European Union in case C-201/13, *Deckmyn v. Vandersteen*. The Court stated that the fundamental right to freedom of expression requires European countries to permit the unauthorized use of copyrighted works for the purposes of parody (which evokes an existing work while being noticeably different and constitutes an expression of humour or mockery). The Court recognized, however, that a particular act of parody might unreasonably abuse the legitimate interests of the author and copyright owner, and that, if a parody "conveys a discriminatory message which has the effect of associating the protected work with such a message", authors "have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message".¹³ The Court advised national courts to determine that considering all the circumstances of a particular case.

38. Copyright regimes may under-protect the moral interests of authors because producers/publishers/distributors and other "subsequent right-holders" typically exercise more influence over law-making than individual creators, and may have opposing interests when it comes to those rights. That makes it important to look beyond moral rights already recognized in copyright regimes to discern additional or stronger moral interests from a human rights standpoint, such as, in particular, the interest of artists and researchers in creative, artistic and academic freedom, freedom of expression, and personal autonomy.

39. The moral interests of authors in artistic freedom and autonomy offer useful guiding principles for setting rules regarding what may and may not be done with copyrighted works. Many countries already recognize that artistic freedom and autonomy require copyright rules to make room for parody, commentary, and other creative transformations of existing works. Artistic freedom and autonomy might also require protecting authors from charges of copyright infringement for adapting or distributing their own works, even where they have transferred their copyright to a publisher.

C. Protecting and promoting the material interests of authors

40. The human right to protection of authorship requires that copyright policy be carefully designed to ensure that authors benefit materially. An important distinction must be drawn here between human authors and corporate rights holders.

41. Authors often sell part or all of the copyright interests in their works to a corporation that commercializes the work. Corporate rights holders play an essential role in the cultural economy. They innovate ways of delivering cultural works to consumers, provide income to artists, offer much-needed capital to finance high-budget cultural productions and can free artists from many of the burdens of commercializing their work. Nonetheless, their economic interests do not enjoy the status of human rights. From the human rights perspective, copyright policy and industry practices must be judged by how well they serve the interests of human authors, as well as the public's interest in cultural participation.

42. Corporate rights holders with immense financial resources and professional sophistication are typically better positioned to influence copyright policymaking, and may even claim to speak for authors in copyright debates. Unfortunately, the material interests

¹³ Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, 3 September 2014, paras. 29–31.

of corporate rights holders do not always coincide with those of authors. The human right to protection of authorship demands particular attention to situations where those interests diverge.

43. Most artists seeking to earn a living from artistic expressions must negotiate copyright licences with corporations to commercialize their works. Those contractual exchanges are often marked by an imbalance of power between the parties. Corporations may leverage a stronger bargaining position to retain most of the resulting profit, reducing benefits for artists. Copyright policy can help protect authors from such vulnerability.

44. One technique is copyright reversion. In some countries, creators retain the right to reclaim copyright interests they have transferred after a set number of years, providing the creator a second opportunity to negotiate a better return. It is important to note that the reversion right cannot be waived by contract, protecting artists against pressure to surrender it.

45. Copyright laws may also establish a creator's right to share in the proceeds from future sales of their work, which may not be waived by contract. For example, many countries protect visual artists whose works are resold (*droit de suite*), ensuring that an artist receives a share of the increased value. Many copyright laws also require that background vocalists and session musicians be compensated at a set percentage of total revenues.

46. Mechanisms providing compensation for uses based on exceptions and limitations, sometimes referred to as statutory licensing, offer another approach. Many countries specify certain uses of copyrighted works that, whilst not requiring a negotiated permission from the rights holder, require that compensation be paid at a legally specified rate — the right to remuneration replaces the right to prohibit. For example, the law might specify that once a musical composition is published, any musician may perform and record it, but must pay a specified fee for each performance/copy. Similarly, some national laws specify that once a book is published, libraries are free to rent out copies of the book but must make a payment each time it is borrowed. Often, these payments are split according to a statutory formula between the creator and the current rights holder, typically a corporation. These royalty splits are not subject to negotiation between the artists and rights holders, and may be more favourable to artists than the splits negotiated in contractual settings.¹⁴

47. National copyright laws may also require that exclusive licences — those that limit the author's ability to offer the work to other parties — be put into writing. Courts may also choose to adopt an interpretative principle that any contractual ambiguities should be resolved in favour of the author rather than in favour of the corporate licensee.

48. Designing copyright law to promote the material interests of authors requires nuance. “Stronger” copyright protection does not necessarily advance the material interests of creators. Exceptions and limitations often support creators' material interests by offering opportunities for statutory licensing income or the possibility of relying in part on the work of other artists in a new work or performance. An appropriate balance is crucial, recognizing that creators are both supported and constrained by copyright rules. Inequalities of bargaining power must be addressed, taking advantage of opportunities to help strengthen the hand of artists through mechanisms such as copyright reversion, *droit de suite* and statutory licensing.

¹⁴ Christophe Geiger, “Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law”, *Vanderbilt Journal of Entertainment & Technology Law*, vol. 12, No. 3 (spring 2010), p. 515.

49. Measures beyond copyright law can also advance the right to protection of authorship. Artistic livelihoods may be supported by, for example, minimum wage protections, collective bargaining power, social security guarantees, budgetary support for the arts, artistic education, library purchasing, immigration and visa policies and measures to promote cultural tourism. Copyright laws should be understood as part of a larger set of policies to promote the cultural sector and the right to science and culture.

50. In contrast to the perpetual moral interests of authors, the Committee on Economic, Social and Cultural Rights has emphasized that the material interests of authors need not necessarily be protected forever, or even for an author's entire life (general comment No. 17, para. 16). The human right to protection of authorship is fully compatible with an approach to copyright that limits the terms of protection in order to ensure a vibrant public domain of shared cultural heritage, from which all creators are free to draw.

51. The Special Rapporteur received a number of contributions, which expressed the concerns of copyright holders about the threat cultural industries face due to digital piracy enabled by evolving digital technologies. Proposals to address that situation as related to the Internet include website blocking, content filtering and other limits on access to content subject to copyright, as well as the liability imposed on intermediaries for infringing content disseminated by users. In the view of the Special Rapporteur, such measures could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture.¹⁵ Additional concern is expressed over the deployment of aggressive means of combating digital piracy, including denial of Internet access, high statutory damages or fines and criminal sanctions for non-commercial infringement. There are also issues of piracy unrelated to the Internet. In the Special Rapporteur's opinion, that important topic requires additional study from a human rights perspective.

D. Copyright law and the human right to property

52. An alternative human rights basis for intellectual property protection is recognized through the lens of the right to property in the European regional human rights system, as well as in some national constitutions both within and outside Europe.¹⁶ The Charter of Fundamental Rights of the European Union specifically calls for the protection of intellectual property within the general rubric of property (art. 17, para. 2).

53. The right to property obliges States to respect the copyright laws that they have adopted.¹⁷ It does not, however, mandate any particular approach to copyright policy. States are free to adjust copyright rules through legal processes to promote the interests of authors, the right of everyone to take part in cultural life and other human rights such as the right to education. Within the right to property framework, it is also acceptable to assure authors' interests through rules granting a right to remuneration rather than a right to exclude, as well as rules granting rights to exclusion or remuneration in some, but not all, circumstances.¹⁸

54. The Committee on Economic, Social and Cultural Rights, in paragraph 15 of its general comment No. 17, for its part, avoided the conflation of the term "material interests"

¹⁵ See Article 19, *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age*, International Standards Series (London, 2013). Available from www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf.

¹⁶ Helfer and Austin, *Human Rights and Intellectual Property*, pp. 212–220 and 511.

¹⁷ See European Court of Human Rights, *Balan v. Moldova*, application No. 19247/03, judgement of 29 January 2008. Available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84720>.

¹⁸ Geiger, "Promoting Creativity", pp. 534–544.

with property rights, especially when held by corporations. It recognized, however, that the protection of authors' "material interests" reflected the close linkage of this provision with the right to own property, as set out in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments, as well as with the right of any worker to adequate remuneration.

E. The rights of indigenous peoples and local communities

55. Recognizing the rights of indigenous peoples to self-determination and to maintain and develop their culture and their struggle for cultural survival, the United Nations Declaration on the Rights of Indigenous Peoples assures indigenous peoples the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions (art. 31, para. 1). Some indigenous peoples consider it vital to keep certain cultural expressions and forms of knowledge from public disclosure, to be used only by persons and in ways appropriate to their customary laws and practices, and never commercially exploited. Some indigenous peoples desire to benefit from the commercial potential of licensing products based on their traditional knowledge and cultural expressions.

56. Intellectual property regimes have historically failed to take into account the unique concerns of indigenous peoples. For instance, trade secrecy regimes require that the information be of commercial value; that is useful for protecting commercial secrets but not sacred songs or folklore. Copyright regimes provide time-limited protections, meaning that traditional cultural expressions may be regarded as being in the public domain.

57. Moral rights might be adapted to provide protection for the collective holders of traditional cultural expressions. Like individual authors, communities care deeply about the right to attribution and credit, protecting their cultural works from destruction and preventing the exhibition of their cultural expressions in ways that disparage the community. As with individual authors, however, the right to freedom of expression protects the right to criticism and parody, from within as well as from outside the community, taking into consideration all circumstances of a particular case.¹⁹

58. In 1995, the principles and guidelines for the protection of the heritage of indigenous peoples made an important contribution to adapting the concept of moral and material interests of authors to the specific context of indigenous cultural property (E/CN.4/Sub.2/1995/26). Of note are the principles that indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable; that the free and informed consent of the traditional owners be a precondition of any agreements for the recording, study, use or display of indigenous peoples' heritage; and that concerned peoples be the primary beneficiaries of commercial application of their heritage.

59. Efforts by States to give effect to indigenous claims over their cultural heritage vary enormously. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is continuing negotiations about a possible international legal instrument, or instruments, for the effective protection of traditional knowledge, traditional cultural expressions and genetic resources.

¹⁹ See the *Deckmyn* case mentioned above in para. 37.

IV. Copyright policy and cultural participation

60. The human rights perspective calls for recognition of the social and human values inherent in copyright law and a heightened regard for fundamental rights and the needs of marginalized groups. The emphasis on active participation in cultural and scientific life, rather than simply the ability to access cultural and scientific works, recognizes the dual importance of accessing the knowledge and expressive creations of others and of self-expression within the broader cultural context.

A. Promoting cultural participation through exceptions and limitations

61. Copyright exceptions and limitations — defining specific uses that do not require a licence from the copyright holder — constitute a vital part of the balance that copyright law must strike between the interests of rights-holders in exclusive control and the interests of others in cultural participation. Copyright exceptions and limitations have rarely been the topic of international norm-setting, hence State practice varies significantly.²⁰

62. One crucial function of exceptions and limitations is to help assure artistic livelihoods. Statutory licensing can facilitate creative transactions and enhance creators' earnings.²¹

63. Another vital function is to empower new creativity. Copyright exceptions and limitations can enable caricature, parody, pastiche and appropriation art to borrow recognizably from prior works in order to express something new and different. Documentary film-makers also require freedom to use specific images, video clips or music necessary to tell a particular story. Depending on a country's exceptions and limitations regime, those artistic practices may be clearly defined as permissible or may occupy a legal grey zone that makes it difficult for creators to commercialize and distribute their works.

64. Copyright exceptions and limitations can also expand educational opportunities by promoting broader access to learning materials. For example, the copyright regimes of China, Thailand and Viet Nam include exceptions and limitations that explicitly authorize many forms of educational copying. In other countries, exceptions and limitations determine whether textbooks may be commercially rented and whether researchers and students can make a personal copy of borrowed materials. Copyright exceptions and limitations allowing for digitization and display can facilitate distance-learning techniques, bringing new opportunities to students in developing countries or rural regions.

65. Furthermore, copyright exceptions and limitations may also expand space for non-commercial culture. When the public performance right is defined broadly, exceptions and limitations can be enacted to exempt religious services, school performances, public festivals and other not-for-profit contexts from securing licences to perform musical or dramatic works.

66. A human rights perspective also requires that the potential of copyright exceptions and limitations to promote inclusion and access to cultural works, especially for disadvantaged groups, be fully explored.

²⁰ Ruth Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries", ICTSD Issue Paper No. 15 (2006). Available from http://unctad.org/en/Docs/iteipc200610_en.pdf.

²¹ See Geiger, "Promoting Creativity".

67. Disability advocates have long expressed concern that copyright law can impede the adaptation of works into formats functional for people with disabilities when copyright holders fail to publish works in accessible formats, such as Braille, or allow others to do so. To resolve that problem, many countries have adopted copyright exceptions and limitations allowing authorized not-for-profit organizations to produce and distribute accessible works to persons with disabilities. In June 2013, WIPO member States adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. Under that treaty, which references the right to science and culture among its motivating principles, States commit to enacting exceptions and limitations to facilitate access to published works by persons with disabilities and to allow cross-border transfers of those works.

68. Problems of translation and linguistic barriers likewise are of concern for speakers of non-dominant languages. Copyright regimes are formally neutral regarding the language of a work. In practice, however, the results are widely disparate, as copyright protection offers little financial incentive to write and publish in most of the world's languages.²² People able to speak English, French or Spanish can select reading material from millions of books; however, those unable to speak a globally used language may enjoy access to very few. The vastly unequal distribution of published literary works across languages poses a significant barrier to the right to take part in cultural life for linguistic communities not offering a major publishing market. The issue is not limited to reading for pleasure; that also impacts the ability to pursue education and knowledge, take part in debates on social and political issues and earn a livelihood as a writer.

69. Previously, international copyright law offered greater encouragement to the flourishing of literature across many languages because it left the issue of translation rights to be decided by each country. Many countries treated translations as an original expression not requiring a licence from the author of the original work. That changed about a century ago, when revisions to the Berne Convention required that all countries accord copyright holders an exclusive right of translation. That global change overlooked the interests of linguistic groups for whom the ability to translate works into their vernacular languages was essential to promote education and cultural development.²³

70. During the era of decolonization, in deference to the concerns of newly independent African countries eager to promote their own cultural and scientific development,²⁴ the Berne Community negotiated the Stockholm Protocol Regarding Developing Countries, now incorporated into the Berne Appendix with Special Provisions for Developing Countries. The Berne Appendix allows for compulsory licences to facilitate translations.²⁵ Unfortunately, that mechanism has proven ineffective, because the onerous conditions placed upon that option make it extremely difficult for developing countries to exercise.²⁶

²² Lea Shaver, "Copyright and Inequality", *Washington University Law Review*, No. 92 (2014), p. 117. Available from <http://ssrn.com/abstract=2398373>.

²³ See Lionel Bently, "Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries", *Chicago-Kent Law Review*, No. 82 (January 2007), p. 1181.

²⁴ Charles F. Johnson, "The Origins of the Stockholm Protocol", *Bulletin of the Copyright Society*, No. 18 (1970), p. 91.

²⁵ Saleh Basalamah, "Compulsory Licensing for Translation: An Instrument of Development?", *IDEA*, No. 40 (2000), p. 503.

²⁶ Ruth Okediji, "Toward an International Fair Use Doctrine", *Columbia Journal of Transnational Law*, vol. 39, No. 75 (2000), pp. 107–109; Okediji, ICTSD, pp. 15–16; Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Koninklijke Brill NV, Leiden, 2012), p. 108.

Significant reforms would be required for the Berne Appendix to serve its intended purpose of ensuring access to copyrighted materials in all languages, at affordable prices.²⁷

71. Depending on the country and specific context, exceptions and limitations may carry an obligation to make payments to authors and/or rights holders or may allow use without compensation. Recognizing that diversity of practice, the Berne Convention requires compensation in the context of statutory licensing arrangements for broadcasting and music recordings, but expressly permits uncompensated exceptions and limitations in other areas, such as quotation or parody.

72. Each approach has merits. While the right to protection of authorship might be interpreted to require fair remuneration in every case, there are many contexts in which unpaid uses are important to preserve and most appropriate, especially in developing countries.²⁸ Examples include exceptions for non-commercial libraries, school theatre performances at which no admission is charged, non-commercial artistic endeavours and initiatives making works accessible to people with limited capacity to pay. There are also situations in which operating the necessary administrative apparatus to ensure compliance of required payments in all cases may be more trouble than it is worth, especially should the payment due to the author be very small, and/or where exceptions be rarely used. A lack of compensation does not by itself render an exception or limitation inconsistent with the right to protection of authorship, providing that exceptions and limitations are thoughtfully designed to balance human rights interests in cultural participation with protection of authorship.

73. A few countries have a more expansive and flexible exception or limitation, commonly referred to as “fair use”. Such provisions authorize courts to adapt copyright law to permit additional unlicensed uses that comply with general standards of fairness to creators and copyright holders. For example, the fair use doctrine in the United States encompasses protection for parody and certain educational uses. It has also been interpreted to permit a search engine to return thumbnail-sized images as part of its search results and to protect technology manufacturers from liability where consumers record a television show to watch later. Most States do not have such broad and flexible exceptions and limitations; instead each specific type of allowable use is listed in the statute. While enumerated provisions may provide greater clarity regarding permitted uses, they may also fail to be sufficiently comprehensive and adaptable to new contexts.

B. International cooperation on exceptions and limitations

74. International copyright treaties generally treat copyright protections as mandatory, while treating exceptions and limitations as optional, with very few exceptions. For example, article 10 of the Berne Convention and most national laws specify that it shall not be considered infringement to make a reasonable quotation from a previously published work, for example in the context of research reports, newspaper reporting or literary criticism. Additionally, the recent WIPO Marrakesh Treaty requires signatory States to enact copyright exceptions and limitations in favour of visually impaired readers.

75. The standard for judging whether a particular exception or limitation is permissible under international copyright law is not articulated with precision. The Berne Convention preserves national discretion to legally permit even outright copying in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably

²⁷ Okediji, ICTSD, p. 19.

²⁸ Ibid., p. 19.

prejudice the legitimate interests of the author (art. 9, para. 2). The TRIPS Agreement uses similar language, but replaces the “interests of the author” with the “interests of the rights holder” (art. 13). Commonly referred to as the “three-step test,” those two provisions are widely understood to set boundaries on States’ ability to enact copyright exceptions and limitations.²⁹ Yet, considerable disagreement and uncertainty remains about how to interpret and apply the standard, leaving many countries hesitant to innovate.³⁰

76. Given the importance of copyright exceptions and limitations for the right to science and culture, several avenues of international cooperation merit further exploration. Some analysts propose that international copyright law should recognize a core list of minimum required exceptions and limitations, incorporating those currently recognized by most States, such as quotations and citations, personal use, reproduction by libraries and archives for storage and replacement, copying and adaptation of computer code for interoperability, parody and others.³¹ Others suggest that a flexible fair-use provision be internationally adopted, explicitly giving countries permission and guidelines to develop additional exceptions and limitations as yet unforeseen.³² Many developing countries would like WIPO to build on its initiative for the Marrakesh Treaty, by considering a treaty on exceptions and limitations to copyright for libraries and archives and/or exceptions and limitations for education. Strongly supported by library advocacy organizations, that suggestion has met with resistance from developed countries.³³

C. Promoting cultural participation through open licensing

77. In addition to copyright exceptions and limitations, open licensing has emerged as another essential copyright tool for expanding cultural participation. Open licences do not replace copyright, but are based upon it. In that contractual practice, authors or other rights holders agree to waive many of the exclusive rights they hold under copyright law, enabling others to use the work more freely. Contracts replace an “all rights reserved” by a “some rights reserved” approach, employing standardized licenses where no compensation is sought by the copyright owner. The result is an agile, low-overhead copyright-management regime, benefiting both copyright owners and licensees.

78. The most widely used open licences are the Creative Commons licences. It is estimated that, by 2015, those licenses will have been attached to more than 1 billion creative works, including photos, websites, music, government databases, UNESCO publications, journal articles and educational textbooks.³⁴ Creative Commons is working to make its open licences interoperable with open licences offered by other organizations, such as the Free Art License and the GNU General Public License widely used for open-source software. The idea behind those efforts is to create a “cultural commons,” in which everyone can access, share and recombine cultural works.

²⁹ See Daniel J. Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations”, *University of Ottawa Law and Technology Journal*, vol. 5, No. 1 (2008).

³⁰ See Christophe Geiger et al., “Declaration: A Balanced Interpretation of the “Three-Step Test” in Copyright Law”. Available from <https://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf>.

³¹ Okediji, ICTSD, p. 22–24.

³² See, generally, Okediji, “International Fair Use”.

³³ Catherine Saez, “Hopes Dampened for Copyright Exceptions for Libraries/Archives at WIPO”, *Intellectual Property Watch*, 5 May 2014. Available from www.ip-watch.org/2014/05/05/hopes-dampened-for-copyright-exceptions-for-librariesarchives-at-wipo/.

³⁴ For more information, see “State of the Commons”. Available from <https://stateof.creativecommons.org/report/> (accessed on 4 December 2014).

79. Open licensing can have a particularly profound impact on the dissemination of scholarly knowledge. Science is a process of discovery, collecting and synthesizing evidence and evolving models of the world. That process relies on being able to access, evaluate and criticize the primary evidence, usually recorded in scientific publications, which, like any other original text, are eligible for copyright protection. For-profit academic journals and publishers often prohibit author-researchers from making their own material accessible over the Internet, in order to maximize subscription fees. The prevailing restricted-access dissemination model limits the ability to share published scientific knowledge, inhibiting the emergence of a truly global and collaborative scientific community.

80. Libraries negotiating subscription fees with publishers face an unequal bargaining situation; they are obliged to pay high prices, or forego providing researchers and students with the resources needed for their work. The burden of journal subscription fees is becoming unsustainable even at some of the world's best-resourced universities.³⁵ In some developing countries, the subscription fee to a single database may exceed the total annual budget of a university library. Students, citizens and professional scientists at less wealthy institutions are denied access to the frontiers of scientific progress.

81. Scientific authors have a moral interest in being able to participate in and contribute to the global scientific enterprise, and to be acknowledged for their contribution as widely as possible. Exclusive subscription models for scientific dissemination thus hinder rather than advance those moral interests. As authors are rarely paid for their contributions, exclusive access to those works promotes the material interests of publishers, but not those of authors.

82. Open access publishing is emerging as a significant alternative model for disseminating scientific knowledge.³⁶ Relying on Creative Commons licences and digital distribution to make academic articles available to anyone over the Internet, it has already become an important part of mainstream academic journal publishing. To fund open access journals, some initiatives have established a publication fee that is paid by the author or the author's employer or funder. In some countries, institutions have pledged grants to cover such author charges. In some cases, to encourage wider participation by researchers from low-and middle-income countries, reductions or waivers in publication fees have been instituted.³⁷

83. Increasingly, academic institutions, research foundations and governments are accelerating the transition by making open access publication the default approach to scientific and government publications. Recently, some government funders have started requiring publicly funded research to be made publicly accessible; many countries are considering similar steps.³⁸

84. A newer initiative for open educational resources makes openly licensed educational materials available online, free for students and teachers to copy, adapt or translate. Open educational resources are increasingly recognized as holding great potential to expand the

³⁵ Faculty Advisory Council, "Memorandum on Journal Pricing: Major Periodical Subscriptions Cannot be Sustained", Harvard Library, 17 April 2012. Available from <http://isites.harvard.edu/icb/icb.do?keyword=k77982&tabgroupid=icb.tabgroup143448>.

³⁶ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 22 October 2003. Available from <http://openaccess.mpg.de/Berlin-Declaration>.

³⁷ For example, the Public Library of Sciences. More information available from www.plos.org/newsroom/viewpoints/global-participation-initiative.

³⁸ See the Registry of Open Access Repository Mandates and Policies (<http://roarmap.eprints.org/>, accessed on 4 December 2014).

availability, affordability and quality of textbooks, because they can be reproduced cheaply, quickly transmitted to distant locations, updated regularly and adapted to new cultural and linguistic contexts.

V. Examples of good practices

85. Different approaches can bring intellectual property regimes into alignment with the right to science and culture: reforming copyright laws to better protect the right to science and culture or supporting novel approaches that encourage innovation and creativity for broader access. Both approaches may be used simultaneously.

86. Several countries have embarked upon a highly participatory process for reforming their copyright law. Brazil, for example, launched a national forum on copyright law, deploying a series of conferences and public audiences to diagnose problems in 2007, as well as using the Internet to elicit feedback on the draft bill. Thousands of comments and contributions were made. In 2014, the copyright law of the United Kingdom was adopted following an extensive consultative process, including public discussions on draft bills.³⁹ The resulting legislation expands copyright exceptions and limitations and ensures that several crucial exceptions and limitations can no longer be overridden by private contract or unilateral terms and conditions. Those efforts offer a blueprint for maximizing public participation in legislative efforts to align intellectual property regimes with human rights and other public interests.

87. Many countries are encouraging the transition to open access scholarly publishing. For example, in Mexico, Government agencies and universities have collaborated to introduce the National Consortium of Scientific and Technological Information Resources to improve open access to Mexican peer-reviewed journals. The Universidad Autónoma del Estado de México already provides free and open access to more than 640 journals, including 169 from Mexico. Universities are also placing thesis papers, conference papers and other multimedia in institutional repositories.⁴⁰

88. In South Africa, open educational resources produced by social publishers help address problems of high-cost textbooks. For example, Siyavula science textbooks for grades 4–12, authored by teams of South African scientists, are licensed for public use through Creative Commons and distributed via the Internet. Teachers prefer those books for their higher-quality content and simple English appropriate for non-native speakers.⁴¹ Siyavula estimates that more than 12 million copies of its books are used in South Africa.⁴²

³⁹ See United Kingdom, Intellectual Property Office, *Consultation on Copyright: Summary of Responses* (2012). Available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320223/copyright-consultation-summary-of-responses.pdf.

⁴⁰ UNESCO, Global Open Access Portal, “Mexico” (December 2013). Available from www.unesco.org/new/en/communication-and-information/portals-and-platforms/goap/access-by-region/latin-america-and-the-caribbean/mexico/.

⁴¹ Cynthia James, Shenandoah Weiss and Renae Keep, “Addressing the Local in Localization: A Case Study of Open Textbook Adoption by Three South African Teachers”, *Journal of Asynchronous Learning Networks*, No. 17 (2013), pp. 73–86.

⁴² Siyavula “Our Products” (www.siyavula.com/our-products/, accessed on 4 December 2014).

The Department of Basic Education has distributed millions of copies to schools as supplementary materials.⁴³

89. In India, the non-profit organization Pratham Books decided “to massively scale the production of high quality, low-cost children’s books for a massively multi-lingual and multi-cultural market.”⁴⁴ Pratham publishes in 11 languages largely neglected by the for-profit publishing industry. Estimating that 200 million children in India cannot afford books, the organization has introduced inexpensive story cards for 2 rupees. Pratham uses Creative Commons licences and partners with a variety of government agencies, corporate sponsors and non-profit organizations to disseminate more than 1 million books each year.

VI. Conclusion and recommendations

90. **The human rights perspective focuses attention on important themes that may be lost when copyright is treated primarily in terms of trade: the social function and human dimension of intellectual property, the public interests at stake, the importance of transparency and public participation in policymaking, the need to design copyright rules to genuinely benefit human authors, the importance of broad diffusion and cultural freedom, the importance of not-for-profit cultural production and innovation, and the special consideration for the impact of copyright law upon marginalised or vulnerable groups.**

91. **The Special Rapporteur draws the following conclusions and makes the following recommendations.**

Ensuring transparency and public participation in law-making

92. **International intellectual property instruments, including trade agreements, should be negotiated in a transparent way, permitting public engagement and commentary.**

93. **National copyright laws and policies should be adopted, reviewed and revised in forums that promote broad engagement, with input from creators and the public at large.**

Ensuring the compatibility of copyright laws with human rights

94. **International copyright instruments should be subject to human rights impact assessments and contain safeguards for freedom of expression, the right to science and culture, and other human rights.**

95. **Such instruments should never impede the ability of States to adopt exceptions and limitations that reconcile copyright protection with the right to science and culture or other human rights, based on domestic circumstances.**

96. **States should complete a human rights impact assessment of their domestic copyright law and policy, utilizing the right to science and culture as a guiding principle.**

⁴³ Eve Gray, “OER in the Mainstream — South Africa Takes a Leap into OER Policy” (OpenUCT Initiative). Available from <http://openuct.uct.ac.za/oer-mainstream-%E2%80%93-south-africa-takes-leap-oer-policy> (accessed on 4 December 2014).

⁴⁴ Allison Domicone, “Letter from Featured Superhero Gautam John of Pratham Books” (Creative Commons), 16 November 2010. Available from <http://creativecommons.org/tag/pratham-books>.

97. National courts and administrative bodies should interpret national copyright rules consistently with human rights standards, including the right to science and culture.

98. Copyright laws should place no limitations upon the right to science and culture, unless the State can demonstrate that the limitation pursues a legitimate aim, is compatible with the nature of this right and is strictly necessary for the promotion of general welfare in a democratic society (art. 4 of the International Covenant on Economic, Social and Cultural Rights). Standards applicable to restrictions on freedom of expression must also be duly taken into consideration. In all cases, the least restrictive measure shall be adopted.

Protection of the moral and material interests of authors

99. The right to protection of authorship is the right of the human author(s) whose creative vision gave expression to the work. Corporate right holders must not be presumed to speak for the interests of authors. Both professional and amateur creators must be empowered to have a voice and influence over copyright regime design.

100. Merely enacting copyright protection is insufficient to satisfy the human right to protection of authorship. States bear a human rights obligation to ensure that copyright regulations are designed to promote creators' ability to earn a livelihood and to protect their scientific and creative freedom, the integrity of their work and their right to attribution.

101. Given the inequality of legal expertise and bargaining power between artists and their publishers and distributors, States should protect artists from exploitation in the context of copyright licensing and royalty collection. In many contexts, it will be most appropriate to do so through legal protections that may not be waived by contract. Enforceable rights of attribution and integrity, *droit de suite*, statutory licensing and reversion rights are recommended examples.

102. States should further develop and promote mechanisms for protecting the moral and material interests of creators without unnecessarily limiting public access to creative works, through exceptions and limitations and subsidy of openly licensed works.

103. Copyright law is but one element of protection of authorship. States are encouraged to consider policies on labour practices, social benefits, funding for education and the arts, and cultural tourism from the perspective of that right.

Copyright limitations and exceptions and the "three-step test"

104. States have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations to honour their human rights obligations. The "three-step test" of international copyright law should be interpreted to encourage the establishment of such a system of exceptions and limitations.

105. States should consider that exceptions and limitations that promote creative freedom and cultural participation are consistent with the right to protection of authorship. Protection of authorship does not imply perfect authorial control over creative works.

106. States should enable allowance for uncompensated use of copyrighted works, in particular in contexts of income disparity, non-profit efforts, or undercapitalized artists, where a requirement of compensation might stifle efforts to create new works or reach new audiences.

107. States should ensure that exceptions and limitations cannot be waived by contract, or unduly impaired by technical measures of protection or online contracts in the digital environment.

108. At the domestic level, judicial or administrative procedures should enable members of the public to request the implementation and expansion of exceptions and limitations to assure their constitutional and human rights.

109. WIPO members should support the adoption of international instruments on copyright exceptions and limitations for libraries and education. The possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognized by most States, and/or an international fair use provision, should also be explored.

110. WTO should preserve the exemption of least developed countries from complying with provisions of the TRIPS Agreement until they reach a stage of development where they no longer qualify as least developed countries.

Adopting policies fostering access to science and culture

111. Open access scholarships, open educational resources and public art and artistic expressions are examples of approaches that treat cultural production as a public endeavour for the benefit of all. Those approaches complement the private, for-profit models of production and distribution and have a particularly important role.

112. The products of creative efforts subsidized by governments, intergovernmental organizations or charitable entities, should be made widely accessible. States should redirect financial support from proprietary publishing models to open publishing models.

113. Public and private universities and public research agencies should adopt policies to promote open access to published research, materials and data on an open and equitable basis, especially through the adoption of Creative Commons licences.

Indigenous peoples, minorities and marginalized groups

114. Creativity is not a privilege of an elite segment of society or professional artists, but a universal right. Copyright law and policy must be designed with sensitivity to populations that have special needs or may be overlooked by the marketplace.

115. States should institute measures to ensure that all people enjoy the moral and material interests of their creative expressions and to prevent limitations, such as geography, language, poverty, illiteracy, or disability, from blocking full and equal access to, participation in and contribution to cultural and scientific life.

116. States should ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, and ensure that their copyright laws contain adequate exceptions to facilitate the availability of works in formats accessible to persons with visual impairments and other disabilities, such as deafness.

117. States should adopt measures to ensure the right of indigenous peoples to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions.

118. Further studies should be undertaken to examine what reforms are needed to better enable access to copyrighted materials in all languages, at affordable prices.

The right to science and culture and copyright in the digital environment

119. All stakeholders should devote more focused discussion on how best to protect the moral and material interests of authors in the digital environment, taking care to avoid a potentially disproportionate impact on the rights to freedom of expression and cultural participation.

120. Alternatives to criminal sanctions and blocking of contents and websites for copyright infringement should be envisaged.

Annex

[English only]

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