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WIPO STUDY ON THE COPYRIGHT EXCEPTIONS FOR THE BENEFIT OF
EDUCATIONAL ACTIVITIES FOR ASIA AND AUSTRALIA

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* The views and opinions expressed in this Study are the sole responsibility of the author. The Study is not intended to reflect the views of the Member States or the Secretariat of WIPO.

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INTRODUCTION

1. The word “education” is derived from the Latin term, “educare”. This term is itself derived from the Latin root “ēdūcere”, which means “to nourish”, “to bring out” or “to draw forth”. As early as 500 BC, the importance of education was explored by Confucius. In his discourses as recorded in *The Analects*, Confucius placed the greatest emphasis on studying, personal knowledge and self-introspection to achieve the status of a virtuous and moral person.¹ And on this central philosophy, he built the axiom that social perfection meant that a government had a duty to educate its people.² This was a philosophy that was as advanced as it was extraordinary for a time of great social unrest in China. Some 100 years later, Plato also arrived at the same conclusion. In his masterpiece, the *Republic*, he opined that educating a nation’s citizenry is education for the State and its leadership. It is only by a process, which Plato’s pupil Aristotle would describe as self-realization, where a child enters into a society’s collective virtue and wisdom by studying its literature, science and philosophy that as an individual, he can grow into the fullness of the proper life of man.

2. In our days, it is axiomatic that every society views education to be fundamental. Article 26(1) of the 1948 UN Universal Declaration of Human Rights asserts that “everyone has the right to education”, that “education shall be free, at least in the elementary and fundamental stages” and “elementary education shall be compulsory”.³ Though the Declaration likewise grants “everyone ... the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,”⁴ the significance of educational activities and the interests of educators, students and educational institutions in the law of copyright has always been given due recognition in the law of copyright. In fact, the very first modern copyright legislation, the Statute of Anne 1709, was entitled “An Act for the Encouragement of Learning”. Not only did it replace the monopoly in printed books granted to printers with rights granted to authors, it also placed emphasis on the continued accessibility of books in public libraries and their affordability to university staff and students.⁵ The public interest in education likewise received favourable treatment in international conventions. Even where the focus of the first draft of the Berne Convention was “to constitute a general Union for the protection of the rights of authors in their literary works and manuscripts”,⁶ a philosophy subsequently embodied in Article 1 of the Berne Convention, the drafters were careful not to encroach on the special status of educational usage of copyright material. Thus, the “liberty of extracting portions from literary or artistic works for use in publications designed for educational or scientific purposes” was expressly reserved for countries of the Berne Union, and the Berne Act was specifically stated not to affect national legislation for this purpose.⁷ As Numa Droz, the Swiss president of the international Berne drafting conferences of 1884 to 1886, who had himself avowed his strong interest in copyright matters, stated in his closing address to the first conference in 1884:

¹ Confucius, *THE ANALECTS*, XVII. 8.

² Confucius, *THE ANALECTS*, XIII.9.

³ Universal Declaration of Human Rights, General Assembly of the United Nations, Resolution 217A(III) of 10 December 1948, <http://www.un.org/en/documents/udhr/> (accessed 12 May 2009) [hereinafter *UN UDHR*].

⁴ *Id.*, Art. 27(1).

⁵ U.K. Copyright Act 1709, 8 Anne c.19, ss. 4 and 5.

⁶ *Histoire* (1889), 161.

⁷ Berne Act, Article 8.

Whereas, for one thing, certain delegations might have wished for more extensive and more uniform protection of authors' rights, due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually on the so-varied countries that we wish to see joining the Union.

Consideration also has to be given to the fact that limitations on absolute protection are dictated, right in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reproduction facilities which are at the same time, should not generate into abuses. These were the various viewpoints and interests which we have sought to reconcile in the draft convention... Our work is therefore the result of mutual concessions, and it is with that in mind that it is recommended to all governments for approval.⁸

3. Today, there is an ever-increasing emphasis on public education from the very young to corporate training to continuing adult education. Likewise, instructional pedagogies are changing from imparting information in classrooms to self-learning and self-realization. Students are learning from an increasingly wide array of texts and subjects, and authors and publishers have responded with a proliferation of quality texts and instructional materials. And the globalization of education has led to the rise of new players and participants in the for-profit education services industry,⁹ ranging from tuition providers to pre-schools and preparatory schools to training, testing and practice examination services. Furthermore, the advent of information technology and the Internet has changed the paradigms of teaching, as more and more materials become easily available on the digital environment, and at low or no cost, and new paradigms of instruction such as e-learning and distance learning become possible and accessible. Both developed and developing countries alike appreciate the continued importance of having a high level of availability and accessibility of knowledge for educational purposes, as it is crucially important to a country's social and economic sustenance and development.

SCOPE AND METHODOLOGY OF THE STUDY

4. Within the existing framework established by international copyright treaties, national legislatures have evolved rules in their copyright laws that seek to reconcile and balance the interests of authors, publishers, educators, students and educational and instructional institutions. These range from exceptions and limitations that support educational activities to licenses and contractual solutions to setting up repositories by institutes of higher learning for educational purposes.

5. This study, which is commissioned by the WIPO Secretariat, seeks to examine the copyright exceptions for the benefit of educational activities that have been developed in the

⁸ Minutes of the Sixth Meeting of the Conference for the Protection of Authors' Rights, 18 Sept. 1884 in WIPO, *1886-Berne Convention Centenary-1986* (1986), 105.

⁹ The size of the global education and training market has been estimated to be US\$2 trillion in 2003. See e.g. Nicholas J. Glakas, Trends, Policies and Issues Reauthorization – 2003 (Jan. 9, 2003), at: <http://www.google.com/url?sa=t&source=web&ct=res&cd=2&ved=0CA8QFjAB&url=http%3A%2F%2Fwww.erzwiss.uni-hamburg.de%2Fpersonal%2Flohmann%2FDatenbank%2FN-Glakas-GlobalEduMarketplace-2003.ppt&ei=GXbRSryrJ47-tQO9gKHwCw&usq=AFQjCNHY0CAHvPjT8dWBUujNLawWlkwDgQ>

countries under review. It also seeks to review the impact of technological measures on the exercise of these exceptions and the relationship between laws protecting the circumvention of technological measures and the educational exceptions. This examination is conducted in the following manner.

6. Part One of this study briefly examines the relevant provisions in the Berne Convention and Rome Convention that provide exceptions for the benefit of educational activities.

7. Part Two of this study examines the individual copyright exceptions for the benefit of educational activities in the national legislation of WIPO member states in Asia. The member states covered in this study are:

1. Australia	2. Bangladesh
3. Bhutan	4. Cambodia
5. China (<i>excluding</i> Hong Kong and Macau) ¹⁰	6. Cook Islands
7. Democratic People's Republic of Korea	8. Fiji
9. Indonesia	10. India
11. Indonesia	12. Iran
13. Japan	14. Kiribati
15. Lao	16. Malaysia
17. Maldives	18. Marshall Islands
19. Micronesia	20. Mongolia
21. Myanmar	22. Nauru
23. Nepal	24. New Zealand
25. Niue	26. Pakistan
27. Palau	28. Papua New Guinea
29. Philippines	30. Republic of Korea
31. Samoa	32. Singapore
33. Solomon Islands	34. Sri Lanka
35. Thailand	36. Timor-Leste
37. Tonga	38. Tuvalu
39. Vanuatu	40. Vietnam

Table 1: List of Countries Reviewed in this Study

¹⁰ This study does not include a review of the copyright laws in Hong Kong and Macau. Although these Special Administrative Regions in China have their own separate legal systems, this review calls for a comparison and evaluation between WIPO member states and their national copyright legislation.

8. Part Three of this study conducts a comparison, analysis and assessment of the copyright exceptions identified in Part Two of the study. It presents case studies from the licensing solutions deployed by a selected number of countries in the study. It also examines the technological protection laws of the countries under review and examines their interaction and relationship with educational exceptions.

9. For the purposes of this study, in particular, in Part Two of this study, an examination of the relevant national legislation is confined to the English translations of statutes which are publicly accessible or deposited with the WIPO Secretariat. However, preference will be given to the English versions of the statutes that are made available on or through the official copyright or intellectual property offices of the WIPO member states, because occasionally, these versions reflect more recent revisions to copyright legislation than the versions of the copyright legislation deposited with the WIPO Secretariat. Where no English translations of the statutes are available, or where the quality of the translations is poor, this author has, on the advice of the WIPO Secretariat, not conducted the requisite examination and analysis for that country in this study. Where there is a patent ambiguity in the English version of the copyright legislation which quite possibly arises from problems with the translation, this will be pointed out accordingly.

10. One of the more difficult aspects of researching on the copyright laws of these countries in Asia has been encountered in relation to South Pacific countries. Many of these countries have neither enacted their own copyright laws nor have online databases of legislation. To find the applicable copyright legislation in these countries requires researching their Constitutions and the transitional provisions in their laws, many of which are neither easily accessible nor available. The results show that in many of these countries, the legal position is that governed by either the U.K. Imperial Copyright Act of 1911 or the U.K. Copyright Act of 1956. While every effort has gone into checking these conclusions against accessible secondary literature to confirm this conclusion, this is by no means conclusive because at the time of preparing this study, these countries could have enacted their own copyright legislation to replace the U.K. copyright legislation.

11. There is considerable nexus in the public interest roles of educational institutions and libraries, particularly public and academic libraries and archives and those that are not-for-profit. A comprehensive study of the copyright limitations and exceptions for libraries and archives has been commissioned by the WIPO Secretariat and has recently been published (“WIPO Study on Libraries and Archives”).¹¹ To avoid any overlap in coverage, this study will not look at the copyright limitations and exceptions for libraries. Instead, reference will be made to that study by Dr Kenneth Crews dated 26 August 2008.

12. As this is an international study of copyright laws across a wide and diverse regional grouping, the co-operation of all the countries and their organizations is very important to lead to a better understanding of the legal systems of copyright as based on the legal cultures in each country. While this author does not claim to be an expert in the copyright laws of all the countries surveyed in this study, some care has indeed gone into reviewing and checking all references and citations in this massive study. Given the time limits for the completion of this

¹¹ Kenneth Crews, WIPO STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES (SCCR/17/2) (WIPO, 2008) [hereinafter *WIPO Study on Libraries and Archives*].

study, this study employs primarily a largely literal interpretation of the copyright legislation in these countries in conducting the review and analysis. This may not be the most appropriate approach. Thus, genuine issues could arise in interpreting and applying these legislative provisions. While the author deeply appreciates the help of the national experts in this regard, this author also humbly accepts that all errors in this study are his, notwithstanding the exercise of his best efforts within the time frame for this study, and looks forward to receiving the readers' constructive input and feedback. As the great English poet and satirist Alexander Pope said, "To err is human, and to forgive divine." The approach adopted in this study is to be largely descriptive of the issues, and to avoid presenting any of the issues as the author's opinion in order to be objective and balanced. It is hoped that this study at the very least provides a common platform for countries to share and learn from each other's experiences in the area of legislating for copyright exceptions for the benefit of educational activities.

13. The author wishes to thank the International Federation of Reprographic Rights Organizations ("IFFRO") for the help he received from Mr Olav Stokkmo, Chief Executive and Ms. Anita Huss, General Counsel. He also thanks Ms. Caroline Morgan, General Manager, CAL (Australia) and Chair of IFFRO's Asia Pacific Committee for her unstinting enthusiasm and her kindness and support in securing much of the necessary information needed for this study from the Reprographic Rights Organizations of the respective countries in the study. He also wishes to thank Ms. Zhou Lingling from the Operational Office, National Science Library, Chinese Academy of Sciences and Mr. Sithong Sikhao, Central Library, National University of Laos for their speedy and informative replies to the country questionnaires he sent out via Ms. Teresa Hackett, Programme Manager for Electronic Information for Libraries (eIFL). Thanks must also be given to Ms. Geidy Lung, Legal Officer with the Copyright Law Division, WIPO, for her unstinting encouragement and support, and for her patience with the conduct of this study. Finally, the author wishes to thank his dear wife Xu Le, for serving as his Chinese legal researcher and academic partner, and for her forbearance, her patience and her understanding for all the long hours he put in to finish the study. With the completion of the study, he will resume the role of a good husband and a good father to her and to their first born daughter, whose infectious smile never ceases to bring one on his face, even during those long and dreary nights when he is pouring over the minutiae in copyright treaties and legislation.

PART I: INTERNATIONAL CONVENTIONS AND INSTRUMENTS

THE BERNE CONVENTION

Article 10(2): Free Uses for Teaching

14. The starting point for an examination of provisions in international copyright instruments that are relevant to educational activities must be the Berne Convention for the Protection of Literary and Artistic Works. As noted above in the Introduction, the significance of educational activities has been recognized as early as the first edition of the Berne Convention in Article 8 of the Berne Act, which read as follows.

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the effect of the legislation of the countries of the Union, and of special arrangements existing or to be concluded between them, is not to be affected by the present Convention.

15. In its present form is Article 10(2) of the Berne Convention (1971 Paris Act), which reads:

Article 10: Certain Free Uses of Works

(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.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

a) *Scope of “Teaching”*

16. As Professor Ricketson explained in his WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, Article 10(2) is a permissive rather than mandatory exception.¹² It enables Berne Union members to permit, either through national legislation or bilateral agreements between the member states, the utilization of

¹² The language of Article 10(2) reads, “It shall be [a matter for national legislation or special agreements] to permit the utilization”. The similar language of Article 10(1) reads, “It shall be permissible...”. Professor Ricketson has opined that the language of Article 10(1) renders it a mandatory exception that must be applied by Union members, and that all other limitations and exceptions in the Berne Convention are permissive. *See Sam Ricketson, WIPO STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT (SCCR/9/7) at 14, (WIPO, 2003) [hereinafter refers to as RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS].*

works by way of illustration for “teaching”. At the Stockholm Conference, the conference delegates explained the meaning of the word “teaching” in the Committee’s as follows:

*The wish was expressed that it should be made clear in this Report that the word “teaching” was to include teaching at all levels – in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded.*¹³

17. In the light of these comments, teaching under Article 10(2) has been said by some commentators to equate to formal education at elementary, intermediate and tertiary institutions of learning,¹⁴ figuratively described by a learned commentator as one that would lead to an “official” degree.¹⁵ However, given the breath of degrees, diplomas, certifications and qualifications that both public and private education institutions may award for a multitude of course of studies, perhaps an alternative view is to focus on not just on the academic, vocational or professional accreditation, certification or qualification awarded at the conclusion of the instruction but also the nature of the instruction and formal assessment leading to the accreditation, certification or qualification. That way, educational institutions offering adult education programmes such as language proficiency courses, literacy programmes and vocational training will come within its ambit, but not continuing education or refresher programmes generally.¹⁶ Indeed, as will be illustrated in the review of the countries’ copyright exceptions, many countries have provided for the inclusion of such programmes within their educational exceptions.

b) Utilization “to the extent justified by the purpose ... by way of illustration” for Teaching

18. One feature of the Article 10(2) exception which requires elaboration is the requirement that the “utilization” of the work be “by way of illustration ... for teaching”. However, this utilization has to be “to the extent justified by the purpose ... for teaching”.

19. A commentator has expressed the view that the qualifier “by way of illustration ... for teaching” introduced in the Stockholm Act (which led to the current version of Article 10(2)) was not intended to circumscribe or restrict the condition that the “liberty of extracting portions [be] for educational ... purposes” (in the original Article 8 of the Berne Act).¹⁷ In fact, the revisions arose from concerns raised as to whether the then existing provision limited the amount of a work that could be used. The result of the discussions arising from the

¹³ RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967 at 1148.

¹⁴ Sam Ricketson and Jane C Ginsburg, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 at § 13.45 (2nd ed. 2006) [hereinafter RICKETSON AND GINSBURG - THE BERNE CONVENTION].

¹⁵ Raquel Xalabarder, *On-line teaching and copyright: any hopes for an EU harmonized playground?*, in COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 378 (Paul Torremans ed., 2007) 378 [hereinafter COPYRIGHT LAW HANDBOOK].

¹⁶ Cf. RICKETSON AND GINSBURG - THE BERNE CONVENTION, at § 13.45; RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS, at 15.

¹⁷ COPYRIGHT LAW HANDBOOK, at 379.

Stockholm Revision Conference was to accept that there were some limitations on the scope of use of the work (“by way of illustration”). However, this would not exclude the use of the whole of a work in appropriate circumstances (“for teaching”).¹⁸ The net result is that subject only to the condition that “such utilization [be] compatible with fair practice”, Article 10(2) contains no quantitative limitations on the amount of a work that could be used for teaching purposes, or the number of copies that may be made.¹⁹

c) “Compatible with Fair Practice”

20. Various commentators have accepted the view that the requirement that utilization be “compatible with fair practice” should be given the same interpretation as that in Article 10(1), where the expression also appears. At the Stockholm Revision Conference, there was considerable discussion about this requirement in conjunction with Article 10(1). In the context of whether the length of a quotation should be allowed, the Main Committee I stated that whether a use for quotation purposes was compatible with fair practice “can only be accepted after an objective appreciation”.²⁰ In the absence of any definitive interpretation of this expression, and in the context of the TRIPS Agreement, the WCT and the WPPT, some commentators have suggested that this involves a consideration of the criteria for the three-step test as set out in Article 9(2) – namely, that such utilization for teaching (i) does not conflict with a normal exploitation of the work and (ii) does not unreasonably prejudice the legitimate interests of the author.²¹

21. An example of how this would apply was suggested by Professors Ricketson and Ginsburg in their commentary on the Berne Convention. On the issue of whether coursepacks (a collection of materials, usually extracts from books and articles from periodicals, that are used in classrooms and made in multiple copies as handouts or bound and distributed as books) and anthologies of poetry, which could have come under the original language of Article 10(2) as chrestomathies and anthologies, the learned commentators have opined that “it will be a distortion of language to describe [them] as being used ‘by way of illustration ... for teaching’”.²² However, the same authors opine that such uses subject to voluntary licensing arrangements or compulsory licensing schemes could meet the requirements of Article 9(2), and thus qualify as being “compatible with fair practice”.²³ Another commentator has however voiced his disagreement with this observation, opining that these two examples are not exemplificative or exhaustive of all possible teaching anthologies, thus implying that the existence of licensing schemes will not detract from a possible reliance on Article 10(2) to support the free use of literary and artistic works in coursepacks and anthologies.²⁴ There is some force in the observation that what is a use that is “compatible

¹⁸ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, at § 13.45. See also RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, *supra* note 12, at 14.

¹⁹ *Id.* See also RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, *supra* note 12, at 15.

²⁰ RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967 at 117.

²¹ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 13.45 at 786, 793; RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, *supra* note 12, at 15.

²² RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 13.45 at 794.

²³ *Id.* Cf. at 786 (referring to a compulsory license for use of quotations). See also RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, *supra* note 12, at 15.

²⁴ *COPYRIGHT LAW HANDBOOK*, at 379.

with fair practice” is not necessarily resolved by reference to remuneration to the authors, particularly where these interpretative approaches to international instruments are based on the subjective aims or objectives pursued by national legislation.²⁵ Support for this observation may come from the object and purpose of Article 10 (expressly described as “certain *free* uses of works”).²⁶ In addition, if the right of the author to obtain equitable remuneration is not to be prejudiced, that right is expressly reserved to the author in the Berne Convention.²⁷

d) *Range of Works for Teaching Purposes*

22. Article 10(2) permits the utilization “of literary or artistic works” for teaching purposes. As defined in Article 2(1), this expression shall include “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”.

e) *Range of Teaching Utilizations*

23. Article 10(2) provides that the copyright exceptions provided in national legislation may permit the utilization of literary and artistic works by way of illustration in “publications, broadcasts [and] sound [and] visual recordings”. The term “publications” is drawn from the expression “published works” as defined in Article 3(3) to mean copies of works published with their authors’ consent to satisfy the reasonable requirements of the public. This encompasses all permanent forms of fixation of a work, “whatever may be the means of manufacture of the copies”.²⁸ “Broadcasts” would be the wireless transmission for public reception of sounds or images and sounds of the representations.²⁹ “Sound and visual recordings” would include tapes, videograms, phonograph records and cinematographic films.³⁰

²⁵ See WTO Panel Decision on *US – Section 110(5)*, paras. 6.11 at 34. See also Appellate Body Report on *Japan – Alcoholic Beverages*, 19-23 (rejecting the “aims-and-effects” test in the context of the national treatment clause of Article III of GATT 1994), Appellate Body Report on *EC – Bananas III*, paras. 241, 243, 246 (rejecting the “aims-and-effects” test in the context of the national treatment clause of Article XCII of GATS).

²⁶ Article 31(1) of the Vienna Convention on the Law of Treaties 1969 requires that the treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is argued that the enumerated heading of Article 10 indeed expresses the over-arching object and purpose of both the quotation exception (Article 10(1)) and the education exception (Article 10(2)).

²⁷ See e.g. Berne Convention, Arts. 11*bis*(2), 13(1) (referring to the rights of authors to obtain equitable remuneration which shall be fixed by competent authority in the absence of agreement). See also Articles II, II, III and IV of the Appendix to the Berne Convention (referring to the grant of licenses for translations and reproductions of works for use in developing countries)..

²⁸ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, §§ 6.29-6.30 at 260-262.

²⁹ Rome Convention, Art. 2(f). Though this term is not defined in the Berne Convention, from the records of the Brussels Conference, it was clear that the delegates felt no need to define the term as they accepted that it was one means of wireless communication to the public. See also *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 12.34 at 732.

³⁰ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.45 at 793.

24. Thus, on the issue of whether Article 10(2) prescribes the range or type of *utilization* of the works for teaching purposes (as opposed to the type of *work* that can be utilized), one view taken by Professors Ricketson and Ginsburg is that the utilization is limited to publications, broadcasts and sound and visual recordings. This implies that works that are transmitted by way of “communication to the public by wire” fall outside Article 10(2).³¹ For this reason, Professors Ricketson and Ginsburg have argued that “on-demand transmissions” such as works streamed via the Internet will fall outside the range of works that can be utilized under Article 10(2), not even as an extended form of “broadcasting”.³² On this view, online instruction will be a form of “making available” of the works for teaching purposes,³³ and as an exception, it will have to satisfy the criteria set out in the three-step test.³⁴

25. A contrary view, expressed by Professor Xalabarder, is that Article 10(2) is an “open, flexible and technology-neutral exception”.³⁵ For instance, commentators have generally accepted that permissible teaching utilizations under Article 10(2) would encompass not only the making of broadcasts but also the performances of broadcasts in schoolrooms or lecture theatres.³⁶ Professor Xalabarder has argued persuasively that the Stockholm Conference delegates intended to broaden the permissible utilizations with the expression “publications, broadcasts and sound and visual recordings”, and that these categories were not intended to exhaust the full range of permissible utilizations. Thus he takes the view that the term “utilization” is neutral enough to cover not only reproductions but also communications to the public. On this approach, there would seem no reason to exclude “distance learning”, correspondence courses, “teaching on demand” or even “pod-casting” where Web-based courses take the place of face-to-face instruction, which Professors Ricketson and Ginsburg had nominally accepted as being permissible forms of teaching.³⁷

Article 10(1): Free uses for quotations

26. As the ability to make quotations from other works is an essential part of the intellectual process for conducting education and instruction, reference will be made to the only mandatory exception in the Berne Convention. Article 10(1) permits the making of quotations from a work which has already been “lawfully made available to the public”, providing the making is “compatible with fair practice” and “their extent does not exceed that justified by the purpose”.

27. Commentators have opined that the expression “lawfully made available to the public” encapsulates not just works that have been published, where *copies* are “made available” but also works that have been performed in public or broadcasted, where no such copies of the works are made.³⁸ Hence works which may be quoted pursuant to Article 10(1) include not

³¹ RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, *supra* note 12, at 15. Cf. Art. 10bis(1) and (2) (providing for communication to the public by wire).

³² RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 13.45 at 794.

³³ Pursuant to Article 8, WIPO Copyright Treaty.

³⁴ A more detailed discussion follows from a review below of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

³⁵ *COPYRIGHT LAW HANDBOOK*, at 379.

³⁶ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 13.45 at 794.

³⁷ *Id.*, at 793.

³⁸ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 13.41 at 786.

just books, articles, visual works and other printed matters, but also lectures, performances or broadcasts.³⁹

28. Unlike the version in the Brussels Act, which limits the scope of the taking to “short quotations”, the current version expressly removes this quantitative restriction, preferring to subject this to the requirement of whether the extent of the quotation is “compatible with fair practice”.⁴⁰ The same point made in the previous discussion regarding the same requirement in Article 10(2) applies, namely that an “objective appreciation” will be conducted, to determine if a lengthy quotation is necessary for reasons such as the purpose of the exposition or for ensuring the robustness of scholarship.⁴¹

29. As regards the third element, the preparatory work for the Stockholm Conference and the discussions at the Stockholm Main Committee I affirmed that quotations for “scientific, critical, informatory or educational purposes” are within the scope of Article 10(1).⁴² As a corollary, instruction for scientific research as part of a teaching curriculum would also probably fall within Article 10(2).

Article 10(3): Attribution of authorship and source

30. Both free uses for quotations in Article 10(1) and for teaching purposes in Article 10(2) are subject to the requirement set out in Article 10(3), which provides that mention should be made of the source and the name of the author if it appears thereon. After all, attribution of the source and authorship is consistent with good scholarship and academic practice. Commentators are agreed that Article 10(3) removes any doubt that the right of attribution is to be observed in relation to quotations and educational uses. However, commentators are divided on whether the right of integrity referred to in Article 6bis also applies. In his earlier commentary, the WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, Professor Ricketson took the view that the right of integrity did not apply, in view of the necessity to make modifications and alterations to a work for quotations and teaching purposes⁴³ However, in the latest Berne Convention Commentary by Professors Ricketson and Ginsburg, they take the view that “while modifications within reason may be required when works are utilized for teaching purposes, this should not give *carte blanche* to educators to make deleterious, reputation-damaging alterations”.⁴⁴ Professors Ricketson and Ginsburg’s latest view is probably more consistent with the statement of the Report of the Main Committee I of the Stockholm Conference where the delegates agreed that the Article 6bis applied in respect of exceptions authorized by the Convention, including Article 10.⁴⁵

³⁹ *Id.*, at 788.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967* at 116-17 (Document S/1), 860-1 (minutes).

⁴³ *RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS*, 16.

⁴⁴ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.46 at 795.

⁴⁵ *RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967* at 1165.

Articles 2(4) (Official texts), 2(8) (News of the day), 2bis (Political speeches and legal proceedings) and 10bis (Informatory purposes and current events)

31. At a societal level, education may be seen as encompassing knowledge of the policies and events within a society. Preserving a citizen's "freedom of opinion and expression to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers",⁴⁶ his "right to take part in the government of his country" and express "the will of the people" to found the authority of the government⁴⁷ are fundamental human rights which stem from a citizen's self-realization of social policies and his role in society. It is thus appropriate to briefly mention the following Articles in the Berne Convention which address this larger notion of "social education" as encompassing notions of research and freedom of information. The reader is advised to refer to the WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment by Professor Ricketson for a more detailed discussion of these Articles.

32. Article 2(4) provides that it shall be a matter for national legislation to determine the copyright protection to be granted to laws, court orders and other kinds of legal and official documents and official translations of such texts. The public interest ground for doing so is to ensure unrestricted and free public access to official government information. The flexibility afforded to national legislation means that member countries can choose to leave official texts in the public domain, or accord them protection as literary or artistic works, or grant them qualified protection subject to generous public use rights.⁴⁸ Likewise, Article 2bis(1) provides that it shall be a matter for national legislation to exclude, wholly or in part, political speeches and legal proceedings from the scope of copyright protection. Again, the operative public interest is to ensure public access to and participation in the political process and to promote transparency and accountability in politics and government.

33. Article 2(8) excludes "news of the day or ... miscellaneous facts having the character of mere items of press information" from the protection of the Berne Convention. This provision has been described by commentators as embodying the principle that copyright protection does not extend to facts and information as such.⁴⁹ The public interest in facilitating the dissemination of current events and promoting the free flow of information extends to various exceptions made for the benefit of the press.

34. Article 10bis(1) similarly permits mass media such as the press, radio and TV to reproduce, broadcast or communicate to the public by wire, articles published in newspapers or periodicals on "current economic, political or religious topics" or broadcast works of the same. That this exception is confined only to matters of public interest can be seen from the qualification on the subject matter. It does not extend to other types of news reporting such as literary and artistic reviews, sports reports and lifestyle write-ups.⁵⁰ This exception is subject to the requirement that the source of the subject matter must be clearly indicated. Its related exception, Article 10bis(2), permits the use of literary or artistic works seen or heard in the

⁴⁶ *UN UDHR*, Art. 19.

⁴⁷ *Id.*, Art. 21.

⁴⁸ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 8.108 at 502.

⁴⁹ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, §§ 8.105-8.106 at 498-501.

⁵⁰ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, §§ 13.53 at 800.

course of reporting current events to be reported by means of photography, cinematography, broadcasting or communication to the public by wire, “to the extent justified by the informatory purpose”.

35. Yet another related exception is Article 2bis(2), which permits mass media to reproduce, broadcast and communicate to the public by wire, public lectures, addresses and other works of the same nature, “when such use is justified by the informatory purpose”. This last expression has been explained by commentators as implying that the reporting of a public talk or lecture must be with the object of informing the public, and that the talk or lecture itself need not be “news”.⁵¹

Article 9(2): General exception concerning reproduction rights

36. It is appropriate to discuss Article 9(2), the general exception concerning reproduction rights and its “three-step” test last because this exception post-dated the other exceptions previously discussed and was only introduced pursuant to the Stockholm Act. A detailed analysis of Article 9(2) and the “three-step” test lies outside the scope of the present Study, as it has been previously addressed in a comprehensive study by Professor Ricketson.⁵² It suffices here to make some observations about Article 9(2) and its relationship with the other exceptions, with reference to Article 10(2) in particular.

37. First, the reference to “certain special cases” in Article 9(2) has been explained in the WTO Panel decision as referring to the requirement that the exception or limitation “must be limited in its field of application or exceptional in its scope”⁵³ in both a “quantitative as well as in a qualitative sense”.⁵⁴ Like the WTO Panel, some commentators take the view that the “special cases” must be justified by some reason of public policy or some other exceptional circumstance.⁵⁵ However, others take the view that the expression “certain special cases” should not receive a normative interpretation, as the purpose behind the exception will fall to be tested by the second and third steps of the three-step test.⁵⁶ In other words, there need not be a clear public-policy justification for such exceptions, as long as they are sufficiently narrow.⁵⁷

38. In the context of the present study, on the latter view, exceptions that are specifically directed to educational activities are more likely to pass muster as exceptions directed towards “certain special cases”. Nonetheless, given the wide spectrum of education activities, which range from specific modes of use of works in instruction in schools to general public education, too narrow a view of the first requirement in the three-step test will potentially limit the scope of exceptions that qualify under Article 9(2) and limit their consideration in the second and third steps of the test.

⁵¹ *Id.*, §13.57-13.58 at 807-808.

⁵² RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*.

⁵³ *United States – Section 110(5) of the US Copyright Act*, para. 6.109, Report of the Panel, 15 June 2000, document WT/DS/160/R [hereinafter *WTO Panel*].

⁵⁴ *Id.*

⁵⁵ M Ficsor, *THE LAW OF COPYRIGHT AND THE INTERNET* 284 (2001); Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996* at 124-125 (2002).

⁵⁶ RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, AT 22.

⁵⁷ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §§ 13.13-13.14 at 765-767.

39. Secondly, as regards the second step, the WTO Panel seemed to reject a purely empirical approach, preferring the view that uses permitted under the exception would “conflict with the normal exploitation of the work” if uses “enter into economic competition with the ways that right holders normally extract economic value from that right to the work ... and thereby deprive them of significant or tangible commercial gains.”⁵⁸ Commentators have further opined that the normative approach which seeks to establish a justification for use of the work should include non-economic considerations as well, since an assessment based purely on economic normative considerations would preclude exceptions that permit any free use from being considered under the third step of the three-step test in Article 9(2).⁵⁹ The net result is that there is a balancing exercise involving difficult value judgments to be conducted to assess the non-economic normative considerations (for the author as well as the user) against the economic normative considerations (for the author) to determine whether such a use is “normal”.⁶⁰ In conjunction with the stated objective of the Berne Convention to protect the rights of authors, this calls for non-economic normative considerations for the user to be clearly articulated and the public interest character of such uses going beyond the purely individual interests of the user to be identified.⁶¹

40. To illustrate, the use of works for examination purposes is on its face a use that authors would normally extract economic value from the works. However, such uses would benefit its users (educators as well as students) and are clearly for public interest purposes as examinations are a crucial part of the assessment process in education. On balance, such uses appear to qualify under the second step of the three-step test and fall for further consideration under the third step. On the other hand, where commercial publishers seek to publish a compilation of these examination papers, the non-economic normative considerations supporting examination uses (to help students prepare for examinations based on past-year papers) is subjected to the countervailing use by the publishers of the commercial interests of authors in the potential uses of their works.

41. Thirdly, the uses permitted under the exception must not “unreasonably prejudice the legitimate interests of the author”. Commentators have explained this to mean that exceptions that may cause prejudice of a significant or substantial kind to the author’s legitimate interests, provided that the first and second steps stipulated in Article 9(2) above are satisfied, and that the prejudice is proportionate or within the limits of reason.⁶² This implies subjecting the usage, which may include free usage, to certain conditions or within certain guidelines, or attributing the authorship and source, or making payment for its use, such as by way of compulsory licenses.⁶³ Support for this last possibility is found in the Report of the Main Committee I at the Stockholm Conference, which referred to the possibility that while the making of a small number of photocopies without payment may be permitted for individual or scientific use, where a large number of copies are made for use in industrial

⁵⁸ *WTO Panel*, para. 6.183.

⁵⁹ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.21 at 772.

⁶⁰ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.22 at 773; *RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS*, at 25.

⁶¹ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.22 at 773.

⁶² *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.26 at 776; *RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS*, at 27.

⁶³ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.26 at 776; *RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS*, at 27.

undertakings, the payment of equitable remuneration may negative the unreasonable prejudice caused to the legitimate interests of the author.⁶⁴

42. As regards the application of the three-step test, it is also worth mentioning that in its current form as set out in the Berne Convention, the exception in Article 9(2) is only applicable as an exception to the reproduction right. In contrast, Article 10(2) applies not just to the making of reproductions, as the permissible utilization is “to the extent justified by the purpose by way of illustration for teaching”. As Article 10(2) sets out a range of utilizations that includes broadcasts and performances, the scope of its application is broader than Article 9(2). However, the use of the three-step test in TRIPS and the Internet treaties has greatly extended the reach and importance of Article 9(2). The application of the three-step test in TRIPS and the Internet treaties in relation to educational activities will be considered below.

Appendix to the Paris Act

43. The Appendix to the Paris Act is a special concession to the needs of developing countries to access literary and artistic works to assist in the promotion of national literacy and scholastic purposes. Arising from the Stockholm Revision Conference where the Stockholm Protocol was adopted, it was revised and replaced with the Appendix to the Paris Act as representing a consensus between the developed countries as net exporters of intellectual works and developing countries as net consumers of such works.

44. The two facilities provided in the Appendix for this purpose are Article II (compulsory licenses for translations) and Article III (compulsory licenses for reproductions).

a) Article II: Compulsory Licenses for Translations

45. Article II provides that a Berne Union country which has declared that it will avail itself of the facility provided in this Article shall be entitled, through a competent authority, to grant a non-exclusive and non-transferable translation license⁶⁵ to any national of the country to make a translation of the work in the language in general use in that country (the “country’s language”) and publish that translation in printed or analogous forms of reproduction,⁶⁶ for “the purpose of teaching, scholarship or research”.⁶⁷ In conjunction with the equivalent translation license under Article Vter of the revised Universal Copyright Convention, the UCC conference agreed that the word “scholarship” was to refer not just to “instructional activities at all levels in tutorial institutions, primary and secondary schools, colleges, and universities, but also to a wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject”.⁶⁸ Arguably, this

⁶⁴ RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967 at 1145-46.

⁶⁵ Berne Convention, Appendix, Article II(1).

⁶⁶ Berne Convention, Appendix, Article II(2)(a).

⁶⁷ Berne Convention, Appendix, Article II(5).

⁶⁸ RECORDS OF THE CONFERENCE FOR THE REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION, PARIS, 5-24 JULY 1971, at 236.

implies a broader reach of teaching activities than that envisaged under Article 10(2) of the Berne Convention, as it envisages continuing adult education and instruction.

46. The grant of the translation license is subject to conditions. The conditions are that (i) the work is published in printed or analogous forms of reproduction, which rules out sound recordings and works in electronic form,⁶⁹ (ii) a translation of the work has not been published in country's language three years⁷⁰ from its first publication⁷¹ ("waiting period") or if a translation has been published in country's language but all editions of the translation are out of print,⁷² (iii) the author has not withdrawn from circulation all copies of his work,⁷³ and (iv) an Article III license is also obtained if the work is composed mainly of illustrations.⁷⁴ In addition, if the owner of the translation right has published an authorized translation (in the same language and with substantially the same content) at a price "reasonably related to that normally charged in the country for comparable works), the granted translation license would terminate, though any copies already made could continue to be distributed until the stock is exhausted.⁷⁵

47. As a concession for languages which are not in general use in one or more developed countries, which commentators have suggested could apply to languages such as Arabic, Chinese and Russian,⁷⁶ the waiting period of three years for an official translation can be reduced to one year. On the other hand, as a concession for publishers in English, French and Spanish as languages in use in developed countries, the waiting period can only be reduced from three years (to at least one year) only if there is "unanimous agreement" of the aforesaid developed countries.⁷⁷ This requirement has led commentators to question the practicality of obtaining this "unanimous agreement" from the aforesaid developed countries, and in turn query the utility of this provision.

48. One important characteristic of the Article II facility is the grant of a translation license to broadcasting organizations in developing countries. This arose because of concerns expressed by developing countries regarding the shortage of textbooks and teachers, which meant that broadcasting is a very important part of their education programmes.⁷⁸ Where no authorized or licensed translation is available,⁷⁹ it enables the competent authority in a developing country to grant a license to any broadcasting organization in the developing country to make a translation from a lawfully acquired copy⁸⁰ of a printed or analogous work "for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession"⁸¹ through

⁶⁹ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §14.61 at 930.

⁷⁰ Berne Convention, Appendix, Article II(2)(a) ("or of any longer period determined by the national legislation of the said country").

⁷¹ Berne Convention, Appendix, Article II(2)(a).

⁷² Berne Convention, Appendix, Article II(2)(b).

⁷³ Berne Convention, Appendix, Article II(8).

⁷⁴ Berne Convention, Appendix, Article II(7).

⁷⁵ Berne Convention, Appendix, Article II(6).

⁷⁶ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §§ 14.64 at 932.

⁷⁷ Berne Convention, Appendix, Article II(3)(b).

⁷⁸ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 14.72 at 937.

⁷⁹ E Ulmer, *The Revisions of the Copyright Conventions* (1971) 2 IIC 345, 364.

⁸⁰ Berne Convention, Appendix, Article II(9)(a)(i).

⁸¹ Berne Convention, Appendix, Article II(9)(a)(ii).

lawfully-made broadcasts intended for recipients in that country.⁸² This last reference to a “lawfully-made” broadcast requires that in addition to the grant of the translation license, the broadcast must be authorized by the owner of the broadcasting right or made pursuant to a compulsory license allowed under Article 11bis(2).⁸³ Likewise, any sound or visual recordings of a translation made for broadcasting purposes must also be lawfully made⁸⁴ under Article 11bis(3).⁸⁵ In addition, the use of the translation must be “without any commercial purpose”, which meant that the broadcasting organization itself is not a private corporation operated for profit-making purposes and that no commercial advertising is included in the programme incorporating the translation.⁸⁶ Pursuant to the grant of the translation license to broadcasting organizations, a license may also be granted for the organization to translate any text incorporated in an audio-visual fixation prepared and published by the organization, “for the sole purpose of being used in connection with systematic instructional activities”.⁸⁷ This would encompass fixations such as training films, video cassettes, slides and other visual aids used as part of the sound track or written commentary to accompany the broadcasts.⁸⁸ Finally, where an authorized translation of the work has been published by the owner of the right of translation, or where the author has withdrawn from circulation all copies of his work, the broadcast translation license will not be granted.⁸⁹ Likewise, where the work composes mainly of illustrations, for its use in the broadcast, a separate Article III license is required.⁹⁰

49. Another important concession is to allow another broadcasting organization in the country to use the ephemeral sound or visual recording made by the first broadcasting organization pursuant to the abovementioned translation license, subject to the agreement of the first broadcasting organization.⁹¹ This is an extension of Article 11bis(3),⁹² which would otherwise limit the use of the ephemeral sound or visual recording to the first broadcasting organization.⁹³

b) Article III: Compulsory Licenses for Reproductions

50. Article III provides that a Berne Union country which has declared that it will avail itself of the facility provided in this Article shall be entitled, through a competent authority, to

⁸² Berne Convention, Appendix, Article II(9)(a)(iii). This condition is satisfied even though the broadcasts are received by listeners or viewers in other countries. *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 14.73 at 939.

⁸³ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 14.73 at 938.

⁸⁴ Berne Convention, Appendix, Article II(9)(a)(iii).

⁸⁵ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 14.73 at 939.

⁸⁶ RECORDS OF THE CONFERENCE FOR THE REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION, PARIS, 5-24 JULY 1971, at 240.

⁸⁷ Berne Convention, Appendix, Article II(9)(c).

⁸⁸ RECORDS OF THE CONFERENCE FOR THE REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION, PARIS, 5-24 JULY 1971, at 240-1.

⁸⁹ Berne Convention, Appendix, Article II(9)(d) (incorporating Article II(6) and (8)).

⁹⁰ Berne Convention, Appendix, Article II(9)(d) (incorporating Article II(7)).

⁹¹ Berne Convention, Appendix, Article II(9)(b).

⁹² Berne Convention, Article 11bis(3) (“ephemeral recordings made by a broadcasting organization by means of its own facilities and *used for its own broadcasts*”).

⁹³ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 14.73 at 939.

grant a non-exclusive and non-transferable reproduction license⁹⁴ to any national of the country to reproduce and publish an edition of the work for use in connection with “systematic instructional activities”.⁹⁵ The general report of the UCC Conference notes that this expression is intended to encompass activities connected with the formal and informal curriculum of an educational institution and also systematic out-of-school education.⁹⁶ Unlike Article II, reproduction for the purposes of research is excluded.⁹⁷

51. Like the grant of the translation license in Article II, the grant of the reproduction license is subject to conditions. The conditions are that (i) the work is published in printed or analogous forms of reproduction, which rules out sound recordings and works in electronic form,⁹⁸ (ii) authorized copies of a particular edition of the work have not been distributed in that country to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works during the “waiting period” (defined as the period commencing from the date of first publication of a particular edition of the work,⁹⁹ which varies from the standard five years to three years for works of natural and physical sciences, mathematics and technology, and seven years for works of fiction, poetry, drama and music and for art books¹⁰⁰) or if no authorized copies of the edition of a work have been on sale in the developing country to the general public for a period of six months, or in connection with systematic instructional activities at a “normal price” charged in the country for comparable works,¹⁰¹ and (iii) the author has not withdrawn from circulation all copies of his work.¹⁰² In addition, if the owner of the reproduction right has distributed an authorized edition of a work to the general public in connection with systematic instructional activities (in the same language and with substantially the same content) at a price “reasonably related to that normally charged in the country for comparable works”, the granted reproduction license would terminate, though any copies already made could continue to be distributed until the stock is exhausted.¹⁰³

52. A license to reproduce and publish a translation of a work may also be granted under Article III, unless the translation was not published with the authorization of the owner of the right of translation, or if the translation is not in a language in general use in the developing country.¹⁰⁴ The language of Article II(5) thus precludes a person from obtaining a compulsory translation license under Article II and then a reproduction license from the competent authority under Article III.¹⁰⁵

⁹⁴ Berne Convention, Appendix, Article III(1).

⁹⁵ Berne Convention, Appendix, Article III(2) proviso.

⁹⁶ RECORDS OF THE CONFERENCE FOR THE REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION, PARIS, 5-24 JULY 1971, at 244.

⁹⁷ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 14.86 at 945.

⁹⁸ Berne Convention, Appendix, Article III(7). Cf. *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, §14.61 at 930.

⁹⁹ Berne Convention, Appendix, Article III(2)(a).

¹⁰⁰ Berne Convention, Appendix, Article III(3).

¹⁰¹ Berne Convention, Appendix, Article III(2)(b).

¹⁰² Berne Convention, Appendix, Article III(4)(d).

¹⁰³ Berne Convention, Appendix, Article III(6).

¹⁰⁴ Berne Convention, Appendix, Article III(5).

¹⁰⁵ *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, §14.85 at 944.

53. Another point to note is that the license granted under Article III applies to reproduction in audio-visual form of lawfully made audio-visual fixations, including any protected works which the fixations incorporate.¹⁰⁶ This includes the translation of any incorporated text into a language in general use in the developing country.¹⁰⁷ Thus in conjunction with the aforesaid translation right, a license may be granted to translate the entire sound track of a teaching film or video-tape that had been lawfully acquired, and to dub the soundtrack with the translated sub-titles.¹⁰⁸ However, the original audio-visual fixations have to be prepared and published for the sole purpose of being use in connection with systematic instructional activities.¹⁰⁹ The narrowness of this license should be noted: it is not to allow the reproduction in written text of an audio-visual fixation, nor does it allow for the reproduction of sound recordings such as commercial tapes or cinematographic fictional works.¹¹⁰ Nor does it allow for the reproduction of audio-visual fixations which were not originally prepared and published in conjunction with systematic instruction.¹¹¹

54. The utility of the Article III exception is to make it possible for the distribution of locally-produced low cost editions of books and printed material and audio-visual works for use with systematic instruction, for which the academic and scholastic community would have to rely on high cost imports. The reason for the lack of locally-produced low cost editions are many: the absence of indigenous printing and production facilities is often cited as one, and the economic infeasibility of producing them for the developing country is the other.¹¹² Commentators have opined that sometimes the high cost of books is because of monopolistic practices on the part of overseas or local publishers or distributors to keep the “normal price” of books artificially high.¹¹³ If so, it may be more appropriate to use competition laws to bring down the prices of these books rather than to deploy compulsory licenses for developing countries.¹¹⁴

c) Conditions for Grant of Compulsory Licenses for Translations and Reproductions

55. Further conditions have to be observed before the license for translations (Article II) and reproductions (Article III) can be granted. The first is that the license applicant has to give the owner of the translation or reproduction right a “grace period” (of six months if the waiting period is three years (for translations and reproductions)¹¹⁵), or nine months if the

¹⁰⁶ Berne Convention, Appendix, Article III(7)(b).

¹⁰⁷ Berne Convention, Appendix, Article III(7)(b).

¹⁰⁸ RECORDS OF THE CONFERENCE FOR THE REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION, PARIS, 5-24 JULY 1971, at 249-50.

¹⁰⁹ Berne Convention, Appendix, Article III(7)(b).

¹¹⁰ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §14.89 at 946.

¹¹¹ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §§14.89-90 at 946-47.

¹¹² RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §14.82 at 942.

¹¹³ RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, §14.82 at 942.

¹¹⁴ Concerns may be justifiably expressed by many developing countries that they lack competition laws, or that extra-territorial competition laws are difficult to enforce, particularly when the overseas publishers and distributors are outside the reach of the jurisdiction of the developing countries' competition authorities.

¹¹⁵ It has been opined that there is no grace period applicable in the case of five- or seven-year reproduction licenses under Article II. *See RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 14.84 at 944.

(shortened) waiting period is one year (for translations))¹¹⁶ to decline to authorize the application for a right to publish a translation in the country's language or a right to reproduce and publish the edition.¹¹⁷ If during the grace period, an authorized translation is published or an authorized edition is distributed, no license under Articles II and III may be granted.¹¹⁸

56. The second is that the name of the author shall be indicated on all copies of the translation or reproduction licensed under Articles II or III, together with the title of the work (and the original title of the work in relation to a translation).¹¹⁹

57. The third is that these copies cannot be exported out of the developing country, including the country's declared territories.¹²⁰

58. The exception is for a non-commercial transfer by the government or a competent authority of the developing country granting the license (the "exporting country") to export the copies to individuals who are the exporting country's nationals, for the purpose of teaching, scholarship or research, and that the receipt and distribution of these copies is with the agreement of the importing country and upon the notification of the Director General by the exporting country.¹²¹ The object of this exception is to allow communities situated overseas to continue to have access to cheap translations from their home countries. In this regard, some commentators have challenged the premises inherent in the exception, noting that many members of the community would no longer be nationals of the exporting country but would have taken up the nationality of their host country. In addition, any notion of preservation of these communities' cultures would surely be better achieved by exporting the exporting country's texts to them rather than by way of translating works from third party countries into the exporting country's language.¹²²

d) Notification by "Developing Country"

59. A Berne Union member that is a "developing country"¹²³ seeking to take advantage of the provisions has to deposit a notification with the WIPO Director General that it will avail itself of either or both of the facilities. Notifications are renewable for ten-year periods, and may be renewed in whole or in part for periods of ten years each by a new notification

¹¹⁶ Berne Convention, Appendix, Article II(4) (translations) and Article III(4) (reproductions).

¹¹⁷ Berne Convention, Appendix, Article IV(1). Article IV also sets out a procedure for the applicant to follow if the applicant is unable, after due diligence on his part, to find the owner of the right. See Article IV(2).

¹¹⁸ Berne Convention, Appendix, Article II(4)(b) (translations), Article III(4)(c) (reproductions).

¹¹⁹ Berne Convention, Appendix, Article IV(3).

¹²⁰ Berne Convention, Appendix, Article IV(4)(b).

¹²¹ Berne Convention, Appendix, Article IV(4)(c).

¹²² RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 14.96 at 952.

¹²³ Berne Convention, Appendix, Article I(1) ("Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act...").

deposited with the Director General before the expiration of the ten-year period then running.¹²⁴

60. A check with WIPO shows that of the 40 Asia-Pacific countries reviewed in this study, only six have filed notifications with the Director General. Of these, only five of these notifications are active and have not lapsed. Four of the countries (Bangladesh, Mongolia, Philippines and Sri Lanka) have filed notifications to avail themselves of Articles II and III. Only Thailand has filed a notification to avail itself of Article II. India, which filed a notification for Articles II and III since 10 October 1974, has apparently allowed it to lapse on 10 October 1994.

THE ROME CONVENTION

61. The limitations and exceptions allowable under the Rome Convention, which deals with the rights of performers, phonogram producers and broadcasting organizations, are compendiously set out in Article 15 of the Convention. Again, as these have been previously addressed in a comprehensive study by Professor Ricketson,¹²⁵ reference will only be made to those exceptions that pertain to educational activities.

Article 15(1)(a): Private Use

62. Article 15(1)(a) permits a Rome Convention contracting state to provide for exceptions to the protection granted in the Convention as regards private use, which commentators have agreed refers to use that is neither public nor for profit,¹²⁶ though commentators are divided as to whether this encompasses matters such as private copying of phonograms and videograms.¹²⁷ In relation to educational activities, while Article 15(1)(a) will sanction exceptions that permit a student to make a copy of a performance, a phonogram or a broadcast for personal purposes as part of a teaching curriculum, or even an educator in his studies and preparations for his instruction, it is doubted if the use of such materials pursuant to a one-to-many mode of instruction can be accurately described as “private use”. In comparison, Article 10(2) of the Berne Convention appears to be a broader, more flexible and open-ended exception in that it encompasses performances, broadcasts and communications to the public by wire for educational purposes of all literary and artistic works (but not works that are transmitted by way of communication to the public by wire).¹²⁸

¹²⁴ *Id.*, Article I(2)(a) (“not more than fifteen months and not less than three months before the expiration of the ten-year period then running”).

¹²⁵ RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*.

¹²⁶ RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, AT 44; RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 19.12 at 1217; S STEWARD, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* (2ND ED, 1989), PARA 8.41.

¹²⁷ RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, AT 44; RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 19.12 at 1217. Cf. S STEWARD, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* (2ND ED, 1989), PARA 8.41.

¹²⁸ Of course, Article 10(2), Berne Convention only sanctions the use of authorship works (in publications, broadcasts and sound and visual recordings) but not the separate and independent neighbouring rights in such performances, phonograms and broadcasts.

Article 15(1)(b): Short Excerpts for Reporting of Current Events

63. Article 15(1)(b) provides for exceptions for the use of short excerpts in connection with the reporting of current events. This exception parallels Articles 2bis(2) and 10bis(2) of the Berne Convention, which, as have been previously noted, serve the informatory purpose in societal education, though the extent of the use is qualified by the condition that the use be of “short excerpts”, which appears to be more restrictive than that of “informatory purpose” in the Berne Convention.¹²⁹

Article 15(1)(d): Teaching and Scientific Research

64. Like Article 10(2) of the Berne Convention, Article 15(1)(d) uses a “purpose-oriented” exception that enables a Rome Convention contracting state to provide for exceptions as regards “use solely for the purposes of teaching and scientific research.” While the reference to “teaching” is likely to receive the same interpretation as Article 10(2) as referring to teaching at all levels of learning, the reference to “scientific research” makes Article 15(1)(d) broader in scope than Article 10(2). In addition, unlike Article 10(2), Article 15(1)(d) is unencumbered by qualitative (and arguably quantitative) conditions such as requiring such uses to be “compatible with fair practice” and utilization be “to the extent justified by the purpose”.

65. Nonetheless, this is unlikely to have any practical effect because any teaching and educational usage will necessarily involve qualifying such uses under *both* Article 10(2) (in relation to the authorship works) and Article 15(1)(d) (in relation to performances, phonograms and broadcasts as entrepreneurial works which embed the authorship works). However, to the extent that permission has been granted for use of the authorship works, either by way of a free-use exception such as Article 10(2) or pursuant to a compulsory license under Article 9(2), Article 15(1)(d) will permit the use of the performance, phonogram or broadcast of that work for teaching and scientific purposes.

Article 15(2): Limitations Equivalent to Copyright Limitations

66. Article 15(2) provides an alternative set of allowable “limitations” with regards to the protection of performers, producers and broadcasting organizations. The “limitations” allowed must be of the “same kind” as that provided for copyright works. In addition, as Article 15(2) operates “irrespective” of Article 15(1), a Rome contracting state may adopt these allowable “limitations” in addition to the exceptions set out in Article 15(1).

67. The only condition is that if compulsory licenses are provided, these are allowed “only to the extent to which they are compatible with [the Rome] Convention”. This is a reference to Article 7(2)(2) (use by broadcasting organizations of fixations made for broadcasting purposes), Article 12 (use of commercially published phonogram for broadcasting or for any communication to the public) and Article 13(d) (public communication of TV broadcasts in

¹²⁹ RICKETSON – *STUDY ON LIMITATIONS AND EXCEPTIONS*, AT 44; RICKETSON AND GINSBURG - *THE BERNE CONVENTION*, § 19.13 at 1217.

publicly accessible places where an entrance fee is payable).¹³⁰ In conjunction with educational activities, Articles 7(2)(2) and 12 are likely to be relevant in conjunction with educational broadcasts, such as that envisaged in (but not limited to) Article II(9)(a)(ii) of the Appendix to the Berne Convention.

¹³⁰ *RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS*, AT 45; *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 19.16 at 1218.

PART II: REVIEW OF NATIONAL LEGISLATION

68. The analysis above of the international copyright conventions and instruments in relation to educational activities shows that the copyright exceptions for the benefit of educational activities have always received the full attention of law and policy makers. The sheer breadth and scope of educational activities – at the individual and personal level, at the institutional level and at the national level – means that any analysis of national legislation has to be undertaken with some care.

69. A general review of national copyright legislation for exceptions for the benefit of educational activities can be divided into six categories. The first category pertains to the private or fair use exceptions for copyright works and entrepreneurial works. The second category of exceptions pertains to the copying of works by libraries and archives for the information and collection management activities of libraries. The third category of exceptions pertains to the copying of works by libraries and archives to support users' research. The fourth category pertains to the instructional use of works by educational institutions. The fifth category pertains to the study of computing science, in particular, the reverse engineering of computer programs and the study of computing technology and its related fields such as encryption and security. The sixth category deals with the reproduction and dissemination of works such as news and official information to achieve the social object of public education.

70. As this study focuses exclusively on the exceptions for the benefit of educational activities, to avoid any overlap with the WIPO Study on Libraries and Archives, this study will only focus on the first, fourth and fifth categories of educational exceptions. The second and third categories of exceptions have been addressed in the WIPO Study on for Libraries and Archives.¹³¹

71. Also, to the extent that the national legislations contain exceptions that address the usage of copyright works for the benefit of educational activities of institutions that assist persons with intellectual disabilities, to avoid any overlap with the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired by Judith Sullivan (“WIPO Study on Exceptions for the Visually Impaired”),¹³² the analysis in this part will not discuss these exceptions.

72. To assist in the analysis, a brief description of the copyright exceptions for educational activities in the Asia-Pacific countries under review in this study follows.

¹³¹ *WIPO Study on Libraries and Archives*, supra note 11.

¹³² Judith Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired* (SCCR/15/7) (WIPO, 2007) [hereinafter *WIPO Study on Limitations and Exceptions for the Visually Impaired*].

Australia

73. Even before the extension of the U.K. Imperial Copyright Act of 1911 to Australia as an imperial colony, Australian then self-governing colonies such as Victoria, New South Wales, South Australia and Western Australia had enacted their own copyright statutes.¹³³ Following the federation of the Australian colonies in 1901 to form the Commonwealth of Australia, the new Commonwealth Parliament enacted a new copyright law in 1905.¹³⁴ However, this was soon superseded by the Imperial Copyright Act which the Commonwealth government declared the British Act to be in force in the Commonwealth from 1 July 1912 and repealed all previous legislation.¹³⁵ The British Act remained in force even after its repeal in the U.K. in 1956, until its repeal by the current version of the Commonwealth Copyright Act in 1968.¹³⁶ Since then, the Copyright Act 1968 has been consistently revised pursuant to various law reform initiatives, to deal with technological and industrial developments. The latest edition of the Australian Copyright Act 1968 consulted for purposes of this study takes into account amendments up to Act No. 113 of 2008.

Section 28: Performances and Communications in the Course of Educational Instruction

74. Section 28 is an exception permitting the free use of copyright works for educational purposes. It provides that the performance of a literary, dramatic or musical work in class or in the presence of an audience by a teacher or a student in the course of giving or receiving such non-profit instruction respectively shall not be deemed to be a performance in public.¹³⁷ The scope of the exception is essentially delimited by two conditions. The first condition is that the audience is limited to persons who are taking part in the instruction (which would include the teachers and students who are not performing),¹³⁸ who are directly connected with the place where the instruction is given (which would include technical support staff who set up the equipment),¹³⁹ and who are parents or guardians of the students.¹⁴⁰ The inclusion of parents and guardians is intended to bring school concerns and school performance recitals within the scope of the section.¹⁴¹

75. The second condition relates to the requirement that the performance be “in the course of giving educational [non-profit] instruction”, and the non-profit requirement is not displaced for the only reason that the teacher receives remuneration for giving instruction at a place of education.¹⁴² It is submitted that a careful reading will show that the requirement as to “a

¹³³ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 3.295.

¹³⁴ *Id.*, at § 3.330.

¹³⁵ *Id.*, at § 3.360.

¹³⁶ *Id.*

¹³⁷ Australian Copyright Act, s 28(1).

¹³⁸ Australian Copyright Act, s 28(1).

¹³⁹ Australian Copyright Act, s 28(1).

¹⁴⁰ Australian Copyright Act, s 28(3).

¹⁴¹ *Cf.* Australian Copyright Law Review Committee, *SIMPLIFICATION OF THE COPYRIGHT ACT 1968 REPORT*, para. 9.18.

¹⁴² Australian Copyright Act, s 28(2) (providing that, that shall not be taken to be instruction given for profit).

place of education” relates to the issue of whether the educational instruction is conducted for profit, and does not impose a requirement that the performance be held “at a place of education”. In any event, the term “place of education” is not defined in the Australian Copyright Act. This presumably includes primary, secondary and tertiary institutes of learning.¹⁴³ Thus schools and educational institutions can hold performances under section 28 in premises such as rented concert halls and theatres which are outside of the schools and institutions, as long as they are pursuant to a course of giving educational instruction.

76. The exception also extends to causing sound recordings and cinematographic films to be heard or seen in class for the same purpose,¹⁴⁴ causing the communication of a literary, dramatic or musical work, a sound recording or a cinematographic film to be “communicated to the public” to facilitate a performance of the work or a sound recording or film to be heard or seen for the same purpose,¹⁴⁵ causing the communication of an artistic work¹⁴⁶ or a TV or sound broadcast¹⁴⁷ to be seen or heard in class or in the presence of the aforesaid audience in the course of educational instruction.

Sections 40 and 103C: Fair Dealing for Purposes of Research or Study

77. The fair dealing defences in the Australian Copyright Act originated from section 2(1)(i) of the Imperial Copyright Act 1911, which provided that copyright in a work would not be infringed by any fair dealing for the purposes of private study, research, criticism, review or newspaper summary.¹⁴⁸ In the latest edition of the Australian Copyright Act, instead of one general fair dealing provision, there are four fair dealing provisions, all of which deal with one specific aspect of “fair dealing”.

78. Section 40 provides that fair dealing with a literary, dramatic, musical or artistic work or an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute copyright infringement. Section 103C provides that fair dealing with a sound recording, a cinematograph film, a sound broadcast or a television broadcast (an “audio-visual item”) for the purpose of research or study does not constitute an infringement of copyright in the item or in any work or audio-visual item included in the item. Reading section 40 (and section 103C) with section 14(1), which states that a reference to acts done in relation to a substantial part of a work or other subject-matter shall be deemed to be done in relation to the whole, this means that copyright in a work or audio-visual item or its adaptation is not infringed by a person who, not being the owner of the copyright, and without the license of the copyright owner, reproduces or authorizes the reproduction of the work or audio-visual item or of a substantial part of it, in a material form, if the reproduction is a “fair dealing” with the work or audio-visual item “for the purpose of research or study”.¹⁴⁹

¹⁴³ A commentator has further queried if this includes a place of instruction (not of learning) as long as this is not done for profit. See S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.85.

¹⁴⁴ Australian Copyright Act, s 28(4).

¹⁴⁵ Australian Copyright Act, s 28(5).

¹⁴⁶ Australian Copyright Act, s 28(7).

¹⁴⁷ Australian Copyright Act, s 28(6).

¹⁴⁸ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.15.

¹⁴⁹ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), para. 2.10.

79. The terms “research” and “study” have been judicially interpreted in the Australian Federal Court decision in *De Garis v. Neville Jeffress Pidler Pty Ltd* as meaning “a diligent and systemic inquiry or investigation into a subject in order to discover facts or principles” and “the application of the mind to the acquisition of knowledge, by reading, investigation or reflection, the cultivation of a particular branch of learning, science or art, a particular course of effort to acquire knowledge and a thorough examination and analysis of a particular subject” respectively.¹⁵⁰ In 1980, the adjective “private” which had qualified the word “study” in “research or study” was omitted, pursuant to the recommendations of the Copyright Law Committee on Reprographic Reproduction (“the Franki Committee”), in order to make it clear that not only is the reproduction of copyrighted material for private study allowed, the reproduction of such materials to enable teachers and students to prepare material for classroom use is also allowed, and that it was difficult to maintain a distinction between private study and other educational purpose.¹⁵¹ “So long as the photocopying of material for educational use is qualified, for the purposes of section 40, by the requirement of fair dealing, we think that the removal of the limitation to private study will not prejudice owners of copyright.”¹⁵²

80. However, in *De Garis v. Neville Jeffress Pidler Pty Ltd*, the court held that section 40 did not extend to allowing a third party such as a publisher to reproduce for a fee a copy of the materials for use for research purposes by the recipients.¹⁵³ Nonetheless, the removal of the adjective “private” in sections 40 and 103C implies that research undertaken in a commercial or governmental organization for commercial or public purposes, while not the typical kind of “research” undertaken by those receiving instruction in educational institutions, would be considered activities that increase the knowledge in the organization or community and that there is no reason to differentiate between basic research and research directed at particular commercial objectives.¹⁵⁴

81. By way of amendments made in 1989, it was made explicit that the fair dealing defense applies to dealings with literary works (but not of lecture notes) made by “an enrolled external student of an educational institution” “for the purpose of, or associated with, an approved course of study or research”.¹⁵⁵ An “educational institution” is in turn defined to explicitly and exhaustively mean an enumerated class of institutions, which range from pre-schools or kindergartens to full-time primary and secondary schools, from universities, colleges and technical and further education institutions to institutions that conduct correspondence courses or on an external study basis, to nursing schools, medical training schools, teacher and educational training schools.¹⁵⁶ This means that externally enrolled students may only copy

¹⁵⁰ *De Garis v. Neville Jeffress Pidler Pty Ltd*, [1990] FCA 218, (1990) 18 IPR 292.

¹⁵¹ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), para. 2.64.

¹⁵² *Id.*

¹⁵³ *De Garis v. Neville Jeffress Pidler Pty Ltd*, [1990] FCA 218, (1990) 18 IPR 292 (holding that the purpose of the publisher was purely commercial and the relevant purpose required is that of the recipient of the materials, not the publisher).

¹⁵⁴ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.30 (citing the New Zealand decision of *Television New Zealand v Newsmonitor Services Ltd* (1993) 27 IPR 441 at 463 in support).

¹⁵⁵ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.32.

¹⁵⁶ Australian Copyright Act, s 10(1) (interpretation).

works or adaptations which the student locates and uses at their own initiative, such as in a local library, or the notes of other students, but not the lecture notes supplied by the lecturer or teacher.¹⁵⁷

82. Some background to section 40 is in order. Introduced by the Franki Committee in 1980 in an attempt to address concerns as to the “open-ended” nature of “fair dealing”, what constitutes a “fair dealing” by way of reproduction is to be determined, among other matters, by having regard for the following guidelines (which were largely influenced by and modeled on (the then proposed) section 107 of the U.S. Copyright Act 1976):¹⁵⁸

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

83. The same guidelines are also used in section 103C to determine what constitutes a “fair dealing” with an audio-visual item for purposes of research or study.¹⁵⁹

84. Though section 40 (and section 103C) are unlike the “omnibus approach” adopted in section 107 of the U.S. Copyright Act as regards “fair use” (sections 40 and 103C are confined only to “fair dealing for the purpose of research or study”), the use of open-ended guidelines is similar to section 107. While this has the advantage of flexibility, its inherent uncertainty stemming from a requirement for a judicial evaluation of the factors to determine if the dealing is “fair” drew concerns. To further address the problem about the “indefinite” nature of the test of “fair dealing”, operative rules that provide situations where the dealing is “presumptively” fair or unfair were also introduced by the Franki Committee in relation to copyright works (but not audio-visual items).¹⁶⁰ These are: where the reproduction for research or study is of a work contained in an article in a periodical publication,¹⁶¹ but not where another article in the same publication is also reproduced for the purpose of different research or a different course of study,¹⁶² and where for the purpose of research or study, a reasonable portion of a work or adaptation not contained in an article in a periodical publication is taken.¹⁶³ There are further rules as to what constitutes a “reasonable portion”

¹⁵⁷ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at §11.32.

¹⁵⁸ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), paras. 1.33, 2.06, 2.60, 2.64, 11.54, 11.66.

¹⁵⁹ Australian Copyright Act 1968, s 103C(2).

¹⁶⁰ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), para. 2.57ff.

¹⁶¹ Australian Copyright Act 1968, s 40(3).

¹⁶² Australian Copyright Act 1968, s 40(4).

¹⁶³ Australian Copyright Act 1968, s 40(5).

(in which the dealing is “deemed” to be fair) depending on whether the work is a published edition of a literary, dramatic or musical work or in electronic form.¹⁶⁴

Sections 51, 51A, 110A and 110B: Research or Study of Works, Films and Sound Recordings

85. Sections 51 and 110A enable the reproduction and communication of unpublished works and sound recordings and films in libraries and archives for purposes of research or study with a view to publication. Sections 51A and 110B enable the reproduction and communication of works and films and sound recordings in libraries for the purpose of research. Such uses are subject to conditions. For an elaboration of these conditions, please refer to the WIPO Study on Libraries and Archives.¹⁶⁵

Sections 41, 41A, 103A, 103AA: Other Fair Dealing Provisions – Criticism or Review, Parody or Satire

86. Section 41 enables a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of criticism or review of that work or another work, subject to the making of a sufficient acknowledgment of the work. This section is mirrored in section 103A in relation to audio-visual items. In *De Garis v. Neville Jeffress Pidler Pty Ltd*, the court interpreted “criticism” as including “the act or art of analyzing and judging the quality of a literary or artistic work, the act of passing judgment as to the merits of something, [and] a critical comment, article or essay, a critique” and “review” as including “a critical article or report, as in a periodical, on some literary work, commonly some work of recent appearance, a critique”, and took the view that the latter is the former is the critical application of the latter.¹⁶⁶ The requirement of “fairness” in the criticism or review requires the court to examine if there is an oblique or hidden motive which will disqualify reliance upon the exception.¹⁶⁷

87. Similarly, section 41A enables a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of parody or satire. This section is mirrored in section 103AA in relation to audio-visual items. There is no legal definition of what constitutes a “parody or satire”, and the Explanatory Memorandum to the Copyright Amendment Bill 2006 affirmed that a use of copyright material for parody and satire is likely to overlap or be closely associated with the other fair dealing provisions.¹⁶⁸

¹⁶⁴ Australian Copyright Act 1968, s 40(5) (10% of the number of pages in the edition or a single chapter if the work is divided into chapters, of a literary, dramatic or musical work – except a computer program, or an adaptation of such a work contained in a published edition of at least 10 pages, or 10% of the number of words in the work or adaptation or a single chapter if the work is divided into chapters, of a published literary or dramatic work in electronic form or an adaptation of the same). However, a person is not entitled to use the “reasonable portion” rule to make subsequent reproductions from the same work or adaptation.

¹⁶⁵ WIPO Study on Libraries and Archives, Appendix, at 88-90.

¹⁶⁶ *De Garis v. Neville Jeffress Pidler Pty Ltd*, [1990] FCA 218, (1990) 18 IPR 292.

¹⁶⁷ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*, (200 1) 108 FCR 235, 50 IPR 335 at 381 (Conti J).

¹⁶⁸ Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006, para. 43.

While the use of a work for parody or satire will involve some measure of scorn or ridicule, a learned commentator has opined that the requirement that the dealing be “fair” may restrict its use if it is extraneous and incidental to the subject of the parody or satire.¹⁶⁹

Sections 43C, 47J, 109A, 110AA: Format Shifting for Owner’s Private and Domestic Use

88. Sections 43C, 47J, 109A and 110AA arose from the original recommendations of the Joint Standing Committee on Treaties of the Australian Parliament that the fair dealing defence in the Australian Copyright Act should be replaced by an “open-ended defence” along the lines of the fair use defence under U.S. copyright law, to help “ensure [that] the balance of interests between users and owners is maintained”.¹⁷⁰ The recommendations were not accepted by the Australian government. Instead, the government introduced the aforesaid exceptions to give ordinary consumers the legal right to reproduce materials that they legitimately purchased into different formats for their private and domestic use.¹⁷¹ The expression “private and domestic use” has been defined to mean “private and domestic use on or off domestic premises”,¹⁷² which would encompass the individual use of works for study and instructional purposes, in homes and even in schools.

89. Section 43C enables the owner of a book, newspaper or periodical publication to make a copy of a work contained in such a publication in a different form for his private and domestic use in lieu of the publication,¹⁷³ but not to make another reproduction of the work from that copy.¹⁷⁴ However, this exception does not apply if there is a commercial dealing with that copy by the owner¹⁷⁵ or if the owner disposes of that copy to another person.¹⁷⁶ This exception encompasses the incidental making of a temporary reproduction of the work as a necessary part of the technical process of the making of the main copy, provided the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy.¹⁷⁷

90. Section 47J likewise enables the owner of a photograph which is not an infringing copy of a work to make one electronic reproduction of the original hardcopy photograph, or one hardcopy photograph of the original electronic photograph, for his private and domestic use in lieu of the original photograph. The exception does not apply if there is a commercial dealing by the owner of the copy of the photograph¹⁷⁸ or if he disposes of that copy.¹⁷⁹ Temporary

¹⁶⁹ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at §11.57.

¹⁷⁰ Commonwealth of Australia, Joint Standing Committee on Treaties, Report 61.

The Australia-United States Free Trade Agreement (June 2004) Recommendation 17.

¹⁷¹ Australian House of Representatives, statement by the Attorney-General, Philip Ruddock MP, 18 Oct. 2007.

¹⁷² Australian Copyright Act 1968, s 10(1).

¹⁷³ Australian Copyright Act 1968, s 43C(1).

¹⁷⁴ Australian Copyright Act 1968, s 43C(5).

¹⁷⁵ Australian Copyright Act 1968, s 43C(3).

¹⁷⁶ Australian Copyright Act 1968, s 43C(6).

¹⁷⁷ Australian Copyright Act 1968, s 43C(7).

¹⁷⁸ Australian Copyright Act 1968, s 47J(3).

¹⁷⁹ Australian Copyright Act 1968, s 47J(6).

reproductions of the photograph made as a necessary part of the technical process of making the copy are disregarded,¹⁸⁰ like section 43C.

91. Section 109A enables the owner of a licensed copy of a sound recording to make another copy for his private and domestic use with a playback device that he owns, provided that the “original” copy is not be made by an Internet download of a radio broadcast or similar program.¹⁸¹ Likewise the exception does not apply if there is a commercial dealing by the owner of the copy made or if he uses it for causing the sound recording to be heard in public or for broadcasting the sound recording.¹⁸²

92. Section 110AA enables the owner of a licensed analog videotape to make a copy in electronic form for his private and domestic use, provided he has not previously made another electronic copy substantially identical to the first-mentioned electronic copy.¹⁸³ No commercial dealings with the copy are allowed.¹⁸⁴ Nor does the exception apply if he disposes of the copy to another.¹⁸⁵ Temporary incidental reproductions made as part of the technical process are disregarded.¹⁸⁶

93. In all these cases, the loan of the copy by the owner-lender to a member of the lender’s family or household for his private and domestic use is allowed.¹⁸⁷

94. Pursuant to the Copyright Amendment Act 2006, a review of the operation of sections 47J and 110AA was carried out by the Attorney-General, to determine if they have achieved an appropriate balance the legitimate interests of the rights holders and users of copyright material. In its report of August 2008, the Attorney-General recommended the retention of these sections and that no changes be made to them.

Section 44: Chrestomathies for Use by Places of Education

95. Section 44 allows for the inclusion in a collection contained in a book, sound recording or film of short extracts from published literary, dramatic, musical or artistic works or their adaptations.¹⁸⁸ The collection must be intended for use by places of education, and be described or labeled as such.¹⁸⁹ The other conditions are that the work or adaptation must not be published for the purpose of being used by places of education,¹⁹⁰ that the collection consists principally of matter in which copyright does not subsist,¹⁹¹ that a sufficient acknowledgment of the work or adaptation be made,¹⁹² and that in addition to the extract

¹⁸⁰ Australian Copyright Act 1968, s 47J(7).

¹⁸¹ Australian Copyright Act 1968, s 109A(1)(c).

¹⁸² Australian Copyright Act 1968, s 109A(3)(e), (f).

¹⁸³ Australian Copyright Act 1968, s 110AA(1)(c).

¹⁸⁴ Australian Copyright Act 1968, s 110AA(3).

¹⁸⁵ Australian Copyright Act 1968, s 110AA(5).

¹⁸⁶ Australian Copyright Act 1968, s 110AA(6).

¹⁸⁷ Australian Copyright Act 1968, ss 43C(4), 47J(4), 109A(4), 110AA(4).

¹⁸⁸ Australian Copyright Act 1968, s 44(1).

¹⁸⁹ Australian Copyright Act 1968, s 44(1)(a).

¹⁹⁰ Australian Copyright Act 1968, s 44(1)(b).

¹⁹¹ Australian Copyright Act 1968, s 44(1)(c).

¹⁹² Australian Copyright Act 1968, s 44(1)(d).

concerned, there should not be “2 or more other extracts from, or from adaptations of, works by the author of the first- mentioned work are contained in that collection, or are contained in that collection taken together with every similar collection, if any, of works intended for use by places of education and published by the same publisher within the period of 5 years immediately preceding the publication of the first- mentioned collection” (“multiple extract condition”).¹⁹³

96. The Australian Copyright Law Review Committee in its *Simplification of the Copyright Act 1968* Report has noted that this section is seldom, if ever, used, because of the limited circumstances in which it can be relied upon and recommended its repeal.¹⁹⁴ Likewise, a learned commentator has also opined that section 44 is unlikely to be of much practical use because the condition requiring the collection to consist principally of non-copyright material and the multiple extract condition are likely to severely restrict its usage.¹⁹⁵

Sections 47B, 47D, 47E, 47F: Research and Study of Computer Programs and Computing Technology

97. This set of exceptions found in Division 4A of the Australian Copyright Act provide for exceptions to acts that would otherwise constitute infringements of copyright in computer programs. The Division also contains exceptions that pertain to the research and study of computer programs and computing technology. Section 47B(3) provides that the incidental and automatic reproduction of a computer program made as part of a technical process of running a licensed copy of the program for the purpose of studying the ideas behind the program and the way in which it functions is not an infringement of copyright in the program. Section 47D permits the reproduction or adaptation of a licensed copy of computer program for the purpose of making another program or article interoperable with the first program or any other program. It is also permissible under section 47E to reproduce or adapt a licensed copy of a computer program for the purpose of correcting an error in the original copy of the program, provided that an error-free program is not available within a reasonable time at an ordinary commercial price. Finally, section 47F permits the reproduction or adaptation of a licensed copy of a computer program for the purpose of good faith security testing or investigating or correcting security flaws or vulnerabilities in the program or the network of which the program is part.

¹⁹³ Australian Copyright Act 1968, s 44(2) (meaning that only one other extract from the same author’s published work or adaptation could be included in that collection, or included in any similar collection of works intended for use by places of education and published within five years of the first collection by the same publisher).

¹⁹⁴ Australian Copyright Law Review Committee, *SIMPLIFICATION OF THE COPYRIGHT ACT 1968* REPORT, paras. 9.21-22.

¹⁹⁵ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.90.

Sections 135ZG and 135ZMB: Reproduction of Insubstantial Portions of Works in Educational Institutions

98. Section 135ZG enables multiple reproductions of “insubstantial portions” of a literary or dramatic work in hardcopy edition for the purpose of a course of education provided by an educational institution, if the reproduction is carried out on the premises of the institution. The edition arguably includes a periodical publication of works.¹⁹⁶ An “insubstantial portion” is limited to not more than 2 pages of the edition unless there are more than 200 pages in the edition and the total number of pages reproduced does not exceed 1% of the total number of pages in the edition.¹⁹⁷ To discourage repetitive multiple reproductions that may encompass the whole work, the exception cannot be relied upon to make multiple copies of another part of that work within 14 days of the previous reproduction under the exception.¹⁹⁸

99. An educational institution making multiple reproductions of insubstantial portions of a work under section 135ZG would not be able to further communicate the reproductions, including making them available online. To do so, reference must be had to section 135ZMB. Section 135ZMB is the equivalent of section 135ZG for reproduction of insubstantial portions of electronic works in educational institutions. It is extended however to not just a reproduction but also to a communication of an “insubstantial part” of a published electronic literary or dramatic work on the premises of an educational institution for the purposes of a course of study provided by the institution.¹⁹⁹ An “insubstantial part” is defined as not more than 2 pages or not more than 1% of the total number of pages of the work in paged electronic form if there are more than 200 pages in the work, or, in the case of unpagged works, not more than 1% of the number of words in the work.²⁰⁰ To discourage copying of selective portions of works, for purposes of this exception, non-contiguous “parts” of a work cannot be aggregated into an “insubstantial part”.²⁰¹ Like section 135ZG, repetitive multiple reproductions and communications are discouraged by not allowing the exception to be used within 14 days of the previous reproduction or communication being made,²⁰² or where the previous communication is still available online.²⁰³

¹⁹⁶ See Australian Copyright Act, s 135ZGA. *But see* S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.100.

¹⁹⁷ Australian Copyright Act, s 135ZG(3). It follows that the exception does not apply to the making of a reproduction of the whole of a work. Australian Copyright Act, s 135ZG(2).

¹⁹⁸ Australian Copyright Act, s 135ZG(4).

¹⁹⁹ Australian Copyright Act, s 135ZMB(1).

²⁰⁰ Australian Copyright Act, s 135ZMB(1A). The indirect wording of section 135ZMB(1A) opens up the possibility, clearly not envisaged by the draftsman, that more than 2 pages of a work that is less than 200 pages is allowed, even if this exceeds 1% of the number of pages. *See* S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.101.

²⁰¹ Australian Copyright Act, s 135ZMB(5).

²⁰² Australian Copyright Act, s 135ZMB(3).

²⁰³ Australian Copyright Act, s 135ZMB(4).

Sections 200 and 200AAA: Other Uses in Educational Institutions

100. The conduct of educational instruction by educational institutions may involve the use of works for instructional purposes by instructors and students in ways not envisaged by any of the previously enumerated means or purposes. To this end, section 200(1)(a) offers an “open-ended” exception to enable the reproduction of a literary, dramatic, musical or artistic work, or an adaptation of a literary, dramatic or musical work, “otherwise than by the use of an appliance adapted for the production of multiple copies or an appliance capable of producing a copy or copies by a process of reprographic reproduction.” This indirectly-crafted, technology-specific provision thus includes within its scope any reproductions or adaptations as long as these are not made by multi-copy appliances or reprographic devices. The use of photocopying machines is clearly not permitted, but some uncertainty remains as to whether other devices such as projectors and cameras are allowed.²⁰⁴ In particular, if there is a “live webcast” of a lecture where the lecturer projects a copyrighted work, will the use of the webcast equipment, which creates multiple “copies” of the work on the computers of students tuned to that webcast, be allowed? In this regard, it should be noted that reliance on section 135ZMB will be of limited assistance, as it is confined to “insubstantial” parts of a work. In 1976, the Franki Committee had reviewed section 200(1)(a) and concluded that it was unsatisfactory for it provided insufficient reason to deny a teacher the right to use a modern photocopying machine to make copies for educational purposes.²⁰⁵ In its place, the Committee had recommended that it be superseded with a statutory licensing scheme.²⁰⁶ However, this suggestion was not taken up by the Australian government.

101. Section 200(2) contains a narrow exception that allows for the making of a record of a sound broadcast that was intended to be used for educational purposes, wherein the making of the record for use in the course of instruction does not infringe the copyright in the work or sound recording included in the broadcast. The conditions are that the record must be “made by, or on behalf of, the person or authority in charge of a place of education that is not conducted for profit”²⁰⁷ and that it “not [be] used except in the course of instruction at that place”.²⁰⁸ As a commentator has noted, this exception does not permit an educational institution to make video recordings, only sound recordings, and even then, does not encompass programmes for the general audience or even news reports which may have substantial educational value.²⁰⁹

102. This section is to be contrasted with section 200(2A), which permits the making of a record of a sound broadcast by or on behalf of an educational institution and used for the “educational purposes of an educational institution” or that of another educational institution.

²⁰⁴ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.105.

²⁰⁵ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), para. 6.05. For a more detailed discussion, please refer to that part of this Study on Parts VA and VB of the Australian Copyright Act.

²⁰⁶ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), para. 6.68.

²⁰⁷ Australian Copyright Act, s 200(2)(a).

²⁰⁸ Australian Copyright Act, s 200(2)(b).

²⁰⁹ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.106.

The quoted expression receives an extended definition in the Copyright Act to include not just the making or retention for use in connection with a particular course of instruction provided by the institution, but also for inclusion in the collection of a library of that institution.²¹⁰ In addition, the exception is broader than section 200(2) in that it encompasses general sound broadcasts (rather than a broadcast that was intended to be used for educational purposes), and may be made for use in connection with another educational institution.

103. However, Section 200AAA exempts proxy web caching by educational institutions of computer systems operated primarily to enable staff and students to gain online access for educational purposes to works and other subject-matter. This exception appears to mirror that for carriage service providers in section 116AD, the main difference being that section 200AAA provides a blanket defence for educational institutions (“copyright ... is not infringed”) whereas section 116AD operates to simply limit the remedies available against a carriage service provider.²¹¹

Section 200(1)(b): Reproduction or Adaptation for Examinations

104. No controversy arises in relation to section 200(1)(b), which permits the use of a literary, dramatic, musical or artistic work or an adaptation of the first three types of works as part of examination questions or in answer to such questions.

Section 200AB(3): Residual Exception for Educational Instruction based on Three-step Test

105. In 2006, the Australian government introduced via the Copyright Amendment Act 2006 an innovative residual exception for uses by libraries, educational institutions and persons with disabilities.²¹² Based on the three-step test in Article 13 of TRIPS,²¹³ it provides that copyright in a work or other subject-matter is not infringed by a use of the work or subject-matter if the circumstances of the use amount to a special case, the use does not conflict with a normal exploitation of the work or other subject-matter and the use does not unreasonably prejudice the legitimate interests of the copyright owner.²¹⁴ In relation to educational uses, the use must be made by or on behalf of a body administering an educational institution, made for the purpose of giving educational instruction and not made partly for the purpose of the body obtaining a commercial advantage or profit.²¹⁵

²¹⁰ Australian Copyright Act, s 10(1A).

²¹¹ See Australian Copyright Act, s 116AG(2), (4).

²¹² That it is a residual exception is affirmed in the Australian Copyright Act, s 200AB(6), which provides that it does not apply if the use is not or would not be an infringement of copyright if other conditions are met in some other exception in the Copyright Act. However, based on the Explanatory Memorandum to the Copyright Amendment Act 2006, there is a suggestion that section 200AB does not apply to validate an obligation to pay remuneration for use permitted under a statutory license. Professor Ricketson questions whether this interpretation is valid. See S. Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 11.109.

²¹³ Australian Copyright Act, s 200AB(7).

²¹⁴ Australian Copyright Act, s 200AB(1).

²¹⁵ Australian Copyright Act, s 200AB(3).

Section 248A: Other Exceptions as regards Performances

106. The exceptions examined above encompass exceptions to copyright in works and other subject-matter that are exercised by rightholders. A similar set of exceptions exists in the Australian Copyright Act as regards the rights that performers have in their performances. In the Australian Copyright Act, these are framed and enumerated as “exempt recordings” of performances in section 248A(1).²¹⁶ The exceptions distinguish between a “direct recording”, which is a sound recording or film of a performance made directly from the live performance, and an “indirect recording”, which is a sound recording or film of a performance made from a communication of the performance.²¹⁷ For purposes of this study regarding educational activities, the relevant exceptions include:

An indirect film of a performance, made solely for the purpose of the private and domestic use of the person who made it;²¹⁸

An indirect sound recording or film of a performance, made in domestic premises, solely for private and domestic use for time-shifting purposes;²¹⁹

An indirect sound recording of a performance, being a recording that is a fair dealing with the performance for the purpose of research or study;²²⁰

An indirect film of a performance, made solely for the purpose of use in scientific research;²²¹

An indirect film of a performance, made by or on behalf of the body administering an educational institution, solely for the educational purposes of that institution or another educational institution;²²²

A direct or indirect film of a performance made for the purpose of reporting of news or current affairs, or for the purpose of criticism or review;²²³

A direct or indirect sound recording of a performance, being a recording that is a fair dealing with the performance, for the purpose of criticism or review or for the purpose of reporting of news in print, by communication or in a film;²²⁴

107. To determine what is a “fair dealing” in relation to an exempt recording for the purpose of research or study, the same five factors spelt out in sections 40 and 103C regarding “fair dealing” are also applicable.²²⁵

Parts VA and VB: Remunerated Reproduction by Educational Institutions of Broadcasts and Works in Hardcopy and Electronic Form

108. In 1974, one of the terms of reference for the Franki Committee was to examine the extent of reproduction by means of reprography in educational institutions. Together with its

²¹⁶ Australian Copyright Act, s 248A(1) (“recording” means a sound recording or cinematograph film, other than an exempt recording).

²¹⁷ Australian Copyright Act, s 248A(1).

²¹⁸ Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (a)).

²¹⁹ Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (aaa)).

²²⁰ Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (aa)).

²²¹ Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (b)).

²²² Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (c)).

²²³ Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (f)).

²²⁴ Australian Copyright Act, s 248A(1) (definition of “exempt recording”, para. (fa)).

²²⁵ Australian Copyright Act, s 248A(1A) (definition of “fair dealing”, para. (g)).

recommendations that would allow for the reproduction of copyrighted material for private study by both individual teachers and students as part of “fair dealing”, the Committee also recommended the establishment of a new statutory license to cover the making of multiple copies of the whole or parts of a work in educational establishments for classroom use or for distribution to students.²²⁶ The Committee accepted that some limited multiple copying could be permissible as fair dealing “in appropriate circumstances”.²²⁷ However, the Committee felt that given the not insubstantial extent of multiple copying taking place at educational establishments, particularly at the tertiary level, the wide availability of reprographic machines, the increasing demand for their use and the greater emphasis on modern educational techniques which place more emphasis on the study of materials from a variety of sources,²²⁸ copyright law should accommodate this demand. However, the Committee felt that it was wrong to allow it to be carried out without remuneration to the copyright owner, “in any case where it represents a substantial use of his property or it could prejudice sales of his work, particularly if the work has been specifically written for use in schools”.²²⁹ In the absence of a comprehensive voluntary licensing scheme then existing, the Committee proposed in its place a statutory licensing scheme to entitle educational institutions to make multiple copies of a “reasonable portion” of a work without permission from the copyright owner if records are kept by the institutions, subject to a claim to payment that owners can make against the institutions.²³⁰

109. These recommendations were accepted and in 1980, a new section 53B was introduced into the Australian Copyright Act. Section 53B has since been replaced by provisions in Part VB (which deals with the copying and communication of works), and supplemented with provisions in Part VA (which deals with the copying and communication of broadcasts).

110. Part VB Division 2 enables an educational institution to make multiple reproductions of an article in a periodical publication,²³¹ a literary or dramatic work in a published anthology,²³² a literary, dramatic, musical or artistic work (other than in an article in a periodical)²³³ and its accompanying artistic work,²³⁴ where these works are in hardcopy or printed form, solely for the “educational purposes of the institution or another institution”. A work is used for the “educational purposes” if it is made or retained for use or used in connection with a particular course of instruction provided by the institution, or made or retained for inclusion in the collection of the institution’s library.²³⁵ There are also detailed rules as regards the extent of copying of periodicals (one article),²³⁶ anthologies (15 pages),²³⁷

²²⁶ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), paras. 6.02-6.04.

²²⁷ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), paras. 6.02, 6.66.

²²⁸ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), paras. 6.24.

²²⁹ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), paras. 6.26.

²³⁰ *COPYRIGHT LAW COMMITTEE ON REPROGRAPHIC REPRODUCTION* (1976), paras. 6.63.

²³¹ Australian Copyright Act, s 135ZJ.

²³² Australian Copyright Act, s 135ZK.

²³³ Australian Copyright Act, s 135ZL.

²³⁴ Australian Copyright Act, s 135ZM.

²³⁵ Australian Copyright Act, s 10(1A).

²³⁶ Australian Copyright Act, s. 135ZJ.

²³⁷ Australian Copyright Act, s.135ZK.

literary works (reasonable portion),²³⁸ and illustrations (embedded in articles, literary, dramatic or musical works).²³⁹ Division 2A mirrors the same provisions, to enable an educational institution to make reproductions and communication of an article,²⁴⁰ a literary or dramatic work in an anthology,²⁴¹ a literary, dramatic, musical or artistic work (other than an article)²⁴² and its accompanying illustrative artistic work,²⁴³ where these works are in electronic form. In both instances, the educational institution relying on the statutory licenses has to give a remuneration notice containing an undertaking to pay equitable remuneration to the collecting society.²⁴⁴ The remuneration notice specifies²⁴⁵ whether the amount of the equitable remuneration is to be assessed²⁴⁶ by way of a records system,²⁴⁷ a sampling system²⁴⁸ or an electronic use system.²⁴⁹ Upon receipt of the notice, the collecting society may request payment of an amount of equitable remuneration to the society.²⁵⁰ The amount of the remuneration is first left to be determined by agreement between the institution and the collecting society and, failing agreement, by the Copyright Tribunal.²⁵¹ In Australia, the collecting societies that represent the copyright owners for the purposes of the statutory licenses are Screenrights for sound recordings and the Copyright Agency Limited for all other works.

111. There are restrictions as to how much of the article or work can be reproduced pursuant to the statutory licenses. For instance, in relation to a literary, dramatic, musical or artistic work (other than in an article in a periodical), not more than a “reasonable portion” of the work can be reproduced. This is defined as not exceeding, in a published edition of a work of not less than 10 pages, 10% of the number of pages in that edition in the aggregate, or the whole or part of a single chapter where the work is divided into chapters.²⁵² As regards works in electronic form, a “reasonable portion” is defined as not exceeding 10% of the number of words in the work, or the whole or part of a single chapter where the number of words copied exceeds, in the aggregate, 10% of the number of words in the work which is

²³⁸ Australian Copyright Act, s. 135ZL (reproductions of the whole or more than a reasonable portion of a work are possible if reasonable investigations are conducted that show that reproductions of the work cannot be obtained within a reasonable time at an ordinary commercial price).

²³⁹ Australian Copyright Act, s. 135ZM.

²⁴⁰ Australian Copyright Act, s 135ZMC.

²⁴¹ Australian Copyright Act, s 135ZMDA.

²⁴² Australian Copyright Act, s 135ZMD.

²⁴³ Australian Copyright Act, s 135ZME.

²⁴⁴ Australian Copyright Act, s 135ZU(1).

²⁴⁵ Australian Copyright Act, s 135ZU(2).

²⁴⁶ Australian Copyright Act, s 135ZY(1) (collecting society given power to inspect all records to assess the amount of copying of broadcasts and communication of such copies).

²⁴⁷ Australian Copyright Act, ss 135ZV, 135ZX(1) (through the issuance of a records notice by the educational institution).

²⁴⁸ Australian Copyright Act, ss 135ZW, 135ZX(3) (though the issuance of a sampling notice by the educational institution).

²⁴⁹ Australian Copyright Act, s 135ZWA (through the issuance of an electronic use notice by the educational institution). Only an electronic use notice, and not a records notice or a sampling notice, may be issued in conjunction with the use of licensed copies in electronic form. *See* Australian Copyright Act, ss 135ZB, 135ZU(2A).

²⁵⁰ Australian Copyright Act, s 135ZZA.

²⁵¹ Australian Copyright Act, ss 135ZV(1), 135ZW(1) and 135ZWA(1).

²⁵² Australian Copyright Act, s 10(2).

divided into chapters.²⁵³ Likewise, not more than two or more articles in the same periodical may be reproduced or communicated unless the articles relate to the same subject-matter.²⁵⁴ There are also marking and record keeping obligations in relation to the use of such licensed printed copies of the work,²⁵⁵ notification obligations in relation to the use of copies of electronic forms of works,²⁵⁶ and where a copy of the electronic work is communicated, the educational institution must take all reasonable steps to ensure that the communication can only be received or accessed by persons entitled to receive or access it, such as teachers or students.²⁵⁷

112. Any possible infringement arising from the incidental copying of any published edition rights in hardcopy works copied under the statutory license is absolved under sections 135ZH and 112(a)(ii) and (b)(ii).²⁵⁸

113. Notwithstanding the statutory license arrangements in Part VB, the right of copyright owners to enter into voluntary license arrangements with educational institutions is preserved.²⁵⁹

114. The key provisions in Part VB are summarized in this table:

Provision	Work	Form of Copying	Purpose	Restrictions and Conditions	Basis of remuneration	Owner
Section 135ZJ (Division 2)	Article contained in a (hardcopy) periodical publication	Multiple reproductions of whole or part of article	Solely for educational purposes of institution or another educational institution	Not more than 2 or more articles in same periodical unless articles relate to same subject-matter	Remuneration notice – records, sampling or electronic use	Collecting society
Section 135ZK (Division 2)	Literary or dramatic work contained in a printed (hardcopy) published anthology	Multiple reproductions of whole or part of work	Solely for educational purposes of institution or another educational institution	Work not to comprise more than 15 pages in anthology ²⁶⁰	Remuneration notice – records, sampling or electronic use	Collecting society
Section	Literary,	Multiple	Solely for	Not applicable	Remuneration	Collecting

²⁵³ Australian Copyright Act, s 10(2A). It should also be noted that in the case where a work is in both hardcopy and electronic form, s 10(2) and (2A) can operate interchangeably to the extent that the reasonable portion requirement of either is applicable. *See* Australian Copyright Act, s 10(2B).

²⁵⁴ Australian Copyright Act, ss 135ZJ, 135ZMC.

²⁵⁵ Australian Copyright Act, s 135ZX(1), (3).

²⁵⁶ Australian Copyright Act, s 135ZXA(a).

²⁵⁷ Australian Copyright Act, s 135ZXA(b).

²⁵⁸ However, there are no exceptions in relation to the published edition copyright infringed from the reproduction and communication of electronic forms of works. *See* S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 12.120.

²⁵⁹ Australian Copyright Act, s 135ZZF.

²⁶⁰ Australian Copyright Act, s 135ZK.

Provision	Work	Form of Copying	Purpose	Restrictions and Conditions	Basis of remuneration	Owner
135ZL (Division 2)	dramatic, musical or artistic work (hardcopy) (other than an article in a periodical)	reproductions of whole or part of work	educational purposes of institution or another educational institution	to whole or more than a reasonable portion of a separately published work unless satisfied, after reasonable investigation, that reproductions (other than second-hand reproductions) cannot be obtained within a reasonable time at an ordinary commercial price ²⁶¹	notice – records, sampling or electronic use	society
Section 135ZM (Division 2)	Artistic work that explains or illustrates accompanying (hardcopy) article, literary, dramatic or musical work	Multiple reproductions	Solely for educational purposes of institution or another educational institution	Artistic work on reproduced page to explain or illustrate article or work, for which remuneration notice has been given ²⁶²	One-half of remuneration for remuneration notice for article or work ²⁶³	Collecting society
Section 135ZMC (Division 2A)	Article contained in a periodical (electronic form)	Multiple reproductions and communication of the whole or a part of article	Solely for educational purposes of institution or another educational institution	Not more than 2 or more articles in same periodical unless articles relate to same subject-matter ²⁶⁴	Remuneration notice – electronic use notice	Collecting society
Section 135ZMD (Division 2A)	Literary, dramatic, musical or artistic work	Multiple reproductions and communication	Solely for educational purposes of institution	Not applicable to whole or more than a reasonable	Remuneration notice – records, sampling or	Collecting society

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²⁶¹ Australian Copyright Act, s 135ZL(2).

²⁶² Australian Copyright Act, s 135ZL(2)(c).

²⁶³ Australian Copyright Act, s 135ZM(2)(e).

²⁶⁴ Australian Copyright Act, s 135ZMC(2).

Provision	Work	Form of Copying	Purpose	Restrictions and Conditions	Basis of remuneration	Owner
	(electronic form) (other than an article in a periodical)	of the whole or a part of work	or another educational institution	portion of a separately published literary or dramatic work, or the whole or more than 10% of a separately published musical work unless satisfied, after reasonable investigation, that the work is not available in electronic form within a reasonable time at an ordinary commercial price ²⁶⁵ Not to simultaneously make available online another part of work via section 135ZMD ²⁶⁶	electronic use	
Section 135ZMDA (Division 2A)	Literary or dramatic work contained in an ((paged) electronic form) published anthology	Multiple reproductions and communication of whole or part of work	Solely for educational purposes of institution or another educational institution	Work not to comprise more than 15 pages in anthology ²⁶⁷	Remuneration notice – records, sampling or electronic use	Collecting society
Section 135ZME (Division 2A)	Artistic work (in electronic form) that explains or illustrates accompanying (electronic	Multiple reproductions and communication	Solely for educational purposes of institution or another educational institution	Artistic work on reproduced page to explain or illustrate article or work, ²⁶⁸ for which	Agreed division of amount of remuneration as per remuneration notice for	Collecting society

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²⁶⁵ Australian Copyright Act, s 135ZMD(2).

²⁶⁶ Australian Copyright Act, s 135ZMD(3).

²⁶⁷ Australian Copyright Act, s 135ZMDA(c).

²⁶⁸ Australian Copyright Act, s 135ZMD(2)(c).

Provision	Work	Form of Copying	Purpose	Restrictions and Conditions	Basis of remuneration	Owner
	form) article, literary, dramatic or musical work			remuneration notice has been given ²⁶⁹	article or work ²⁷⁰	

Table 2: Summary of Provisions in Part VB, Australian Copyright Act

115. Part VA enables an educational institution²⁷¹ to make a copy of²⁷² and communicate a broadcast²⁷³ (as well as any work included within) solely²⁷⁴ for educational purposes,²⁷⁵ subject to the giving of a remuneration notice containing an undertaking to pay equitable remuneration to the collecting society. The remuneration notice specifies²⁷⁶ whether the amount of the equitable remuneration is to be assessed²⁷⁷ by way of a records system²⁷⁸, a sampling system²⁷⁹ or an agreed.²⁸⁰ Upon receipt of the notice, the collecting society may request payment of an amount of equitable remuneration to the society.²⁸¹ In Australia, the collecting society designated for this purpose is Screenrights.²⁸²

116. Part VA also allows for the making and communication of preview copies of broadcasts for the purpose of deciding whether it should be retained for educational purposes,²⁸³ provided that if it is retained, the remuneration arrangements above apply,²⁸⁴ otherwise it has

[Footnote continued from previous page]

²⁶⁹ Australian Copyright Act, s 135ZME(2)(a).

²⁷⁰ Australian Copyright Act, s 135ZME(3).

²⁷¹ Australian Copyright Act, s 135E(1)(b). The provision also enables an institution assisting persons with an intellectual disability to take advantage of the statutory license. *See* Australian Copyright Act, s 135E(1)(c).

²⁷² A “copy” of a broadcast probably includes a digital copy of the broadcast. *See* Australian Copyright Act, s 135B(a) (a reference to a copy of a broadcast is a reference to a record embodying a sound recording or cinematograph film of the broadcast) and s 10(1) (record includes an electronic file or other device in which *sounds* are embodied).

²⁷³ The broadcast includes an online copy made available by the broadcaster of a free-to-air broadcast. *See* Australian Copyright Act, s 135C(1). *See also* Australian Copyright Amendment Act 2006 (Cth), Explanatory Memorandum.

²⁷⁴ *See* Australian Copyright Act, s 135E(2) (providing that where a copy is used for a purpose other than that specified, is sold or supplied for a financial profit or given to an institution who has not issued a remuneration notice, the statutory license does not apply).

²⁷⁵ Australian Copyright Act, s 135E(1)(b) (“solely for the educational purposes of the institution or of another educational institution”), (c) (“solely for the purposes of use in the provision of assistance to persons with an intellectual disability by the institution or by another similar institution”).

²⁷⁶ Australian Copyright Act, s 135G(2).

²⁷⁷ Australian Copyright Act, s 135L(1) (collecting society given power to inspect all records to assess the amount of copying of broadcasts and communication of such copies).

²⁷⁸ Australian Copyright Act, s 135H.

²⁷⁹ Australian Copyright Act, s 135J.

²⁸⁰ Australian Copyright Act, s 135JA(1).

²⁸¹ Australian Copyright Act, s 135N.

²⁸² Commonwealth of Australia Gazette (13 June 1990).

²⁸³ Australian Copyright Act, s 135F(1), (7), (8). This provision also enables institutions that assist persons with an intellectual disability to make and communicate preview copies.

²⁸⁴ Australian Copyright Act, s 135F(5).

to be destroyed after the 14-day preview period.²⁸⁵ Part VA goes on to prescribe the marking and record keeping requirements required for each copy of a broadcast and each communication of such a copy made.²⁸⁶ Notwithstanding the statutory license arrangements in Part VA, the rights of copyright owners and performers to enter into voluntary license arrangements with these institutions are preserved.²⁸⁷

117. The key operative provisions in Part VA are summarized in this table:

Provision	Work	Institution	Purpose	Basis of remuneration	Owner
Section 135E(1)(b)	Broadcast, or any work, sound recording or cinematograph film included in a broadcast	Educational institution	Solely for educational purposes of institution or another educational institution	Remuneration notice – records, sampling or agreed	Collecting society of rightholders
Section 135E(1A)(b)	Broadcast, or any work, sound recording or cinematograph film included in a broadcast	Educational institution	Solely for educational purposes of institution or another educational institution	Remuneration notice – records, sampling or agreed	Collecting society for performers
Section 135E(1)(c)	Broadcast, or any work, sound recording or cinematograph film included in a broadcast	Institution assisting persons with an intellectual disability	Solely for purposes of use in provision of assistance to persons with intellectual disability by the institution or another similar institution	Remuneration notice – records, sampling or agreed	Collecting society of rightholders
Section 135E(1A)(c)	Broadcast, or any work, sound recording or cinematograph film included in a broadcast	Institution assisting persons with an intellectual disability	Solely for purposes of use in provision of assistance to persons with intellectual disability by the institution or another similar institution	Remuneration notice – records, sampling or agreed	Collecting society for performers

Table 3: Summary of Provisions in Part VA, Australian Copyright Act

²⁸⁵ Australian Copyright Act, s 135F(3).

²⁸⁶ Australian Copyright Act, s 135K (providing that if remuneration is by way of a records system, records have to be kept of each copy and each communication of such a copy of the broadcast, but more simplified records are kept where a sampling system is used). *See also* the Australian Copyright Regulations 1969 (Cth), regs. 23A to 23HB.

²⁸⁷ Australian Copyright Act, s 135Z.

Bangladesh

118. Bangladesh is a member of the Berne Convention since 1999 and a WTO member since 1995. The relevant copyright legislation in Bangladesh is the Copyright Act 2005 (Act No. 14 of 2005) of May 18, 2005, which amended the Copyright Act 2000 (Act No. 28 of 2000). Copyright protection in Bangladesh has its roots in the U.K. Imperial Copyright Act of 1911, which was extended to Bangladesh (then part of British India) in 1914.²⁸⁸ However, as no authorized translation of the Bangladesh Copyright Act was available to this author at the time this study was conducted, the author is unable to conduct a detailed examination of the Bangladesh Copyright Act in this study. For purposes of this study, the Bangladesh Copyright Act would be relevant because Bangladesh has filed her Notifications to the WIPO Director-General regarding her application of the exceptions relating to translations and reproductions for developing countries as set out in the Appendix to the Berne Convention (Paris Act).

Bhutan

119. The Copyright Act of the Kingdom of Bhutan 2001 (“Bhutan Copyright Act”) came into force on 17 July 2001. Pursuant to its enactment, Bhutan joined the Berne Convention in 2004. Because Bhutanese are still new to the law of copyright, the Intellectual Property Division of Bhutan has conducted several awareness workshops for the general public and law enforcement agencies, although local Bhutan artistes demand that more be done to ensure that local creations of Bhutanese films and music albums are protected.²⁸⁹ This is indeed the objective behind the enactment of the Copyright Act of the Kingdom of Bhutan 2001, whose preamble recognized that the progressive enhancement of Bhutan’s unique culture and further enrichment of her national cultural heritage could only be sustained in an environment conducive to inspiring expressions of creativity by authors in the domain of literature and the arts.

Section 10: Private Reproduction for Personal Purposes

120. Section 10 of the Bhutan Copyright Act provides that the “private reproduction” of a single copy of a published work made by a “physical person” exclusively for his own personal purposes shall be permitted, without the authorization of the author or owner of copyright in the work. The reference to a “physical person” is also found in the definitions of an “author” (“the physical person who has created the work”), a “collective work” and an “owner of copyright”. The term is clearly intended to distinguish a “physical person” from a “legal entity” as an artificial or legal person,²⁹⁰ and implies that a legal entity such as a

²⁸⁸ Mohiuddin Ahmed, *New Bangladesh Copyright Law and Scenario – Pertaining to Books and Publication*, NATIONAL SEMINAR AND WORKSHOP ON COPYRIGHT AWARENESS AND PRODUCTION AND UTILISATION OF "ASIAN COPYRIGHT HANDBOOK" 45 (2008)..

²⁸⁹ Gyalsten K Dorji and Samten Yeshi, Bhutan artists demand stricter copyright laws (OneWorld South Asia, 20 Apr. 2009), at: <http://southasia.oneworld.net/todayshadlines/bhutan-artists-demand-stricter-copyright-laws> (accessed 9 June 2009).

²⁹⁰ See Bhutan Copyright Act, s. 4(ix) (definition of “owner of copyright”), (xv) (definition of “producer”), s. 9(3) (moral rights and the physical person to whom or legal entity to which the

corporation or society is not able to make a single copy “private reproduction” exclusively for its own “personal purposes” such as research and development.

121. Interestingly, the “private reproduction” exception is further subject to restrictions.²⁹¹ Section 10(2)(b) provides that the exception does not extend to, *inter alia*, circumstances “where the reproduction is reprographic reproduction, *or* an entire book, or a substantial part thereof, or of a musical work in graphic form”. The other exclusions in section 10(2) include a data base and a computer program (except as provided in section 15). The exceptions here merit closer examination. The reference to reprographic reproduction means that a person is disentitled from using it to make a private reproduction of even an insubstantial part of a published work. Likewise, a student would not be able to make a hand-written copy of notes which are drawn from substantial portions of a textbook, exclusively for his own personal purposes. This would seem to greatly limit the scope of the private reproduction exception. It could be that section 10(2)(b) should read “where the reproduction is reprographic reproduction, *of* an entire book, or a substantial part thereof, or of a musical work in graphic form”.²⁹² But this issue cannot be resolved without further reference to experts in Bhutan copyright law.

122. It is also noteworthy that section 10(2)(e) provides that any private reproduction shall not extend to the reproduction of any work “in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author of, or other owner of the copyright in, the work.” This clearly imports elements of the three-step test to delimit the scope of private reproduction, though it would add a considerable measure of uncertainty as to the scope of any private reproduction exclusively for personal purposes.

Section 11: Quotations

123. The reproduction of a short part of a published work “in the form of quotation, in another work” is permitted under section 11 “provided that such a reproduction is compatible with fair practice and its extent does not exceed the extent justified by the purpose”. There is a mandatory attribution requirement associated with the use of quotations (“indication of its source and the name of the author”).

Section 12: Reproduction for Teaching

124. Section 12 is the main provision in the Bhutan Copyright Act that provides exceptions for the benefit of instruction. Section 12(1)(a) provides that the reproduction of a short part of a published work, by way of illustration, in writings, sound or visual recordings for teaching, is allowed provided such a reproduction is compatible with fair practice and its extent does

[Footnote continued from previous page]

rights have devolved). Cf. Bhutan Copyright Act, s 4(x) (definition of “performers”, which does not use the term “physical person”).

²⁹¹ Bhutan Copyright Act, s. 10(2).

²⁹² See e.g. Cambodian Copyright Act, Art. 24(b) (“In the form of reprography of the whole or a substantial part of a book, and of a musical work in the form of musical notation”).

not exceed that justified by the purpose. There is an attribution requirement with such reproductions.²⁹³

125. Section 12(1)(b) provides that the reprographic reproduction of a published article, short work or short extract of a writing (with or without illustrations), for “face-to-face teaching in educational institutions whose activities do not serve direct or indirect commercial gain”,²⁹⁴ is allowed, provided that “the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions”²⁹⁵ and there is no collective license available for such reproductions.²⁹⁶ There is also an attribution requirement with such reproductions.²⁹⁷

Section 27: Limitations on Protection of Entrepreneurial and Performers Rights

126. Section 27 mirrors the exceptions as regards personal purposes (section 10),²⁹⁸ face-to-face teaching (section 12)²⁹⁹ and exceptions as regards copyright works generally,³⁰⁰ and applies them to create exceptions to entrepreneurial and performers’ rights.

127. It is interesting to note that section 27(c) also permits the use of entrepreneurial works and performances “for scientific research”. This apparently mirrors the formulation in Article 15(1)(d) of the Rome Convention, and should be contrasted with section 13 of the Bhutan Copyright Act, which enables a library or archive to assist a person in the conduct of his “private research”.

Brunei Darussalam

128. The copyright law of Brunei takes the form of an Emergency (Copyright) Order 1999 (“Brunei Copyright Order”) first promulgated by the Sultan and Yang Di-Pertuan of Brunei on 26 February 2000. The order came into force on 1 May 2000. Brunei is a WTO member since 1 January 1995 and is bound by its obligations under TRIPS. It became a Berne Union member on 30 August 2006. The government body in charge of copyright is the Copyright Office, which is under the supervision of the Attorney General’s Chambers.

129. The Brunei Copyright Order is relatively modern, as it was drafted pursuant to Brunei’s WTO obligations. In this regard, it also contains a number of exceptions to provide for educational usage of works and to support various educational activities.

²⁹³ Bhutan Copyright Act, s. 12(2).

²⁹⁴ Bhutan Copyright Act, s. 12(1)(b).

²⁹⁵ Bhutan Copyright Act, s. 12(1)(b)(i).

²⁹⁶ Bhutan Copyright Act, s. 12(1)(b)(ii).

²⁹⁷ Bhutan Copyright Act, s. 12(2).

²⁹⁸ Bhutan Copyright Act, s. 27(a).

²⁹⁹ Bhutan Copyright Act, s. 27(c).

³⁰⁰ Bhutan Copyright Act, s. 27(d).

Section 33: Fair Dealing for Research and Study

130. Section 33 provides that fair dealing with a literary, dramatic, musical or artistic work for the purpose of research or private study does not infringe any copyright in the work, including the published edition copyright. It further provides that if the person doing the copying is not the researcher or student and he “knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose”, the copying is not fair dealing.³⁰¹

Section 34: Criticism and Review

131. Section 34(1) provides that fair dealing with a work for the purpose of criticism or review of that or another work or of a performance of a work does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgment.

Section 36: Copying in the Course of Education or Preparation for Instruction

132. Section 36(1), which provides that copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of, or preparation for, instruction, if the copying is done by the instructor (person giving the instruction) or student (person receiving the instruction) and is not by means of a reprographic process. By excluding reproductions by reprographic processes from its ambit, section 36 enables the operation of statutory licenses in Chapter VII of the Brunei Copyright Order. Conversely, section 36(1) potentially enables other forms of multiple reproductions not by means of reprographic reproduction, such as electronic reproductions and distribution through emails or file sharing systems, as long as these are done in the course of or preparation for instruction.

133. Section 36(2) extends its application to the making of films or film sound tracks from sound recordings, films, broadcasts or cable programmes, in the course of or preparation for instruction in film making.

134. Section 36(3) exempts anything done for the purpose of an examination by way of setting, communication or answering the questions. However, this exception does not extend to the making of a reprographic copy of a musical work for performances for music examinations.³⁰²

135. Any subsequent commercial dealings with such copies made in the course of education or preparation for instruction will be treated as infringing copies for purposes of that dealing.³⁰³

³⁰¹ Brunei Copyright Order, s. 33(3)(b).

³⁰² Brunei Copyright Order, s. 36(4). *See also* Brunei Copyright Order, Second Schedule, para. 4.

³⁰³ Brunei Copyright Order, s. 36(5).

136. It should also be noted that section 36 does not limit its application to a course of instruction conducted by an “educational establishment”, which is defined in the Brunei Copyright Order as referring to any school or establishment as prescribed by the Minister responsible for education matters or even teachers employed to give instruction to pupils unable to attend an educational establishment.³⁰⁴ This potentially enables its application to modes of instruction not necessarily associated with the schooling system, such as professional or technical instruction and the conduct of language, upgrading or self-enhancement courses.

Sections 37 and 64: Educational and Scientific Chrestomathies and Abstracts

137. Section 37 permits the creation of anthologies for use in an educational establishment, by way of including short passages from published literary or dramatic works in a collection, as long as the collection “consists mainly of material in which no copyright subsists”, the work itself is not intended for educational usage and there is a sufficient acknowledgment accompanying each inclusion.³⁰⁵ However, not more than two excerpts from copyright works by the same author in collections published by the same publisher over any period of five years may be included in the creation of the anthology.³⁰⁶

138. Section 64 applies the same concept and allows for abstracts of articles on scientific or technical subjects in periodicals to be copied or issued to the public, to the extent that there is no certified licensing scheme available for this purpose. This section is frequently relied upon to create anthologies or compilations from these abstracts to facilitate research and study.

Section 38: Performances in the Course of Educational Activities

139. Section 38 exempts performances of a literary, dramatic or musical work by teachers or students in the course of activities of the educational establishment, or at the establishment by any person for the purpose of instruction, before an audience of teachers, students and “other persons directly connected with its activities”.³⁰⁷ This includes exempting the performances as public performances,³⁰⁸ or as public playing or showing of the work.³⁰⁹

Section 39: Educational Recordings of Broadcasts or Cable Programmes

140. Section 39 exempts from infringement a recording of a broadcast or cable programme or such a copy made by an educational institution for its educational purposes, provided there

³⁰⁴ Brunei Copyright Order, s. 177(1).

³⁰⁵ Brunei Copyright Order, s. 37(1).

³⁰⁶ Brunei Copyright Order, s. 37(2). References to “same author” here include works by all the joint authors and collaborators. Brunei Copyright Order, s. 37(3).

³⁰⁷ This does not include the parents of the students per se. However, if the parent were to be involved in the performance or serve in some capacity on the educational establishment, he would arguably be “directly connected with its activities”. Brunei Copyright Order, s. 38(3).

³⁰⁸ Brunei Copyright Order, s. 38(1).

³⁰⁹ Brunei Copyright Order, s. 38(2). *See also* Brunei Copyright Order, Second Schedule, para. 5.

is not in existence a licensing scheme certified for this purpose.³¹⁰ No subsequent commercial dealing with such a recording is allowed.³¹¹

Section 40: Insubstantial Reprographic Copying

141. Section 40 permits an educational establishment to make not more than 1% of a published literary, dramatic or musical work by way of reprographic copies for the purpose of instruction, as long as licenses are not available to authorize such copying, which the person making the copies knew or ought to have known.³¹² The 1% limit restriction per educational establishment is lifted after each quarter of the year (every three months).³¹³ No subsequent commercial dealing with such copies is allowed.³¹⁴

Statutory licensing scheme in chapter vii for reprographic copying by educational establishments

142. The Brunei Copyright Order devotes an entire Chapter to a mechanism wherein the Brunei Copyright Tribunal may validate or vary³¹⁵ a “licensing scheme”, defined as a scheme in which the license operator is prepared to grant licenses to a class of cases on the indicated terms,³¹⁶ or individual licenses, referred in Chapter VII of the Brunei Copyright Order as “the grant of licenses by a licensing body otherwise than in pursuance of a licensing scheme” or simply “license”.³¹⁷ The mechanism generally does not establish a statutory license scheme. Instead, it facilitates the establishment of voluntary license schemes or voluntary licenses within a legal framework where interested parties, including the license operators,³¹⁸ existing³¹⁹ and prospective licensees³²⁰ or their representatives³²¹ may refer matters to the Copyright Tribunal for its consideration such as whether the scheme or license would apply to them,³²² whether the terms of a license are unreasonable³²³, whether the license which is due to expire should be extended³²⁴ or generally any disputes that may arise.³²⁵

143. The Copyright Tribunal in this regard plays a facilitative role, such as ensuring that there is no unreasonable discrimination between licensees to the scheme or license,³²⁶ take

³¹⁰ Brunei Copyright Order, s. 39(2).

³¹¹ Brunei Copyright Order, s. 39(3). *See also* Brunei Copyright Order, Second Schedule, para. 6.

³¹² Brunei Copyright Order, s. 40(3).

³¹³ Brunei Copyright Order, s. 40(2).

³¹⁴ Brunei Copyright Order, s. 40(5).

³¹⁵ Brunei Copyright Order, ss. 122(3), 129(3).

³¹⁶ Brunei Copyright Order, s. 120(1).

³¹⁷ Brunei Copyright Order, s. 128.

³¹⁸ Brunei Copyright Order, ss. 124(1)(a),

³¹⁹ Brunei Copyright Order, s. 130(1).

³²⁰ Brunei Copyright Order, ss. 123(1)(a), 124(1)(b), 125(1), 129(1).

³²¹ Brunei Copyright Order, ss. 123(1)(b), 124(1)(c).

³²² Brunei Copyright Order, ss. 122(1), 125(1), 125(2)(a).

³²³ Brunei Copyright Order, s. 125(2)(b).

³²⁴ Brunei Copyright Order, s. 130(1).

³²⁵ Brunei Copyright Order, ss. 123(1), 124(1).

³²⁶ Brunei Copyright Order, s. 133.

into account the reasonable payments to be made by the copyright owner in consequence of granting the license,³²⁷ and generally take into account all relevant matters.³²⁸ Where the reference or application before the Copyright Tribunal is as regards a licensing scheme or license that authorizes reprographic reproductions of published literary, dramatic, musical or artistic works or the typographic arrangement of published editions by educational establishments, Chapter VII provides that the Tribunal will have regard to the extent to which the published editions of the works are otherwise available, the proportion of the work to be copied and the nature of the use to which the copies are likely to be put.³²⁹ Where the reference or application is as regards the recording by educational establishments of broadcasts or cable programmes which include copyright works or the making of copies of such recordings for educational purposes, in considering the charges to be paid for a license, the Tribunal is directed to have regard for the extent to which the copyright owners of works included in the broadcast or cable programme have already received payment.³³⁰

144. Chapter VII further provides that if there is an existing licensing scheme or license that authorizes reprographic reproductions of published literary, dramatic, musical or artistic works or the typographic arrangement of published editions by educational establishments, the Brunei Attorney-General may by order extend the scheme or license to works of a similar description that have been unreasonably excluded from the scheme or license, provided that doing so “would not conflict with the normal exploitation of the works or unreasonably prejudice the legitimate interests of the copyright owners”.³³¹ Such orders are subject to the Attorney-General first giving an opportunity for representations to be made by copyright owners, the licensing body and persons or representatives of educational establishments,³³² requests by the copyright owner to vary or discharge the order,³³³ and appeals by the copyright owner, license applicant or persons or representatives of educational establishments to the Copyright Tribunal.³³⁴

145. In the alternative, the Attorney-General may appoint an inquiry to determine if a new provision or a new licensing scheme or general license to authorize the reprographic reproductions of literary, dramatic, musical or artistic works or typographic arrangements of published editions by educational establishments should be required.³³⁵ At the inquiry, where representations may be made by copyright owners and educational establishments,³³⁶ the recommendation for a new provision or licensing scheme or license would only be made if the person holding the inquiry is satisfied that it would be advantageous to the educational establishments to make reprographic copies of the works in question, and that the making of those works subject to a licensing scheme or general license would not conflict with the normal exploitation of the works or unreasonably prejudice the legitimate interests of the

³²⁷ Brunei Copyright Order, s. 137 (in conjunction with payments for performances arising from licenses granted for sound recordings, films, broadcasts and cable programmes).

³²⁸ Brunei Copyright Order, s. 139.

³²⁹ Brunei Copyright Order, s. 134.

³³⁰ Brunei Copyright Order, s. 135.

³³¹ Brunei Copyright Order, s. 148(2).

³³² Brunei Copyright Order, s. 148(3).

³³³ Brunei Copyright Order, s. 149.

³³⁴ Brunei Copyright Order, s. 150.

³³⁵ Brunei Copyright Order, s. 151.

³³⁶ Brunei Copyright Order, s. 151(3).

copyright owners.³³⁷ Pursuant to the recommendations of the inquiry, the licensing bodies are to act to implement the recommendations. If not, the Attorney-General may by order provide for it if no such licensing scheme or license has been made pursuant to the recommendation by the inquiry.³³⁸ In this regard, the order by the Attorney-General operates in a way that is similar to a statutory license.

146. Where a licensing scheme or license has been established to permit educational institutions to conduct the reprographic copying of published literary, dramatic, musical or artistic works or the typographic arrangements, Chapter VII further implies into every scheme and license an undertaking by the scheme operator or licensor to indemnify the licensee against any liability incurred by reason of any making or authorizing the making of reprographic copies of a work in circumstances within the apparent scope of the license.³³⁹ Setting out an implied statutory indemnity actually reinforces the advantages of the licensing scheme for educational institutions and encourages them to sign up for the same.

Cambodia

147. To protect the cultural value of Cambodia,³⁴⁰ to develop its national economy and to integrate its economy into the world economy, Cambodia enacted the Law on Copyright and Related Rights (“Cambodian Copyright Act”) and promulgated it into law on 5 March 2003. Oversight for Cambodian copyright law rests with the General Director of Administration and Finance, Ministry of Culture and Fine Arts. Cambodia has since joined the WTO on 13 October 2004 and is accordingly bound by its obligations under TRIPS.

148. The Cambodian Copyright Act gives legal recognition for all types of literary, dramatic, musical or artistic works, including “all kinds of reading books or other literary, artistic, scientific, and educational documents”,³⁴¹ audio-visual works, computer programs and even products of collage work in handicraft, hand-made textile products or other clothing fashions.³⁴² It also recognizes the legal protection to be given to the reproduction of copyright works “in any manner or form, including any permanent or temporary storage of the work or phonogram in electronic form”.³⁴³ However, the Cambodian Copyright Act also recognizes various exceptions to the right of reproduction, based on the three-step test stipulated in Article 9(2) of the Berne Convention and Article 13 of TRIPS.³⁴⁴

149. An examination of these exceptions in the Cambodian Copyright Act for the benefit of educational activities follows.

³³⁷ Brunei Copyright Order, s. 151(4).

³³⁸ Brunei Copyright Order, s. 152.

³³⁹ Brunei Copyright Order, s. 148.

³⁴⁰ Cambodian Copyright Act, Art. 1.

³⁴¹ Cambodian Copyright Act, Art. 7(a).

³⁴² Cambodian Copyright Act, Art. 7.

³⁴³ Cambodian Copyright Act, Art. 2(m).

³⁴⁴ Sim Sarak, General Director of Administration and Finance, Ministry of Culture and Fine Arts, “Topic 3: Copyright Law in Cambodia-Rights of Reproduction” in NATIONAL TRAINING SEMINAR ON COPYRIGHT AWARENESS (2008), at http://www.accu.or.jp/appreb/10copyr/pdf_ws0810/c2_03.pdf.

Articles 23 and 24: Personal Use

150. Article 23 provides that any natural person may import a copy of a work for his personal use without the consent of the author or rightholder. There is no indication in the Article whether this copy should be a licensed or authorized copy or otherwise.

151. Article 24 permits the private reproduction of a single copy of a published work by a natural person exclusively for his own personal purposes without the authorization of the author or rightholder. The exception does not apply to works of architecture,³⁴⁵ reprography of the whole or a substantial part of a book or of a musical work in the form of musical notation,³⁴⁶ the whole or a substantial part of a database in digital form,³⁴⁷ a computer program (other than a backup copy)³⁴⁸ or “[o]f any work, in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or the right-holder”.³⁴⁹

Article 25: Conservation, Research and Education

152. Article 25 provides that the author cannot prohibit the making of preservation copies of a work “for the purpose of conservation or research”.³⁵⁰ It would seem that this exception as worded is limited to the conservation and research activities of the library, rather than to permit a user to make copies for conversation or research purposes, because of its emphasis on library preservation.

153. Article 25 provides that the “use of work for the purposes of education, which is not for financial gain” cannot be prohibited by the author.³⁵¹ On its face, this seems to envisage any educational usage, and to the extent that educational instruction is provided nominally for payment, it should not count as “financial gain”.

154. However, the Article 25 exceptions are stated as activities which “the author cannot prohibit”, whereas Articles 23 and 24 refer to the “consent of the author or the rightholder”. Without reference to an expert on Cambodian copyright law, it is difficult to ascertain if this difference in wording matters. It could be contended that it does not as the rightholder’s rights accrue from the economic rights of the author. Similar exceptions as regards the limitation of entrepreneurial rights refer to acts which are permitted “without the authorization of the rightholder”.³⁵²

³⁴⁵ Cambodian Copyright Act, Art. 24(a).

³⁴⁶ Cambodian Copyright Act, Art. 24(b).

³⁴⁷ Cambodian Copyright Act, Art. 24(c).

³⁴⁸ Cambodian Copyright Act, Art. 24(d).

³⁴⁹ Cambodian Copyright Act, Art. 24(e).

³⁵⁰ Cambodian Copyright Act, Art. 25(b).

³⁵¹ Cambodian Copyright Act, Art. 25(c).

³⁵² See Cambodian Copyright Act, Art. 50.

Articles 25, 28 and 50: Analyses, Quotations, Caricatures, Informatory Purposes, Citations

155. Article 25 further provides for the making of analyses and short quotations (justified by the critical, polemical, pedagogical, scientific or informative nature of that work), broadcasting of press commentaries, dissemination of public speeches through press releases or TV broadcasts, adaptation of comics, styles or caricatures, without the prohibition of the author, subject to the attribution requirement of a clear indication of the author's name and the source of the work.

156. Article 28 further provides for the citation of a legitimately published work in another work, subject again to the attribution requirement.

157. Article 50 mirrors these exceptions in relation to the related rights of performers, phonogram and video producers and broadcasting organizations, in Article 50(e) ("All other uses constituting exceptions concerning works protected under copyright by the virtue of this law."). In addition, it also provides for exceptions in relation to the related rights for news reporting (provided that only short fragments from performances, phonograms and broadcasts are used),³⁵³ reproductions for scientific research³⁵⁴ and quotations in the form of short citations extracted from performances, phonograms and broadcasts that conform to reasonable practices and are justified by the "proper information objective".³⁵⁵

Articles 29, 50(d): Educational Purposes

158. Article 29(a) provides that it is permissible to make a free use ("without payment of any remuneration") of a legally published work "for the purpose of illustration in publication such as book or newspaper, or by broadcasting, or by audio or visual screening[,] [sic] which are intended for educational purposes", subject to the attribution requirement. It would appear that this Article is based on Article 10(2) of the Berne Convention and should be interpreted as enabling the free use of a work for purposes of illustrations in publications, broadcasts and screenings for educational purposes.

159. Article 29(b) provides that it is permissible to make a free use ("without the author's authorization and without payment of any remuneration") by reprographic reproductions of "any separated articles, articles of the newspaper or magazine, or short extracts of any legally published works" for "the sake of teaching or for examinations held by any educational establishments of which the activities do not lead directly or indirectly to commercial gain and must be done with appropriate reason according to this specific objective". The attribution requirement must also be satisfied.

160. Article 50(d) further provides, in relation to related rights, that it is permissible to make reproductions "for the framework of educational purpose, except for the performance or phonogram which has been produced for the educational purposes". The limitation to this exception ensures that performances and phonograms which are specifically produced for educational purposes may not be so utilized as part of free use.

³⁵³ Cambodian Copyright Act, Art. 50(a).

³⁵⁴ Cambodian Copyright Act, Art. 50(b).

³⁵⁵ Cambodian Copyright Act, Art. 50(d).

China

161. Some historians have argued that with the invention of printing in China automatically came the need for copyright protection with the exclusive rights of printing, and that China was in fact the first country in the world to develop a consciousness about copyright.³⁵⁶ However, the first domestic law that was passed to recognize copyright protection came only in the Qing Dynasty, the Copyright Act of the Great Qing Dynasty in 1910 (*Da Qing Zhuzuoquan lii*). After the proclamation of the People's Republic of China in 1949, some steps were taken by the newly established General Publication Office to enact the Decision on the Improvement and Development of Publication Activities in 1951. However these nascent steps were extinguished with the onset of the Cultural Revolution.³⁵⁷

162. The Copyright Law of the People's Republic of China ("Copyright Law of China") came into force on 1 June 1991. Since its admission to the WTO in December 2001, China has further acceded to various international copyright conventions (Berne Convention in October 1992, WCT and WPPT in June 2007). It has also revised and included within the Penal Code of the People's Republic of China offences that protect against the infringement of intellectual property rights, and enacted numerous other administrative regulations and interpretations, further signaling China's commitment and determination to protect copyright works in this regard.

163. Legal developments in this area picked up only after the start of the new reform policy introduced in 1978 under the leadership of the late Deng Xiaoping. That same year, the National Publication Office presented a first draft of the Copyright Act of China.³⁵⁸ The drafting of a comprehensive Copyright Act would last until 1990,³⁵⁹ when the first version of the Copyright Law of China was enacted.

164. The version of the Copyright Law of China referred to in this study is the 2001 version, revised in accordance with the Decision on the Amendment of the Copyright Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001. The revisions to the 1990 Copyright Law of China can be traced to the enhanced intellectual property obligations brought about by China's WTO accession.³⁶⁰

³⁵⁶ Zheng Chengsi, "Printing and Publishing in China and Foreign Countries and the Evolution of the Concept of Copyright" (I, II), *China Patents and Trademarks* 1997 No. 4, 39 and 1998 No. 1, 44; Zhou Baorong, "Zhongguo gudai banquan baohu de yantou" ("Sources of Ancient Copyright Protection in China"), *Zhuzuoquan* 1993 No. 4, 40.

³⁵⁷ Peter Ganea and Thomas Pattloch, *INTELLECTUAL PROPERTY LAW IN CHINA* 208 (Christopher Heath ed., 2005).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*, at 210-211.

Article 22: Exceptions and the Three-step Test

165. Article 22 of the Copyright Law of China provides for a comprehensive series of exceptions wherein a work may be exploited without permission from and without payment of remuneration to the copyright owner, subject to the attribution requirement that the name of the author and the title of the work shall be mentioned. The exceptions provided here also apply to the related rights of publishers, performers, producers of sound and video recordings and radio and TV broadcasters.³⁶¹ It should also be noted that Article 21 of the Regulation on the Implementation of the Copyright Law of the People's Republic of China 2002 associates the exceptions with the three-step test in stating the following:

Article 21 According to the relevant provisions of the Copyright Law, the use of any published work for which it is permitted not to obtain the permission of the holder of copyright shall not affect the normal use of the work, and shall not unreasonably impair the lawful rights of the holder of copyright.

166. The question that is pertinent is whether Article 21 introduces an additional requirement that the permitted use under the Copyright Law of China is further subject to the (last two elements of the) three-step test, or whether the exceptions as spelt out in the Copyright Law of China conform to the three-step test. If the former interpretation is the correct one, as suggested by the original Chinese version, this would appear to introduce a “double-barrelled” test to delimit all exceptions spelt out in Article 22 of the Copyright Law of China.

Article 22(1): Private Study and Research

167. Article 22(1) provides that the use of a published work “for the purposes of the user's own private study, research or self-entertainment” is allowed. Some academics have raised the issue of whether “private study” entitles the use of the work for distribution among relatives or friends.³⁶² However, it is submitted that it is reasonably clear that the reference to “the user's own private study”, both in the English as well as the original Chinese version of the Copyright Law of China, limits the application of the exception to the individual's own use, rather than his “domestic” use. Unlike the similar provisions found in other national laws, this exception is not further qualified or limited in its application. However, it does require that it be for the purpose of the user's own private study or research. It should also be noted that the attribution requirement, previously noted above, must be met.

168. Article 6(3) of the Regulation on the Protection of the Right to Network Dissemination of Information 2006 further provides that a person disseminating a small quantity of any publicly available work on information networks for the use of others engaged in teaching or scientific research need not seek the permission of the rightholder or pay him remuneration for this purpose.

³⁶¹ Copyright Law of China, Article 22 proviso.

³⁶² Peter Ganea and Thomas Pattloch, *INTELLECTUAL PROPERTY LAW IN CHINA* 246 (Christopher Heath ed., 2005).

Article 22(2): Quotations

169. Article 22(2) provides for the use of “appropriate quotations from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point”. Again, the attribution requirement must be met.

170. Article 6(1) of the Regulation on the Protection of the Right to Network Dissemination of Information 2006 further provides that a person disseminating to the general public an appropriate portion of any published work on information networks for the purpose of introducing or commenting on any work or elaborating on any issue need not seek the permission of the rightholder or pay him remuneration for this purpose.

Article 22(6): Translation or Reproduction for Teaching and Scientific Research

171. This is an important exception for teaching and scientific research purposes. It permits for the translation or reproduction “in small quantity of copies” of a published work for use by teachers or scientific researchers in classroom teaching or scientific research. However, such translations or reproductions may not be published or distributed.

172. Note again the attribution requirement previously mentioned.

Article 22(9): Free Live Performance (by an Educational Institution)

173. Article 22(9) provides for a general exception which may be applicable to performances by teachers and students of educational institutions. It allows for a free-of-charge live performance of a published work wherein no fees are collected from members of the public nor is remuneration paid to the performers. The attribution requirement previously mentioned applies.

Article 22(11): Translation into Minority Nationality Languages

174. The exception in Article 22(11), which permits for the translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language (Chinese) into any minority nationality language for publication and distribution within the People's Republic of China is allowed, subject to the attribution requirement. This exception is clearly relevant to part of the social and national education programme of China, to permit the minority groups in China to have access to mainstream publications by the Han Chinese. In this regard, it is noteworthy that like the other exceptions in Article 22, the exception in Article 22(11) enables a work to be exploited “without payment of remuneration to the copyright owner”.

Article 23: Use of Works for the Compulsory National Education Program

175. Unlike Article 22(6), Article 23 is not a free use exception. Without naming the entities entitled to the exercise the exception, it presumably entitles national education administrators,

educational institutions, authors and publishers to compile and publish textbooks for implementing the national nine-year compulsory education and national education programmes, to take parts of published works, short written works, music works or single copies of works of painting or photographic works without the authors' authorization. This exception further applies to the related rights of publishers, performers, producers of sound and video recordings and broadcasters.

176. However, this exception does not apply where the authors have made an advance declaration that such use is not permitted. Again, the names of authors and titles of the works must be attributed in the textbooks. In addition, remuneration must be paid according to the regulations. Article 22 of the Regulation on the Implementation of the Copyright Law of the People's Republic of China 2002 states that the rate of royalties for the use of works as provided in Article 23 of the Copyright Law of China "shall be formulated and promulgated by the administrative authority of copyright under the State Council in collaboration with the administrative authority of price affairs under the State Council". Though the National Copyright Administration of the People's Republic of China has issued the Remuneration for Published Works Regulations in 1999, it is stated in the 1999 Regulations that they are not applicable to the use of works for the compulsory national education program in Article 23 of the Copyright Law of China.

Cook Islands

177. The Cook Islands has no copyright law of its own. Instead, as a non-self-governing part of New Zealand, it has adopted, via the Cook Islands Act 1915, the New Zealand Copyright Act of 1962 and the New Zealand Design Act of 1953. It should also be noted that New Zealand has itself repealed the Copyright Act of 1962 and replaced it with the New Zealand Copyright Act of 1994.

178. Modelled largely on the U.K. Copyright Act 1956, the New Zealand Copyright Act 1962 gives recognition to copyright and related rights in the form of sound recordings, cinematograph films, TV and sound broadcasts and published editions of works ("other subject-matter"). The exceptions found in the U.K. Copyright Act 1956 are also largely replicated in the New Zealand Copyright Act 1962.

Sections 19 and 20: Fair Dealing for Research or Private Study, Criticism or Review

179. Section 19 sets out the fair dealing exceptions from the copyright protection of literary, dramatic or musical works and other subject-matter³⁶³. These encompass fair dealing for purposes of research or private study,³⁶⁴ and criticism or review (accompanied by a sufficient acknowledgment).³⁶⁵

³⁶³ New Zealand Copyright Act 1962, s. 19(5).

³⁶⁴ New Zealand Copyright Act 1962, s. 19(1).

³⁶⁵ New Zealand Copyright Act 1962, s. 19(2).

180. Section 20 sets out a similar fair dealing exception in relation to artistic works for purposes of research or private study,³⁶⁶ or criticism or review (accompanied by a sufficient acknowledgment).³⁶⁷

Section 19(6): Scholastic Anthologies (Chrestomathies)

181. Section 19(6) provides for the inclusion of short passages in a collection intended for the use of schools from published literary, dramatic or musical works or published editions of such works. The conditions to be satisfied are that the collection be so described in its title or in its publisher's advertisements, that the works or editions were not published for use in schools, that the collection consists mainly of material in which no copyright subsists or in which copyright is owned by the publisher or the Crown, and where the inclusion of the passage is accompanied by a sufficient acknowledgment.

182. Section 19(6) further provides that such a chrestomathy (or any similar chrestomathy published by the same publisher within 5 years of the first-mentioned chrestomathy) should not include, in addition to one passage of the work in question, two or more other excerpts from works by that author. (It will be noted that this "multiple-extract condition" is also found in section 44 of the Australian Copyright Act.)

Section 21(1): Multiple Copies supplied for Educational Purposes

183. Section 21 is the main exception as regards the use of copyright works in schools and universities for educational purposes. "School" is defined to mean a primary, post-primary public or other registered school, a teacher's training college and any other educational institution not conducted for profit and approved by the Minister of Education, and a "university" to include a University college and a University College of Agriculture.³⁶⁸ Section 21(1) provides that copyright in a published literary, dramatic, musical or artistic work or in a published edition of such a work is not infringed by the making and supplying of copies of the work or edition, made or supplied by or on behalf of a teacher at any university or school or non-profit library, to persons satisfying the teacher or librarian or person acting on his behalf that they require them for the purpose of research or private study and will not use them for any other purpose.³⁶⁹ Other conditions are that no copy shall extend to more than a reasonable portion of the work or edition or to more than one article in a periodical (unless two or more articles in that publication relate to the same subject-matter),³⁷⁰ that no person shall be furnished with more than one copy of the same work, article or part of the work,³⁷¹ and that persons to whom copies are supplied are not required to make a payment for them other than for the cost of production.³⁷²

³⁶⁶ New Zealand Copyright Act 1962, s. 20(1).

³⁶⁷ New Zealand Copyright Act 1962, s. 20(2).

³⁶⁸ New Zealand Copyright Act 1962, s. 21(8).

³⁶⁹ New Zealand Copyright Act 1962, s. 21(1)(a).

³⁷⁰ New Zealand Copyright Act 1962, s. 21(1)(b) (an artistic work being excepted).

³⁷¹ New Zealand Copyright Act 1962, s. 21(1)(c).

³⁷² New Zealand Copyright Act 1962, s. 21(1)(d).

Section 21(4): Examination and Course of Instruction

184. Section 21(4)(a) extends this exception to encompass reproductions or adaptations of the work made in the course of instruction, whether at a university or school “or elsewhere” or by correspondence, where the reproduction or adaptation is made by a teacher or student.

185. Section 21(4)(b) applies this exception in relation to questions to be answered in an examination and in answer to such a question.

186. Section 21(6) extends this exception to exempt from infringement of copyright in sound recordings, films, TV and sound broadcasts and diffusion programmes, the making of a recording, the showing of a film, or the making of a film or recording of a TV or sound “school broadcast”,³⁷³ in the course of instruction at a university or school “or elsewhere”.

187. The reference to “or elsewhere” is presumably intended to address the situation of educational instruction by way of correspondence courses where there is no physical premises that would constitute the “university or school”. It is one of the earliest copyright laws to deal with the issue of distance learning.

Section 21(5): Educational Performances

188. Section 21(5) exempts from copyright infringement the performance of a literary, dramatic or musical work in class or in the presence of an audience in the course of the activities of a university or school by a teacher or student of that university or school, if the audience is limited to persons who are that university’s or school’s teachers or students (but not parents or guardians of students per se).

Democratic People’s Republic of Korea

189. No copyright legislation has been found for the Democratic People’s Republic of Korea, though anecdotal evidence suggests that it exists.

Fiji

190. The Fiji Copyright Act was enacted in 1999, repealing various piecemeal legislation such as the Performers Protection Act, the Copyright (Broadcasting of Gramophone Records) Act, the Copyright (Fiji) Order 1961 (UK) (which had extended the application of the U.K. Copyright Act 1956 to Fiji), the Copyright (International Organisations) Order 1961 (UK), the Copyright (Broadcasting Organisations) Order 1961 (UK) and the Copyright (International Conventions) Order 1964 (UK) that were then in place to protect copyright works in Fiji. Fiji had been a Berne Convention member since 1971 and a Rome Convention member since 1972. It became a WTO member in January 1996.

³⁷³ New Zealand Copyright Act 1962, s. 21(8) (defining “school broadcast” as any broadcast made for reception and use in schools).

191. The new Fiji Copyright Act is modeled largely on the New Zealand Copyright Act 1994. It is extensive and it covers, *inter alia*, the copyright protection of computer programs, sound recordings and audio-visual works, moral rights, performers' rights and border protection measures. It also contains a number of provisions that deal with exceptions for educational activities, which are set out below.

Section 41: Criticism and Review

192. Section 41(1) provides that copying a work for the purpose of criticism or review of that or another work, or of a performance of a work, does not infringe copyright in the work if the copy is accompanied by a sufficient acknowledgement.

193. Note that the exception in section 41 applies only in relation to the "copying" of a work. The otherwise identical provision in section 42 of the New Zealand Copyright Act 1994 refers to the "fair dealing" of a work instead of its copying.

Section 42: Research or Private Study

194. Section 42(1) exempts from copyright infringement any copying of a literary, dramatic, musical or artistic work by an individual for the purpose of research or private study, unless there is a collective license available of which the individual is or should be aware under which the copying can be done. However, there are additional conditions to be satisfied in relation to each category of works. These are:

A literary, dramatic or musical work contained in a book or a published edition of a book by one author	Limited to the making of one copy of the same work or same part of a work on any one occasion. ³⁷⁴
A literary, dramatic or musical work contained in an article in a periodical or a published edition that is an article in a periodical	Does not include copying the whole or part of the work or edition if another article dealing with a different subject matter is copied, on the same occasion, from the same issue of the periodical (but otherwise includes copying of the whole or part of the work or edition and any artistic work included) ³⁷⁵
A literary, dramatic or musical work or published edition (that does not fall into the above categories)	Limited to not more than 10% of the work or edition and any artistic work included in that 10% ³⁷⁶

Table 4: Summary of Conditions in Section 42(1), New Zealand Copyright Act 1962

³⁷⁴ Fiji Copyright Act 1999, s. 42(3).

³⁷⁵ Fiji Copyright Act 1999, s. 42(4).

³⁷⁶ Fiji Copyright Act 1999, s. 42(5).

195. Except as provided in the above categories, section 42(6) further affirms that “copying a work for the purposes of research or private study by an individual may include copying for the purposes of research or private study the whole or part of the work”. For this purpose, the court is directed to have regard to the five factors of the purpose of the copying, the nature of the item copied, whether the item could have been obtained within a reasonable time at an ordinary commercial price, the effect of the copying on the potential market for or value of the work and the amount and substantiality of the part copied taken in relation to the whole item (“five fair dealing factors”).³⁷⁷ Given that the above categories seem to exhaustively enumerate the categories of published literary, dramatic or musical works, section 42(6) would appear to have application only in relation to unpublished literary, dramatic or musical works or to artistic works.

196. Where such copying is justified as research or private study, there is no infringement of the typographical arrangement of the edition of the work.³⁷⁸

197. The research or private study exception does not extend to computer programs.³⁷⁹

Sections 43 and 44: Multiple Copying for Educational Instruction

198. Sections 43 and 44 operate a two-tier mechanism to enable the copying of literary, dramatic, musical or artistic works for educational instruction purposes. In each case, the exceptions do not apply where there is a collective license available for the same purpose under which the school or educational establishment should be aware that the copying could be done.³⁸⁰

199. The first tier refers to “schools”, defined as including kindergartens, primary, intermediate, secondary and special schools.³⁸¹ The second tier refers to “educational establishments”, defined to mean tertiary, private training and government training institutions.³⁸² Free copying by schools of the whole or part of a literary, dramatic, musical or artistic work for the supply to any student or staff member of the school (“copying [by schools] for purposes of research or private study”) is allowed, provided the school supplies no more than one copy of the copied material to any student or staff, and any payment required is no higher than the cost of production and a reasonable contribution to the general expenses of the school.³⁸³ On the other hand, free copying by educational establishments can only be of not more than one chapter of the literary, dramatic, musical or artistic work, or 10% of the work, whichever is less, for supply to any student or staff member,³⁸⁴ and furthermore, for determining whether copying is for the purpose of research or private study, a court “must have regard to” the five fair dealing factors.³⁸⁵

³⁷⁷ Fiji Copyright Act 1999, s. 42(7).

³⁷⁸ Fiji Copyright Act 1999, s. 42(2).

³⁷⁹ Fiji Copyright Act 1999, s. 42(8).

³⁸⁰ Fiji Copyright Act 1999, ss. 43(1), 44(1).

³⁸¹ Fiji Copyright Act 1999, s. 43(2).

³⁸² Fiji Copyright Act 1999, s. 2(1).

³⁸³ Fiji Copyright Act 1999, s. 43(3).

³⁸⁴ Fiji Copyright Act 1999, s. 44(2).

³⁸⁵ Fiji Copyright Act 1999, s. 44(4).

200. Obviously the policy was taken to facilitate more extensive free multiple copying in schools as opposed to educational establishments. In addition, copying in educational establishments is subject to the double-barrelled test of one chapter or 10% and the five fair dealing factors. Concerns may have been felt that this introduces a potential amount of uncertainty as regards the application of this exception for institutes of higher learning. Section 44(3) thus provides that an educational establishment may apply to the Minister for a certificate of exemption to entitle it to the section 43 (tier one) exemption.

Section 44(5): Non-reprographic Copying for Instruction

201. Section 44(5) exempts the non-reprographic copying of a dramatic, musical or artistic work in the course of or preparation for instruction by the instructor or student. It is interesting that literary works are not brought within this section, presumably because it is felt that reprographic reproduction more usefully applies to literary works. However, if the policy is as regards the limited nature of non-reprographic copying for purposes of instruction, there should be no reason to exclude literary works from its scope. Otherwise, there would be an issue as to whether written homework (or even assignments and projects done on word processors) done by students infringes copyright. (It should be noted that such activities would not constitute examinations and fall within the exception in section 47.)

Sections 44(6) and 172(1): Media Studies

202. Section 44(6) exempts the infringement of copyright in the copying of “derivative works” (sound recordings, audio visual works or soundtracks, broadcast and cable programme) in the making of audio visual works or sound tracks “in the course of instruction, or preparation for instruction, in the making of an audio visual work or audio visual soundtrack”. The language of this provision is complex, but it is clearly intended to exempt possible claims of copyright infringement in derivative works from media and movie studies. However, the provision does not examine the media study instructors and students from possible copyright infringement in authorship works (literary, dramatic, musical or artistic works).

203. Section 172(1) exempts any performance rights infringed by the copying by the instructor or student of a recording of a performance in preparing, for use of, and during and after a course of instruction in how to make audio visual works and sound tracks or relates to language learning or is conducted by correspondence. No charge must be made for supplying the copy to the student.

Sections 45, 173 and 183: Performances and Showing Works at Educational Establishments

204. Section 45 exempts as public performances, performances of a literary, dramatic or musical work by teachers or students in the course of activities of the school or educational establishment, or at the school or establishment by any person for the purpose of instruction, before an audience of teachers, students and “other persons directly connected with its

activities”³⁸⁶ The playing or showing of sound recordings, audio visual works, broadcasts or cable programmes for this purpose is also exempted as a “playing or showing of the work in public”³⁸⁷

205. A similar exception in section 173 applies in relation to the public performance of a sound recording, audio visual work, broadcast or cable programme at an educational establishment for the purposes of instruction in similar circumstances.

206. The exception in 183 exempts from infringement of performers’ rights, the free public performance of a broadcast or cable programme to an audience who have not paid for admission. This is potentially applicable in relation to broadcasts or communications of school performances.

Sections 46 and 174: Recordings of Broadcasts and Cable Programmes for Educational Purposes

207. Section 46 exempts a recording of a broadcast or cable programme, or a copy of such a recording, made by a school or educational establishment for educational purposes from copyright infringement in the broadcast or cable programme or in any work included in it. This exception is subject to the availability of a collective license for this purpose and awareness of its availability by the school or educational establishment.

208. A similar exception in 174 applies to exempt any infringement of performance or recording rights included in the recording or copy.

Sections 47 and 172(2): Examinations

209. Section 47 exempts from copyright infringement, anything done for the purposes of an examination, whether by way of setting, communicating or answering the questions. A similar exception in section 172(2) exempts from any infringement of performance rights in performances.

Section 65: Abstracts of Scientific or Technical Articles

210. Section 65 permits the copying of abstracts from scientific or technical articles and the public issue of such abstracts, subject to the availability of a collective license of which the copier is or should be aware.

Section 73: Rental of Computer Programs, Recordings and Audio Visual Works by Educational Institutions

³⁸⁶ Fiji Copyright Act 1999, s. 45(1). Parents and guardians of students are not per se deemed to be directly connected with the activities of the school. Fiji Copyright Act 1999, s. 45(3).

³⁸⁷ Fiji Copyright Act 1999, s. 45(2).

211. Section 73 exempts from copyright infringement any rental by an educational establishment or a prescribed library of a computer program, recording or audio visual work to any person, if the rental is not affected for profit and the subject matter of the rental work has previously been put into circulation with the copyright owner's license.

India

212. Copyright protection in India can be traced back to 1847, when the English East India Company enacted the first copyright statute in India, to guarantee the rights of the author in his work. In 1914, the Indian Copyright Act, largely based on the Imperial Copyright Act of 1911, was enacted. India is one of the earliest Asian countries to join the Berne Convention in 1928. The current version of the Indian Copyright Act, the Copyright Act of 1957, is based on the 1914 Copyright Act and also borrows provisions extensively from the U.K. Copyright Act of 1956. Since then, the Indian Copyright Act has been substantially revised, in 1983, 1984, 1992, 1994 and 1999, to ensure that the Indian Copyright Act adheres to the Berne Convention, the Rome Convention and TRIPS.

213. The exceptions in the Indian Copyright Act that deal with educational activities fall within two sets of provisions. The first set of exceptions is found generally in section 52 of the Indian Copyright Act. The second set of exceptions pertain to India's Notifications to the WIPO Director-General regarding its application of the exceptions relating to translations and reproductions for developing countries as set out in the Appendix to the Berne Convention (Paris Act).

Sections 39, 52(1)(a)(i): Private Use and Research as Fair Dealing

214. Section 52(1)(a)(i) exempts from copyright infringement a fair dealing with a literary, dramatic, musical or artistic work (not being a computer program), for the purposes of private use, including research.

215. Section 39 likewise exempts from the infringement of any broadcast reproduction or performer's right, the making of any sound or visual recording for the private use of the person making such a recording.

Section 52(1)(a)(ii): Criticism or Review as Fair Dealing

216. Section 52(1)(a)(ii) exempts from copyright infringement a fair dealing with a literary, dramatic, musical or artistic work (not being a computer program) for the purposes of criticism or review, whether of that work or of any other work.

217. Is there an attribution requirement for a fair dealing for purposes of criticism or review? The answer to this question depends on the interpretation of the proviso to section 52(1)(y), which requires that a fair dealing for criticism or review be subject to an acknowledgment being made of the work, to identify the work by its title or other description, and also identifying the author, unless the work is anonymous or the author has previously agreed

otherwise or not required any acknowledgment (“acknowledgment condition”).³⁸⁸ However, as it is currently formatted in all copies of the Indian Copyright Act that are consulted, this is *a proviso to the exception in section 52(1)(y)* (which enables a film that includes an out of copyright work to be exhibited), rather than as a proviso to section 52(1) (even though the proviso which contains the acknowledgement condition itself refers to various exceptions in section 52(1), which includes, *inter alia*, section 52(1)(a)(ii)). This yields an incongruent reading of section 52(1)(y), which, as a stand-alone exception in section 52(1), is not related to section 52(1)(a)(ii).

218. Taking into consideration the requirement for attribution of source and authorship in any use of the work for quotation purposes under Article 10 of the Berne Convention, perhaps the correct interpretation is that the acknowledgment condition should qualify the enumerated exceptions in section 52(1), rather than section 52(1)(y). This interpretation is further supported by the fact that the exceptions enumerated in the section 52(1)(y) proviso relate to criticism and review (section 52(1)(a)(ii)), reporting current events in a newspaper (section 52(1)(b)(i)), works reproduced or published in legislative reports (section 52(1)(d)), public reading or recital (section 52(1)(f)), chrestomathies (section 52(1)(g)), reproduction of articles on current economic, political, social or religious topics (section 52(1)(m)) and reproduction of an unpublished work (section 52(1)(p)). Many of these exceptions correlate to uses for which the Berne Convention prescribes an attribution requirement.³⁸⁹

Section 52(1)(ab), (ac): Interoperability and Computing Studies

219. Section 52(1)(ab) exempts from copyright infringement the doing of any act necessary to obtain information essential for program inter-operability, and section 52(1)(ac) likewise exempts from copyright infringement any observation, study or testing of the functioning of computer programs to determine the ideas and principles underlying them.

Section 52(1)(g): Chrestomathies

220. Section 52(1)(g) exempts from copyright infringement any bona fide publication of a collection, mainly composed of non-copyright matter, intended for use of educational institutions, of short passages from published (and copyrighted) literary or dramatic works, not themselves published for the use of educational institutions. The conditions are that the work must be so described in the title and in any of the publisher’s advertisements, and that not more than two such passages from works by the same author are published by the same publisher during any period of five years. In the case of works of joint authorship, this condition extends to passages of all works by any one of the authors, whether alone or in collaboration.

221. A sufficient acknowledgment must be made of all such short passages extracted for publication subject to the interpretation problems regarding the interpretation of the acknowledgment condition as noted above.³⁹⁰

³⁸⁸ Indian Copyright Act, s. 52(y).

³⁸⁹ See e.g. Berne Convention, Articles 10(3) and 10bis(1).

³⁹⁰ Indian Copyright Act, s. 52(y).

Section 52(1)(h)(i): Course of Instruction

222. Section 52(1)(h)(i) exempts from copyright infringement the reproduction of any literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction.

223. This exception does not appear to be qualified as regards the scope or extent of the reproduction, unlike the similar provision in section 57(1)(h) of the Pakistan Copyright Ordinance, which restricts its application to a non-reprographic reproduction.

Section 52(1)(h)(ii), (iii): Examinations

224. Section 52(1)(h)(ii) and (iii) exempts from copyright infringement the reproduction of any literary, dramatic, musical or artistic work as part of the questions to be answered in an examination and in answers to such questions.

Section 52(1)(i): Performances in Educational Institutions

225. Section 52(1)(i) exempts from copyright infringement the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work, by the staff and students of the institution, a cinematograph film or a sound recording, or the communication of such a film or recording, if the audience is limited to staff, students, parents and guardians of the students and persons directly connected with the activities of the institution.

226. An educational institution may also rely on section 52(1)(l), which exempts from copyright infringement the performance of a literary, dramatic or musical work by an amateur club or society (such as those found in schools as part of the students' extra-curricular activities), if the performance is given to a non-paying audience, or for the benefit of a religious institution (some religious schools would qualify for this exception).

Section 32: License to Produce and Publish Translations and Article II, Appendix to Berne Convention

227. Section 32 is a complex and detailed provision that seeks to license the making of translations and publication of translations of literary or dramatic works. This provision is enacted pursuant to India's declaration to rely on Article II of the Appendix to the Berne Convention. All licenses have to be sought by way of applications to the Indian Copyright Board.

228. Section 32(1) allows any person to apply to the Board for a license to produce and publish a translation of a literary or dramatic work in any language 7 years from the first publication of the work. Section 32(1A) allows any person to apply to the Board for a license to produce and publish a translation of a foreign (non-Indian) literary or dramatic work, in any language in general use in India 3 years from the first publication of the work, if such a translation is required for the "purposes of teaching, scholarship or research". This period of time is shortened to 1 year if the translation is in a language not in general use in any developed country.

229. It should be noted that research for purposes of the section 32(1A) license does not include industrial research or research by bodies corporate (not being bodies corporate owned or controlled by the Government) or other associations or bodies of persons for commercial purposes.³⁹¹ Teaching, however, receives an inclusionary definition to encompass instructional activity at all levels of educational institutions and all other types of organized educational activities.³⁹²

230. The grant of the non-exclusive license will only be made by the Copyright Board, subject to payment by the applicant to the copyright owner royalties in respect of sold copies of the translation, calculated at rates determined by the Board.³⁹³ The Board must be satisfied that the applicant is competent to produce and publish a correct translation and possesses the means to pay the royalties payable.³⁹⁴ The author must also not have withdrawn from circulation copies of the work.³⁹⁵ Before the grant of the license, the Copyright Board will, wherever practicable, give the copyright owner an opportunity to be heard.³⁹⁶ In addition, an application made under section 32(1A) is subject to the further condition that export of copies of the translation outside India is not allowed, and every copy of such a translation shall contain a notice to this effect.³⁹⁷ The only exception is as regards the export of such copies, with the permission of the importing country, by the Indian government or authorities to Indian citizens or associations of such citizens outside India for non-commercial teaching, scholarship and research purposes.³⁹⁸

231. The key condition to the grant of the license is that the license applicant must have first contacted the copyright owner or publisher for the requisite translation permission and had his request rejected,³⁹⁹ and waited for the availability of the official translation from the publisher or before making the application (“second waiting period”). Other conditions are summarized below in the table.

License application	Section 32(1)	Section 32(1A)	Section 32(1A) proviso
Work	Literary or dramatic work	Foreign literary or dramatic work	Foreign literary or dramatic work
Purpose		Teaching, scholarship or (non-commercial) research	Teaching, scholarship or (non-commercial) research
Translation language	Any language	Any language in general use in India	Any language in general use in India, not in general use in any developed country
Translation form	No restrictions	In printed or analogous forms of reproduction	In printed or analogous forms of reproduction

³⁹¹ Indian Copyright Act, s. 32(6)(c).

³⁹² Indian Copyright Act, s. 32(6)(d).

³⁹³ Indian Copyright Act, s. 32(4)(i).

³⁹⁴ Indian Copyright Act, s. 32(4)(d).

³⁹⁵ Indian Copyright Act, s. 32(4)(e).

³⁹⁶ Indian Copyright Act, s. 32(4)(f).

³⁹⁷ Indian Copyright Act, s. 32(4)(ii).

³⁹⁸ Indian Copyright Act, s. 32(4)(ii)(1) and (2).

³⁹⁹ Indian Copyright Act, s. 32(4)(b), (c).

Waiting period (first)	7 years from first publication	3 years from first publication	1 year from first publication
Export restrictions	None	For distribution only in India (subject to export to foreign Indian community exception)	For distribution only in India (subject to export to foreign Indian community exception)
Existing translation	None within 7 years first publication or out of print	None within 3 years of first publication or out of print	None within 1 year of first publication or out of print
Applicant contacts copyright owner/publisher if unable to find owner	Request made to copyright owner (or publisher via registered air mail post) and denied	Request made to copyright owner (or publisher via registered air mail post) and denied	Request made to copyright owner (or publisher via registered air mail post) and denied
Waiting period (second)	2 months – lapse of time between request and application	6 months - lapse of time between request and availability of published translation by owner/publisher	9 months - lapse of time between request and availability of published translation by owner/publisher
Conditions		Name of author, title of edition printed on all copies of translation	Name of author, title of edition printed on all copies of translation
Illustrations	If any, to comply with section 32A	If any, to comply with section 32A	If any, to comply with section 32A

Table 5: Summary of Conditions in Section 32, Indian Copyright Act

232. It should also be noted that at any time after the grant of a section 32(1A) license, an authorized translation of the work in the same language and substantially the same in content at a price reasonably related to the price normally charged in India for the translation of works of the same standard on the same or similar subject is available, the license granted will be terminated⁴⁰⁰ after the lapse of a 3-month notice served on the license applicant.⁴⁰¹ The residual copies of the produced translated work may however still be sold or distributed until they are exhausted.⁴⁰²

233. Section 32(5) and (6) extends the section 32(1A) license to enable a broadcasting authority to apply for a license to produce and publish a section 32(1A) translation,⁴⁰³ or the translation of any text incorporated in audio-visual fixations prepared and published solely for the purpose of systematic instructional activities, for non-commercial⁴⁰⁴ broadcasting (though sound and visual recordings)⁴⁰⁵ in India⁴⁰⁶ such translation for purposes of teaching or

⁴⁰⁰ Indian Copyright Act, s. 32B(1).

⁴⁰¹ Indian Copyright Act, s. 32B(1) proviso.

⁴⁰² Indian Copyright Act, s. 32B(1) proviso.

⁴⁰³ Indian Copyright Act, s. 32(5)(a).

⁴⁰⁴ Indian Copyright Act, s. 32(6)(d).

⁴⁰⁵ Indian Copyright Act, s. 32(6)(b).

dissemination of the results of specialized, technical or scientific research to experts in any particular field.⁴⁰⁷

Section 32A: License to Produce and Publish and Article III, Appendix to Berne Convention

234. Section 32A is likewise a complicated provision that seeks to license the reproduction and publication of “affordably” priced literary, scientific or artistic works for the purpose of systematic instructional activities. This provision is enacted pursuant to India’s declaration to rely on Article III of the Appendix to the Berne Convention. All licenses have to be sought by way of applications to the Indian Copyright Board.

235. Section 32A(1) allows any person to apply to the Board, after the expiration of the “relevant period”,⁴⁰⁸ for a license to reproduce and publish a literary, scientific or artistic work where copies of such editions are not available in India or were not put on sale in India for a period of 6 months to the general public, or in connection with systematic instructional activities, were sold at a price not reasonably related to that normally charged in India for comparable works. The Board may grant a non-exclusive license⁴⁰⁹ to reproduce and publish such a work in printed or analogous forms of reproduction at the price at which the original edition was sold or at a lower price for the purposes of systematic instructional activities,⁴¹⁰ subject to payment by the applicant of royalties calculated at rates determined by the Board⁴¹¹ to the copyright owner.

236. The Board must be satisfied that the applicant is competent to produce and publish a correct translation and possesses the means to pay the royalties payable.⁴¹² The author must also not have withdrawn from circulation copies of the work.⁴¹³ Before the grant of the license, the Copyright Board will, wherever practicable, give the copyright owner an opportunity to be heard.⁴¹⁴ The main conditions are (a) that the applicant undertakes to reproduce and publish the work at such price as may be fixed by the Copyright Board, being a price reasonably related to the price normally charged in India for similar works,⁴¹⁵ (b) that the name of the author and title of the particular edition of the work be printed on all copies of the reproduction,⁴¹⁶ and (c) that the license does not extend to the export of copies outside

[Footnote continued from previous page]

⁴⁰⁶ Indian Copyright Act, s. 32(6)(c).

⁴⁰⁷ Indian Copyright Act, s. 32(5)(b).

⁴⁰⁸ Indian Copyright Act, s. 32A Explanation (“relevant period” means 7 years from first publication of a work relating to fiction, poetry, drama, music or art, 3 years from first publication of a work relating to natural science, physical science, mathematics or technology, and 5 years from first publication in any other case).

⁴⁰⁹ Indian Copyright Act, s. 32A(4).

⁴¹⁰ Indian Copyright Act, s. 32A(1).

⁴¹¹ Indian Copyright Act, s. 32A(4)(i).

⁴¹² Indian Copyright Act, s. 32A(4)(c).

⁴¹³ Indian Copyright Act, s. 32A(4)(g).

⁴¹⁴ Indian Copyright Act, s. 32A(4)(h).

⁴¹⁵ Indian Copyright Act, s. 32A(4)(d).

⁴¹⁶ Indian Copyright Act, s. 32A(4)(f).

India and each copy shall contain a notice that the copy is available for distribution only in India.⁴¹⁷

237. The key condition to the grant of the license is that the license applicant must have first contacted the copyright owner for the requisite translation permission and had his request rejected,⁴¹⁸ or if unable to find the owner, sent his request to the publisher by registered airmail post and waited not less than three months before making the application for the license⁴¹⁹ (“first waiting period”). Subsequently, six (in the case of works of natural science, physical science, mathematics or technology) or three (in the case of other works) months must have lapsed between the request made to the copyright owner or publisher (“second waiting period”), wherein no authorized copy of the work had been published.⁴²⁰

238. No license to reproduce and publish the translation of a work shall be granted under section 32A unless an authorized translation has been published by the owner of the right of translation and the translation is not in a language in general use in India.⁴²¹

239. Section 32A also applies to the reproduction and publication, or translation into a language in general use in India, of any text incorporated in audio-visual fixations prepared and published solely for the purpose of systematic instructional activities.⁴²²

240. It should also be noted that at any time after the grant of a section 32A license, an authorized edition or translation of the work in the same language and substantially the same in content at a price reasonably related to the price normally charged in India for works of the same standard on the same or similar subject is available, the license granted will be terminated⁴²³ after the lapse of a 3-month notice served on the license applicant.⁴²⁴ The residual copies of the produced translated work may however still be sold or distributed until they are exhausted.⁴²⁵

Indonesia

241. Although Indonesia introduced a new Copyright Act in 2002 (“Indonesian Copyright Act”), copyright law in Indonesia started in 1912 with the Dutch colonial Auteurswet that was extended to the Netherlands East Indies (now Indonesia). After its independence in 1949, the copyright law was translated into the new national language as Undang-Undang Hak Tjipta (law on the right to a creation”). Citing political reasons, it withdrew from the Berne Convention in 1958. However in 1982, the situation changed with the introduction of a new national Copyright Act. This legislation was amended in 1987 to include the protection of batik art, computer programs, video and sound recordings. And with its membership of the WTO in 1994, Indonesia re-entered the Berne Convention in 1997 and ratified the WCT in

⁴¹⁷ Indian Copyright Act, s. 32A(4)(ii).

⁴¹⁸ Indian Copyright Act, s. 32A(4)(a).

⁴¹⁹ Indian Copyright Act, s. 32A(4)(b).

⁴²⁰ Indian Copyright Act, s. 32A(4)(e).

⁴²¹ Indian Copyright Act, s. 32A(5).

⁴²² Indian Copyright Act, s. 32A(6).

⁴²³ Indian Copyright Act, s. 32B(2).

⁴²⁴ Indian Copyright Act, s. 32B(2) proviso.

⁴²⁵ Indian Copyright Act, s. 32B(2) proviso.

the same year. This led to the replacement of the 1982 Copyright Act with the completely revised Copyright Act of 2002.⁴²⁶

242. “Copyright” is defined in Article 1(1) of the Indonesian Copyright Act as “an exclusive right for an Author or the recipient of the right to publish or reproduce his Work or to grant permission for said purposes, *without decreasing the limits according to the prevailing laws and regulations*”. This wording is influenced by the virtually identical wording of Article 1 of the Dutch Copyright Act, and affirms the significance of the provisions relating to exceptions in the Indonesian Copyright Act.

Article 15(a): Use for Purpose of Education, Research, Scientific Thesis, Report Writing

243. Article 15(a) exempts from copyright infringement the use of a work for the purpose of “education, research, scientific thesis, report writing, criticizing or reviewing an issue, provided that it does not prejudice the normal interest of the author”. The previous version of Article 15(a), Article 14(a) of the Indonesian Copyright Act 1987, had permitted quoting up to 10% of a work but the new version instead abandoned this quantitative limitation, preferring instead, as the explanatory memorandum to the 1997 revision states, to make a qualitative evaluation as to whether copyright has been violated.⁴²⁷ Hence the reference to the requirement that the scope of the use “does not prejudice the normal interest of the author”. However, while the broadened exemption applies to educational and research activities, of which scientific thesis and report writing are illustrations, some have criticized this additional qualitative assessment requirement based on the third element of the three-step test as vague and argue that it would give rise to disputes.⁴²⁸

244. The references to “scientific thesis” and “report writing” also engender some measure of uncertainty. For instance, issues could be raised as to whether a thesis on the social sciences would fall within the rubric of a “scientific thesis”. Likewise, there could be disputes as to whether a report written for non-educational and non-research purposes e.g. a business report, could take advantage of the exception offered in Article 15(a). However, if Article 15(a) is construed as an expansion of the original quotation exception (then Article 14(a)) in line with Article 10(1) of the Berne Convention, there would be no reason to give these terms a restrictive interpretation.

245. Note that there is an attribution requirement for the sources to be fully cited for Article 15(a) (as is with all the exceptions in Article 15). Also note that all the Article 15 exceptions apply as regards the related rights of performers, phonogram producers and broadcasting organizations.⁴²⁹

Article 15(a): Use for Criticism and Review

⁴²⁶ Christopher Antons, Copyright Law Reform and the Information Society in Indonesia, COPYRIGHT LAW, DIGITAL CONTENT AND THE INTERNET IN THE ASIA-PACIFIC 235-238 (Brian Fitzgerald, Fuping Gao, Damien O’Brien, Samsung Xiaoxiang Shi, eds., 2008).

⁴²⁷ Christopher Antons, INTELLECTUAL PROPERTY LAW IN INDONESIA 101 (2000).

⁴²⁸ Christopher Antons, INTELLECTUAL PROPERTY LAW IN INDONESIA 101 (2000).

⁴²⁹ Indonesian Copyright Act, Article. 51.

246. Article 15(a) also exempts from copyright infringement the use of a work for criticism and review, provided that it does not prejudice the normal interest of the author. Such uses must be attributed.

Article 15(c): Education and Scientific Lectures

247. Article 15(c) exempts from copyright infringement the use of “the excerpt of a work ... in whole or in part” for the purposes of “lecturers [sic] of which the purpose is solely for education and science”. This has been described by a commentator as using a work to help clarify the content of the lecture.⁴³⁰

248. Again, it is the norm for education and scientific lectures to observe rigorous citation and attribution standards. This is reflected in Article 15 as well.

Article 15(e): Limited Reproduction of a Work by a Scientific or Educational Institution

249. The predecessor to Article 15(e) is Article 14(e) of the Indonesian Copyright Act 1987, which had permitted copying to a restricted degree by way of photocopy or similar methods. The current formulation was first introduced in Article 14(e) of the Indonesian Copyright Act 1997. It allows for the “limited reproduction” of a work other than a computer program “limitedly [sic] by using any means whatsoever or by employing a similar process” by, *inter alia*, a scientific or education institution, “solely for the purpose of conducting their activities”. This last expression both limits the nature of the copying permitted as well as the quantity permissible. And in this regard, the qualifier that only a “limited reproduction” be made, likewise qualifies the number of copies made and the extent of copying made, without imposing or prescribing any preconceived quantitative restrictions.⁴³¹

250. The attribution requirement is again to be noted.

Article 16: Compulsory Translations, Reproductions and Licenses

251. Article 16 of the Indonesian Copyright Act is unique in that it is intended to guarantee that texts in the field of science and literature, which are of significance for Indonesian “education, science and research and development”, can be translated and copied. In various Indonesian government orders, education is defined as “the effort or activity of preparing the participants of educational institutions for their future roles by way of schooling and/or training”.⁴³² Science is defined as “the knowledge in a field which is accumulated in a systematic manner according to specific methods and can be used to explain certain phenomena in this field”.⁴³³ And research and development is defined as “systematic scientific efforts to discover new processes, to solve problems, to examine the truth of a

⁴³⁰ Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 102 (2000).

⁴³¹ *See also* Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 105 (2000).

⁴³² Indonesian Government Regulation, Art. 1 No. 1 (Government Regulation No. 1/1989).

⁴³³ Indonesian Government Regulation, Art. 1 No. 2 (Government Regulation No. 1/1989).

hypothesis or theory, and to find practical applications".⁴³⁴ It will be clear that commercial research and research undertaken by laboratories of large corporations could also fall within this provision.⁴³⁵

252. Article 16 originated from the Indonesian Governmental Regulation No. 1 of 1989 on translation and copying of works for the interest of education, science, research and development.⁴³⁶ This object is achieved by way of Ministerial directive in one of three ways, after receiving input from the Copyright Council:

- a. The Minister may obligate the copyright holder to himself carry out the translation and/or reproduction of such work in Indonesia within a stipulated period of time, or
- b. The Minister may obligate the copyright holder to grant a license to other parties to translate and/or reproduce such work in Indonesia within a stipulated period of time, or
- c. The Minister may otherwise designate other parties to carry out the translation and/or reproduction of such work.

253. The Government Regulation No. 1/1989 also stipulates that if none of these options is feasible (that is, the Indonesian licensee fails to carry out the translation or reproduction), the Indonesian government may itself as a last resort undertake the translation or reproduction.⁴³⁷

254. Although Article 16 states that the decision to order the carrying out of the translation or reproduction is by the Minister, the Government Regulation No. 1/1989 stipulates that the initiative for triggering Article 16 can also be taken by state or private institutions in the area of education, science, research and development, by presenting proposals to the Minister.⁴³⁸

255. The obligation to translate only arises if after a lapse of 3 years after the first publication of the work in the field of science and literature, the work has not been translated into the Indonesian language.⁴³⁹

256. The obligation to reproduce only arises if after a lapse of 3 years (books in the field of mathematics and natural sciences), 5 years (books in the field of social sciences) and 7 years (books in the field of arts and literature), the books have never been reproduced in Indonesia.⁴⁴⁰

257. All translations and reproductions may only be used within Indonesia and could not be exported.⁴⁴¹

⁴³⁴ Indonesian Government Regulation, Art. 1 No. 3 (Government Regulation No. 1/1989).

⁴³⁵ Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 107 (2000).

⁴³⁶ Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 102 (2000).

⁴³⁷ Indonesian Government Regulation, Arts. 7, 17 and 18 (Government Regulation No. 1/1989). *See also* Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 109 (2000).

⁴³⁸ Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 107 (2000).

⁴³⁹ Indonesian Copyright Act, Art. 16(2).

⁴⁴⁰ Indonesian Copyright Act, Art. 16(3).

⁴⁴¹ Indonesian Copyright Act, Art. 16(4).

258. It is interesting to note that any Ministerial obligations to the copyright holder to grant a license to translate or reproduce the work (obligation (b)) or designate a third party to carry out the translation or reproduction (obligation (c)) entitles the granting of a fee the amount of which is stipulated by Presidential Decree.⁴⁴² Articles 20-22 of the Government Regulation No. 1/1989 sets out the mechanisms for calculating compensation for the translation and reproduction of works of significance for education, science, research and development. However, there is no mechanism in the Indonesian Copyright Act or the Government Regulation No. 1/1989 for the copyright owner to appeal the amount of compensation that it may receive. This is one of the problems of this provision as pointed out by an academic writer.⁴⁴³

259. It should also be noted that Indonesia has not made her declaration to the Director-General of WIPO regarding the reservation of her rights to avail herself of the facilities in the Appendix to the Berne Convention.

Iran

260. Iran is not a member of the Berne Union. It is also not a WTO member state. However, though Iran has a law of copyright in the form of the Copyright Law dated 1970, foreign works outside of Iran are not protected. Iranian copyright law recognizes copyright protection in authorship works, ranging from books to musical works to sculptures, architectural works and photographic works, works of applied handicraft to audio-visual works for stage or screen performances.⁴⁴⁴ It also recognizes the author's exclusive rights to publish, broadcast, perform and publicize works, and any financial and intellectual profit resulting from his work or name.⁴⁴⁵

261. A review of the copyright exceptions for the benefit of educational activities follows.

Article 7: Quotations for Literary, Scientific, Technical or Educational Purposes

262. Article 7 provides that it is permissible to quote from published works and to refer to them for literary, scientific, technical or educational purposes. However, mention must be made of the sources of the quotations and the "customary limitations" must be observed. The expression "customary limitations" would appear to be a reference to a requirement that the use of the quotation be "compatible with fair practice" and the extent of the use "does not exceed that justified by the purpose" in Article 10(1) of the Berne Convention.

263. Article 7 however goes on to provide that it is not necessary to mention the sources of quotations, where the work is reproduced, not for monetary gain, for use in educational institutions by its employed teachers.

⁴⁴² Indonesian Copyright Act, Art. 16(5).

⁴⁴³ Christopher Antons, *INTELLECTUAL PROPERTY LAW IN INDONESIA* 110 (2000).

⁴⁴⁴ Iranian Copyright Law, Art. 2.

⁴⁴⁵ Iranian Copyright Law, Art. 3.

Article 7: Quotations in Criticism or Praise

264. Article 7 likewise provides that it is permissible to quote from published works and to refer to them for criticism or praise, subject to observing the attribution requirement and the “customary limitations” requirement.

Article 8: Photographic Reproductions for Educational Purposes

265. Article 8 provides that non-commercial public libraries, documentation centres, scientific institutions and educational establishments may make reproductions of works by a “photographic or similar process, *in the numbers necessary, for the purpose of their activities*”, according to a decree to be issued by the Board of Ministers. There is no reference in the exception as to any restrictions as to the scope and number of reproductions that could be made. This is a very broad and generous exception granted to, *inter alia*, educational establishments, especially tertiary institutions, since a wide range of direct and indirect activities can be associated with educational instruction and brought under the exception.

266. It is also worth noting that the exception on its own makes no reference to any remuneration for multiple reprographic reproductions. Confirmation of this point can only be made if there is further access to the decree issued by the Board of Ministers referred to in Article 8.

Article 11: Private and Noncommercial Reproductions

267. Article 11 exempts from copyright infringement reproduction of copyright works as well as recordings of radio and TV programs, “only for private and non-commercial use”.

Articles 9 and 10: Works published by the Ministry of Information and Ministry of Education

268. Articles 9 and 10 affirm that notwithstanding the passage of the Iranian Copyright Law, the Ministry of Information and the Ministry of Education retain the right to use any works, including school books, it has already reproduced and published.

Japan

269. The Japanese copyright system was established and developed gradually after the Meiji Restoration Era. Her first copyright legislation, the Publishing Ordinance, was enacted in 1896 to protect copyright and regulate publishers.⁴⁴⁶ In 1887, the first substantive copyright statute, the Copyright Ordinance, was enacted.⁴⁴⁷ As the first Asian country to accede to the Berne Convention in 1899, in order to comply with international standards and obligations,

⁴⁴⁶ Copyright Research and Information Centre, *History of Copyright Systems in Japan*, at http://www.cric.or.jp/cric_e/csj/csj.html (accessed 11 June 2009).

⁴⁴⁷ *Id.*

the Copyright Ordinance was replaced by the Copyright Law of 1899. This is the first modern copyright law of Japan.

270. Since then, with the expansion of the subject-matter of protection and technological developments for new means of reproduction and communication of works, the Japanese government decided to affect a comprehensive reform of its copyright system. The result is the enactment of the new (and current version of) the Copyright Act in 1971.⁴⁴⁸ Even then, with Japan's membership of the WTO in 1994 and her accession to the Phonograms Convention in 1978, the Rome Convention in 1989, and the WCT and WPPT in 2000 and 2002 respectively, the Japanese Copyright Act has been consistently revised and updated to ensure that Japan complies with, and exceeds, her international copyright obligations.⁴⁴⁹

271. Article 1 of the Japanese Copyright Act outlines the balance between protecting the rights of authors and providing adequate exceptions for these rights in stating the following:

The purpose of this Act is to provide for, and to secure protection of, the rights of authors, etc. and the rights neighboring thereto with respect [copyrightable] works as well as performances, phonograms, broadcasts and wire-broadcasts, while giving due regard to the fair exploitation of these cultural products, and by doing so, to contribute to the development of culture. [emphasis added]

272. An analysis of the copyright exceptions in the Japanese Copyright Act for the benefit of educational activities follows.

Articles 10(3), 472(1): Computer Science Research and Exceptions

273. Article 10(3) likewise excludes from copyright protection as a “computer program work”, any computer programming language, rule or algorithm⁴⁵⁰ used for creating a computer program. One view that is taken is that the effect of this exemption is to exclude programming languages, rules and algorithms from copyright protection completely⁴⁵¹ as “expression”⁴⁵² though on its face, this exemption does not rule out the protection of programming languages, rules or algorithms as “works” other than as computer programs, for instance, as “compilations” which “by reason of the selection or arrangement of their contents, constitute intellectual creations” under Article 12 of the Japanese Copyright Act, or as “databases” which by reason of the “selection or systematic construction of information contained therein”, constitute intellectual creations under Article 12-2 of the Japanese Copyright Act.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ Japanese Copyright Act, Art. 10(3) (defining “computer programming language” as “letters and other symbols, as well as the systems for their use, as a means of expressing a computer program”, “[computer programming] rule” as “a special rule with respect to how to use a particular computer program's computer programming language” and “[computer programming] algorithm” as “the method of combining, in a computer program, the instructions given to a computer”).

⁴⁵¹ Teruo Doi, *Japanese Copyright Law in the 21st Century* 26, 31 (2001).

⁴⁵² *Id.*, at 77.

274. Article 47-2(1) contains a broad exception to permit the owner of a reproduction of a computer program to “make reproductions or adaptations (including reproductions of derivative works created by means of such adaptation)” of the computer program “if and to the extent deemed necessary for his own exploitation” of the program on a computer. The only restriction is that the user must not use such a reproduction or adaptation “in the course of one’s business” on a computer, in breach of Article 113-2. The combined effect of Article 47-2 and 113-2 is to enable the licensed user (described as the “owner” in the Japanese Copyright Act)⁴⁵³ of a computer program not only make back-ups of his licensed computer program, it also enables him to conduct research and studies, including reverse engineering and other types of reproductions or adaptations, on the licensed program “to the extent deemed necessary for his own exploitation” of the program.⁴⁵⁴

Article 30: Reproduction for Private Use

275. Among the various copyright exceptions, the exception regarding reproductions for private use in Article 30 has attracted substantial revisions arising from technological developments of more efficient reproduction machines. Concerns by rightholders that such private uses may erode their legitimate interests led to the introduction in 1992 of a new provision (Article 30(2)) which provided for compensation from digital sound or visual recording equipment and media to be collected and distributed among copyright owners and neighbouring right owners. An analysis of Article 30 follows.

276. Article 30(1) provides the general rule that it shall be permissible for a user of a copyright work to “reproduce the work for his personal use or family use or other equivalent uses within a limited scope”, described as “private use” in the Japanese Copyright Act. Internal use within a corporation does not count as private use.⁴⁵⁵ Article 43(i) further provides that the user may translate, arrange, transform and adapt such a work pursuant to “private use”.

277. However, Article 30(1)(i) provides that reproductions made by means of publicly-installed automatic reproduction machines such as high-speed dubbing machines set up at video rental shops and reprographic machines at convenience stores fall outside this exception. This did not deny users access to reproduction machines, provided they are home devices. But with the advent of home taping devices such as cassette tape recorders in the 1970s, it was felt that the total amount of private reproductions produced in society would, if no compensation is provided, reach a level that would unreasonably prejudice the interests of copyright owners, performers and producers of phonograms. After a joint survey conducted by the Japanese Society for the Rights of Authors, Composers and Publishers (JASRAC), the Japan Council of Performers Organizations (GEIDANKYO) and the Recording Industry

⁴⁵³ Japanese Copyright Act, Art. 47-2(2) (stating that if the owner of the reproductions ceases to own any of such reproductions, including reproductions made pursuant to Art. 47-2(1), other than if the reproductions were destroyed (presumably referring to the original reproduction), the other reproductions may not be preserved, “in the absence of any declaration of intention of the copyright holder to the contrary”).

⁴⁵⁴ Y Tamura, CHOSAKUKENHÔ GAISETSU (Overview of the Copyright Act) 228 (Tokyo, 2nd ed. 2001).

⁴⁵⁵ Tokyo District Court, 22 Jul. 1977, 9-2 *Mutaishû* 534.

Association of Japan (RIAJ), an amendment in 1992 was made to subject Article 30(1)(i) to the newly introduced Article 30(2).

278. Article 30(2) provides that a person who makes digital sound or visual recordings by means of “home use” machines possessing such non-incidental functions to make recordings shall pay compensation to the copyright holders, performers and phonogram producers.⁴⁵⁶ The Cabinet Order referred to in Article 30(2), known as the Copyright Act Enforcement Order,⁴⁵⁷ was introduced via Cabinet Order Number 147 of 1993 and subsequently revised in 1998, 1999 and 2000.⁴⁵⁸ Also known as the Compensation System for Digital Private Recording, this Cabinet Order imposed a levy on the following, based on the method of recording, the sampling frequency and type of recording media:

- Sound recording equipment and their media such as the Digital Audio-Tape Recorder (DAT), Digital Compact Cassette (DCC) and Mini-Disk (MD). The Cabinet Order amendment in 1998 added media such as Compact Disk Recordable (CD-R) and Compact Disk Rewriteable (CD-RW) to the list.
- Visual-recording equipment and their media such as Digital Video Cassette Recorder (DVCR), Data Video Home System (D-VHS) were added via the Cabinet Order amendment in 1999. A Cabinet Order amendment in 2000 added three new types of visual recording equipment and media: Multimedia Video Disk (MVDISC), Digital Versatile Disk Rewriteable (DVD-RW and DVD+RW) and Digital Versatile Disk Random Access Memory (DVD-RAM).⁴⁵⁹

279. For this purpose, the copyright holders, performers and phonogram producers have set up the Society for Administration of Remuneration for Audio-home Recording (SARAH) and the Society for the Administration of Remuneration for Video Home-Recording (SARVH). As approved by the Japanese Agency for Cultural Affairs, compensation for the rightholders, performers and producers is payable by the user for a single piece of specified equipment and recording medium at the time of purchase.⁴⁶⁰ The amounts of compensation are calculated using the formulas as follows:⁴⁶¹

⁴⁵⁶ Japanese Copyright Act, Art. 102(1)(a) (stating that the provisions of Art. 30(2) “shall apply mutatis mutandis to the exploitation of performances or phonograms which are the subject matter of neighboring rights”).

⁴⁵⁷ Japanese Cabinet Order Number 335, 1970.

⁴⁵⁸ See also Copyright Research and Information Center, *Copyright Case Study Vol. 2: Private Recording & Copyright*, at http://www.cric.or.jp/cric_e/cs_2/case2.html (accessed 11 June 2009).

⁴⁵⁹ Teruo Doi, *Japanese Copyright Law in the 21st Century* 26, 105-110 (2001).

⁴⁶⁰ Japanese Agency for Cultural Affairs, Copyright Division, Schedule of Compensation for Private Sound Recording (March 1993); Japanese Agency for Cultural Affairs, Copyright Division, REPORT ON THE STARTING OF THE PRIVATE VISUAL COMPENSATION SYSTEM – SCHEDULE 38-39 (June 1999).

⁴⁶¹ Teruo Doi, *Japanese Copyright Law in the 21st Century* 26, 120-124 (2001); Peter Ganea and Christopher Heath, *Economic Rights and Limitations*, JAPANESE COPYRIGHT LAW 59 (Peter Ganea, Christopher Heath and Hiroshi Saitô, eds., 2005); Copyright Research and Information Center, *Copyright Case Study Vol. 2: Private Recording & Copyright*, at http://www.cric.or.jp/cric_e/cs_2/case2_qa.html#q5 (accessed 11 June 2009).

Compensation for Private Audio Recording	
designated machines	Standard price indicated in the catalogue × 65% × 2%, subject to a maximum of ¥ 1000
designated media	Standard price indicated in the catalogue × 50% × 3%

Compensation for Private Visual Recording	
designated machines	Standard price indicated in the catalogue × 65% × 1%, subject to a maximum of ¥ 1000
designated media	Standard price indicated in the catalogue × 50% × 1%

Table 6: *Compensation for Private Audio and Visual Recording in Japan*

280. The compensation system for private recording is premised on the assumption that the individual user of a home recording device will use it to carry out a private recording of copyright works. In some circumstances, the purchasers of a specified machine or medium will not carry out any private recording under Article 30, for instance, under another exception in the Japanese Copyright Act or for the reproduction of works not protected by copyright. In such a case, the purchasers may seek reimbursement of the compensation from SARAH or SARVH with proof of the requisite evidence, which will undertake a compensation decision on a case-by-case basis.⁴⁶²

281. In this regard, it should also be noted that reprographic machines used for reprographic copying of literary works fall outside the scope of Article 30(2). Reprographic rights in this regard are collectively managed by the Japan Reprographic Rights Centre. However as its system is not comprehensive, it was felt inappropriate to make all such acts of the use of reprographic machines illegal. Therefore, Article 5bis of the Supplementary Provisions of the Japanese Copyright Act provides, as a tentative provision that automatic reproducing machines exclusively for use in copying "writings or printings" should be excluded "for the time being" from the scope of the automatic reproducing machine in Article 30. In other words, it does not constitute infringement under the present Japanese Copyright Act to copy a whole book for private use, by making use of a copying machine in a convenience store for public use.⁴⁶³

282. Finally, it is worth noting that Japan is the only Asian country which has a private recording compensation system.

⁴⁶² Peter Ganea and Christopher Heath, *Economic Rights and Limitations*, JAPANESE COPYRIGHT LAW 59-60 (Peter Ganea, Christopher Heath and Hiroshi Saitô, eds., 2005). See also Copyright Research and Information Center, *Copyright Case Study Vol. 2: Private Recording & Copyright*, at http://www.cric.or.jp/cric_e/cs_2/case2_qa.html#q11 (accessed 11 June 2009).

⁴⁶³ Copyright Research and Information Center, *Copyright Case Study Vol. 3: Library & Copyright*, at http://www.cric.or.jp/cric_e/cs_3/case3_qa.html (accessed 11 June 2009).

Article 32(1): Quotations, News Reporting, Critique and Research

283. Article 32 exempts from copyright infringement the quotation from and exploitation of a work already made public, provided that such a quotation is compatible with fair practice and the extent justified by the purpose of the quotation, such as for news reporting, critique or research. The scope of what is necessary for reporting, criticism or research is exceeded if the quoted work is presented in a manner that invites the reader to enjoy it independently of the quoting work.⁴⁶⁴ However, a more restrictive view is taken of parodies, which the Japanese Supreme Court requires to be clearly distinguishable from the parodied (quoted) work.⁴⁶⁵ Article 43(i) further provides for the translation of such a quotation for the same purpose.

284. When so using the work, Article 48(1) provides that the source of the work must be clearly indicated in the manner and to the extent deemed reasonable in the light of the manner of its reproduction and exploitation.

Article 33: Reproduction in School Textbooks

285. Article 33(1) exempts from copyright infringement the reproduction in school textbooks (authorized by the Minister of Education and Science or its authorship for use in the education of students in primary, secondary, junior and senior high schools) works that are already made public, “to the extent deemed necessary for the purpose of school education”. However, such a reproduction is subject to notification of, and payment of compensation to, the author by the person who makes the reproduction, at an amount to be fixed by the Commissioner of the Agency for Cultural Affairs in consultation with the Council for Cultural Affairs.⁴⁶⁶ Assessment of this amount is to take into account, among others, the spirit of scholastic education, the type and usage of the work and the ordinary royalty rate.⁴⁶⁷

286. Article 33(4) extends this scheme to textbooks intended for correspondence courses of senior high schools and teachers’ manuals.

287. Textbooks so reproduced may be further translated, arranged, transformed and adapted pursuant to Article 43(i). When so using the work, the source of the work must be clearly indicated in the manner and to the extent deemed reasonable in the light of the manner of its reproduction and exploitation.⁴⁶⁸

288. Article 33-2 provides a similar scheme as regards the reproduction of a work already reproduced in a school textbook for use by weak-sighted students in their studies. Please refer to the WIPO Study on Exceptions for the Visually Impaired for more details.⁴⁶⁹

⁴⁶⁴ Tokyo High Court, 17 Oct. 1985, 1176 *Hanrei Jihô* 33.

⁴⁶⁵ Japanese Supreme Court, 28 Mar. 1980, 34-3 *Minshû* 244.

⁴⁶⁶ Japanese Copyright Act, Art. 71.

⁴⁶⁷ Japanese Copyright Act, Art. 33(2).

⁴⁶⁸ Japanese Copyright Act, Art. 48(1).

⁴⁶⁹ WIPO Study on Exceptions for the Visually Impaired, at 156-57.

289. Article 20(2) provides that in this regard, the need to change ideographs or words or other modifications considered unavoidable for school educational purposes shall not be considered a breach of the author's right to maintain the integrity of his work.

Article 34: Broadcast in School Education Programs

290. Article 34 exempts from copyright infringement, the broadcasting, wire-broadcasting or automatic public transmission (online transmission, referred to as "automatic public transmission") of a public work in educational broadcast and wire-broadcast programs which conform to the educational course standards established by the laws and regulations on school education, and to reproduce such public works in teaching materials for these programs. However, this is subject to giving notice to the work's author and payment of reasonable compensation. When so using the work, the source of the work must be clearly indicated in the manner and to the extent deemed reasonable in the light of the manner of its exploitation.⁴⁷⁰

Article 35: Reproduction in Schools and Other Educational Institutions

291. Article 35(1) exempts from copyright infringement the reproduction of a public work by a teacher or a student, in a school or other educational institution (excluding those established for profit-making purposes), to the extent deemed necessary for use "in the course of a lesson". The "lesson" referred to in Article 35(1) is not limited to formal instruction in subjects, but also covers activities such as special educational activities, moral education activities and comprehensive learning activities as long as they are included in the school curriculum.⁴⁷¹ It has also been opined that the expression "a person who teaches a lesson ... may ... reproduce [the work]" enables a teacher to instruct a school clerk to make copies: the teacher need not himself make copies personally.⁴⁷² The exception does not apply where the initiative to make reproductions is not taken by someone in charge of teaching directly e.g. the board of education of the school.⁴⁷³

292. The exception also does not apply in cases where such reproduction is "likely to unreasonably prejudice the interests of the copyright holder in the light of the type and the usage of the work as well as the number of copies and the manner of reproduction". Some examples given of uses of works not covered by the exception include: the reproduction of a computer program for computers used by students, the reproduction and distribution of a workbook, reproduction of copies that outnumber the students in the class and the production of a book to be used outside teaching.⁴⁷⁴

293. It should be noted that the exception enables students to make reproductions for teaching purposes, such as to reproduce pre-existing works such as those downloaded from

⁴⁷⁰ Japanese Copyright Act, Art. 48(1).

⁴⁷¹ Copyright Research and Information Center, *Copyright Case Study Vol. 1: Formal Education & Copyright*, at http://www.cric.or.jp/cric_e/cs_1/case1.html (accessed 11 June 2009).

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

the Internet for the students' own learning activities, and distribute the copies within the class without the authors' authorization.⁴⁷⁵

294. Article 35(2) extends the above exception to distance learning, through the offering, presenting, performing or recital of the original work or its reproductions by means of a public transmission of such a work (including online transmissions), "for reception by those who are receiving the same lesson at the same time but at a location other than where such lesson is being given". However, the exception does not apply where the public transmission is likely to unreasonably prejudice the interests of the copyright holder in light of the type and the usage of the work as well as the manner of the public transmission.

295. All reproductions made in this regard must be attributed, as provided in Article 48(1)(iii) of the Japanese Copyright Act, where standard practice so requires.

296. Article 43(i) additionally provides that the teacher or student may further translate, arrange, transform and adapt such a work as may be necessary for use "in the course of a lesson".

Article 36: Examination Purposes

297. Article 36(1) exempts from copyright infringement the reproduction, translation,⁴⁷⁶ and the automatic public transmission of making a work (and its translation) transmissible (online transmission) of a public work as questions for an examination or a license, to the extent deemed necessary for such purpose. However, the exception does not apply where the reproduction or public transmission is likely to unreasonably prejudice the interests of the copyright holder in light of the type and the usage of the work as well as the manner of the public transmission. Thus the repackaging and reissuing of examination questions as compilations for publication, either by the school or a commercial publisher, would arguably not be as questions for examinations, and would fall outside the scope of this exception.⁴⁷⁷

298. It should be noted that the part of a work reproduced (and transmitted) for purposes of the examination question should be "to the extent deemed necessary for such purpose". An extensive quotation from a work will generally not be favoured for a question which requires only a short answer, unless that part of the work has to be necessarily included in order for an effective analysis or critique of the work to be made as part of the answer. Furthermore, broadcasting and wire diffusion are excluded from the scope of the exception, leaving only interactive transmissions of examination questions such as through the Internet and manual transmissions such as through faxes.⁴⁷⁸

299. The exception also does not apply in cases where such reproduction or transmission is "likely to unreasonably prejudice the interests of the copyright holder in the light of the type and the usage of the work as well as the number of copies and the manner of the public

⁴⁷⁵ *Id.*

⁴⁷⁶ Japanese Copyright Act, Art. 43(ii).

⁴⁷⁷ Copyright Research and Information Center, *Copyright Case Study Vol. 1: Formal Education & Copyright*, at http://www.cric.or.jp/cric_e/cs_1/case1.html (accessed 11 June 2009). Cf. Japanese Copyright Act, Art. 47-4.

⁴⁷⁸ *Id.*

transmission". An example of such an unreasonable use would be the continued public accessibility of examination questions online after the examinations have been concluded,⁴⁷⁹ (but arguably subject to compensation being given to the rightholder, as explained below).

300. It is noteworthy that Article 36(1) does not refer to an examination conducted by an educational establishment. This implies that examinations conducted by private or quasi-private organizations such as admission tests, qualification examinations and professional assessments may rely on this exception.⁴⁸⁰ However, where for profit-making purposes, such reproductions and transmissions are made, Article 36(2) requires the person to pay to the copyright holder compensation in an amount which corresponds to the ordinary royalty rate. This provision enables a balance to be struck between the non-profit use of works for examination purposes, and the subsequent attempts to commercialize and profit from such examination questions.

301. It is also noteworthy that when so using the work, the source of the work must be clearly indicated in the manner and to the extent deemed reasonable in the light of the manner of its exploitation, if standard practice so requires.⁴⁸¹

Article 38(1): Non-profit (School) Performances

302. Article 38(1) exempts from copyright infringement the public performance, presentation or recitation of a public work, for non-profit purposes, if the audience is charged no fees and the performers are not paid any remuneration for their performance, presentation or recital. When so using the work, the source of the work must be clearly indicated in the manner and to the extent deemed reasonable in the light of the manner of its exploitation, if standard practice so requires.⁴⁸²

303. As this exception pertains only to performances, it does not enable a school to make copies of plays or musical scores to enable practices of performances,⁴⁸³ unless it could be said that such a performance is pursuant to scholastic lessons wherein reliance could be had of Article 35 of the Japanese Copyright Act.

Article 38(4): Non-profit (School) Rentals

304. Article 28(4) exempts from copyright infringement the free rental of reproductions of a publicly-available work for non-profit-making purposes.⁴⁸⁴ This would enable schools to lend copies of literary, musical and dramatic works, notwithstanding the rental rights of the author.⁴⁸⁵ However, the general rental of cinematographic works is not permissible, except by audiovisual educational establishments.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ Japanese Copyright Act, Art. 48(1).

⁴⁸² Japanese Copyright Act, Art. 48(1).

⁴⁸³ Copyright Research and Information Center, *Copyright Case Study Vol. 1: Formal Education & Copyright*, at: http://www.cric.or.jp/cric_e/cs_1/case1.html (accessed 11 June 2009).

⁴⁸⁴ Japanese Copyright Act, Art. 38(4).

⁴⁸⁵ Japanese Copyright Act, Art. 26-3.

Article 38(5): Rentals of Cinematographic Works by Audiovisual Education Establishments

305. Article 38(5) exempts from copyright infringement the free rentals of a publicly available cinematographic work by audiovisual education establishments and other non-profit establishments designated by Cabinet Order and having among its purposes the providing of cinematographic films and other audiovisual materials for use by the public, subject to the condition that a reasonable amount of compensation is paid to the owner of right of distribution of the cinematographic work and the owner of the work reproduced in the cinematographic work.

306. This exception exists to facilitate the work of media study and movie schools, and also to ensure the accessibility of publicly available cinematographic works as provided by these institutions.

Kiribati

307. The Republic of Kiribati obtained its independence in 1979. Before then, the U.K. had declared a protectorate over the Gilbert and Ellice Islands in 1882. The two protectorates became a Crown colony of the U.K. in January 1916 as the Gilbert and Ellice Islands Colony.

308. Prior to independence, U.K. laws applied to Kiribati. Section 15(1) of the Western Pacific (Courts) Order in Council, 1961, states that “statutes of general application in force in England on the 1st day of January, 1961 ... shall be in force [but] so far only as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty’s jurisdiction permit and subject to such qualifications as local circumstances render necessary”. This rendered applicable the U.K. Copyright Act 1956.⁴⁸⁶

309. Although it was granted independence in 1979, Article 5(1) of the Kiribati Independence Order provides that existing laws and Acts of the Parliament of the U.K. or Order of Her Majesty in Council, having effect as part of the law of Kiribati immediately before independence day, shall continue in force and be construed with such conforming modifications. With the enactment of the Kiribati Copyright Ordinance (Chapter 16, Revised Edition 1980), which came into force on 13 June 1917, the U.K. Copyright Act 1956, which continues to apply in Kiribati,⁴⁸⁷ will be construed with the Kiribati Copyright Ordinance.

310. An examination of the law of copyright in Kiribati necessarily involves an examination of the U.K. Copyright Act 1956, read in conjunction with the Kiribati Copyright Ordinance. In this regard, a review of the exceptions for the benefit of educational activities follows.

311. It should be noted that Kiribati is neither a Berne Union member nor a WTO member.

⁴⁸⁶ U.K. Copyright Act, 1956 (4 & 5 Eliz. 2, Ch. 74).

⁴⁸⁷ University of the South Pacific, LA100 – Legal Systems 1 – Topic 8 – Legislation, at: http://www.vanuatu.usp.ac.fj/Courses/LA100_Legal_Systems1/LA100_Unit_8.html (accessed 11 June 2009).

Sections 6(1), 9(1), U.K. Copyright Act 1956: Fair Dealing for Research or Private Study

312. Sections 6(1) and 9(1), U.K. Copyright Act 1956 exempt from copyright infringement any fair dealing with a literary, dramatic, musical or artistic work for purposes of research or private study.

Sections 6(2), 9(2), Copyright Act 1956: Fair Dealing for Criticism or Review

313. Sections 6(2) and 9(2), Copyright Act 1956 exempt from copyright infringement any fair dealing with a literary, dramatic, musical or artistic work for purposes of criticism or review, whether it is of that work or another work, if it is accompanied by a sufficient acknowledgment.

Section 6(6), U.K. Copyright Act 1956: Chrestomathies

314. Section 6(6), U.K. Copyright Act 1956 exempts from copyright infringement the inclusion of a short passage from a published literary or dramatic work in a collection, intended for the use of schools. The conditions are that the collection and its advertisements are so described by the publisher, the work in question was not published for the use of schools, the collection consists mainly of material in which no copyright subsists, and the inclusion of the passage is accompanied by a sufficient acknowledgment. The further condition is that there additionally cannot be two or more excerpts from works by the same author contained in that collection, or in every similar collection published by the same publisher within five years of the first collection.

Section 3(5): Importation of an Article for Private and Domestic Use

315. Section 3(5) of the Kiribati Copyright Ordinance exempts from the act of copyright infringement, the importation of a foreign literary, dramatic or musical work which, if it had been published in Kiribati, would be an infringing copy of the work, if such an importation is by a person for his private and domestic use.

Lao

316. While Lao has recently enacted its copyright law, this author does not have access to an authorized English version of the Lao copyright legislation. Lao is not a Berne Union member or a WTO member.

Malaysia

317. Prior to 1912, the law of copyright in Malaysia can be traced to the law of copyright in England as Malaysia was part of the Straits Settlements.⁴⁸⁸ With the enactment of the U.K. Copyright Act 1911 and its extension to the Straits Settlements, Malaysia had its first modern copyright law. The enactment of the U.K. Copyright Act of 1956 only applied to two states, Sarawak in 1960 and North Borneo in 1962, but not to the rest of Malaysia.⁴⁸⁹

318. With its independence in 1957, and when Sarawak and North Borneo became part of the Federation of Malaysia in 1964, the U.K. Copyright Act 1956 became part of the corpus of the copyright laws of Malaysia. To deal with the problem of the multiplicity of copyright statutes, Malaysia enacted its own Copyright Act in 1969 and repealed all previous copyright legislation.⁴⁹⁰ It remained in force until 30 November 1987 when it was replaced by the Copyright Act 1987, which embodies the current version of Malaysian copyright law. Since then, it has been revised in 1990, 1996, 1997, 2000 and 2002 to deal with Malaysia's accession to the Berne Convention in 1990 and its membership in WTO in 1995 (and its corresponding obligations under TRIPS). Malaysia's participation in the Diplomatic Conference in Geneva in 1996 which led to the WCT and WPPT (though Malaysia has not yet ratified both treaties) has also influenced amendments made to her Copyright Act in 1997 to make her copyright laws ready for the digital era.⁴⁹¹

319. The current version of the Malaysian Copyright Act 1987 consulted for this purpose is the 2001 reprint, which incorporates the amendments of the Copyright (Amendment) Act 2002 (Act 1139/2002). An examination of the exceptions for the benefit of educational activities follows.

Section 13(2)(a): Fair Dealing for Non-profit Research or Private Study

320. An exclusive right of copyright is formulated in the Malaysian Copyright Act as an "exclusive right to control in Malaysia", the various activities that constitute copyright such as the right of reproduction, communication to the public and so on in section 13(1), in relation to a literary, musical or artistic work, a film, a sound recording, or a derivative work.

321. The various exceptions to copyright are formulated as "rights of control" that are not included in the rights of control that constitute copyright. Thus section 13(2)(a) provides that the fair dealing for purposes of non-profit research or private study shall constitute such "rights of control" not included in copyright.

322. Section 9(4) goes on to provide that any reproduction of the typographical arrangement of a published edition of a work for purposes of research or private study does not infringe the

⁴⁸⁸ In 1902, the Legislative Council of the Straits Settlements enacted the Telegram Copyright Ordinance (Cap 161) but this legislation did not really pertain to copyright protection. *See* Khaw Lake Tee, COPYRIGHT LAW IN MALAYSIA 4 (2001).

⁴⁸⁹ Khaw Lake Tee, COPYRIGHT LAW IN MALAYSIA 6 (2001).

⁴⁹⁰ Khaw Lake Tee, COPYRIGHT LAW IN MALAYSIA 6-7 (2001).

⁴⁹¹ Khaw Lake Tee, COPYRIGHT LAW IN MALAYSIA 10 (2001).

copyright in the published edition of the work if such reproduction is compatible with fair dealing. A similar requirement is spelt out in section 9(5) as regards the reproduction by any public library and educational, scientific or professional institutions of any typographical arrangement of a published work “if such reproduction is in the public interest and is compatible with fair dealing and the provisions of any regulations”. These seem to introduce an additional requirement for the incidental reproduction of the typographical arrangement of a work to be considered “fair” in addition to showing that the reproduction of the work itself for purposes of research or private study is “fair”.

Section 13(2)(a): Fair Dealing for Criticism or Review

323. Section 13(2)(a) excludes from the scope of copyright the fair dealing of a work for purposes of criticism or review, provided that there be an acknowledgment of the title of the work and its authorship.

324. Section 9(4) as discussed above applies, as does its attendant observations.

Section 13(2)(f): Illustration for Teaching Purposes

325. Section 13(2)(f) excludes from the scope of copyright the inclusion of a work in a broadcast, performance, showing or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair practice. It should be noted that there is an attribution requirement associated with such uses of the work.

Section 13(2)(ff): Examination Purposes

326. Section 13(2)(g) likewise excludes from the scope of copyright the use of a work for the purpose of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions. However, this exception does not apply to the making of a reprographic copy of a musical work for use by a music examination candidate for performing the work.

Section 13(2)(g): Recordings of School Broadcasts

327. Section 13(2)(g) excludes from the scope of copyright the recordings made in schools, universities or educational institutions of a work included in “a broadcast intended for such schools, universities or educational institutions”. This last expression is intended to refer to the special school broadcast programming intended for receipt by schools, universities and educational institutions.

Section 13(2)(gg), (ggg): Private and Domestic Use of Sound Recordings and Films

328. Section 13(2)(gg) and (ggg) excludes from the scope of copyright the making of recordings (sound and film) of broadcasts, or literary, dramatic or musical works or films included in the broadcasts, for the private and domestic use of the person making the record. This exception is directed at time-shifting uses of both sound broadcasts (radio) and sound and video broadcasts (TV).

Section 13(2)(k): Performance for Charitable or Educational Purposes

329. Section 13(2)(k) excludes from the scope of copyright the performance, showing or playing of a work by a non-profit making club or institution where such performance, showing or playing is for charitable or educational purposes and is in a place where no admission fee is charged for such performance, showing or playing.

330. It should be noted that this exemption does not state that the performance, showing or playing of a work must be by an educational institution (it refers to a “non-profit institution”). Presumably, this would encompass most public educational institutions. However, there would be some educational institutions that are commercial institutions. The term “educational institution” is defined in the Malaysian Copyright Act with reference to the Malaysian Education Act 1961. The latter legislation (the Malaysian Education Act 1996) defines an “educational institution” very broadly as “a school or any other place where, in the carrying on of the work of an organization or institution, persons are habitually taught, whether in one or more classes, and includes a kindergarten and a distance education centre” but does not include religious schools or any places declared by Ministerial notification not to be an educational institution.⁴⁹²

331. To qualify for the exception, such performances, shows or plays must be for “charitable or educational purposes”. This expression again offers a broad exception, in allowing, for instance, a school club to provide performances, not for instructional purposes, but for charitable purposes (for instance, for the benefit of a charity supported by the school club). However, since the exception provides that no admissible fee be charged for such performances, shows or plays, the charity object of the performance would presumably be met through donations or other payments in kind for items such as autographs or records sold at the venue of such performances, shows or plays.⁴⁹³

Section 13(2)(m): Quotations

332. Section 13(2)(m) excludes from the scope of copyright the making of quotations from a published work if they are “compatible with fair practice” and “their extent does not exceed that justified by the purpose”, subject to the attribution of source and author requirement. This includes quotations from newspaper articles and periodicals in the form of press summaries.

⁴⁹² Malaysian Education Act 1966, s. 2.

⁴⁹³ See Khaw Lake Tee, COPYRIGHT LAW IN MALAYSIA 208 (2001).

Section 31: License to Produce and Publish Translations

333. Section 31 of the Malaysian Copyright Act is a provision that enables the Copyright Tribunal to grant a non-exclusive, non-transferable⁴⁹⁴ license to an applicant to produce and publish a translation into Malay, the national language of Malaysia,⁴⁹⁵ a literary work written in any other language, for the purpose of teaching, scholarship or research,⁴⁹⁶ on payment by the applicant to the copyright owner of the right of translation in respect of copies sold to the public, royalties at a rate to be determined by the Tribunal. If the work consists mainly of illustrations, no license under this section will be granted.⁴⁹⁷ The power to grant a license to produce and publish translations does not extend to audio-visual materials (which may embody literary works) prepared for instructional and educational purposes.⁴⁹⁸

334. Section 31 is based on Article II of the Appendix to the Berne Convention, though Malaysia has not made a Berne Notification pursuant to Article I(1) of the Appendix to declare that it will avail itself of the facility provided for in Article II. Nonetheless, many of the conditions that it prescribes are similar. The Copyright Tribunal will hold an inquiry into each application that is made pursuant to the Copyright (License to Produce and Publish in the National Language a Translation of a Literary Work) Regulations 1987, in accordance with the following conditions:

- A translation of the work in Malay must not have been published by the copyright owner within 1 year after the first publication of the work, or the translation so published is out of print.⁴⁹⁹
- The applicant has requested and been denied copyright authorization to produce and publish the translation by the copyright owner, or, the applicant has, after due diligence, been unable to find the owner.⁵⁰⁰
- The applicant has sent a copy of his request for the translation to the diplomatic or consular representative of the translation rightholder's state (if known), or to that organization so designated by the government of that state.⁵⁰¹
- Nine months has elapsed since this formal request, and during this period, no authorized translations in Malay have been published.⁵⁰²
- The applicant proves to the satisfaction of the Tribunal that he is able to produce and publish a correct translation and possesses the means to pay the requisite royalties, and also undertakes to have the original title and name of the author printed on all copies of the published translation.⁵⁰³
- The author of the work has not withdrawn it from circulation.⁵⁰⁴
- The owner of the translation right has first been given an opportunity of being heard, wherever practicable.⁵⁰⁵

⁴⁹⁴ Malaysian Copyright Act, s. 31(3)(a).

⁴⁹⁵ Malaysian Federal Constitution, Art. 152.

⁴⁹⁶ Malaysian Copyright Act, s. 31(3)(h).

⁴⁹⁷ Malaysian Copyright Act, s. 31(7).

⁴⁹⁸ Khaw Lake Tee, COPYRIGHT LAW IN MALAYSIA 134 (2001).

⁴⁹⁹ Malaysian Copyright Act, s. 31(3)(a).

⁵⁰⁰ Malaysian Copyright Act, s. 31(3)(b).

⁵⁰¹ Malaysian Copyright Act, s. 31(3)(c).

⁵⁰² Malaysian Copyright Act, s. 31(3)(g).

⁵⁰³ Malaysian Copyright Act, s. 31(3)(d).

⁵⁰⁴ Malaysian Copyright Act, s. 31(3)(e).

335. The license is only valid for publication in Malaysia and all copies must bear a notice in Malay stating that the copies are available for distribution only in Malaysia.⁵⁰⁶ The license will terminate if an authorized translation with substantially the same content has been published at a reasonable price for comparable works.⁵⁰⁷

336. Other conditions are that exports of such translated publications of the work are not allowed, unless they are exported with the permission of the importing country, for the teaching, scholarship or research of nationals of Malaysia or organizational groupings in those countries, and not for any commercial purpose.⁵⁰⁸

Maldives

337. The Republic of Maldives was governed as a British protectorate from 1887 until its independence in 1965, though it was never under direct British rule. Though the Maldivian legal system is based on Islamic laws with admixtures of English common law, no copyright legislation for the Maldives has been found,⁵⁰⁹ though it is reported to be drafting copyright legislation with the help of WIPO⁵¹⁰ and is now subject to final review.⁵¹¹ The Maldives is not a Berne Union member or a WTO member.

Marshall Islands

338. The Republic of the Marshall Islands has a very colourful legal history. Spanish sovereignty was originally granted by Pope Leo XII in 1885, but it was annexed by Germany in 1886. Subsequently the League of Nations mandated Micronesia (which includes the Marshall Islands) to Japan in 1920. After its capture by U.S. forces in 1944, it remained under U.S. administration until its independence in 1986 (officially recognized by the U.N. in 1990).⁵¹²

339. No copyright legislation for the Marshall Islands has been found in the Marshall Islands Revised Code. It should also be noted that when the Marshall Islands was under American administration, the Trust Territory Code provided that American common law, as expressed in the American law Institute's Restatements, would be the common law of the Marshall

[Footnote continued from previous page]

⁵⁰⁵ Malaysian Copyright Act, s. 31(4).

⁵⁰⁶ Malaysian Copyright Act, s. 31(5).

⁵⁰⁷ Malaysian Copyright Act, s. 31(6). Any copies made may continue to be distributed until their stock is exhausted. *Id.*

⁵⁰⁸ Malaysian Copyright Act, s. 31(4).

⁵⁰⁹ Access to Maldivian laws can be found at the AG's office website at:

<http://www.agoffice.gov.mv/V2/Dhivehi/LawsMain.asp> (accessed 14 June 2009).

⁵¹⁰ WTO document IP/N/3/Rev. 5, 6 July 2001.

⁵¹¹ AG's Office of the Republic of Maldives, Legislative Agenda 2009 (May 2009), at:

<http://www.agoffice.gov.mv/pdf/LegAgEng14May.pdf> (accessed 14 June 2009).

⁵¹² Jean G. Zorn, *The Republic of the Marshall Islands*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 100-102 (Michael A. Ntummy ed., 1993).

Islands as trust territory.⁵¹³ As this provision no longer appears in the Marshall Islands Revised Code, the view has been taken that American common law has been repealed,⁵¹⁴ including American common law principles on copyright protection. The Marshall Islands is not a Berne Union member or a WTO member.

Micronesia

340. Like the Marshall Islands (which was part of the Micronesian islands), the Federated States of Micronesia had a very colourful legal history. It was subject to Spanish, German and Japanese sovereignty until its capture by U.S. forces in 1944, where it remained under U.S. administration until its independence in 1986 (which was officially recognized by the U.N. in 1990).⁵¹⁵

341. Copyright law came to Micronesia as early as 1982, when the Second Congress enacted Public Law No. 2-29, the Copyrights Act (now Title 35, Chapter 1). The Micronesia Copyright Act is modeled on the U.S. Copyright Act 1976. In 2003, Micronesia joined the Berne Union.

342. A study of the exceptions for the benefit of educational activities in the Micronesia Copyright Act follows.

Section 107: Fair Use – Criticism, Comment, News Reporting, Teaching, Scholarship, Research

343. Like section 107 of the U.S. Copyright Act, section 107 of the Micronesia Copyright Act provides an omnibus exemption for the fair use of a copyrighted work from copyright infringement. It defines a “fair use” as including such use by reproductions in copies or phonorecords, or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

344. To determine whether the use made of the work in any particular case is a fair use, the fair use factors to be considered include the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for or value of the copyrighted work.

⁵¹³ Jean G. Zorn, *The Republic of the Marshall Islands*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 105 (Michael A. Ntummy ed., 1993).

⁵¹⁴ Jean G. Zorn, *The Republic of the Marshall Islands*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 105 (Michael A. Ntummy ed., 1993).

⁵¹⁵ Jean G. Zorn, *The Republic of the Marshall Islands*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 100-102 (Michael A. Ntummy ed., 1993).

Section 107: Fair Use – Multiple Copies for Classroom Use

345. It is worth noting that section 107 enables as a fair use, the making of multiple copies of works for classroom use as part of teaching. The works for which multiple copies could be made as part of “fair use” are not limited to literary works but encompass musical and audio-visual works.

346. In this regard, references to developments of the U.S. may be useful. On or after the enactment of the U.S. Copyright Act 1976, rightholders and educational institutions met and reached various agreements which set out guidelines on the scope and extent of multiple reproductions of printed material, music and audio-visual material.⁵¹⁶ The guidelines, which were offered to fulfil the need for greater certainty and for the protection of teachers, also provide that the conditions prescribed therein may change, that certain types of copying permitted under the guidelines may not be permissible in the future, that these guidelines do not limit the standards of fair use under judicial decision, and that there may be instances where copying which does not fall within the guidelines may be permitted under the criteria of fair use.⁵¹⁷

Section 109: Other Limitations on Exclusive Rights of Specific Works

347. Section 109 further provides that other limitations on the exclusive rights of specific works or exemptions of certain performances and displays may be prescribed by way of rules and regulations issued by the Micronesian Attorney-General, which are consistent with sections 107 and 108. For purposes of this study, these other rules and regulations were not found.

Mongolia

348. Following the recognition of copyright protection in Article 12 of the Mongolian Constitution, the Mongolian Copyright Act was enacted in 1993. In 1997, Mongolia joined the WTO and she became a Berne Convention member in 1998. She subsequently acceded to the WCT and WPPT in 2002. Arising from her succession obligations, revisions were made to the Mongolian Copyright Act in 1997 and again in 1999.⁵¹⁸

349. The copyright exceptions in the Mongolian Copyright Act for the benefit of educational activities will be examined below.

⁵¹⁶ See AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS (19 Mar. 1976) and GUIDELINES FOR EDUCATIONAL USES OF MUSIC (30 Apr. 1976), available at: <http://www.ciu.edu/library/document/guidelines.pdf>.

⁵¹⁷ *Id.*

⁵¹⁸ Tseden-Ish SHINEBAYAR, Director, Division of Copyright, Intellectual Property Office of Mongolia, “Topic 8: Issues of Mongolia's Copyright Protection” in NATIONAL TRAINING SEMINAR ON COPYRIGHT AWARENESS (2008), at: http://www.accu.or.jp/appreb/10copyr/pdf_ws0610/c2_08.pdf (accessed 14 June 2009).

Article 13: Requisition of Work for Public Interest Purposes

350. As described by the Director, Division of Copyright for the Intellectual Property Office of Mongolia, there have been some problematic issues as regards the copyright ownership in works commissioned by the previous socialist government of Mongolia. As approved in a joint order of the Ministry of Finance and the chief of the Press Affairs Committee of Mongolia in 1966 under the socialist government of Mongolia, there was system that was set up in which a small percentage of the revenue arising from commercial exploitation of the works would be paid to the author. Since 1990, this system has been abolished. But though the author's name stays with his works, these are now works "left ... in the middle of nowhere".⁵¹⁹

351. For this reason Article 13 of the Mongolian Copyright Act is unique in this regard. It provides that the state or its state agencies may reach an agreement with the author to purchase his work for immediate public interest, failing which the work can be requisitioned, subject to payment of the cost, compensation and remuneration for the use of the work by the state or its agency. Any disputes arising thereto will be resolved by the courts.

352. Article 13 also states that the Mongolian government shall establish rules on the use of the requisitioned works.

Article 14(1) Paragraph (1) and Article 23(2): Public Communication for Teaching Use

353. Article 14 and the other provisions in Chapter Three of the Mongolian Copyright Act are described as pertaining to the "Unauthorised Use of Work[s]". In this regard, these are exceptions that apply in derogation to the author's exclusive economic rights (in Article 9) rather than the non-economic moral rights (in Article 8) of the author, since it is stated as regards to the latter that "it shall be prohibited" to derogate from the author's right to alter or disclose his name and his right of integrity,⁵²⁰ and since many of the exceptions in Chapter Three import the requirement of attribution of the source and name of the author.

354. On this interpretation, Article 14(1) Paragraph (1) exempts from copyright infringement, as a making "for the public benefit", the public communication of *part of* a publicly-available work for "use for teaching", provided that mention shall be made of the source and name of the author. Presumably the teaching use of a publicly-available work is an activity that is "for the public benefit". A "right to make a public communication" is a right to make a public communication of a work by any means other than the transfer of copyright.⁵²¹

⁵¹⁹ Tseden-Ish SHINEBAYAR, Director, Division of Copyright, Intellectual Property Office of Mongolia, "Topic 8: Issues of Mongolia's Copyright Protection" in NATIONAL TRAINING SEMINAR ON COPYRIGHT AWARENESS (2008), at: http://www.accu.or.jp/appreb/10copyr/pdf_ws0610/c2_08.pdf (accessed 14 June 2009).

⁵²⁰ Mongolian Copyright Act, Art. 8(1), (3) respectively. Cf. Art. 8(2) gives the author a right of attribution but does not describe it as a "prohibition".

⁵²¹ Mongolian Copyright Act, Art. 9(1) Para. (4). In contrast, the "right to make a work available to the public" refers to making the original work or a reproduction of it available to the public by way of sale or transfer/license. Mongolian Copyright Act, Art. 9(1) Para. (3).

355. Article 23(2) likewise exempts the making of a public communication of part of a derivative work, a sound and visual recording or a broadcast of such a communication, for the purpose of teaching.

356. Hence these exceptions would encompass activities such as the broadcasting of part of a work on an education channel, the online communication of part of a work in the teaching instructions as part of distance learning and the performance of part of a dramatic work or choreographic work for teaching purposes.

357. Article 14(1) does not define what “part of a work” means. In contradistinction to Article 15(1), which refers to the reproduction of “a work”, this suggests that not the whole work can be communicated for teaching purposes.

Article 14(2) and Article 23(2): Public Communications of Reproductions for Research and Literary Criticism

358. Article 14(2) goes on to provide that it shall be permissible to make, without the author’s consent and without payment of any remuneration, a public communication of a work by a person who has reproduced the work for use in research and for literary criticism.⁵²² If this relates to public communications for public benefit, this would be in the nature of enabling researchers to publicly communicate their research findings and share their literary critiques with the public.

359. Article 23(2) likewise exempts the making of a public communication of part of a derivative work, a sound and visual recording or a broadcast of such a communication, for the purpose of “scientific research”.

Article 15(1): Reproduction for Private Use

360. Article 15 exempts from copyright infringement the reproduction of a publicly-available work exclusively for private use without the author’s consent and without payment of any remuneration. Unlike Articles 14(1) and 16(1), which refer to the communication and reproduction of “part of a work”, there is no such restriction in Article 15. Presumably this implies that the whole work can be reproduced for private use purposes.

Article 15(2): Residual Exception for Reproduction based on Three-step Test

361. It was originally provided in Article 15(2) that the reproduction for private use of architecture and building designs or plans without the author’s consent or erect structures making use of such reproductions. However Article 15(2) has since been deleted pursuant to the amendments on 21 May 1999. The revised Article 15(2) provides that permission “may extend to the reproduction where it does not conflict with a normal exploitation of a work and would not otherwise prejudice the legitimate interests of the copyright owner”.

⁵²² Mongolian Copyright Act, Art. 16(5) (referred to in Art. 14(2)).

362. The reference to the three-step test and the introduction of a new permissive exception (“may”) suggests that this is not a private use exception (notwithstanding its designation as an Article 15 exception) or an additional condition for private use, but a new residual exception that permits reproductions based on Article 9(2) of the Berne Convention.

Article 16(2): Reproduction of Part of a Publicly-available Work for Teaching

363. This is the corollary to Article 14(1) Paragraph (1), in allowing for the reproduction of a part of a publicly-available work for use for teaching, without the author’s consent and without payment of any remuneration. This exception is subject to the attribution requirement.

Article 16(5): Reproduction for Use in Research and for Literary Criticism

364. As noted above, Article 16(5) enables the reproduction, subject to attribution, of a part of a publicly-available work for use in research, which would, if it is submitted, encompass commercial research and development activities. The exception in Article 14(2) to provide for the public communication of such reproductions of works for use in research is a corollary to this exception.

365. Article 16(5) likewise enables the reproduction of a part of a publicly-available work for literary criticism. The exception in Article 14(2) to provide for the public communication of such reproductions of works for literary criticism is a corollary to this exception. The attribution requirement, in that mention be made of the source and name of the author, must be met.

Myanmar

366. No copyright legislation for Myanmar has been found, though it has been surmised that the copyright law applicable in Myanmar is the U.K. Copyright Act 1911 (by way of the Burma Copyright Act of 1914).⁵²³ Myanmar is not a Berne Union member or a WTO member.

Nauru

367. Nauru was administered as a territory of the Commonwealth of Australia. But with its independence in 1965, all Australian acts that extend to Nauru as a territory of the Australian Commonwealth cease so to extend⁵²⁴ and Australia ceased to exercise any powers of legislation, administration and jurisdiction over Nauru.⁵²⁵

⁵²³ Burma Copyright Act (India Act III, 1914).

⁵²⁴ Nauru Independence Act 1967, s. 4(1)(b).

⁵²⁵ Nauru Independence Act 1967, s. 4(2).

368. No copyright legislation for Nauru has been found. Nor is Nauru a Berne Union member or a WTO member. But under section 4(1) of the Custom and Adopted Laws Act 1971 of Nauru, the statutes of general application which were in force in England on 31 January 1968 were adopted as the laws of Nauru. This implies that the U.K. Copyright Act 1956 is part of the copyright law of Nauru.

369. As Kiribati has also adopted the U.K. Copyright Act 1956 as part of the copyright law of Kiribati, the analysis above as regards the exceptions in the copyright law of Kiribati applies to Nauru.

Nepal

370. Nepal's Copyright Act dates from 1965 and was updated in 1997. The 1965 Act was enacted when "the infrastructural and other institutional supports and facilities needed for the development and promotion of creative works were virtually non-existent".⁵²⁶ A learned commentator opined that the 1997 amendment of the 1965 Copyright Act failed to consider new technological developments and their national and international implications.⁵²⁷ In 2002, these concerns were addressed with the enactment of the new Copyright Act and the repeal of the 1965 Act. In 2005, the Nepalese Copyright Act was again amended.

371. The administration of the Nepalese Copyright Act is under the Nepal Copyright Registrar's Office, which is under the Ministry of Culture, Tourism and civil Aviation for Copyright and Related Right Protection.⁵²⁸

372. A review of the exceptions relating to educational activities under the Nepalese Copyright Act follows.

Section 16: Reproduction for Personal Purposes

373. Section 16(1) exempts from copyright infringement the right to reproduce some portions of any published work for personal use. However, this exception does not encompass any reproduction of (a) an architectural design erected as a building and other construction related design, (b) a significant portion of any book or of a musical work as notation, (c) all or a significant portion of a database through digital transmission.⁵²⁹

⁵²⁶ Pustun Pradhan, Project Director for the Centre for Economic Development and Administration (CEDA) at Tribhuvan University, Kirtipur, Kathmandu, Nepal, News and Information – Copyright Law in Nepal, COPYRIGHT BULLETIN – APPROACHING INTELLECTUAL PROPERTY AS A HUMAN RIGHT Vol. XXXV No. 3 at 77 (Unesco, 2001) at: <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf#page=77> (accessed 15 June 2009).

⁵²⁷ *Id.*

⁵²⁸ Min Prasad Gnyawali, Present Status of Intellectual Property Rights in Nepal, WIPO/UNESCAP Colloquium on Intellectual Property, Bangkok, Thailand (Nov. 2006), at: http://www.unescap.org/tid/mtg/ip_s4nep.pdf (accessed 15 June 2009).

⁵²⁹ Nepalese Copyright Act, s. 16(2) ("an architectural design erected as a building and other construction related design or a significant portion of any book or of a musical work as notation of [sic] all or significant portion of a database through digital transmission").

374. A “database” that is referred to in section 16(2) refers back to section 3(2) and its reference to a “translation, arrangement, sequential arrangement of [a] work or collection of works presented as [an] original [work] from [the] viewpoint of presentation, collection or expression, data or database readable with or without support of [a] machine”. In the absence of any definition, the exclusion of a “database by digital transmission” from the personal purposes exception is likely to prove contentious in distinguishing a database from a presentation or collection, for which the personal purposes exception will apply.

Section 17: Fair Use for Citation Purposes

375. Section 17 exempts from copyright infringement the reproduction by way of citation of some portions of a published work by way of fair use, in a manner not prejudicial to the economic right of the author or owner, subject to the attribution requirement that the source and author’s name be mentioned.

Section 18: Reproduction for Teaching and Learning and Educational “Performance”

376. Section 18 exempts from copyright infringement (a) the reproduction of a small portion of any published work by way of citation, writing or audio-visual aid, and (b) the reproduction, broadcast and exhibition of some portions of the work for purposes of educational activities to be performed in the classroom, where such acts ((a) and (b)) are done for teaching and learning activities and in a manner not prejudicial to the economic right of the author or owner. All copies reproduced are required to have the source and author’s name indicated.⁵³⁰

377. There is some overlap between section 17 and section 18(1) as regards the citation of a portion of a work for teaching and learning activities. However, to the extent that section 17 is more generous in allowing for the citation of “some portions” of a published work, section 18 allows for multiple copies of reproductions of “a small portion” of a published work to be made. This limitation as regards “a small portion” is lifted in relation to works reproduced, broadcasted and exhibited (but not performed) in conjunction with educational activities to be performed in the classroom, where the limit is “some portion” instead.

378. There is a clear mistake in section 18 as regards its reference to its operation to exempt from copyright infringement, “anything contained in clause (a) of section 7”, which refers only to the reproduction right of the author. Since the exception derogates from the right of broadcast and exhibition in the work, section 18 should refer to the author’s economic rights in clauses (h), (j) and (k) of section 7 as well.

Section 22: Importation for Personal Purposes

379. Section 22 exempts from copyright infringement the importation for personal purposes one copy of any work. It is not clear from this section whether in this regard, the

⁵³⁰ Nepalese Copyright Act, s. 18(2).

“hypothetical manufacturer” test applies to the work, nor does the section indicate who is supposed to be the “hypothetical manufacturer”.

New Zealand

380. The history of New Zealand copyright law parallels that of Australian copyright law. Early copyright protection in New Zealand was achieved through a mixture of local and Imperial legislation.⁵³¹ After the New Zealand statutes were consolidated into the New Zealand Copyright Act 1908, it was quickly superseded by the Imperial Copyright Act in 1913.⁵³² Following from the 1956 U.K. Copyright Act, the New Zealand Copyright Act was passed in 1962.⁵³³ Modeled largely on the U.K. Copyright, Designs and Patents Act 1988,⁵³⁴ the latest version of the New Zealand Copyright Act was passed in 1994. The current edition of the New Zealand Copyright Act 1994 consulted for purposes of this study is the reprint as at 3 September 2007.

Sections 42 and 176: Criticism, Review

381. Section 42(1) provides that fair dealing with a work for the purpose of criticism or review of that or another work, or of a performance of a work, does not infringe copyright in the work if the fair dealing is accompanied by a sufficient acknowledgement.

382. A similar exception applies in relation to performance rights regarding the fair dealing of a performance or recording for purposes of criticism or review or for reporting current events in section 176.

Section 43: Research or Private Study

383. Section 43(1) exempts from copyright infringement any fair dealing of a literary, dramatic, musical or artistic work for the purpose of research or private study. Unlike Fiji, this exception is not premised on the availability of a collective license of which the individual is or should be aware under which the fair dealing can be effected.

384. For the purpose of determining if copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, the court is directed to have regard to the five factors of the purpose of the copying, the nature of the item copied, whether the item could have been obtained within a reasonable time at an ordinary commercial price, the effect of the copying on the potential market for or value of the work and the amount and substantiality of the part copied taken in relation to the whole item (“five fair dealing factors”).⁵³⁵ However, section 43(4) states that nothing in the section

⁵³¹ S Ricketson, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION* (2nd ed, 1999) at § 3.395.

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ New Zealand Copyright Act 1994, s. 43(3).

authorizes the making of more than one copy of the same work or of the same part of the work on any one occasion.

385. Where such copying is justified as research or private study, there is no infringement of the typographical arrangement of the edition of the work.⁵³⁶

Sections 44 and 177: Multiple Copying for Educational Instruction

386. Sections 44 and 45 operate a multi-tier mechanism to enable the copying of literary, dramatic, musical or artistic works for educational or instruction purposes. Section 44 deals with the copying of a literary, dramatic, musical or artistic work or the typographical arrangement, and section 45 deals with the copying of a sound recording, film, broadcast or cable programme and any work included therein.

387. The exceptions in section 44 are summarized in the table below: Provision	Section 44(1)	Section 44(2)	Section 44(3)
Work	Literary, dramatic, musical or artistic work and typographical arrangement of published edition	Literary, dramatic, musical or artistic work and typographical arrangement of published edition	Literary, dramatic or musical work and typographical arrangement of published edition
Extent	Copying of whole or part of work or edition	Copying of whole or part of work or edition	Copying of part of work or edition ⁵³⁷
Copies	No more than one copy is made on an one occasion	One or more copies are made on any one occasion	One or more copies are made on any one occasion
Activity	By means of reprographic process or by any other means	NOT by means of reprographic process	By means of reprographic process or by any other means
Purpose	In course of preparation for instruction, for use in course of instruction, in course of instruction	In course of preparation for instruction, for use in course of instruction, in course of instruction, after course of instruction	Copying is done for an educational purpose
Actor	By or on behalf of person who is to	By person who is to give, is giving, or has	By or on behalf of an educational

⁵³⁶ New Zealand Copyright Act 1994, s. 43(2).

⁵³⁷ New Zealand Copyright Act 1994, s. 44(3)(d).

	give, or who is giving, a lesson	given the lesson By person who is to receive, is receiving or has received the lesson	establishment
Place	Educational establishment		(see above)
Charges			No charge is made for supply of copy to any student or person who is to receive, is receiving or has received a lesson
Condition			(Work/edition of 3 pages or fewer): 50% of work/edition ⁵³⁸ (Work/edition of more than 3 pages): Not more than 3% or 3 pages of work/edition ⁵³⁹ Copied part of work/edition may not and no other part of same work/edition may, within 14 days of copying, be copied again ⁵⁴⁰
Others			Copyright in included artistic work is not infringed ⁵⁴¹

Table 7: Summary of Conditions in Section 44, New Zealand Copyright Act

388. The effect of section 44 may be summarized as follows. Section 44(1) permits the copying of one copy of up to the whole work by the instructor in an educational establishment, which is defined in the New Zealand Copyright Act as any school to which the Education Act 1989 or the Private Schools Conditional Integration Act 1975 applies, any special schools, classes, clinics or services under the Education Act 1964, any special institution, childhood centres, non-profit “institutions, private or government training establishments” under the Education Act 1989, and any other approved body.⁵⁴²

Section 44(2) permits the multiple, non-reprographic copying of up to the whole work by an instructor or student for instructional purposes. It is worth noting that this exception is not confined to educational establishments. Hence for-profit professional training institutes may qualify for this exception.

⁵³⁸ New Zealand Copyright Act 1994, s. 44(4).

⁵³⁹ New Zealand Copyright Act 1994, s. 44(3)(f) (ignoring the transition provisions in s. 44(3)(f)(i)).

⁵⁴⁰ New Zealand Copyright Act 1994, s. 44(6).

⁵⁴¹ New Zealand Copyright Act 1994, s. 44(5).

⁵⁴² New Zealand Copyright Act 1994, s. 2 (definition of educational establishment).

389. On the other hand, section 44(3) permits multiple reprographic copies of works to be made for instructional purposes in educational establishments, but the extent of the copying is limited to 3 pages or 3% of the work or edition, or 50% of the work if it has fewer than 3 pages. There are also restrictions regarding multiple repeated copying.

Section 45: Media Studies, Language and Correspondence Courses

390. The exceptions in section 45 are summarized in the table below:

Provision	Section 45(1)	Section 45(3)
Work	Sound recording, film, broadcast or cable programme, and any work included therein	Sound recording and any work included therein
Extent/activity	Copying of work consisting of or includes the making of a film or film sound track	Copying of work
Purpose	In course of preparation for instruction, for use in course of instruction, in course of instruction, after the course of instruction	In course of preparation for instruction, for use in course of instruction, in course of instruction, after course of instruction
Lesson	Lesson on how to make films or film sound-tracks	Lesson relates to learning of language, or conducted by correspondence
Actor	By person who is to give, is giving, or has given the lesson By person who is to receive, is receiving or has received the lesson	By person who is to give, is giving, or has given the lesson By person who is to receive, is receiving or has received the lesson
Charges	No charges for supply	No charges for supply
Condition		No available licensing scheme authorizing copying Person doing the copying not aware of licensing scheme ⁵⁴³

Table 8: Summary of Conditions in Section 45, New Zealand Copyright Act

391. The exceptions here are narrower, and pertain specifically for media studies, language courses and courses conducted by correspondence. A similar exception arises to exempt from infringement of performers' rights the copying of a recording of a performance for media studies, language courses and courses conducted by correspondence.⁵⁴⁴

⁵⁴³ New Zealand Copyright Act 1994, ss. 45(5).

⁵⁴⁴ New Zealand Copyright Act 1994, s. 177(1).

Sections 46 and 71: Educational and Scientific Chrestomathies

392. Section 46 permits the creation of anthologies for use in an educational establishment, by way of including short passages from published literary or dramatic works in a collection, as long as the collection “consists mainly of material in which no copyright subsists” or is owned by the publisher or by the Crown, the work itself is not intended for educational usage and there is a sufficient acknowledgment accompanying each inclusion.⁵⁴⁵ However, not more than two excerpts from copyright works by the same author in collections published by the same publisher over any period of five years may be included in the creation of the anthology.⁵⁴⁶

393. Section 71 applies the same concept and allows for abstracts of articles on scientific or technical subjects in periodicals to be copied or issued to the public.

Sections 47, 178 and 188: Performances and Showing Works at Educational Establishments

394. Section 47 exempts as public performances, performances of a literary, dramatic or musical work by teachers or students in the course of activities of the school or educational establishment, or at the school or establishment by any person for the purpose of instruction, before an audience of teachers, students and “other persons directly connected with its activities”.⁵⁴⁷ The playing or showing of sound recordings, audio visual works, broadcasts or cable programmes for this purpose is also exempted as a “playing or showing of the work in public”.⁵⁴⁸

395. A similar exception in section 178 applies in relation to the playing or showing of a sound recording, film, broadcast or cable programme at an educational establishment for the purposes of instruction in similar circumstances.

396. The exception in 188 exempts from infringement of performers’ rights, the free public playing or showing of a broadcast or cable programme to an audience who have not paid for admission. This is potentially applicable in relation to broadcasts or communications of school performances.

Sections 48 and 179: Recordings of Broadcasts and Cable Programmes for Educational Purposes

397. Section 48 exempts a recording of a broadcast or cable programme, or a copy of such a recording, made by a school or educational establishment for educational purposes from

⁵⁴⁵ New Zealand Copyright Act 1994, s. 46(1).

⁵⁴⁶ New Zealand Copyright Act 1994, s. 46(2). References to “same author” here include works by all the joint authors and collaborators. New Zealand Copyright Act 1994, s. 46(3).

⁵⁴⁷ New Zealand Copyright Act 1994, s. 47(1). Parents and guardians of students are not per se deemed to be directly connected with the activities of the school. New Zealand Copyright Act 1994, s. 47(3).

⁵⁴⁸ New Zealand Copyright Act 1994, s. 47(2).

copyright infringement in the broadcast or cable programme or in any work included in it. This exception is subject to the availability of a collective license for this purpose and awareness of its availability by the educational establishment.

398. A similar exception in 179 applies to exempt any infringement of performance or recording rights included in the recording or copy.

Sections 49 and 177(2): Examinations

399. Section 47 exempts from copyright infringement, anything done for the purposes of an examination, whether by way of setting, communicating or answering the questions. A similar exception in section 177(2) exempts from any infringement of performance rights in performances.

Section 79: Rental of Computer Programs, Recordings and Audio Visual Works by Educational Institutions

400. Section 79 exempts from copyright infringement any rental by an educational establishment or a prescribed library of a computer program, sound recording or film to any person, if the rental is not affected for profit and the subject matter of the rental work has previously been put into circulation with the copyright owner's license.

Niue

401. Niue has no copyright law of its own. Nor is Niue a Berne Union member or a WTO member. Instead, as a protectorate of the British Crown, it was annexed to New Zealand by an Order-in-Council and administered by the New Zealand government as part of the Cook Islands in 1901.⁵⁴⁹ In 1903, the New Zealand Cook and Other Islands Government Act Amendment Act 1903 placed Niue under separate administration. As a non-self-governing part of New Zealand, it expressly adopted, via the Niue Act 1966, the New Zealand Copyright Act of 1962 and the New Zealand Design Act of 1953.⁵⁵⁰ In 1974, the self-governing status of Niue was fully recognized pursuant to the Niue Constitution Act 1974. Article 36 of the Constitution provides that no act of New Zealand made after 19 October 1974 becomes part of the law of New Zealand without the request and consent of the Niue Assembly. Thus though New Zealand has itself repealed the Copyright Act of 1962 and replaced it with the New Zealand Copyright Act of 1994, the latter act is not the law in Niue.

402. Modelled largely on the U.K. Copyright Act 1956, the New Zealand Copyright Act 1962 gives recognition to copyright and related rights in the form of sound recordings,

⁵⁴⁹ Ah Angelo, *Niue*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 158-159 (Michael A. Ntummy ed., 1993).

⁵⁵⁰ Niue Act 1966 (No 38), s. 686 ("The Copyright Act 1962 shall be in force in Niue in the same manner in all respects as if Niue were for all purposes part of New Zealand, and the term New Zealand as used in that Act shall, both in New Zealand and in Niue, be read as including Niue accordingly.").

cinematograph films, TV and sound broadcasts and published editions of works (“other subject-matter”). The exceptions found in the U.K. Copyright Act 1956 are also largely replicated in the New Zealand Copyright Act 1962.

403. The analysis above as regards the Cook Islands applies to Niue, since the Cook Islands has also adopted the New Zealand Copyright Act 1962 as its copyright law.

Pakistan

404. Pakistan has been a member of the Berne Union since 1948. She enacted her copyright legislation in 1962. Modelled on the U.K. Copyright Act 1911, the Pakistan Copyright Ordinance has since been revised substantially in 1992 and again in 2000. The 1992 amendments extended copyright protection to computer software, periodicals, video films and all kinds of audio-visual works, provided stiffer penalties for offenders and better compensation for those whose rights have been infringed, and restricted the scope of a compulsory license for translations (section 37). Pursuant to the obligations arising from its WTO membership in 1995, in 2000, amendments were made to, *inter alia*, recognize a new typographical arrangement right in published works, provide for an express rental right for computer programs and cinematographic works, and provide further enhancements to the criminal penalties and civil search orders.

405. A review of its provisions for the benefit of educational activities follows.

Section 36: Compulsory License in Works Withheld from Public

406. Section 36 of the Pakistan Copyright Ordinance contains a provision which enables the Copyright Board to direct the Copyright Registrar to grant to an applicant a license to republish a work, perform it in public or communicate it to the public by broadcast, subject to payment to the copyright owner of such compensation and subject to such other terms and conditions as the Board may determine.⁵⁵¹ The work must have been previously published or performed in public.⁵⁵² If the Board is satisfied that a refusal is not in the public interest or that the grounds of refusal are not reasonable or that the republication of the work is necessary in the public interest,⁵⁵³ an application for the license may be granted in the following circumstances:

- Where the copyright owner has refused to republish or allow the republication of the work, or allow the public performance of the work and by reason of such refusal the work is withheld from the public
- Where the copyright owner has refused to allow a public communication by broadcast of such a work or a work recorded on a (sound) record, on terms which the applicant considers reasonable
- Where the copyright owner is dead or unknown or cannot be traced or found and the republication of the work is necessary in the public interest.

⁵⁵¹ Pakistan Copyright Ordinance, s. 36(1) proviso.

⁵⁵² Pakistan Copyright Ordinance, s. 36(1).

⁵⁵³ Pakistan Copyright Ordinance, s. 36(1) proviso.

407. Section 36(2) provides that the Pakistani Federal Government or the Board may, upon an application by any governmental or statutory institution, in the public interest, grant a license to reprint, translate, adapt or publish any textbook on a non-profit basis. There is no mention made in this section as regards any compensation or equitable remuneration payable. This has caused considerable concern to international book publishers.⁵⁵⁴

Section 37: License to Produce and Publish Translations

408. Section 37 is Pakistan's implementation of a compulsory license scheme similar to Article II of the Appendix to the Berne Convention. However, it should be noted that Pakistan has not made a declaration to indicate that it is applying Article II of the Appendix.

409. Section 37 enables a Pakistan citizen or domicile to apply to the Copyright Board for a license to produce and publish a translation of a literary or dramatic work in any Pakistani language or a language ordinarily used in Pakistan not being English, French or Spanish. The Board may hold an inquiry, subject to giving wherever practicable, the copyright owner an opportunity of being heard,⁵⁵⁵ and direct the Copyright Registrar to grant a non-exclusive, non-transferable license, to produce and publish a translation on condition that the applicant pay the copyright owner royalties in respect of copies of the translation sold to the public, calculated at a rate to be determined by the Board. The conditions are:

- That no translation of the work in the required language has been published by the copyright owner within one year of first publication of the work, or if a translation has been so published, it has been out of print.⁵⁵⁶
- That the applicant has proved to the Board's satisfaction that he had request and been denied authorization by the copyright owner to produce and publish such translation, or that he was unable to find the copyright owner, and had sent his request to the publisher whose name appears from the work, not less than 2 months before the license application.⁵⁵⁷
- That the Board is satisfied that the applicant is competent to produce and publish a correct translation of the work and possesses the means to pay royalties to the copyright owner.⁵⁵⁸
- That the Board is satisfied that the grant of the license will be in the public interest, for reasons to be recorded in writing.⁵⁵⁹

⁵⁵⁴ International Intellectual Property Alliance, 2002 SPECIAL 301 REPORT (PAKISTAN) 195, at: <http://www.iipa.com/rbc/2002/2002SPEC301PAKISTAN.pdf> (accessed 16 June 2009).

⁵⁵⁵ Pakistan Copyright Ordinance, s. 37(4)(f).

⁵⁵⁶ Pakistan Copyright Ordinance, s. 37(4)(a).

⁵⁵⁷ Pakistan Copyright Ordinance, s. 37(4)(b), (c).

⁵⁵⁸ Pakistan Copyright Ordinance, s. 37(4)(d).

⁵⁵⁹ Pakistan Copyright Ordinance, s. 37(4)(g).

Section 57(1)(a)(i): Private Use and Research as Fair Dealing

410. Section 57(1)(a)(i) exempts from copyright infringement a fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study.

411. The explanation to section 57(1) clauses (a) or (b) provides the following presumptions as regards what constitutes a fair dealing with a work (for purposes of private use and research, criticism or review and the reporting of current events):

Literary or dramatic work in prose	Single extract of up to 400 words Series of extracts (with comments interposed) up to 800 words with no one extract exceeding 300 words
Literary or dramatic work in poetry	Extract or extracts up to 40 lines, not to exceed ¼ of whole of any poem

Table 9: Presumptions as regards Fair Dealing in the Pakistani Copyright Ordinance

412. It also adds that in the case of a review of a newly published work, “reasonably longer extracts may be deemed fair dealing with such work.”

Section 57(1)(a)(ii): Criticism or Review as Fair Dealing

413. Section 57(1)(a)(ii) exempts from copyright infringement a fair dealing with a literary, dramatic, musical or artistic work for the purposes of criticism or review, whether of that work or of any other work.

414. There is an acknowledgment condition requiring that the work so used be identified by its title or other description, and that the author be identified, unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgment of his name should be made. However, this is found in the proviso to *section 57(1)(x)* instead of section 57(1). As previously noted in relation to the Indian Copyright Act, this would appear to be a formatting mistake made in relation to the Indian Copyright Act, which has likewise appeared in the Pakistan Copyright Ordinance. For reasons noted above in relation to the “acknowledgment condition problem”, it is submitted that the condition should be a free-standing condition that applies to the relevant section 57(1) exception, such as a fair dealing for criticism or review.

415. The above presumption provisions as regards fair dealing in the Pakistani Copyright Ordinance, as outlined above, also apply to the dealing in a work for criticism or review.

Section 57(1)(g): Chrestomathies

416. Section 57(1)(g) exempts from copyright infringement any bona fide publication of a collection, mainly composed of non-copyright matter, intended for use of educational institutions, of short passages from published (and copyrighted) literary or dramatic works, not themselves published for the use of educational institutions. The conditions are that the

work must be so described in the title and in any of the publisher's advertisements, and that not more than two such passages from works by the same author are published by the same publisher during any period of five years. In the case of works of joint authorship, this condition extends to passages of all works by any one of the authors, whether alone or in collaboration.

417. The Pakistan Copyright Ordinance does not contain a requirement in this regard that a sufficient acknowledgment be made of all such short passages extracted for publication, unlike the Indian Copyright Act.⁵⁶⁰

Section 57(1)(h): Course of Instruction

418. Section 57(1)(h) exempts from copyright infringement the reproduction of any literary, dramatic, musical or artistic work by a teacher or a pupil in the course of "and for the sole purpose of" instruction, whether at an educational institution or elsewhere, where the reproduction is made by a teacher or a pupil otherwise than by the use of a printing process.

Section 57(1)(h): Examinations

419. Section 57(1)(h) exempts from copyright infringement the reproduction of any literary, dramatic, musical or artistic work as part of the questions to be answered in an examination and in answers to such questions.

Section 57(1)(i), (l): Performances in Educational Institutions

420. Section 57(1)(i) exempts from copyright infringement the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work, by the staff and students of the institution, a cinematograph film or a (sound) recording, or the communication of such a film or recording, if the audience is limited to staff, students, parents and guardians of the students and persons directly connected with the activities of the institution.

421. This exception appears wider than those in other jurisdictions, where parents and guardian of students are generally excluded from the permissible audience.

422. An educational institution may also rely on section 57(1)(l), which exempts from copyright infringement the performance of a literary, dramatic or musical work by an amateur club or society (such as those found in schools as part of the students' extra-curricular activities), if the performance is given to a non-paying audience, or for the benefit of a religious, charitable or educational institution.

⁵⁶⁰ Pakistan Copyright Ordinance, s. 57 proviso

Section 57(2): Translations and Adaptations of Excepted Works

423. Section 57(2) provides a general exception that exempts from copyright infringement any translation of a literary, dramatic or musical work, or any adaptation of a literary, dramatic, musical or artistic work, excepted under the aforesaid exceptions in section 57(1).

Palau

424. Like the Marshall Islands and Micronesia, the Republic of Palau had a very colourful legal history. It was subject to Spanish, German and Japanese sovereignty until its capture by U.S. forces in 1944, where it remained under U.S. administration until 1982, when the signing of the Compact of Free Association in 1982 gave Palau full internal autonomy and authority to conduct its own foreign affairs in “free association” with the United States.⁵⁶¹ After eight referenda and an amendment to the Palauan Constitution, the Compact went into effect and Palau became an independent republic on 1 October 1994.

425. Article XV Section 3 of the Palauan Constitution provided that all existing laws in force and effect in Palau immediately preceding the effective date of the Constitution shall remain in force and effect until repealed, revoked, amended or has expired by its own terms. In 2003, Palau enacted its own Copyright Act, for the purpose of protecting the owners and creators of original works and the protection of performers’ rights.

426. An analysis of the exceptions for the benefit of educational activities in the Palauan Copyright Act follows.

Section 7: Private Reproduction for Personal Purposes

427. Section 7 exempts from copyright infringement the “private reproduction” by a natural person of a single copy of a published work for his own “personal purposes”. However, the exemption will not apply to a work of architecture, reprography of the whole or a substantial part of a book or a musical work in the form of notation, the whole or a substantial part of a digital database, a computer program, and any work in cases “where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or owner of the copyright”.

Section 8: Quotation

428. Section 8 exempts from copyright infringement the reproduction in the form of quotation of a short part of a published work, provided it is compatible with fair practice and does not exceed the extent justified by the purpose. In addition, the quotation shall be attributed, in that it shall be accompanied by an indication of the source and name of the author (if his name appears in the work from which the quotation is taken).

⁵⁶¹ Bruce L. Ottley, *The Republic of Palau*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 566-568 (Michael A. Ntummy ed., 1993).

Section 9: Reproduction for Teaching

429. Section 9 exempts from copyright infringement two types of reproduction for teaching purposes.

430. Section 9(a) permits the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, “provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose”. The attribution requirement must be met, in having the source of the work and the name of the author indicated on all copies made.⁵⁶²

431. Section 9(b) permits the reprographic reproduction, of published articles, other short works or short extracts of works, “to the extent justified by the purpose”, for face-to-face teaching in educational institutions (the activities of which do not serve direct or indirect commercial gain). Such a reproduction must be “an isolated act occurring, if repeated, on separate and unrelated occasions”.⁵⁶³ In addition, there must be no collective license offered for such reproductions for which the education institution is or should be aware.⁵⁶⁴ Likewise, the attribution requirement must be met, in having as far as practicable the source of the work and the name of the author indicated on all copies made.⁵⁶⁵

Papua New Guinea

432. Papua New Guinea enacted the Copyright and Neighbouring Rights Act 2000, to make provision for the protection of copyright and neighbouring rights, and for other related purposes. Papua New Guinea is a WTO member since 1996, and its obligations with respect to the Berne Convention arise from TRIPS, but it is not yet a Berne Union member. A review of its copyright exceptions for the benefit of educational activities follows.

Section 8: Private Reproduction for Personal Purposes

433. Section 8 exempts from copyright infringement the “private reproduction” by a person of a single copy of a published work for his own “personal purposes”. However, the exemption will not apply to a work of architecture, reprography of the whole or a substantial part of a book or a musical work in the form of notation, the whole or a substantial part of a digital database, a computer program, and any work in cases “where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright”.

⁵⁶² Palauan Copyright Act, s. 9(c).

⁵⁶³ Palauan Copyright Act, s. 9(b)(1).

⁵⁶⁴ Palauan Copyright Act, s. 9(b)(2).

⁵⁶⁵ Palauan Copyright Act, s. 9(c).

Section 10: Quotation

434. Section 10 exempts from copyright infringement the reproduction in the form of quotation of a short part of a published work, provided it is compatible with fair practice and does not exceed the extent justified by the purpose. In addition, the quotation shall be attributed, in that it shall be accompanied by an indication of the source and name of the author (if his name appears in the work from which the quotation is taken).

Section 11: Reproduction for Teaching

435. Section 11 exempts from copyright infringement two types of reproduction for teaching purposes.

436. Section 11(a) permits the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, “provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose”. The attribution requirement must be met, in having the source of the work and the name of the author indicated on all copies made.⁵⁶⁶

437. Section 11(b) permits the reproduction of published articles, other short works or short extracts of works, “to [the] extent justified by the purpose”, for face-to-face teaching in educational institutions (the activities of which do not serve direct or indirect commercial gain). Such a reproduction must be “an isolated act occurring, if repeated, on separate and unrelated occasions”.⁵⁶⁷ In addition, there must be no available license for such reproductions.⁵⁶⁸ Likewise, the attribution requirement must be met, in having as far as practicable the source of the work and the name of the author indicated on all copies made.⁵⁶⁹

Section 12(a): Reprographic Reproduction by Public Institutions for Study, Scholarship or Private Research

438. Section 12(a) exempts from copyright infringement the reproduction by a public institution whose activities are not for commercial gain, of a single copy of a work by reprographic reproduction for the study, scholarship or private research of a person. The person must satisfy the public institution that the copy will be used solely for this purpose⁵⁷⁰ and that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions.⁵⁷¹ In addition, there must be no available license offered for this purpose.⁵⁷²

⁵⁶⁶ Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 11(2).

⁵⁶⁷ Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 11(1)(b)(i).

⁵⁶⁸ Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 11(1)(b)(ii).

⁵⁶⁹ Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 11(2).

⁵⁷⁰ Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 12(a)(i).

⁵⁷¹ Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 12(a)(ii).

⁵⁷² Papua New Guinea Copyright and Neighbouring Rights Act 2000, s. 12(a)(iii).

439. Section 12(b) contains an exemption to enable a library or archive to make a copy of a work for preservation and other library administration purposes. For more details about this exception, please refer to the WIPO Study on Libraries and Archives.⁵⁷³

Section 15: Personal Importation

440. Section 15 exempts from copyright infringement the importation of a copy of a work by a person for his own personal purposes. As noted above in relation to section 22 of the Nepalese Copyright Act, it is not clear from this section whether in this regard, the “hypothetical manufacturer” test applies to the work, nor does the section indicate who is supposed to be the “hypothetical manufacturer”.

Philippines

441. The Philippines is one of the earliest Asian countries to accede to the Berne Convention. As early as 1949, it already has in place the Copyright (Civil Code) Code (No. 386), since replaced with Part IV of the Intellectual Property Code of the Philippines 1998.⁵⁷⁴ The copyright law enshrined in the Intellectual Property Code of the Philippines draws heavily from the U.S. Copyright Act. Philippines is also one of the few countries who is a WTO member (1995) and who has also acceded to the Rome Convention (1984) and the WCT and WPPT (both in 2002). At the same time, Philippines has filed a Berne Notification to indicate its intention to apply both Articles II and III of the Berne Convention Appendix.

442. A study of the copyright exceptions for the benefit of educational activities under the Philippines Intellectual Property Code follows.

Section 184.1(b): Quotations

443. Section 184.1(b) exempts from copyright infringement the making of quotations from a published work, including quotations from newspaper articles and periodicals in the form of press summaries, if they are compatible with “fair use” and only to the extent justified for the purpose. However, the source and name of the author, if appearing on the work, must be mentioned.

444. What is “fair use” for purposes of quotations is arguably to be resolved with reference to the fair use factors set out in section 185.1, as use of the quoted work “for criticism [and] comment”. This could be a consequence of observing the application of the aforesaid three-step test condition.

⁵⁷³ WIPO Study on Libraries and Archives, at 314-315.

⁵⁷⁴ Intellectual Property Code of the Philippines (Republic Act No. 8293).

Section 184.1(e): Illustration for Teaching Purposes

445. Section 184.1(e) exempts from copyright infringement the inclusion of a work in a publication, sound recording, film, broadcast or other public communication, if such an inclusion is made by way of illustration for teaching purposes and is compatible with “fair use”. The source and name of the author must be mentioned.

446. What is “fair use” for teaching purposes, including the making of multiple copies for classroom use, research and similar purposes, is arguably to be resolved with reference to the fair use factors set out in section 185.1. In this regard, it may be queried whether section 184.1(e) and 185.1 are independent and alternative exceptions, to make possible a fair use of a work for teaching purposes, or whether section 185.1 provides a “double-barrelled” test which creates an additional requirement for the excepted use of works for teaching purposes. Perhaps one justification for this “double-barrelled” test is the requirement in section 184.2 for all section 184.1 exceptions to be subject to the three-step test. In this regard, it should be noted that section 184.1(e) is obviously modeled on Article 10(2) of the Berne Convention, whereas section 185.1 is modeled on the omnibus U.S. fair dealing exception. In comparison, Article 10(2) of the Berne Convention is a free-standing exception, independent of Article 9(2), where the three-step test is derived.

447. Reference should also be made to section 212.3, in relation to the use of performances, sound recordings and broadcasts for teaching purposes.

Section 184.1(f): Recordings by Educational Institutions

448. Section 184.1(f) exempts from copyright infringement “recordings” of a work made by schools, universities or educational institutions included in a broadcast “for the use of such schools, universities or educational institutions”, provided such recordings are deleted within a reasonable time after they were first broadcast, and that no recordings may be made from audio-visual works which are part of the general cinema repertoire of feature films except for brief excerpts of the work.

449. Some comments may be made about this exception. First, two possible interpretations are possible as regards the qualifier “for the use of such schools, universities or educational institutions”. It could qualify the use of the recordings, or qualify the nature of the broadcasts (as educational broadcasts). It is submitted that the first interpretation is the preferred one, as it is more in line with Art. 15(1)(d) of the Rome Convention, for which the Philippines is a member, since it refers to “use solely for the purposes of teaching and scientific research.” This interpretation is also more consistent with the aforesaid three-step test as the test refers to a use that does not conflict with a normal exploitation of the work and does not unreasonably prejudice the rightholder’s legitimate interest. It should also be noted that Article II(9)(a)(ii) of the Appendix to the Berne Convention envisages educational broadcasts, and it is possible for an exception to be drafted in relation to recordings of educational broadcasts.⁵⁷⁵

⁵⁷⁵ See e.g. Japanese Copyright Act, Art. 34.

Section 184.1(h): Public Interest Use of Work by Educational Institutions

450. Section 184.1(h) is a broad exemption as regards the use of a work “by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions” where such use is in the public interest and is compatible with fair use.

451. Again, the question which could be raised is whether all uses for educational purposes by educational institutions is “in the public interest” and whether such uses will nonetheless still need to pass muster under the “fair use” test in section 185.1. That this may be an additional requirement may be supported with reference to the three-step test condition.

Section 184.1(i): Non-profit Public Performance for Educational Purposes

452. Section 184.1(i) exempts from copyright infringement “the public performance or the communication to the public of a work, in a place where no admission fee is charged in respect of such public performance or communication, by a club or institution for charitable or educational purpose only, whose aim is not profit making, subject to such other limitations as may be provided in the Regulations”.

453. This exception is not specifically limited to educational institutions. It permits a non-profit public performance for charitable or educational purposes, where the club or institution could be a school or student’s club.

454. Note that the aforesaid three-step test condition applies as regards the interpretation of this section.

Section 185: Fair Use of Copyright Work

455. Section 185.1 exempts from copyright infringement the fair use of a copyright work for “criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes”.

456. To determine whether the use made of a work in any particular case is fair use, the factors to be considered include: the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. Section 185.2 goes on to state that the fact that a work is unpublished does not by itself bar a finding of fair use.

457. As noted above, section 185.1 is an exception based on the omnibus fair use exception in section 107 of the U.S. Copyright Act. Please refer to the discussions above regarding section 107 of the Micronesian Copyright Act for more information.

458. Section 212.4 extends the fair use exception to broadcasts.⁵⁷⁶

Section 185: Software Research and Decompilation

459. Section 185.1 also exempts from copyright infringement, the decompilation of a computer program as fair use of a copyright work. Decompilation is defined as:

*the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs*⁵⁷⁷

460. To qualify for the exception, the decompilation has to be assessed as “fair use” against the fair use factors. This is also the position under U.S. copyright law.⁵⁷⁸

Section 187: Reproduction of Published Work for Research and Private Study

461. Section 187 exempts from copyright infringement the private reproduction of a single copy of a published work by a natural person, exclusively for research and private study. However, the exception does not apply to reproductions in the following circumstances:

- A work of building or construction architecture
- By reprographic means, an entire book, or a substantial part thereof, or of a musical work “in which graphics form”
- A compilation of data and other materials
- A computer program (subject to the right to reproduce a program in conjunction with the purpose for which the program has been obtained)
- Any work in cases where reproduction would unreasonably conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author.

462. The last circumstance is an importation of two of the three elements of the three-step test.

463. Please also refer to section 212.3 in relation to a similar exception for the use of performances, sound recordings and broadcasts for the sole purpose of teaching or scientific research.

Section 190: Importation for Personal Purposes

464. Section 190 exempts from copyright infringement in the public performance of the work (“notwithstanding the provisions of subsection 177.6 [sic]”), the importation of not

⁵⁷⁶ Philippines Intellectual Property Code, s. 212.4.

⁵⁷⁷ Philippines Intellectual Property Code, s. 185.1.

⁵⁷⁸ See e.g. *Sega Enterprises Ltd. v Accolade Inc.*, 977 F.2d 1510 (9th Cir. 1992), *Atari Games v Nintendo of America Inc.*, 975 F.2d 832 (Fed Cir. 1992).

more than one copy of a work by an individual for his personal purposes and “strictly for individual use only”,⁵⁷⁹ if copies of the work are not available in the Philippines.

465. Note however the qualifier in section 190.2, which is discussed below.

Section 190: Importation for Educational Society, Educational Institution or Free Public Library

466. Another clause in section 190 exempts from copyright infringement in the public performance of the work (“notwithstanding the provisions of subsection 177.6 [sic]”), the importation of a copy of a work by an individual for his personal purposes, when copies of the work are not available in the Philippines, if “(iii) The importation, consisting of not more than three (3) such copies or likenesses in any one invoice, is not for sale but for the use only of any religious, charitable, or educational society or institution duly incorporated or registered, or is for the encouragement of the fine arts, or for any state school, college, university, or free public library in the Philippines”.

467. As literally worded, there is an inconsistency in section 190 (aside from the problems with the reference to section 177.6). The first part of section 190 limits the importation to *an individual* of *one* copy of a work for his personal purposes, but the proviso extends it to the importation of up to *three copies* of a work for, *inter alia*, any educational institution and duly incorporated registered religious, charitable, educational society or institution, or is for the encouragement of the fine arts, or for free public library. Reading the two parts harmoniously, it may be suggested that the exception allows an educational institution to import, on any one invoice, via individuals who claim that the importation is for their personal purposes, up to a total of three copies of the work for the educational institution. However awkward this interpretation may be, it is submitted that this is the best interpretation in the context of section 190, although it is suggested that legislative revisions can do much to resolve these interpretational difficulties.⁵⁸⁰

468. Yet another clause in section 190 exempts from copyright infringement the importation of up to three copies of a work that belong to persons or families arriving from foreign countries and are not intended for sale.⁵⁸¹

469. The importation of these copies is subject to the condition subsequent in section 190.2 that they “may not lawfully be used in any way to violate the rights” of the copyright owner, or limit the protection granted to the owner in the Philippines Intellectual Property Code, and that such unlawful use shall be deemed an infringement.⁵⁸² It is opined that the wording of this section is awkward for the expression “lawful use” is not defined and *prima facie* suggests that an “unlawful use” of the imported copies escapes the infringement sanction prescribed. To get around this literal interpretation, it is suggested that the purposive interpretation, that any use, other than that specified in section 190.1 (the use for “personal

⁵⁷⁹ Philippines Intellectual Property Code, s. 190.1(a)(i).

⁵⁸⁰ The WIPO Study on Libraries and Archives refers to but does not discuss this section in any detail. See WIPO Study on Libraries and Archives, at 321.

⁵⁸¹ Philippines Intellectual Property Code, s. 190.1(b).

⁵⁸² Philippines Intellectual Property Code, s. 190.2.

purposes” or for educational institutions, fine arts and public libraries) shall be unlawful and render the imported copy an infringing copy, is to be preferred.

470. For purposes of these imports, section 190.3 provides that the Commissioner of Customs is empowered to make rules and regulations for preventing and dealing with the importation of articles the importation of which is prohibited under section 190, subject to the international treaties and instruments of which the Philippines is a party.

Sections 205, 210, 212: Exceptions for Works extended to Performances, Sound Recordings and Broadcasts

471. Sections 205 and 210 respectively extend the aforementioned exceptions in sections 184 and 185 (fair use) to performances (section 205) and sound recordings (section 210).

472. Section 212.4 extends the fair use exception in section 185 to broadcasts.⁵⁸³

473. Section 212.1 exempts from infringement in performances, sound recordings and broadcasts, the use of performances, sound recordings and broadcasts by a natural person exclusively for his personal purposes.

474. Section 212.3 exempts from infringement in performances, sound recordings and broadcasts, the use of short excerpts from performances, sound recordings and broadcasts for the sole purpose of teaching or scientific research.

Section 237: Berne Appendix Notification

475. Section 237 provides that the Philippines may, by proper compliance with the requirements in the Appendix of the Berne Convention, avail itself of the facilities provided in Articles II and III for compulsory translation and publication licenses. The Philippines has indeed filed a Berne Notification to signify its reliance on Articles II and III of the Appendix, with effect from 10 October 2004. However, this study has not discovered any such provisions or legal instruments issued by the Philippines’ government to give effect to this Notification.

Republic of Korea

476. Copyright protection in Korea dates back to 1908, when the Yi Dynasty enacted the Copyright Order (Royal Order No. 200), which provided for the adoption of the Japanese Copyright Act, which became the law of Korea when Japan annexed Korea in 1910. When independence was restored in 1945, the Copyright Order, and subsequently the Japanese Copyright Act, was again applied. In 1957, the first Korean Copyright Act was enacted.⁵⁸⁴ It

⁵⁸³ Philippines Intellectual Property Code, s. 212.4.

⁵⁸⁴ Ki-Su Lee, *Copyright*, INTELLECTUAL PROPERTY LAW IN KOREA 121 (Christopher Heath ed., 2003).

was wholly amended in 1986, and this version served as the basis of the current Copyright Act.

477. Korea is a member of the Berne Convention since 1996. It became a WTO member in 1995, and has since acceded to the WCT, WPPT and Rome Conventions in 2002, 2002 and 2009 respectively. Arising from these developments, the Copyright Act 1986 has also been substantially revised in accordance with Korea's obligations under these treaties.

478. Article 1 of the Korean Copyright Act states that the purpose of the Act is to "protect the rights of authors and the rights neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture". The aim of the Act is thus to balance the conflicting interests of an author and the public, described by one author as the interests of the author in securing economic gains through the exercise of copyright in his works and the interests of the general public in enjoying the benefit of the author's cultural contributions.⁵⁸⁵ A review of the exceptions for the benefit of educational activities under the Korean Copyright Act follows. The version of the Korean Copyright Act consulted for this purpose is revised as of Law No. 8852 dated 29 February 2008.

Article 25: Uses for the Purpose of School Education

479. Article 25 exempts from copyright infringement various activities relating to school education. Any work so used pursuant to Article 25 must have its sources clearly indicated, in the manner and to the extent deemed reasonable in the circumstances.⁵⁸⁶ These are outlined below.

480. Article 25(1) enables the reproduction of a publicly available work in textbooks to the extent deemed necessary for the purpose of high school, their equivalents and lower level school education.

481. Article 25(2) enables the reproduction, public performance, broadcast or interactive transmission of a publicly available work by an educational institution (established by special laws, the Elementary and Secondary Education Act, the Higher Education Act or operated by the state or local government) to the extent deemed necessary for class teaching. (It is worth noting that under the recent revisions made to the Higher Education Act, "remote universities" that grant students degrees equivalent to technical college or university degrees under the Lifelong Education Act are now "schools or cyber universities", and that these distance learning institutions would also qualify as educational institutions under Article 5(2)). If the use of the whole work is "deemed inevitable in the light of the nature of a work, the purpose and manner of its exploitation" and so on, it may be so used. This meant that the scope of the reproduction in schools is limited neither to excerpts of works nor a single copy of a work.⁵⁸⁷

⁵⁸⁵ Ki-Su Lee, *Copyright*, INTELLECTUAL PROPERTY LAW IN KOREA 137 (Christopher Heath ed., 2003).

⁵⁸⁶ Korean Copyright Act, Art. 37(1).

⁵⁸⁷ Ki-Su Lee, *Copyright*, INTELLECTUAL PROPERTY LAW IN KOREA 138 (Christopher Heath ed., 2003).

482. Likewise, Article 25(3) affirms that the student (“a person who receives education”) in the aforesaid educational institution in Article 25(2) to reproduce or interactively transmit the work to the extent deemed necessary for the purpose of class teaching.

483. However, aside from reproductions, public performances, broadcasts and interactive transmissions done by “high schools, their equivalents or lower level schools as prescribed under Paragraph (2)”, any person who intends to so exploit a work in Articles 25(1) and 25(2) has to pay compensation to the copyright owner.⁵⁸⁸ This will include universities, colleges, lifelong educational centres, vocational, technology education and official training institutes. The following table summarises the legal position for the various types of educational institutions in Korea.

Relevant Laws		Type of educational institution	Remuneration Required?
Special laws	Lifelong education Act.	All types of Lifelong Educational Centers	Yes
	Vocational courage Act.	Public vocational institutes, Approved training institutes	Yes
	Technology education development Act.	Technology education institutes	Yes
	Special educational Act. for the handicapped	Handicapped children education institutions	No
	Pre-school children education Act.	Pre-school or Kindergarten	No
Elementary and Secondary Education Act.		Elementary, Secondary, High School, Civil education center, Technical High School, Handicapped children school	No
Higher Education Act.		Universities, Colleges	Inc.
Educational institute managed by the state or local government		Official training institute, Cities and provinces educational institute	Inc.

Table 10: Educational Institutions in Korea and Article 25, Korean Copyright Act (from KRTRA)⁵⁸⁹

484. This right of compensation is to be exercised by a collecting society (“organization”) which is appointed and regulated by the Minister of Culture and Tourism.⁵⁹⁰ In this regard, the Korean Reprographic and Transmission Rights Association (KRTRA) has been appointed

⁵⁸⁸ Korean Copyright Act, Art. 25(4).

⁵⁸⁹ Korean Reprographic and Transmission Rights Association, Legal Remunerations: Copyrighted Work – Remuneration for Class Teaching Purpose, at: <http://www.copyright.or.kr/jsp/english/NormalCtrl.jsp?L=3&M=3>.

⁵⁹⁰ Korean Copyright Act, Art. 25(5)-(8).

by the Minister of Culture, Sports and Tourism on 13 March 2008 as the relevant organization under Article 25 of the Korean Copyright Act.⁵⁹¹

485. Article 36(1) further provides that a work so used may be translated, arranged or adapted.

486. Two points should be noted. The first is that the student as “a person who receives education in the educational institutions” in Article 25(3) need not make any compensation to the copyright owner under the mechanisms for compensation as set out in Article 25. The second is that any educational institution conducting an interactive transmission of the work may be obliged to implement “reproduction prevention measures” to prevent copyright infringement and other rights, by way of Presidential Decree.⁵⁹²

Article 28: Quotations for News Reporting, Criticism, Education and Research

487. Article 28 exempts from copyright infringement the making of quotations from a publicly available work, for news reporting, criticism, education and research, provided they are within a reasonable limit and compatible with fair practice. The Korean Supreme Court has held in a case decided in 1990 that the quoted work must be supplementary or subordinate to the quoting work or serve as a reference.⁵⁹³ A work so used must have its sources indicated.⁵⁹⁴ A district court has further held that quoting one-third of a work without indicating the source is not reasonable.⁵⁹⁵

488. Article 36(2) further provides that a work so used may be translated.

Article 29: Public Performance and Broadcasting for Non-profit Purposes

489. Article 29 exempts from copyright infringement the public performance or broadcast of a publicly available work for non-profit purposes and without charging the audience, spectators or third parties any fees, and without remunerating the performers. In this regard, commercial phonograms or cinematographic works may be reproduced and played for the public, except in the cases as prescribed by Presidential Decree.⁵⁹⁶

490. Article 36(1) further provides that a work so used may be translated, arranged or adapted.

⁵⁹¹ Korean Reprographic and Transmission Rights Association, Legal Remunerations: Copyrighted Work – Remuneration for Class Teaching Purpose, at: <http://www.copyright.or.kr/jsp/english/NormalCtrl.jsp?L=3&M=3>.

⁵⁹² Korean Copyright Act, Art. 25(10).

⁵⁹³ Supreme Court, 23 Oct. 1990, 90 Daka 8845.

⁵⁹⁴ Korean Copyright Act, Art. 37(1).

⁵⁹⁵ Dong-A Ilbo, 27 Apr. 1994, at 31.

⁵⁹⁶ Korean Copyright Act, Art. 29(2).

Article 30: Reproduction for Private Use

491. Article 30 exempts from copyright infringement the reproduction by a user himself of a publicly available work for the purpose of his personal, family or other similar uses, within a limited circle, if this reproduction is not by way of a reprographic machine set up for public use. Given the easy accessibility of home replication devices, a Korean commentator has opined that this exception seems unduly prejudicial to the rights of authors, in the absence of provisions for compensating the copyright owner.⁵⁹⁷

492. Article 36(1) further provides that a work so used may be translated, arranged or adapted.

Article 32: Examination Questions

493. Article 32 exempts from copyright infringement the reproduction of a publicly available work in questions of entrance examinations or other examinations of knowledge and skills, “to the extent deemed necessary for that purpose; provided that it is for non-profit purposes”. This actually places considerable restrictions on the types of examinations for which this exception may be relied upon. For instance, professional or vocational examinations that are arguably conducted “for profit” may not be able to rely on this exception.

494. Article 36(2) further provides that a work so used may be translated.

Articles 87: Application of Exceptions to Neighbouring Rights

495. The aforesaid exceptions discussed above (Articles 23, 24, 25, 28, 29, 30, 31, 32, 36 and 37) apply equally to exempt from any infringement of the neighbouring rights in performances, phonograms and broadcasts.

Samoa

496. Samoa is officially known as the Independent State of Samoa. Formerly known as Western Samoa (to be distinguished from the U.S. territory of American Samoa), it was administered since the end of World War I by New Zealand. It secured its independence in 1962, as the first country in the Pacific to do so.

497. Article 114 of the Constitution of the Independent State of Samoa provided that all existing law shall, until repealed by Act, continue in force on and after the independence of Samoa. This meant that U.K. and New Zealand copyright laws could apply in Samoa. To clarify the legal position, in 1972, the Reprint of Statutes Act repealed all New Zealand and U.K. statutes except those listed in the schedule to the act. And in 1998, Samoa enacted its own Copyright Act, which is under the administration of the Ministry of Justice and Courts

⁵⁹⁷ Ki-Su Lee, *Copyright*, INTELLECTUAL PROPERTY LAW IN KOREA 139 (Christopher Heath ed., 2003).

Administration, which in effect meant that U.K. and New Zealand copyright laws no longer apply in Samoa.

498. The version of the Samoa Copyright Act consulted for this purpose is the 2008 revised edition.

499. Samoa is a member of the Berne Union since 2006.

Sections 8 and 24(a): Private Reproduction for Personal Purposes

500. Section 8 exempts from copyright infringement the “private reproduction” by a “physical person” of a single copy of a published work for his own “personal purposes”. However, the exemption will not apply to a work of architecture, the whole or a substantial part of a digital database, a computer program, and any work in cases “where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright”.

501. Section 24(a) likewise exempts from infringement in the related rights in performances, sound recordings and broadcasts, the use by a “physical person” exclusively for his own personal purposes.

Section 9: Quotation

502. Section 9 exempts from copyright infringement the reproduction in the form of quotation of a short part of a published work, provided it is compatible with fair practice and does not exceed the extent justified by the purpose. In addition, the quotation shall be attributed, in that it shall be accompanied by an indication of the source and name of the author (if his name appears in the work from which the quotation is taken).

Sections 10 and 24(c): Reproduction for Teaching and Scientific Research

503. Section 10 exempts from copyright infringement two types of reproduction for teaching purposes.

504. Section 10(1)(a) permits the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, “provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose”. The attribution requirement must be met, in having the source of the work and the name of the author indicated on all copies made.⁵⁹⁸

505. Section 10(1)(b) permits the reproduction of published articles, other short works or short extracts of works, “to the extent justified by the purpose”, for face-to-face teaching in educational institutions (the activities of which do not serve direct or indirect commercial gain). Such a reproduction must be “an isolated act occurring, if repeated, on separate and

⁵⁹⁸ Samoan Copyright Act, s. 10(2).

unrelated occasions”.⁵⁹⁹ In addition, there must be no available collective license for such reproductions for which the educational institution should be aware.⁶⁰⁰ Likewise, the attribution requirement must be met, in having as far as practicable the source of the work and the name of the author indicated on all copies made.⁶⁰¹

506. Section 24(c) exempts from infringement in the related rights in performances, sound recordings and broadcasts, the use of such works solely for the purpose of face-to-face teaching activities or for scientific research.

Section 14: Personal Importation

507. Section 14 exempts from copyright infringement (“of section 6(1)(e) [sic]”)⁶⁰² the importation of a copy of a work by a “physical person” for his own personal purposes. As previously noted above in relation to similar provisions in the Nepalese Copyright Act and the Papua New Guinea Copyright and Neighbouring Rights Act, it is not clear from this section whether in this regard, the “hypothetical manufacturer” test applies to the work, nor does the section indicate who is supposed to be the “hypothetical manufacturer”.

Section 24(d): Exceptions in relation to Related Rights

508. Section 24(d) contains a blanket exception to enable a work to be used without infringement of the related rights in performances, phonograms and broadcasts, where the work can be used without the authorization of the author or other owner of copyright.

Singapore

509. Singapore “received” its copyright law from England as early as 27 November 1826, via the Second Charter of Justice which made all English common law principles and statutes part of Singapore law, subject to local circumstances.⁶⁰³ As at this date, the governing copyright legislation in England was the Statute of Anne 1709. This was the status until the U.K. Copyright Act 1911 came into force in Singapore on 1 July 1912 by a proclamation made by the Governor of Singapore. The 1911 Act was supplemented by various copyright ordinances but it remained Singapore’s law until 10 April 1987, when the current Copyright Act came into force.⁶⁰⁴ The 1987 is modeled on the Australian Copyright Act 1968, but it also draws upon various provisions in the U.K. Copyright, Designs and Patents Act 1988 as well as the U.S. Copyright 1976.

510. Since then, the Copyright Act 1987 has been substantially revised, in 1994, 1998, 1999, 2000, 2004 and 2005, to comply with Singapore’s various international obligations, including

⁵⁹⁹ Samoan Copyright Act, s. 10(1)(b)(i).

⁶⁰⁰ Samoan Copyright Act, s. 10(1)(b)(ii).

⁶⁰¹ Samoan Copyright Act, s. 10(2).

⁶⁰² This should be a reference to s. 6(1)(f) (importation) rather than s. 6(1)(e)

⁶⁰³ George Wei, *The Law of Copyright in Singapore* (2nd ed. 2000) at [1.18].

⁶⁰⁴ Singapore Copyright Act (Cap. 63, 2006 Rev Ed).

its obligations under the U.S.-Singapore Free Trade Agreement. Singapore became a WTO member in 1995 and a member of the Berne Union in 1998. It acceded to the WCT and WPPT in 2005.

511. The version of the Singapore Copyright Act consulted for purposes of this study is the version as amended by Act 30 of 2008. A review of the exceptions for the benefit of educational activities follows.

Section 23: Performances in the Course of Educational Instruction

512. Section 23 exempts from copyright infringement as a public performance, the performance of a literary, dramatic or musical work in the premises of an educational institution or elsewhere or in the presence of an audience by the students or staff in the course of the activities of the institution.⁶⁰⁵ An educational institution receives a very broad definition to mean a full-time primary, secondary and pre-university school, a junior college, university, college of advanced education, technical and further education institution, an institution that conducts primary, secondary, pre-university or tertiary education courses by correspondence or an external study basis, a school of nursing, a medical training undertaking within a hospital, a teacher education centre, an institution that has, as its principal function, the provision of courses of study or training for general education, preparation of persons for a particular occupation or profession or continuing education of persons engaged in a particular occupation or profession, an undertaking or institution administering an educational institution that provides for teacher training or furnishing of materials to the educational institution, and such other designated institution where education is provided, but does not include an institution that is conducted for the direct or indirect profit of an individual or individuals.⁶⁰⁶

513. As regards the performance of a literary or dramatic work, the scope of the exception is essentially delimited by the condition⁶⁰⁷ that the audience is limited to persons who are taking part in the instruction (the students and staff⁶⁰⁸), or who are directly connected with the place where the instruction is given,⁶⁰⁹ and who are parents or guardians of the students.⁶¹⁰ As noted above in conjunction with the equivalent provision in the Australian Copyright Act, the inclusion of parents and guardians is intended to bring school concerns and school performance recitals within the scope of the section.⁶¹¹

514. In this regard, it should be noted that musical performances are not subject to the same restriction. In other words, the composition of the audience need not be limited to staff, fellow students and parents and guardians.

⁶⁰⁵ Singapore Copyright Act, s. 23(1), (2).

⁶⁰⁶ Singapore Copyright Act, s. 7(1) (definition of “educational institution”).

⁶⁰⁷ Singapore Copyright Act, s. 23(2).

⁶⁰⁸ Singapore Copyright Act, s. 23(5) (staff includes any adjunct staff and any person engaged by the educational institution to conduct any course of instruction, activity or program of or offered by the educational institution).

⁶⁰⁹ Singapore Copyright Act, s. 23(2).

⁶¹⁰ Singapore Copyright Act, s. 23(3).

⁶¹¹ Cf. Australian Copyright Law Review Committee, SIMPLIFICATION OF THE COPYRIGHT ACT 1968 REPORT, para. 9.18.

515. The exception also extends to causing cinematographic films, broadcasts, cable programmes and “recordings of performances” to be heard or seen for the same purpose.⁶¹² It should be noted that the exception refers to “recordings of performances” but not “sound recordings” (phonograms, as “the aggregate of sounds embodied in a record”⁶¹³). The term “performance” however is not actually defined in Part II of the Copyright Act (it receives a definition only in Part XII as a “live performance given in Singapore by one or more qualified persons, whether in the presence of an audience of otherwise”) and even then, it is stated that a performance referred to in section 23(1) is not to be regarded as a performance for purposes of Part XII.⁶¹⁴ Presumably then the expression “recordings of performances” can receive a broader interpretation than that in Part XII of the Copyright Act but the exception will not exempt the use of recordings made of sounds where there are no human performers.⁶¹⁵ In contrast, section 28 of the Australian Copyright Act avoids this interpretational difficulty by referring exempting the use of sound recordings rather than “recordings of performances”.

Sections 35 and 109: Fair Dealing in relation to Works and Other Subject-matter

516. The original section 35 of the Singapore Copyright Act was largely adapted from section 40 of the Australian Copyright Act. However, it was also influenced by the formulation of section 107 of the U.S. Copyright Act. In 2004, revisions were made to section 35 to more closely model it on the omnibus “fair use” formulation in section 107 of the U.S. Copyright Act. The following analysis of section 35 will proceed on this basis.

517. Section 35 exempts from copyright infringement a fair dealing with a literary, dramatic, musical or artistic work, or with its adaptation, for any purpose (other than that for criticism or review in section 36 and reporting current events in section 37). Likewise section 109 exempts from infringement of the related rights in a sound recording, a cinematograph film, a sound broadcast, a television broadcast or a cable programme (defined as an “audio-visual item”)⁶¹⁶ or any work or audio-visual item included in the item, any fair dealing with the audio-visual item, for any purpose (other than that for criticism or review in section 110 and reporting current events in section 111). Fair dealing with a literary, dramatic, musical or artistic work, and with an audio-visual item, includes research and study.⁶¹⁷

518. To determine if a dealing is fair, the regard must be had for, *inter alia*, the following fair dealing factors: the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes, the nature of the work or adaptation, the amount and substantiality of the part copied taken in relation to the whole work or adaptation, the effect of the dealing upon the potential market for, or value of, the work or adaptation, and the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.⁶¹⁸ In the High Court decision of *Aztech*

⁶¹² Australian Copyright Act, s 28(4).

⁶¹³ Singapore Copyright Act, s. 7(1) (definition of “sound recording”).

⁶¹⁴ Singapore Copyright Act, s. 246(1).

⁶¹⁵ Examples will be recordings of natural and animal sounds.

⁶¹⁶ Singapore Copyright Act, s. 102.

⁶¹⁷ Singapore Copyright Act, ss. 35(1A), 109(2).

⁶¹⁸ Singapore Copyright Act, ss. 35(2), 109(3).

Systems Pte Ltd v. Creative Technology Ltd, the Singapore High Court opined that in addition to the aforesaid fair dealing factors, the matter of public interest is also to be considered.⁶¹⁹

519. To assist in the application of the fair dealing defense as regards literary, dramatic or musical works, it is provided that a dealing with such a work or with its adaptation, by way of copying of the whole or part of an article in a periodical publication, or otherwise, not more than a reasonable portion of the work or adaptation, for the purposes of research or study, shall be taken to be a fair dealing with that work.⁶²⁰ The Singapore Copyright Act defines a “reasonable portion” as not more than 10% of the pages of a published edition (of not less than 10 pages) of a literary, dramatic or musical work, or if it exceeds in the aggregate 10% of the number of pages, to contain only the whole or part of a single chapter of the work.⁶²¹ Where the work is in electronic form and not divided into pages, a reasonable portion of the work is defined as one that (a) does not exceed, in the aggregate, 10% of the total number of bytes in that edition, 10% of the total number of words in that edition, or 10% of the contents of that edition (where it is not practicable to use the total number of words as a measure), or (b) if it does exceed 10% of the total number of bytes, 10% of the total number of words or 10% of the contents, to contain only the whole or part of a single chapter of a work. However, the dealing for research or study by copying the whole or part of an article in a periodical publication shall not be deemed to be fair dealing if another article in that publication on a different subject-matter is also copied.⁶²² This does not imply that it is not possible to duplicate more than one article in a periodical publication, either on the same or a different subject-matter, as fair dealing. It simply means that the operative deeming provisions will not apply, and that whether such a duplication is fair dealing will depend on the application of the fair dealing factors.

Sections 36, 110: Fair Dealing for Criticism or Review

520. Section 36 enables a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of criticism or review of that work or another work, subject to the making of a sufficient acknowledgment of the work. This section is mirrored in section 110 in relation to audio-visual items. In this regard, the Australian decision of *De Garis v. Neville Jeffress Pidler Pty Ltd* will be relevant.

Sections 39A, 39B, 39C: Research and Study of Computer Programs and Computing Technology

521. This set of exceptions found in the Singapore Copyright Act provide for exceptions to acts that pertain to the research and study of computer programs, the policy view being taken that without these exceptions,⁶²³ these activities would constitute infringements of copyright in computer programs. Section 39A provides that the decompilation of a computer program

⁶¹⁹ *Aztech Systems Pte Ltd v. Creative Technology Ltd*, [1996] 1 SLR 683, [1995] SGHC 294, [57].

⁶²⁰ Singapore Copyright Act, s. 35(3).

⁶²¹ Singapore Copyright Act, s. 7(2).

⁶²² Singapore Copyright Act, s. 35(4).

⁶²³ Cf. Daniel Seng, “Reverse Engineering the New Reverse Engineering Provisions in the Copyright (Amendment) Act 2004”, [2005] SINGAPORE JOURNAL OF LEGAL STUDIES 234-245

by a lawful user to achieve interoperability information necessary to create an independent interoperable computer program is not an infringement of copyright in the program. Section 39B exempts from infringement the observing, studying or testing of the functioning of a computer program to determine the ideas and principles which underlie any element of the computer program. And section 39C permits the reproduction or adaptation of a licensed copy of a computer program for the lawful use of the program, where such lawful use includes use for the purpose of correcting errors in the computer program.

Section 40: Chrestomathies

522. Section 40 provides that copyright in a published work is not infringed by an inclusion of a short extract or an adaptation of that work in a collection of works contained in a book, sound recording or film that is intended for use by educational institutions if the collection is so described in an appropriate place, as being intended for use by educational institutions and a sufficient acknowledgment of the work or adaptation is made.

523. Section 40 allows for the inclusion in a collection contained in a book, sound recording or film of short extracts from published literary, dramatic, musical or artistic works or their adaptations.⁶²⁴ The collection must be intended for use by educational institutions, and be described or labeled as such.⁶²⁵ The other conditions are that the work or adaptation must not be published for the purpose of being used by educational institutions,⁶²⁶ that a sufficient acknowledgment of the work or adaptation be made,⁶²⁷ and that in addition to the extract concerned, there should not be 2 or more other extracts from, or from adaptations of, works by the same author in that collection, or are contained in that collection with every similar collection, if any, of works intended for use by educational institutions and published by the same publisher in the previous 5 years.⁶²⁸

524. Interestingly, section 40 drops the requirement, previously found in section 44 of the Australian Copyright Act, that the collection must consist principally of matter in which copyright does not subsist.⁶²⁹

Section 50A: Copying by Non-reprographic Means

525. Where copying of a work is done by non-reprographic processes by either the education instructor or the student for the purposes of a course of education, section 50A provides that copyright in the work is not infringed. Section 50A is derived from section 32(1) of the UK CDPA. The definition of a “reprographic process” is likewise taken from section 178 of the UK CDPA, and is defined as a process for making facsimile copies or using an appliance for

⁶²⁴ Singapore Copyright Act, s 40(1).

⁶²⁵ Singapore Copyright Act, s 40(1)(a).

⁶²⁶ Singapore Copyright Act, s 40(1)(b).

⁶²⁷ Singapore Copyright Act, s 40(1)(c).

⁶²⁸ Singapore Copyright Act, s 40(2) (meaning that only one other extract from the same author’s published work or adaptation could be included in that collection, or included in any similar collection of works intended for use by places of education and published within five years of the first collection by the same publisher).

⁶²⁹ Australian Copyright Act 1968, s 44(1)(c).

making multiple copies and includes any copying by electronic means of a work held in electronic form. Presumably this section was enacted in recognition of the fact that education instructors and students will invariably engage in non-reprographic and manual copying as part of the process of instruction. Furthermore, non-reprographic and manual copying as defined is unlikely to be substantial due to the inherently self-limiting nature of such copying or have an adverse commercial impact on the copyright in a work and the amount of copying will be limited not just by the purpose of the copying but also the effort involved.

526. It is worth noting that pursuant to the proviso, a work that is in electronic form does not qualify for copying by electronic means, unless a film or sound recording of the work is made. So an instructor cannot seek to make a digital copy, or even a substantial copy,⁶³⁰ of an article he finds on the Internet for purposes of instruction. This would apparently seem to greatly limit the relevance and utility of this provision to the digital environment, where the convenience of having the work in digital form is nullified by the fact that no copying by electronic means is permissible under section 50A. However, any such copying may be justified under other exceptions in the Copyright Act.

Section 51: Multiple Copying or Communication of an Insubstantial Part of a Work

527. Returning to the matter of coursepacks, educational institutions could rely on the provisions in Part III, Division 6 of the Copyright Act to give them the right to make copies of works for educational purposes. Under Division 6, there are two distinct schemes for making such coursepacks available to students as part of teaching and instruction.

528. The first scheme is set out in section 51,⁶³¹ which permits the multiple copying of an insubstantial part of a work on an educational institution's premises for the purpose of a course of instruction provided by the institution.⁶³² It does not permit the copying of the whole work,⁶³³ though it permits the copying of any artistic work provided for the purpose of explaining or illustrating the work.⁶³⁴ An "insubstantial part" is defined as not more than 5 pages of a work, or not more than 5% of a work if there are more than 500 pages in the work.⁶³⁵ In 2004, section 51 was revised to permit the copying of a digital edition of a work,⁶³⁶ the communication of a digital version of a work,⁶³⁷ or the communication of a digitized version of a work (the work being originally in non-digital form).⁶³⁸ In the former

⁶³⁰ Singapore Copyright Act, s 10 ("acts done in relation to substantial part of work or other subject-matter deemed to be done in relation to the whole").

⁶³¹ This section is based on s 53A of the Australian Copyright Act 1968 (now ss 135ZG and 135ZMB of the Australian Copyright Act, as revised).

⁶³² Singapore Copyright Act, s 51(1).

⁶³³ *Singapore Copyright Act*, s 51(2). Furthermore, within 14 days after the day on which the copy was made, no other part of that work may be reproduced pursuant to the same section. *See* s 51(5), (5A).

⁶³⁴ Singapore Copyright Act, s. 53.

⁶³⁵ Singapore Copyright Act, s 51(3).

⁶³⁶ Singapore Copyright Act, s 51(4).

⁶³⁷ *Singapore Copyright Act*, s 51(4).

⁶³⁸ Singapore Copyright Act, s 51(3).

two instances, no more than 5% of the total number of bytes in the edition and not more than 5% of the total number of words or 5% of the contents of the edition can be taken.⁶³⁹

529. Unlike section 52 (discussed below), this scheme enables educational institutions to make insubstantial copies of a work for instructional purposes without concerns about administrative burdens of keeping proper records. It is also an important innovation because it enables the educational institution to electronically distribute or “communicate” the copies, by “initiating” the communications from its premises.⁶⁴⁰ This is to ensure that the educational institution retains some measure of control or oversight over the transmission of the copies. It also enables the library of an educational institution to play a role through the use of its digital library facilities as a conduit to distribute the work to students.

Section 52: Multiple Copying or Communication Pursuant to a Statutory License upon Payment of Equitable Remuneration

530. However, the self-policing system in section 51 is of restricted use to educational institutions in that it requires that the copying be limited to “an insubstantial part” of a work. Where more than an insubstantial part is taken, the educational institution may be exposed to copyright liability. For this reason, educational institutions may seek to rely on section 52 instead. This section is based on the then section 53B of the Australian Copyright Act 1968.⁶⁴¹ It enables educational institutions to make multiple copies of (a) an article in a periodical publication, and (b) a work or part of a work, for the educational purposes of that institution. (This includes the reproduction of any artistic works included in the literary, dramatic or musical work for purposes of explaining or illustrating the article or work.⁶⁴²) The “insubstantial part” condition in section 51 is lifted in section 52. Instead, the following conditions apply:

Type of section 52 copying	Conditions
(a) an article in a periodical publication	No more than 1 article in the same periodical unless the articles relate to the same subject matter ⁶⁴³
(b) a work or part of a work	No more than a reasonable portion of a work unless a reasonable investigation is made that copies (not secondhand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price ⁶⁴⁴

Table 11: Copying "an article" and "a work" in Section 52, Singapore Copyright Act

⁶³⁹ Singapore Copyright Act, s 51(4)(a), (b).

⁶⁴⁰ Singapore Copyright Act, s 51(1A).

⁶⁴¹ Austl. Copyright Act, s 53B (as introduced by Act No. 154 of 1980 and amended by Act No. 165 of 1984). S 53B has since been replaced by Part VB of the Austl. Copyright Act (comprising ss 135ZB to 135ZZH, as introduced by Act No. 32 of 1989).

⁶⁴² Singapore Copyright Act, s. 53.

⁶⁴³ Singapore Copyright Act, s 52(4), (7A).

⁶⁴⁴ Singapore Copyright Act, s 52(5), (7B).

531. Section 52 is an example of what is known as copying made pursuant to a statutory license because the law grants a right to the educational institution to make copies of a work, in consideration for retrospective payment of license fees by the institution. For this reason, all copying made under section 52 comes with the mandatory administrative requirement requiring the making of a record of the copying “as soon as practicable after the making of those copies” that sets out the particulars of the copying made in compliance with legal requirements.⁶⁴⁵ This forms one possible basis upon which “coursepacks” or anthologies or compilations of copies of designated reading material bound so as to resemble books as collated by the teaching staff⁶⁴⁶ are legally made available to the students for their reference.

532. In 2004, the amendments to the Copyright Act further broadened the scope of the section 52 statutory license by enabling the “communication” of the articles or works. As explained above, in a communication, the institution actually only “makes” or stores *one* copy of the work on its systems, but that copy is subsequently downloaded or disseminated to *x* students for that course of instruction. Where multiple copies of a work are thus “communicated” instead of being “made”, the same legal requirements as above have to be observed, but a different set of records that comply with a different set of legal requirements have to be met. Thus when an “out-of-classroom” or “online” course is conducted, when “online self-study” materials are made available, or where there is “distance learning”, works will be “communicated” by the educational institution to its students. Of course, there has yet to be evidence that institutions have relied on this regime to enable substantial digital copying of works for instructional purposes.⁶⁴⁷

533. The following is a summary of the conditions and record keeping requirements for the different types of section 52 copying:

Type of section 52 copying	Conditions	Type of multiple “copying”	Copyright Form and Regulations	Form Requirements
(a) an article in a periodical publication	No more than 1 article in the same periodical unless the articles relate to the same subject matter ⁶⁴⁸	Multiple copies	Regulation 7(1), Fourth Schedule	ISSN, name of periodical publication, title/description of article, name of author, volume/number, page numbers, date of copies, number of copies (number of students for that course)

⁶⁴⁵ Singapore Copyright Act, s 52(6), (7).

⁶⁴⁶ *Copyright Agency Ltd. v. University of Adelaide*, [1999] ACopyT 1, [7] (Austl. Copyright Tribunal).

⁶⁴⁷ See *Copyright Agency Ltd. v. University of Adelaide*, [1999] ACopyT 1, [42] (Austl. Copyright Tribunal), *Copyright Agency Ltd. v. Queensland Dept. of Education*, [2002] ACopyT 1, [97] (Austl. Copyright Tribunal).

⁶⁴⁸ Singapore Copyright Act, s 52(4), (7A).

Type of section 52 copying	Conditions	Type of multiple "copying"	Copyright Form and Regulations	Form Requirements
	As above	Communication leading to multiple copies ⁶⁴⁹	Regulation 7A(1), Ninth Schedule	ISSN, name of periodical publication, title/description of article, name of author, volume/number, page numbers (or description), date of communication, number of persons to whom communication was made (number of students for that course), date of record
(b) a work or part of a work	No more than a reasonable portion of a work unless a reasonable investigation is made that copies (not secondhand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price ⁶⁵⁰	Multiple copies	Regulation 7(2), Sixth Schedule	ISBN, title/description of work, publisher, name of author, page numbers, (total number of bytes), date of copies, number of copies (number of students for that course)
	As above	Communication leading to multiple copies ⁶⁵¹	Regulation 7A(2), Tenth Schedule	ISBN, title/description of work, publisher, name of author, page numbers (or description, total number of bytes), date of communication, number of persons to whom communication was made (number of students for that course), date of record

Table 12: Distinction between various section 52 forms of "copying" and "communicating"

⁶⁴⁹ Singapore Copyright Act, s 52(7C).

⁶⁵⁰ Singapore Copyright Act, s 52(5), (7B).

⁶⁵¹ Singapore Copyright Act, s 52(7D).

534. The Copyright Regulations further elaborate on the record keeping requirements.⁶⁵² They provide that these records have to be kept for 4 years,⁶⁵³ A failure to retain the relevant records exposes the “body administering the institution” and “the custodian in charge of the copying records of the institution” shall each be guilty of an offence and be liable to a fine of up to \$1,000,⁶⁵⁴ unless all reasonable precautions and all due diligence to avoid the commission of such an offence are exercised.⁶⁵⁵ To ease this system of record keeping, the Regulations provide that these records may be kept in a computer instead of being kept in writing.⁶⁵⁶

535. It has to be realized that unlike section 51, section 52 copying is not “free”. The owner of copyright in the copied works can make an application to the Copyright Tribunal for determination of the equitable remuneration payable by the educational institution.⁶⁵⁷ No further guidance is afforded in both the Singapore Copyright Act as well as the Copyright Regulations as to how this equitable remuneration is to be determined.

Sections 52A, 115B: Copying for Examinations

536. In 1998, a new exception was introduced in section 52A of the Singapore Copyright Act, to provide that copyright is not infringed for anything that is done for purposes of an examination. This includes the setting of questions, communication of the questions to the candidates or answering the questions. A similar exception applies as regards audio-visual works used for examination purposes in section 115B.

537. It should be noted that this enumerated list is meant to be illustrative and not exhaustive. For instance, a music examination may require that a performance of a musical work be given, or that a sound recording be played. Likewise, where a project or assignment counts as an examination, particularly in institutes of higher learning, the fact that the questions set and the answers given involve the use of copyright works would be absolved by sections 52A and 115B.

⁶⁵² Singapore Copyright Regulations, Regs 8(1), 8A(1).

⁶⁵³ Singapore Copyright Regulations, Regs 8(4), 8A(4). It has been reported that the schools and universities have paid about S\$1 million to the publishers and authors for the photocopying done in the past four years leading up to the licensing agreement reached with them in lieu of the statutory license in section 52. *See Schools pay \$1m for right to photocopy*, STRAITS TIMES (SING.), Oct. 29, 2004.

⁶⁵⁴ Singapore Copyright Regulations, Regs 9(2), 9(5).

⁶⁵⁵ Singapore Copyright Regulations, Regs 9(3), 9(6).

⁶⁵⁶ Singapore Copyright Regulations, Regs 8(1), 8A(1) (“kept in any manner that permits the information in the record to be elicited by the use of a computer”).

⁶⁵⁷ Singapore Copyright Act., s 158(3)(a) (“shall make an order determining the amount that it considers to be equitable remuneration to the owner of the copyright for the making of the copies”).

Part VI: Compulsory Licenses for Translation and Reproduction of Certain Works

538. Singapore had a scheme similar to that in the Malaysian Copyright Act to permit the Copyright Tribunal to grant licenses to permit the translation and reproduction of works for purposes of teaching, research or scholarship in any of the official languages of Singapore.⁶⁵⁸ However, these provisions were discontinued in 2004.⁶⁵⁹

Section 115: Recording Broadcasts for Educational Purposes

539. Section 115, which is based on section 200(2) of the Australian Copyright Act, but with some differences, exempts from copyright infringement in a broadcast or programme, or a work, sound recording or cinematograph film included in that broadcast or programme, the making of a record of a sound broadcast or cinematograph film of a TV broadcast or a cable programme, if it is “made by, or on behalf of, the person or authority in charge of an educational institution” and the record or film is not used except in the course of instruction at that institution.

540. It should be noted that the equivalent provision in section 200(2) of the Australian Copyright Act is limited only to the making of sound recordings, not video recordings. It is also limited to “educational broadcasts”, unlike section 115.

Section 115A: Media Studies

541. Section 115A exempts from copyright infringement in the sound recording, cinematograph film, TV or sound broadcast or cable programme, if it is copied in the course of media studies instruction by the instructor or student in the making of a cinematograph film or sound track associated with the visual images forming part of a cinematograph film.

Section 246: Other Exceptions as regards Performances and Exempt Recordings for Educational Purposes

542. A similar set of exceptions exists in the Singapore Copyright Act as regards the rights that performers have in their performances. These are framed and enumerated as “exempt recordings” of performances in section 246(1).⁶⁶⁰ The exceptions distinguish between a “direct recording”, which is a sound recording of a performance made directly from the live performance or from a broadcast or re-broadcast of, or a cable programme that includes the performance, and an “indirect recording”. However, an “indirect recording” is not defined in

⁶⁵⁸ These four official languages are English, Mandarin, Malay and Tamil. *See* Constitution of the Republic of Singapore, Article 153A. A 3-year waiting period had applied where the application is for a license to translate the work into English (as opposed to 1 year for other languages). *See* Singapore Copyright Act, s. 144(6) (since deleted).

⁶⁵⁹ Part VI was repealed by Act 21 of 2004.

⁶⁶⁰ Singapore Copyright Act, s 246(1) (“recording” means a sound recording other than an exempt recording).

Part XII of the Copyright Act.⁶⁶¹ For purposes of this study regarding educational activities, the relevant exceptions include:

- A direct or indirect recording of a performance, made solely for the purpose of the private and domestic use of the person who made it;⁶⁶²
- A direct or indirect recording of a performance, made solely for the purpose of use in scientific research;⁶⁶³
- A direct or indirect recording of a performance, made by or on behalf of the body administering an educational institution, solely for the educational purposes of that institution or another educational institution;⁶⁶⁴
- A direct or indirect recording of a performance, made solely for the purposes of setting or answering the questions in an examination or communication the questions to the candidates;⁶⁶⁵
- A direct or indirect recording of a performance, made in the course of or preparation for instruction, in the making of a cinematograph film or a sound-track associated with the visual images forming part of a cinematograph film, by a person giving or receiving such instruction;⁶⁶⁶
- A direct or indirect recording of a performance made for the purpose of reporting of news or current affairs, or for the purpose of criticism or review;⁶⁶⁷
- A direct or indirect recording of a performance made solely for the purpose of a judicial proceeding or the seeking or giving of professional legal advice;⁶⁶⁸
- A direct or indirect sound recording or film of a performance made solely for the purpose of a judicial proceeding or the giving of professional legal advice.⁶⁶⁹

543. To determine what is an exempt recording or a copy⁶⁷⁰ made for “educational purposes” of an educational institution, section 247 provides that it shall be taken to have been so made.

Solomon Islands

544. The Solomon Islands was declared a British protectorate in 1892 by the U.K. Order in Council dated 24 June 1912 applied the U.K. Copyright Act 1911 to the Solomon Islands.⁶⁷¹

545. After World War II, British administration was re-imposed on the Solomon Islands.⁶⁷² Although it achieved independence in 1978, under the Solomon Islands Independence Order

⁶⁶¹ Australian Copyright Act, s 248A(1) defines an “indirect recording” as a recording “which is a sound recording or film of a performance made from a communication of the performance”.

⁶⁶² Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (a)).

⁶⁶³ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (b)).

⁶⁶⁴ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (c)).

⁶⁶⁵ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (d)).

⁶⁶⁶ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (e)).

⁶⁶⁷ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (h)).

⁶⁶⁸ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (i)).

⁶⁶⁹ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (g)).

⁶⁷⁰ Singapore Copyright Act, s. 246(1) (definition of “exempt recording”, para. (l)).

⁶⁷¹ Solomon Islands Copyright Act 1996, s. 39(2).

⁶⁷² John Nonggorr, *Solomon Islands*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 268-271 (Michael A. Ntummy ed., 1993).

1978 and the Constitution of Solomon Islands 1978, it is stated that the U.K. Acts of Parliament of general application and in force on 1 January 1961 will have effect as part of the law of Solomon Islands.⁶⁷³ This meant that the U.K. Copyright Act continued to apply in the Solomon Islands.

546. In 1996, the Solomon Islands enacted its own Copyright Act in 1996 to repeal the U.K. Copyright Act 1911.⁶⁷⁴ It became a WTO member that year, and its Berne Convention obligations stem accordingly from its obligations under TRIPS.

Section 7(1)(a): Fair Dealing for Research or Private Study

547. Section 7(1)(a) exempts from copyright infringement any fair dealing with a literary, dramatic, musical or artistic work for purposes of research or private study.

Section 7(1)(b): Fair Dealing for Criticism or Review

548. Section 7(1)(b) exempts from copyright infringement any fair dealing with a literary, dramatic, musical or artistic work for purposes of criticism or review, whether it is of that work or another work, if it is accompanied by a sufficient acknowledgment.

Section 7(4): Chrestomathies

549. Section 7(4) exempts from copyright infringement the inclusion of a short passage from a published literary or dramatic work in a collection, intended for the use of educational institutions. The conditions are that the collection and its advertisements are so described by the publisher, the work in question was not published for the use of educational institutions, the collection consists mainly of material in which no copyright subsists, and the inclusion of the passage is accompanied by a sufficient acknowledgment. The further condition is that there additionally cannot be two or more passages from works by the same author contained in that collection, or in every similar collection published by the same publisher within five years of the first collection.

Sections 6(2)(a), 14(6): Importation of an Article for Private and Domestic Use

550. Sections 6(2)(a) and 14(6) exempts from the act of copyright infringement in literary, dramatic, musical or artistic work, and in the copyright in any sound recording, cinematography film, broadcast or published edition of a literary, dramatic or musical work, the importation of an article, by any person who, not being the owner of the copyright and without his license, into the Solomon Islands for his private and domestic use.

⁶⁷³ Solomon Islands Independence Order, s. 5 and Constitution of Solomon Islands 1978, Sch. 3, para 1.

⁶⁷⁴ Solomon Islands Copyright Act 1996, s. 39(2).

Section 35(1)(a): Use of Copyright Material for Educational Instruction

551. Section 35(1)(a) exempts from copyright infringement in a literary, dramatic, musical or artistic work, any reproduction or adaptation of the work made in the course of educational instruction, where the work is reproduced or adapted by a teacher or student “otherwise than by use of an appliance designed for the production of the [sic] multiple copies”. It is submitted that section 35(1)(a) will not entitle a teacher or student to make multiple copies of an electronic work by a computer, since it could be contended that a general purpose computer is a device “designed for the production of multiple copies” of a work.

Section 35(1)(b): Examination Purposes

552. Section 35(1)(b) exempts from copyright infringement in a literary, dramatic, musical or artistic work, any reproduction or adaptation of the work made as part of the questions to an examination or answers thereto.

Sri Lanka

553. Sri Lanka enacted its Code of Intellectual Property in 1979. The Code has since been amended in 1980, 1990, 1997 and 2004. The Sri Lankan government has recently produced some drafts to update the Code. However, these have yet to be enacted.

554. Sri Lanka is also a WTO member since 1995 and a Berne Union member since 1959. Since 2005, Sri Lanka has filed a Berne Notification to indicate its intention to use the Articles II and III facilities in the Appendix of the Berne Convention. The latest Notification is valid until October 2014.

555. A review of the exceptions for the benefit of educational activities follows. The version of the Code as consulted is last revised by Act No. 40 of 2000.

Section 13(a)(i): Personal or Private Use

556. Section 13(a)(i) exempts from copyright infringement, the reproduction, translation, adaptation, arrangement or other transformation of a lawfully published work, either in the original language or in translation, exclusively for the user’s own personal and private use.

Section 13(a)(ii): Quotations

557. Section 13(a)(ii) exempts from copyright infringement, the inclusion of quotations from a lawfully published work, either in the original language or in translation, provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose, subject to mention of the source and name of the author. This use includes quotations from newspaper articles and periodicals in the form of press summaries.

Section 13(a)(iii): Teaching Purposes

558. Section 13(a)(iii) exempts from copyright infringement, the utilization of a lawfully published work, either in the original language or in translation, by way of illustration in publications, broadcasts or sound or visual recordings for teaching, to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast or televised for use in schools, education, universities and professional training. This is subject to the condition that such use is compatible with fair practice and that the source and name of the author are mentioned in the publication, broadcast, TV broadcast or recording.

Section 15: Limitation of the Right of Translation

559. Section 15 provides that where any work is not published in Sinhala or Tamil within 10 years from its having been first published in its original language, it shall be lawful to translate the work into Sinhala or Tamil, as the case may be, and to publish such translation, even without the authorization of, and without payment to, the owner of the copyright, subject to the moral rights of the author in section 11.

560. It could be asserted that section 15 is Sri Lanka's implementation of the facility in Article II of the Appendix to the Berne Convention. However, the Article II facility operates by way of a compulsory license which requires compensation to be made to the copyright owner for publication of the translation, not by way of limiting the right of translation in copyright. In addition, the Article II facility requires certain conditions to be satisfied before the license can be issued, such as to make attempts to contact the copyright rightholder and the publisher and to wait for the requisite periods. The only condition in section 15 is that the work is not available in Sinhala or Tamil 10 years from its first publication.

Thailand

561. The law of copyright in Thailand in 1892 when the Vajiranana Library announced that it was prohibited to reproduce any novels, poems or articles published in the Vajirayarnvises Books.⁶⁷⁵ A decade later in 1901, the Ownership of Authors Act B.E. 2444, the first copyright statute of Thailand, was enacted.⁶⁷⁶ When Thailand acceded to the Berne Convention in 1931, the Act for Protection of Literary and Artistic Works B.E. 2474 (1931) was enacted to comply with international copyright rules.⁶⁷⁷ After another major revision to the Copyright Act in 1978, the current Copyright Act B.E. 2537 (1994) was enacted to replace the 1978 act in pursuance of "governmental policy to modify and modernize" the law.⁶⁷⁸

562. Thailand became a WTO member in 1995. It has also filed a Berne Notification since 1995 to reserve its right to avail itself of the Article II facility in the Annex. The Notification is valid until October 2014.

⁶⁷⁵ International Institute for Trade and Development, Brief Notes on Copyright Protection in Thailand (2006), at <http://www.itd.or.th/th/node/427> (accessed 19 June 2009).

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.*

⁶⁷⁸ *Id.*

563. A review of the provisions in the Thai Copyright Act B.E. 2537 (1994) follows.

Section 32(1): Research or Study

564. Section 32 provides that an act which does not conflict with a normal exploitation of the copyright work by the copyright owner and does not unreasonably prejudice the legitimate rights of the copyright owner shall not be deemed to be an infringement of copyright. It then specifies that the following acts, subject to the aforesaid condition, shall not be deemed to be an infringement of copyright. This implies a “double barrelled” test, in that in addition to proving that the act falls within the scope of the enumerated exceptions as outlined below, it also has to be shown that the act does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate rights of the copyright owner, as representing two elements of the three-step test (“three-step test conditions”).

565. Section 32(1) exempts from copyright infringement the research or study of a work which is not for profit.

Section 32(2): Personal Benefit

566. Section 32(2) exempts from copyright infringement the use of a work for personal benefit or for the benefit of the user and his family members or close relatives.

567. It could be opined that on its face, this exception is too broad in extending the excepted use to the user’s family members or close relatives. However, this exception is qualified three-step test conditions, which implies that use of a work for the benefit of the user, his family members or close relatives, particularly in a commercial context such as that of a family business, may not fall within the scope of this exception.

Section 32(3): Comment, Criticism or Introduction

568. Section 32(3) exempts from copyright infringement the comment, criticism or introduction of a work, subject to an acknowledgment of the copyright ownership in the work. As noted above, the three-step test conditions further qualify the scope of the exception.

Section 32(6): Teaching Purposes

569. Section 32(6) exempts from copyright infringement the reproduction, adaptation, exhibition or display of a work by a teacher for the benefit of his teaching provided that the act is not for profit. The emphasis here is that the excepted act is done by the teacher for the purpose of non-profit instruction. As noted above, the three-step test conditions further qualify the scope of the exception.

Section 32(7): Abridgment or Summary by Teacher for Distribution or Sale

570. Section 32(7) exempts from copyright infringement (a) the reproduction or “adaptation in part of a work or abridgment” or (b) the making of a summary, by a teacher or an educational institution, for distribution or sale to students in a class or in an educational institution provided that the act is not for profit. As noted above, the three-step test conditions further qualify the scope of the exception.

571. As interpreted, this provision enables a teacher or an educational institution to make a reproduction or adaptation of, not the whole work, but a part of a work or abridgment, for distribution or “sale” to the students in the class. The reference to “sale” and the condition that the act is not for profit suggests that this “sale” enables the teacher or educational institution to impose a charge for distributing the materials to the students, but only on the strict cost-recovery basis to recover the cost of materials for printing and perhaps also include a minimal administrative fee. The teacher or educational institution is also entitled to make a summary of the work for distribution to the students. On its face, there appears to be no qualification that these works or summaries be distributed to the students for educational purposes. But it is submitted that if it were for any other purpose, the activity would not qualify as one that is not for profit and would also probably not qualify based on the three-step test condition.

Section 32(8): Examinations

572. Section 32(8) exempts from copyright infringement the use of the work as part of the questions and answers in an examination. As noted above, the three-step test conditions further qualify the scope of the exception.

Section 33: Citation, Quotation, Copy, Emulation or Reference

573. Section 33 exempts from copyright infringement a reasonable citation, quotation, copy, emulation or reference “in part and from” a copyright work with an acknowledgment of copyright ownership, subject to satisfying the three-step test condition. It is submitted that the condition “in part” of a work restricts the extent of copying of a work, which prevents the whole work from being copied, for instance, for quotation purposes, even if it may be reasonable to do so. Thus the exception will not permit the reproduction of the entirety of a short poem for quotation purposes, even if it may be reasonable to do so in the context of its use.

Section 35: Research and Study of Computer Programs

574. Section 35 exempts from copyright infringement the following activities, provided the purpose is not for profit and the three-step test condition is satisfied. The activities exempted are:

1. research or study of a computer program,
2. use for the benefit of the owner of the copy of the computer program,
3. comment, criticism or introduction of the computer program with an acknowledgment of copyright ownership in the program,
4. reporting of news through mass media with acknowledgment of copyright ownership in the program,
5. making reasonable quantities of copies of a computer program by a person who has lawfully bought or obtained the program from another person for maintenance or prevention of loss,
6. reproduction, adaptation, exhibition or display for the benefit of judicial or administrative proceedings or for reporting such proceedings,
7. use of the computer program as part of questions and answers in an examination,
8. adapting the computer program as necessary for use, and
9. making copies of the program “so as to keep them for reference or research in the public interest”.

575. Of relevance to the present study will be the research or study of a computer program, which would include reverse engineering purposes.⁶⁷⁹ A possible restriction will be that such research or study must not be for profit, which will greatly limit the utility of this exception in connection with commercial reverse engineering undertaken by companies.

576. The use of the computer program for examination purposes is also relevant to educational activities.⁶⁸⁰ Presumably this will be of most relevance to computer science, computing and programming studies, where the programs form an integral part of the questions and answers set for examination purposes. There is no requirement in the exception in that the original copy of the work from which copies are made should be “lawfully bought” or “lawfully obtained” (unlike the exception in section 35(5)), and in this regard, the three-step test condition may require a restrictive interpretation of this exception. A typical scenario where the three-step test condition may be relevant will be where an educational institution makes available multiple copies of a computer program that is neither lawfully bought nor lawfully obtained to candidates for a computer science examination. It should also be noted that the exception as worded does not permit the “use of the computer program ... [for] the questions and answers in an examination”, which would otherwise allow for retail software to be replicated among students for examination purposes. Such an interpretation is also arguably not envisaged under the three-step test condition.

⁶⁷⁹ Thai Copyright Act, s. 35(1). It may also be plausibly contended that computer science students may “comment or criticize” the code in computer programs as part of their computing studies. See Thai Copyright Act, s. 35(2).

⁶⁸⁰ Thai Copyright Act, s. 35(7).

577. Another possible exception of relevance to educational activities will be the making of copies for reference or research in the public interest.⁶⁸¹ A possible situation this may apply to will be the retention of copies of extremely important or pertinent programs by archives (“for reference”), or to conduct research on critical software elements (such as operating systems in widespread public use) arising from critical computing issues such as the Y2K bug (“research in the public interest”). Likewise, a restrictive interpretation of this exception may be needed, as there is no requirement in the exception in that the original copy of the work from which copies are made should be “lawfully bought” or “lawfully obtained”. The requirement that the public interest research be undertaken for non-profit purposes further suggests that only public research institutions such as national technology standards institutes or educational institutions will qualify for this exception.

Section 36: Non-profit Public Performance

578. Section 36 exempts from copyright infringement the non-profit public performance of a dramatic or musical work by an association, foundation or another organization which has the objectives of public charity, education, religion or social welfare. The performance must be “free”, in that there is no direct or indirect charge for watching the performance and no remuneration for the performers. In addition, the three-step test condition must be satisfied.

579. This exception will be most greatest relevance to educational institutions which conduct such performances for fund raising activities, or where student groups in educational institutions conduct similar performances for instructional or charity purposes.

Section 53: Exceptions as regards Performers’ Rights

580. Section 53 provides that the aforesaid exceptions in sections 32, 33, 34 and 36 apply to performers’ rights.

Section 54: Compulsory License for Translation of Work into Thai

581. Section 54 is Thailand’s implementation of Article II of the Appendix to the Berne Convention. It provides for the grant of a compulsory license by the Director General to a Thai national “to translate ... [a previously published work in the form of printed or similar material to the Thai language] *or* to reproduce copies of the translation”,⁶⁸² for the benefit of study, teaching or research, without a profit-seeking purpose. The license applicant must prove that he has previously sought a license from the copyright owner to translate the work into Thai or to reproduce copies of the translation published in Thai, but his request has been denied or, after the lapse of a reasonable period of time, an agreement cannot be reached.⁶⁸³ The license application must be made six months after the lapse of three years since the first publication of the work (if the copyright owner has not translated or authorized any

⁶⁸¹ Thai Copyright Act, s. 35(9).

⁶⁸² *See also* Thai Copyright Act, s. 54(2) (rules, methods and conditions for grant of license – “the grantee shall be solely entitled to translate or publish”).

⁶⁸³ Thai Copyright Act, s. 54.

translation of the work into the Thai language since its first publication), or the last publication of a translation of the work (if the copyright owner has published a Thai translation but no further publication has been made and all editions are out of print after the last publication of the translation).⁶⁸⁴

582. One point to note is that section 54 seems to envisage the grant of a license “to translate” a work into Thai or “to publish” a Thai edition of a work that is out of print. Article II seems to envisage that in the case of the latter, the license granted is a license to translate the original edition of the work into the required language and publish the work. Given the entirety of the translation scheme in Article II, it did not appear to be envisaged in Article II that a publication right be granted (as opposed to Article III, where a publication right will be granted). In this regard, it should be noted that Thailand had only made a declaration with regards to its intent to avail itself of the Article II facility and not Article III.

583. The other conditions are that the grantee will be solely entitled to translate or publish the licensed translation⁶⁸⁵ via a non-assignable license.⁶⁸⁶ If the copyright owner or his licensee can assure the Director General that he has made a Thai translation or has published a translated version in Thai, the content of which is identical to that of the material that is licensed under section 54, and has distributed the material at an appropriate price comparable to that of another work of the same nature being sold in Thailand, the license granted under section 54 will be terminated and the grantee informed, subject to his right to distribute the remaining copies of the already made or published printed material until they are out of stock.⁶⁸⁷ Exports of the copies are disallowed, unless they are for non-commercial export to a Thai recipient for purposes of study, teaching or research, and the country of import allows Thailand to deliver or distribute the printed material to or within the country.⁶⁸⁸

584. The Director General will arrange an agreement between the parties as regards the remuneration and conditions of the license, failing which it will make an order for equitable remuneration taking into account the normal rate of remuneration and other appropriate conditions.⁶⁸⁹ Parties may appeal against an order made by the Director General to the Copyright Committee.⁶⁹⁰

⁶⁸⁴ Thai Copyright Act, s. 54 items (1) and (2) and 54(2)(rules, methods and conditions for grant of license - “time specified in the license has not elapsed or has elapsed for a time not exceeding six months”).

⁶⁸⁵ Thai Copyright Act, s. 52(2).

⁶⁸⁶ Thai Copyright Act, s. 52(3).

⁶⁸⁷ Thai Copyright Act, s. 54(4).

⁶⁸⁸ Thai Copyright Act, s. 54(5).

⁶⁸⁹ Thai Copyright Act, s. 55.

⁶⁹⁰ Thai Copyright Act, s. 55.

Timor-Leste

585. No copyright legislation for Timor-Leste has been found. Timor-Leste is not a Berne Union member or a WTO member.

Tonga

586. Tonga was a British protected state since 1900. In 1970, Tonga became independent. Because of its close relationship with the British, Tongan law is today evolved from a mix of Tongan chiefly law with English jurisprudence.⁶⁹¹

587. Since 1966, sections 3 and 4 of the Tongan Civil Law Act had provided that in the absence of Tongan law in a particular area, Tonga shall apply “the statutes of general application in force in England”, in the absence of any provision being made by any Tongan Act. This would have rendered applicable the U.K. Copyright Act 1956.⁶⁹² However, in 1985, Tonga enacted its own Copyright Act, which came into force in 1986. This had displaced the application of the U.K. Copyright Act 1956. This was in turn repealed and replaced with the new Copyright Act 2002. A review of the exceptions in the Tongan Copyright Act for the benefit of educational activities follows.

588. Tonga is a Berne Union member since 2001 and a WTO member since 2007. Reference will be made to the new Copyright Act 2002.

Section 8: Private Reproduction for Personal Purposes

589. Section 8 exempts from copyright infringement the “private reproduction” by a person of a single copy of a published work for his own “personal purposes”. However, the exemption will not apply to a work of architecture, reprography of the whole or a substantial part of a book or musical work in the form of notation, the whole or a substantial part of a digital database, a computer program, and any work in cases “where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright”.

Section 10: Quotation

590. Section 10 exempts from copyright infringement the reproduction in the form of quotation of a short part of a published work, provided it is compatible with fair practice and does not exceed the extent justified by the purpose. In addition, the quotation shall be attributed, in that it shall be accompanied by an indication of the source and name of the author (if his name appears in the work from which the quotation is taken).

⁶⁹¹ C. Guy Powles, *Tonga*, SOUTH PACIFIC ISLANDS LEGAL SYSTEM 317-318 (Michael A. Ntummy ed., 1993).

⁶⁹² U.K. Copyright Act, 1956 (4 & 5 Eliz. 2, Ch. 74).

Sections 11 and 26(c): Reproduction for Teaching

591. Section 11 exempts from copyright infringement two types of reproduction for teaching purposes.

592. Section 11(1)(a) permits the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, “provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose”. The attribution requirement must be met, in having the source of the work and the name of the author indicated on all copies made.⁶⁹³

593. Section 11(1)(b) permits the reprographic reproduction of published articles, other short works or short extracts of works, “to the extent justified by the purpose”, for face-to-face teaching in educational institutions (the activities of which do not serve direct or indirect commercial gain). Such a reproduction must be “an isolated act occurring, if repeated, on separate and unrelated occasions”.⁶⁹⁴ In addition, there must be no available collective license for such reproductions for which the educational institution should be aware.⁶⁹⁵ Likewise, the attribution requirement must be met, in having as far as practicable the source of the work and the name of the author indicated on all copies made.⁶⁹⁶

594. Section 26(c) likewise exempts from copyright infringement of the related rights in the reproduction of performances, phonograms and broadcasts, solely for the purpose of face-to-face teaching activities, except for performances and phonograms which have been published as teaching or instructional materials.

Section 15: Personal Importation

595. Section 15 exempts from copyright infringement the importation of a copy of a work by a person for his own purposes. As previously noted above in relation to similar provisions in the Nepalese Copyright Act, the Papua New Guinea Copyright and Neighbouring Rights Act and the Samoan Copyright Act, it is not clear from this section whether in this regard, the “hypothetical manufacturer” test applies to the work, nor does the section indicate who is supposed to be the “hypothetical manufacturer”.

Section 26(b): Reproduction of Performances, Phonograms and Broadcasts for Scientific Research

596. Section 26(b) exempts from copyright infringement of the related rights the reproduction of performances, phonograms and broadcasts “solely for scientific research”.

Section 26(d): Exceptions in relation to Related Rights

⁶⁹³ Tongan Copyright Act, s. 11(2).

⁶⁹⁴ Tongan Copyright Act, s. 11(1)(b)(i).

⁶⁹⁵ Tongan Copyright Act, s. 11(1)(b)(ii).

⁶⁹⁶ Tongan Copyright Act, s. 11(2).

597. Section 26(d) contains a blanket exception to enable a work to be used without infringement of the related rights in performances, phonograms and broadcasts, where the work can be used without the authorization of the author or other owner of copyright.

Tuvalu

598. Prior to independence, U.K. laws applied to Tuvalu. Section 15(1) of the Western Pacific (Courts) Order in Council, 1961, states that “statutes of general application in force in England on the 1st day of January, 1961 ... shall be in force [but] so far only as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty’s jurisdiction permit and subject to such qualifications as local circumstances render necessary”. This rendered applicable the U.K. Copyright Act 1956.⁶⁹⁷

599. Although it was granted independence in 1978, Section 2(2) of Schedule 5 of the Constitution of Tuvalu provides that existing laws and Acts of the Parliament of the U.K. or Order of Her Majesty in Council, having effect as part of the law of Tuvalu immediately before independence day, shall continue in force and be construed with such conforming modifications. Thus notwithstanding the enactment of the Tuvalu Copyright Ordinance (Chapter 60, Revised Edition 1978), which came into force on 13 June 1978, the U.K. Copyright Act 1956 will continue to apply in Tuvalu,⁶⁹⁸ will be construed with the Tuvalu Copyright Ordinance.

600. An examination of the law of copyright in Tuvalu necessarily involves an examination of the U.K. Copyright Act 1956, read in conjunction with the Tuvalu Copyright Ordinance. For a review of the exceptions for the benefit of educational activities under Tuvalu’s copyright law, please refer to the analysis of the same provisions in the U.K. Copyright Act for the Republic of Kiribati.

601. Tuvalu is neither a Berne Union member nor a WTO member.

Vanuatu

602. Prior to independence, U.K. laws applied to Vanuatu. Section 15(1) of the Western Pacific (Courts) Order in Council, 1961, states that “statutes of general application in force in England on the 1st day of January, 1961 ... shall be in force [but] so far only as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty’s jurisdiction permit and subject to such qualifications as local circumstances render necessary”. This rendered applicable the U.K. Copyright Act 1956.⁶⁹⁹

⁶⁹⁷ U.K. Copyright Act, 1956 (4 & 5 Eliz. 2, Ch. 74).

⁶⁹⁸ Tuvalu Copyright Ordinance, s. 3 (referring to s. 22 of the U.K. Copyright Act 1956). *See also* University of the South Pacific, LA100 – Legal Systems 1 – Topic 8 – Legislation, at http://www.vanuatu.usp.ac.fj/Courses/LA100_Legal_Systems1/LA100_Unit_8.html (accessed 11 June 2009).

⁶⁹⁹ U.K. Copyright Act, 1956 (4 & 5 Eliz. 2, Ch. 74). *See also* University of the South Pacific, LA100 – Legal Systems 1 – Topic 8 – Legislation, at http://www.vanuatu.usp.ac.fj/Courses/LA100_Legal_Systems1/LA100_Unit_8.html (accessed 11 June 2009).

603. Although it was granted independence in 1980, Article 95 of the Constitution of the Republic of Vanuatu provides that existing British and French laws in force or applied in Vanuatu immediately before independence day, shall continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

604. As Vanuatu has not repealed the U.K. Copyright Act and has not enacted its own copyright legislation, an examination of the law of copyright in Vanuatu necessarily involves an examination of the U.K. Copyright Act 1956. For a review of the exceptions for the benefit of educational activities under the U.K. Copyright Act, please refer to the aforesaid analysis for the Republic of Kiribati.

605. Vanuatu is neither a Berne Union member nor a WTO member.

Vietnam

606. Vietnam enacted its first copyright law in 1995. A decade later, Vietnam overhauled its copyright laws with the enactment of the Law on Intellectual Property in 2005. This law marked the modernization of Vietnam's intellectual property laws. It is also the culmination of Vietnam's accession to the Berne Convention in 2004 and paved the way for Vietnam's WTO membership in 2007. Since then, Vietnam has also acceded to the Rome Convention in March 2007, making it just the second South-East Asian country to do so (after the Philippines).

607. A review of the exceptions for the benefit of educational activities in the Vietnamese Law on Intellectual Property follows.

Articles 25(1)(a), (g) and 32(1)(a), (b): Scientific Research or Teaching Purposes

608. Article 25(1) provides for a number of exceptions pertaining to the use of published works without permission and without payment of royalties. In all these instances, the use of the works "must neither affect the normal utilization of such works nor cause prejudice to rights of the authors and/or copyright holders, and must indicate the authors' names, and sources and origins of the works."⁷⁰⁰

609. Article 25(1)(a) exempts from copyright infringement the reproduction of published works for non-commercial⁷⁰¹ scientific research or teaching purposes by individuals.⁷⁰² However, it is not possible to reproduce computer programs as published works for scientific

⁷⁰⁰ Vietnamese Law on Intellectual Property, Art. 25(1).

⁷⁰¹ Vietnamese Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights (2006), Art. 25(1).

⁷⁰² Vietnamese Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights (2006), Art. 25(1).

research or teaching purposes as computer programs are excluded from the scope of the Article 25(1) exceptions.⁷⁰³

610. Article 25(1)(g) likewise exempts from copyright infringement the audiovisual recording of performances for teaching purposes.

611. Article 32(1)(a) exempts from infringement in the related rights of performers, phonogram and video recording producers and broadcasting organizations the reproduction of works for scientific research purposes.

612. Article 32(1)(b) likewise exempts from infringement of the related rights, the reproduction of works for teaching purposes, except where the performances, phonograms, video recordings or broadcasts have been published for teaching purposes.

Articles 25(1)(b) and 32(1)(c): Recitation of Works for Commentary or Illustrative Purposes

613. Article 25(1) also contains a number of exceptions as regards the various uses and purposes for recitation of works. Article 25(1)(b) exempts from copyright infringement the reasonable recitation of works without misrepresenting the authors' views for commentary or illustrative purposes. This is further defined as a recitation which must satisfy the conditions that the recited parts aim merely to introduce, comment or clarify matters touched upon in the work, and that the number and essence of the parts recited from the work used are not prejudicial to the copyright in such a work and are suitable to the nature and characteristics of the type of work used for recitation.⁷⁰⁴

614. Note that the attribution requirement in which the authors' names and sources and origins of the works must be indicated.⁷⁰⁵

615. Likewise Article 32(1)(c) exempts from infringement of the related rights in performances, phonograms, video recordings and broadcasts, reasonable recitations for informative purposes.

Article 25(1)(d): Recitation of Works in Schools for Lecturing Purposes

616. Article 25(1)(d) exempts from copyright infringement the recitation of works in schools for non-commercial lecturing purposes, without misrepresenting the authors' views. Note that the aforesaid attribution requirement applies.⁷⁰⁶

Article 25(1)(f): Performance of Dramatic Works

⁷⁰³ Vietnamese Law on Intellectual Property, Art. 25(3).

⁷⁰⁴ Vietnamese Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights (2006), Art. 24(1).

⁷⁰⁵ Vietnamese Law on Intellectual Property, Art. 25(2).

⁷⁰⁶ Vietnamese Law on Intellectual Property, Art. 25(2).

617. Article 25(1)(f) exempts from copyright infringement the performance of dramatic works or other performing art works in mass cultural, communication or mobilization activities where no charges of any form are collected. The emphasis on “mass” events arguably means that events short of national events would not qualify for this exception. Note that the aforesaid attribution requirement applies.⁷⁰⁷

Article 25(1)(j): Importation for Personal Use

618. Article 25(1)(j) exempts from copyright infringement the importation of one copy⁷⁰⁸ of a work for personal use. However, this exception does not apply to permit the importation of computer programs for personal use.⁷⁰⁹ Note that the aforesaid attribution requirement applies.⁷¹⁰ However, its utility and relevance in relation to personal uses may be questioned.

⁷⁰⁷ Vietnamese Law on Intellectual Property, Art. 25(2).

⁷⁰⁸ Vietnamese Decree No. 100/2006/ND-CP of of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights (2006), Art. 24(2).

⁷⁰⁹ Vietnamese Law on Intellectual Property, Art. 25(3).

⁷¹⁰ Vietnamese Law on Intellectual Property, Art. 25(2).

PART III: SUMMARY AND ANALYSIS OF NATIONAL LEGISLATION

Breadth of Educational Activities and the Exceptions in National Legislation

619. It will be clear from the above review of national legislation for countries in the Asia-Pacific that while all copyright legislations recognize exceptions for the benefit of educational activities, the breadth and scope of educational activities – encompassing those at the individual and personal level to those at the institutional and national level – mean that there is no one standard approach adopted in formulating the requisite exceptions. Many countries supplement their exceptions pertaining to educational activities (for the benefit primarily of educational institutions) with exceptions pertaining to quotations, criticism and review, to allow educational institutions, teachers and students alike to take extracts and use quotes from diverse sources. Others have implemented statutory, voluntary or compulsory licensing arrangements to enable the use of multiple reproductions of works in educational institutions. Still others have supplemented these exceptions with generic fair use or fair dealing exceptions or even residual exceptions based on the three-step test set out Article 9(2) of the Berne Convention and Article 13 of TRIPS.

620. There is a plethora of approaches in crafting of educational exceptions because modern day educational activities are no longer confined to classroom instruction or the traditional notion of impartation of information. Educational instruction, particularly in high schools and tertiary institutions, blur the distinction between education and research. It encourages self-learning and instruction through student activities that range from plays to recitals, from performances to student-run broadcasts and publications, to enable and facilitate this voyage of self-discovery for each student. The breadth of educational curriculum in tertiary institutions means that legislators can either create a very broad exception to cover all aspects of an educational curriculum wherein copyright works are used (subject to limits or conditions such as equitable remuneration for the content holders), or craft piece-meal exceptions to deal with specific types of educational activities, such as art and media studies and music and the performing arts. To reduce or minimize the instances where legislation has to be constantly revised with piece-meal exceptions, legislators may also recognize personal and private use exceptions to exempt, *inter alia*, the non-systematic and individual uses of works for educational purposes.

621. A holistic view of educational activities will necessarily include the use of works for societal education. The non-exhaustive review in Part II of this paper shows that these encompass a diverse range of exceptions that range from news reporting to access to public information, laws and government decision-making processes. All national legislations reviewed above have some exceptions that deal with this aspect of societal education.

The Influence of International Treaties permitting Educational Exceptions

622. The multiplicity of approaches adopted in national copyright legislations is further influenced by the myriad of approaches permissible in international copyright treaties.

623. As noted in Part I of this paper, the provisions in international copyright legislation that permit member states to formulate exceptions for educational activities call for different elements and requirements to be satisfied. For instance, Article 10(2) of the Berne Convention refers to exceptions to “permit the utilization, *to the extent justified by the*

purpose, of literary or artistic works ... for teaching, provided such utilization is *compatible with fair practice*". On the other hand, Article 15(1)(d) of the Rome Convention simply provides for exceptions as regards "use *solely* for the *purposes of teaching and scientific research*", unencumbered and unqualified by the qualitative (and arguably quantitative) conditions found in Article 10(1).⁷¹¹ Even so, countries may choose to extend the educational exceptions which apply to authorship works to derivative works via a *pari passu* exception, pursuant to Article 15(2) of the Rome Convention.⁷¹² Reliance on either Article 10(2) or Article 15(1)(d) would seem to be the first basis for the formulation of broad teaching and educational exceptions in national copyright legislation.

624. By way of comparison, Article 10(1) of the Berne Convention (a frequently-used counterpart to Article 10(2) for educational exceptions) enables free use of quotations from works which have been lawfully made available to the public, where the use is "*compatible with fair practice*" and where the extent of such use "*does not exceed that justified by the purpose*". Reliance on Article 10(1) may be apposite not just for short extracts from works but also when longer extracts are used, since the removal of the quantitative restriction in the Brussels Act⁷¹³ means that the extent of the quotation as well as the number of copies made (particularly if there is dissemination of parts of publicly-available materials in classrooms by way of printed and reprographic materials, or through electronic dissemination systems) must be "compatible with fair practice" and "justified by the purpose" for which the quotation or extract is made.

625. In contrast, countries may formulate their educational exceptions based on the three-step test in Article 9(2) of the Berne Convention, which would require that the exception be confined to "*certain special cases*" that "*do not conflict with the normal exploitation of the work*" and "*do not unreasonably prejudice the legitimate interests of the author*". Although it is an exception limited to reproduction rights, the subsequent adoption of the three-step test in Article 9(2) as a generic test for exceptions pursuant to Article 13 of TRIPS, Article 10 of the WCT and Article 16 of the WPPT has extended its application beyond reproduction rights. This may indicate a growing acceptance of the three-step test as the *de rigueur* for any exception, including exceptions pertaining to educational activities.

⁷¹¹ Examples of this approach can be found in the Philippines Intellectual Property Code, s. 212; Samoan Copyright Act, s. 24(c).

⁷¹² Examples of this approach can be found in Bhutan Copyright Act, s. 27; U.K. Copyright Act 1956, s. 16(6) (Kiribati, Tuvalu); Korean Copyright Act, Art. 87; Samoan Copyright Act, s. 24(d), Tongan Copyright Act, s. 26(d).

⁷¹³ *Supra*, note 40 and the accompanying text.

The Three-step Test as a Double-barrelled Exception

626. On the basis of concerns about the over-arching requirement to comply with the three-step test, while some countries have recognized a broad personal use exception (which would permit an individual use of materials for educational instruction, such as that expressly spelt out in Article 15(1)(a) of the Rome Convention), they have nonetheless subjected that to a remuneration requirement. Still other member states (who may be signatories to TRIPS and/or the WCT and WPPT) have formulated broad educational exceptions based on Articles 10(1) and 10(2) of Berne or Article 15 of Rome and expressly scoped them down with reference to the three-step test.⁷¹⁴ Examples of countries that have adopted this “double-barrelled” approach are Bhutan,⁷¹⁵ China,⁷¹⁶ Philippines,⁷¹⁷ and Thailand.⁷¹⁸

627. In this regard, reference should also be made to Articles II and III of the Appendix to the Berne Convention, in which provision is made for compulsory licenses for reproductions and translations of works to be made for national literacy and scholastic purposes. Although these exceptions are only available to developing countries that have made declarations that they wish to avail themselves of these facilities, these provisions could be the basis for the formulation of statutory, compulsory and voluntary license schemes in copyright legislations to provide for the remunerated use of works by institutions for educational purposes.

628. In conformity to the above schema which has developed out of the international formulations for copyright exceptions, for purposes of this part of the paper, an analysis of the copyright exceptions in national legislation for educational activities will seek to characterize the exceptions into one of the following categories:

- Exceptions for teaching purposes
- Exceptions for quotation
- Exceptions for private or personal uses or “fair dealing”
- Multiple reproductions and copyright licensing schemes

629. All these exceptions will be analysed and reviewed for their scope (what types of educational activities they pertain to), the applicable works (what types of works qualify for the exception), the rights excepted (what exclusive rights are covered by the exception) and the eligibility requirements (qualifications of the institution or individual). For a summary of

⁷¹⁴ Article 2(2) of TRIPS disallows WTO members from derogating from their existing Berne and Rome Convention obligations. So commentators have opined that the three-step test may not be used to extend the scope of the activities permitted in Article 10(1) and (2) of the Berne Convention and Article 15(1)(d) of the Rome Convention. See *RICKETSON – STUDY ON LIMITATIONS AND EXCEPTIONS*, *supra* note 12, at 51; *RICKETSON AND GINSBURG - THE BERNE CONVENTION*, § 13.108 at 857. However, reference should also be made to Article 20 of the Berne Convention, incorporated via Article 9(1) of TRIPS, which permits member states to make agreements to grant to authors “more extensive rights than those granted” by the Berne Convention. See P Goldstein, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 295 (2001).

⁷¹⁵ Bhutan Copyright Act, s. 10(2)(e).

⁷¹⁶ Regulation on the Implementation of the Copyright Law of the People’s Republic of China 2002, Art. 21.

⁷¹⁷ Philippines Intellectual Property Code, s. 184.2.

⁷¹⁸ Thai Copyright Act, s. 32.

all the exceptions reviewed in Part II of this paper that pertain to all the identified aspects of educational instruction, please consult Appendix 2 of this paper.

Exceptions for the benefit of educational activities teaching and research and their related exceptions

Introduction

630. All the countries reviewed in this paper have some form of education or education-related exceptions. These may be formulated as exceptions for teaching purposes, for research purposes or for specific aspects of teaching and research.

631. Many countries provide for these exceptions in conjunction with the use of works in libraries and archives for teaching, studying and research purposes. We will not analyze such exceptions in this study. For an analysis of such exceptions, please refer to the WIPO Study on Libraries and Archives.⁷¹⁹

Approaches to Formulation of Education-related Exceptions

632. Two distinct approaches towards the formulation of education-related exceptions can be discerned in the copyright legislation for the Asia-Pacific countries under review. The first set of countries formulate a “broad” education exception that mirrors the approach taken in section 7(1)(c) of the Tunis Model Law on Copyright (modeled after Article 10(2) of the Berne Convention),⁷²⁰ which reads:

SECTION 7 - FAIR USE

[T]he following uses of a protected work, either in the original language or in translation, are permissible without the author’s consent:

(1) in the case of any work that has been lawfully published:

(c) the utilization of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching, to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast for use in schools, education, universities and professional training, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast or the recording; [emphasis added]

a) “Teaching”

633. Various variations of this formulation have been used. Countries adopting an educational exception based on “teaching”, “teaching purposes”, “teaching and learning

⁷¹⁹ WIPO Study on Libraries and Archives, Appendix, at 88-90.

⁷²⁰ Commentary, Tunis Model Law on Copyright for developing countries, at 10 para. 42 (“in conformity with the spirit and letter of the [Berne Convention and the Universal Copyright Convention]”).

activities”, “lecturing purposes” or “class teaching” are Bhutan,⁷²¹ China,⁷²² Malaysia,⁷²³ Mongolia,⁷²⁴ Nepal,⁷²⁵ Palau,⁷²⁶ Papua New Guinea,⁷²⁷ Philippines,⁷²⁸ Republic of Korea,⁷²⁹ Sri Lanka,⁷³⁰ Samoa,⁷³¹ Thailand,⁷³² Tonga,⁷³³ and Vietnam.⁷³⁴ Even then, the exception can be formulated broadly or narrowly. For instance, section 13(2)(f) of the Malaysian Copyright Act reads:

*(2) Notwithstanding subsection (1), the right of control [of the exclusive rights of copyright] under that subsection does not include the right to control –
(f) the inclusion of a work in a broadcast, performance, showing or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair practice:*

634. Thus section 13(2)(f) of the Malaysian Copyright Act makes no express reference to the right of reproduction. It is not formulated as an exception for “the doing of any of the acts [of exclusive rights of copyright] referred to in subsection (1)” for the purposes of teaching.⁷³⁵ Instead, it exempts the “inclusion” of the work in another work such as a literary or musical collection, a broadcast, performance, recording or film, for illustration for teaching purposes.

635. In contrast, the Mongolian Copyright Act enumerates the excepted exclusive rights to copyright by providing that it is permissible to both reproduce and make a public communication of a publicly available work for teaching purposes. Articles 14 and 16 of the Mongolian Copyright Act read:

⁷²¹ Bhutan Copyright Act, s. 27(c).

⁷²² Copyright Law of China, Art. 22(6).

⁷²³ Malaysian Copyright Act, s. 13(2)(f).

⁷²⁴ Mongolia Copyright Act, Arts. 14, 16.

⁷²⁵ Nepalese Copyright Act, s. 18.

⁷²⁶ Palauan Copyright Act, s. 9(a).

⁷²⁷ Papua New Guinea Copyright and Neighbouring Rights Act, s. 5.

⁷²⁸ Philippines Intellectual Property Code, s. 184.1(e).

⁷²⁹ Korean Copyright Act, Art. 25(2).

⁷³⁰ Sri Lanka Code of Intellectual Property, s. 13(a)(iii).

⁷³¹ Samoan Copyright Act, s. 10(1).

⁷³² Thai Copyright Act, s. 32(6).

⁷³³ Tongan Copyright Act, s. 11(1)(a).

⁷³⁴ Vietnam Law on Intellectual Property, s. 25(1)(d).

⁷³⁵ Cf. Malaysian Copyright Act, s. 13(b).

Article 14. Public communication of works for public benefit

1. In the following cases it shall be permissible to make for the public benefit, without the author's consent and without payment of any remuneration, a public communication of part of a work which has already been made available to the public, provided that mention shall be made of the source and of the name of the author:

(1) use for teaching...

Article 16. Reproduction of works for public benefit

1. In the following cases it shall be permissible to make for the public benefit, without the author's consent and without payment of any remuneration, a reproduction of part of a work which has already been made available to the public, provided that mention shall be made of the source and of the name of the author:

...

(2) use for teaching...

b) "Research"

636. Some countries have adapted the formulation in Article 15(1)(d) of the Rome Convention to exempt the use of works for "research", "science", "scientific research", "scientific thesis", "teaching and scientific research", "research or private study", "technical purposes" or other similar formulations. Countries adopting this formulation are Bhutan,⁷³⁶ China,⁷³⁷ Fiji,⁷³⁸ Iran,⁷³⁹ Mongolia,⁷⁴⁰ Philippines,⁷⁴¹ Samoa,⁷⁴² Tonga,⁷⁴³ and Vietnam.⁷⁴⁴ Thus, Article 25(1) of the Vietnam Law on Intellectual Property reads:

1. Cases of use of published works where permission or payment of royalties and/or remunerations is not required include:

a. Duplication of works by authors for scientific research or teaching purpose;

⁷³⁶ Bhutan Copyright Act, ss. 12, 27(c).

⁷³⁷ Copyright Law of China, Art. 22(6).

⁷³⁸ Fiji Copyright Act, ss. 43, 44 ("research or private study").

⁷³⁹ Iranian Copyright Act, Art. 8.

⁷⁴⁰ Mongolia Copyright Act, Arts. 14(2), 16(5), 23(2).

⁷⁴¹ Philippines Intellectual Property Code, s. 212.3.

⁷⁴² Samoan Copyright Act, s. 24.

⁷⁴³ Tongan Copyright Act, s. 26(b).

⁷⁴⁴ Vietnam Law on Intellectual Property, Arts. 25(1)(a), (g), 31(1)(a), (b).

c) “Education”

637. Some countries have adopted exceptions to permit the use of a work for “the purposes of education”, “the purposes of a course of education”, “the purpose of school education”, “in the course of instruction”, “in the course of a lesson” or such similar formulations. Countries adopting such a formulation are Australia,⁷⁴⁵ Brunei,⁷⁴⁶ Cambodia,⁷⁴⁷ Cook Islands,⁷⁴⁸ India,⁷⁴⁹ Indonesia,⁷⁵⁰ Iran,⁷⁵¹ Japan,⁷⁵² New Zealand,⁷⁵³ Niue,⁷⁵⁴ Pakistan,⁷⁵⁵ Singapore,⁷⁵⁶ and Solomon Islands.⁷⁵⁷ For instance, Article 29 of the Cambodian Copyright Act reads:

Notwithstanding the provisions of Article 21 of this law, it is permitted to:

(a) Use a legally published work for the purpose of illustration in publication such as book or newspaper, or by broadcasting, or by audio or visual screening which are intended for educational purposes, without payment of any remuneration. In this connection, source and author's name must be identified, if author's name is given in the source.

Likewise, section 52(1)(h)(i) of the Indian Copyright Act reads:

The following acts shall not constitute an infringement of copyright, namely: ... the reproduction of a literary, dramatic, musical or artistic work –

(i) by a teacher or a pupil in the course of instruction; ...

⁷⁴⁵ Australian Copyright Act, Parts VA and VB. See e.g. ss. 135ZG, 135ZMB.

⁷⁴⁶ Brunei Copyright Order, s. 36.

⁷⁴⁷ Cambodian Copyright Act, Arts. 25(c), 29, 50(d).

⁷⁴⁸ New Zealand Copyright Act 1962, s. 21(1) (Cook Islands).

⁷⁴⁹ Indian Copyright Act, s. 52(1)(h)(i).

⁷⁵⁰ Indonesian Copyright Act, Art. 15(a).

⁷⁵¹ Iranian Copyright Act, Art. 8.

⁷⁵² Japanese Copyright Act, Arts. 35, 43(i).

⁷⁵³ New Zealand Copyright Act, ss. 44, 45.

⁷⁵⁴ New Zealand Copyright Act 1962, s. 21(1) (Niue).

⁷⁵⁵ Pakistan Copyright Ordinance, s. 57(1)(h).

⁷⁵⁶ Singapore Copyright Act, ss. 51, 52.

⁷⁵⁷ Solomon Islands Copyright Act, s. 35(1)(a).

d) *Hybrid Formulations*

638. Other countries have developed exceptions that combine one or more of these terms. For instance, Article 29 of the Cambodian Copyright Act goes on to read:

Notwithstanding the provisions of Article 21 of this law, it is permitted to:

(b) Reproduce any separated articles, articles of the newspaper or magazine, or short extracts of any legally published works. This reproduction can be done providing that it is made by reprographic means, and must be used for the sake of teaching or for examinations held by any educational establishments of which the activities do not lead directly or indirectly to commercial gain and must be done with appropriate reason according to this specific objective. The said reproduction can be done without the author's authorization and without payment of any remuneration, but if the author's name is mentioned in the source, this source and name must be identified.

639. Likewise, Article 15(a) of the Indonesian Copyright Act reads:

Provided that the sources are fully cited, the following shall not be deemed as Copyright infringement:

(a) the use of a work of another party for the purpose of education, research, scientific thesis, report writing, criticizing or reviewing an issue, provided that it does not prejudice the normal interest of the Author; [emphasis added]

640. Likewise, Article 23(2) of the Mongolian Copyright Act provides:

In the following cases it shall be permissible to make, for the public benefit a public communication of part of a derivative work or a sound and visual recording and to broadcast without the consent of the relevant persons and without payment of any remuneration for such communication:

(2) use it for the purposes of teaching or scientific research; ...

Scope of Permissible Educational Activities

641. Some countries, predominantly but not exclusively those that follow the Anglo-Saxon legal tradition, seek to formulate narrow exceptions to deal with specific aspects of teaching and research-related activities that are part of modern day educational instruction. (These may (or may not) be implemented in copyright legislation together with the broad exceptions outlined above). In particular, these countries have exceptions to deal with the manifold aspects of educational instruction, ranging from the preparation of teaching compilations and anthologies to educational performances to the setting of examination questions.

642. The analysis here is complicated by the fact that an activity that is part of educational instruction may fall within a general exception for that class of activities. For instance, the excepted use of public artwork and buildings for purposes of making paintings, drawings,

engravings, photographs, films and TV broadcasts is widely recognized in national copyright legislation.⁷⁵⁸ Art schools, media study and filmmaking students and architecture training institutes would benefit from such exceptions, as would non-education related organizations such as artists, news broadcasters and filmmakers. Likewise, the limitation of copyright protection in official texts such as legislation, administrative rules and judicial proceedings⁷⁵⁹ or exemption from infringement⁷⁶⁰ would benefit scholars and students of law and public policy schools.

643. Given the infinitely expansive nature of educational activities, it will not be possible in this study to conduct an exhaustive survey of every such exception in copyright legislations. Instead, the following analysis will focus on those exceptions that are directly referable to educational or research activities.

a) *Chrestomathies and Abstracts*

644. Chrestomathies as collections of short extracts from published works or their adaptations may serve as a useful purpose for educational instruction. Though it was originally recognized in Article 8 of the Berne Act, it has since been subsumed under Article 10(2) of the Berne Convention.

645. Countries such as Australia,⁷⁶¹ Brunei,⁷⁶² Cook Islands,⁷⁶³ India,⁷⁶⁴ Kiribati,⁷⁶⁵ New Zealand,⁷⁶⁶ Niue,⁷⁶⁷ Pakistan,⁷⁶⁸ Singapore,⁷⁶⁹ Solomon Islands,⁷⁷⁰ Tuvalu,⁷⁷¹ and

⁷⁵⁸ See e.g. Australian Copyright Act, ss. 65, 66, 68; Copyright Law of China, Art. 22(10); New Zealand Copyright Act 1956, s. 20(4), (5) (Cook Islands); Fiji Copyright Act, s. 67; Indian Copyright Act, s. 52(1)(s), (t); Japanese Copyright Act, Art. 46; U.K. Copyright Act 1956, s. 9(3), (4) (Kiribati, Tuvalu, Vanuatu); Malaysian Copyright Act, s. 13(2)(c); New Zealand Copyright Act, s. 73; Pakistan Copyright Ordinance, s. 57(1)(r), (s); Korean Copyright Act, Art. 35; Singapore Copyright Act, ss. 65, 66, 68; Solomon Islands Copyright Act, s. 7(7), (8); Sri Lanka Code of Intellectual Property, s. 13(d); Thai Copyright Act, ss. 37, 38; Vietnam Law on Intellectual Property, s. 25(1)(h).

⁷⁵⁹ See e.g. Bhutan Copyright Act, s. 7; Fiji Copyright Act, s. 27; Indonesian Copyright Act, Arts. 13, 14(b); Japanese Copyright Act, Art. 32(2); Malaysian Copyright Act, s. 3; Mongolia Copyright Act, Art. 3(2); Nepalese Copyright Act, s. 4; New Zealand Copyright Act, s. 27; Palauan Copyright Act, s. 3(b); Papua New Guinea Copyright and Neighbouring Rights Act, s. 5; Philippines Intellectual Property Code, ss. 175, 176; Korean Copyright Act, Art. 7; Samoan Copyright Act, s. 5; Sri Lanka Code of Intellectual Property, s. 9(a); Thai Copyright Act, s. 7(2)-(5); Tongan Copyright Act, s. 5(b); Vietnam Law on Intellectual Property, Art. 15(2).

⁷⁶⁰ See e.g. Australian Copyright Act, s. 182A; Indian Copyright Act, s. 52(1)(q); Pakistan Copyright Ordinance, s. 57(1)(q).

⁷⁶¹ Australian Copyright Act, s. 44.

⁷⁶² Brunei Copyright Order, ss. 37, 64.

⁷⁶³ New Zealand Copyright Act 1962, s. 19(6) (Cook Islands).

⁷⁶⁴ Indian Copyright Act, s. 52(1)(g).

⁷⁶⁵ U.K. Copyright Act 1956, s. 6(6) (Kiribati).

⁷⁶⁶ New Zealand Copyright Act, s. 46.

⁷⁶⁷ New Zealand Copyright Act 1962, s. 19(6) (Niue).

⁷⁶⁸ Pakistan Copyright Ordinance, s. 57(1)(g).

⁷⁶⁹ Singapore Copyright Act, s. 40.

⁷⁷⁰ Solomon Islands Copyright Act, s. 7(4).

Vanuatu,⁷⁷² recognize such an exception where the collection is intended for use by places of education. However, conditions such as the requirement of attribution⁷⁷³ and limitations on the number of extracts that may be included in the collection are imposed to ensure that such collections do not unduly prejudice the legitimate interests of rightholders. Another typical condition is that the collections contain primarily only matter in which copyright does not subsist.⁷⁷⁴

646. Countries such as Brunei,⁷⁷⁵ Fiji,⁷⁷⁶ and New Zealand,⁷⁷⁷ recognize a related exception to permit the copying of abstracts from scientific or technical articles and the issue of such copies. This exception is narrower than the chrestomathies exception as it is designed to enable scholars, scientists and others in the industry to be alerted to and stay abreast of the latest publications and is not intended to be a substitute for the publications themselves.

647. Thailand⁷⁷⁸ has an exception in its Copyright Act which operates in a somewhat similar fashion in that it exempts from copyright infringement, the making by a teacher or an educational institution of a reproduction or adaptation of part of a work or abridgement or a summary of a work, for distribution or sale to students in a class or in an educational institution, provided that the act is not for profit.

[Footnote continued from previous page]

⁷⁷¹ U.K. Copyright Act 1956, s. 6(6) (Tuvalu).

⁷⁷² U.K. Copyright Act 1956, s. 6(6) (Vanuatu).

⁷⁷³ Cf. Pakistan Copyright Ordinance, s. 57(1)(g).

⁷⁷⁴ Australian Copyright Act 1968, s 44(1)(c); Brunei Copyright Order, s. 37; New Zealand Copyright Act 1962, s. 19(6) (Cook Islands); Indian Copyright Act, s. 52(1)(g); Pakistan Copyright Ordinance, s. 57(1)(g).

⁷⁷⁵ Brunei Copyright Order, s. 64.

⁷⁷⁶ Fiji Copyright Act, s. 65 (subject to the availability of a collective license).

⁷⁷⁷ New Zealand Copyright Act, s. 71.

⁷⁷⁸ Thai Copyright Act, s. 32(7).

b) *Educational Performances*

648. Countries such as Australia,⁷⁷⁹ Brunei,⁷⁸⁰ China,⁷⁸¹ Cook Islands,⁷⁸² Fiji,⁷⁸³ India,⁷⁸⁴ Indonesia,⁷⁸⁵ Japan,⁷⁸⁶ Malaysia,⁷⁸⁷ New Zealand,⁷⁸⁸ Niue,⁷⁸⁹ Pakistan,⁷⁹⁰ Philippines,⁷⁹¹ Samoa,⁷⁹² and Singapore,⁷⁹³ have also created exceptions for teaching-related activities which involve performances. To differentiate these activities from public performances, typical conditions ascribed to these performances are: that the performers are teachers or students in the course of giving or receiving instruction,⁷⁹⁴ that the performances be free-of-charge⁷⁹⁵ and that no remuneration be paid to the performers.⁷⁹⁶ Some countries require that the members of the audience be the school teachers or students,⁷⁹⁷ but others expressly permit parents and guardians of the students to be part of the audience.⁷⁹⁸

649. Other countries such as Republic of Korea,⁷⁹⁹ Thailand⁸⁰⁰ and Vietnam⁸⁰¹ exempt from infringement non-profit public performances and broadcasts of publicly available works.

c) *Educational Broadcasts and Communications*

650. Some countries also recognize that teaching-related activities involve films, broadcasts and communications. This may involve the communication of works, the playing of sound

⁷⁷⁹ Australian Copyright Act, s. 28.

⁷⁸⁰ Brunei Copyright Order, s. 38.

⁷⁸¹ Copyright Law of China, Art. 2296).

⁷⁸² New Zealand Copyright Act 1962, s. 21(5) (Cook Islands).

⁷⁸³ Fiji Copyright Act, ss. 45, 173, 183.

⁷⁸⁴ Indian Copyright Act, s. 52(1)(i).

⁷⁸⁵ Indonesian Copyright Act, Art. 15(c).

⁷⁸⁶ Japanese Copyright Act, Art. 38(1).

⁷⁸⁷ Malaysian Copyright Act, s. 13(2)(k).

⁷⁸⁸ New Zealand Copyright Act, s. 47.

⁷⁸⁹ New Zealand Copyright Act 1962, s. 21(5)) (Niue).

⁷⁹⁰ Pakistan Copyright Ordinance, s. 57(1)(i).

⁷⁹¹ Philippines Intellectual Property Code, s. 184.1(i).

⁷⁹² Samoan Copyright Act, s.24(c).

⁷⁹³ Singapore Copyright Act, s.23.

⁷⁹⁴ Australian Copyright Act, s. 28; Brunei Copyright Order, s. 38; Pakistan Copyright Ordinance, s. 57(1)(i).

⁷⁹⁵ Copyright Law of China, Art. 22(9); Indian Copyright Act, s. 52(1)(l) (amateur club or society, including those found in schools); Japanese Copyright Act, Art. 38(1); Malaysian Copyright Act, s. 13(2)(k).

⁷⁹⁶ Copyright Law of China, Art. 22(9); Japanese Copyright Act, Art. 38(1).

⁷⁹⁷ Brunei Copyright Order, s. 38; New Zealand Copyright Act 1962, s. 21(5) (Cook Islands); Fiji Copyright Act, s. 45; .

⁷⁹⁸ Australian Copyright Act, s. 28(3); Indian Copyright Act, s. 52(1)(i); Pakistan Copyright Ordinance, s. 57(1)(i); Singapore Copyright Act, s. 23(3) .

⁷⁹⁹ Korean Copyright Act, Art. 29.

⁸⁰⁰ Thai Copyright Act, s. 36.

⁸⁰¹ Vietnam Law on Intellectual Property, s. 25(1)(f) (exempting performance of dramatic works or other performing art works in *mass* cultural, communication or mobilization activities).

recordings and the showing of cinematographic films for instructional purposes. Countries which recognize this exception are Australia,⁸⁰² Brunei,⁸⁰³ Cook Islands,⁸⁰⁴ Fiji,⁸⁰⁵ Japan,⁸⁰⁶ New Zealand,⁸⁰⁷ Niue,⁸⁰⁸ Republic of Korea,⁸⁰⁹ and Singapore.⁸¹⁰

651. Other countries such as Australia,⁸¹¹ Brunei,⁸¹² Fiji,⁸¹³ New Zealand,⁸¹⁴ Philippines,⁸¹⁵ and Singapore,⁸¹⁶ also recognize exceptions for the making of video and sound recordings of broadcasts, cable programmes or other communications for instructional purposes. Countries like Malaysia⁸¹⁷ recognize a narrower exception in relation to the making of recordings of educational programming. Notably, countries such as Brunei,⁸¹⁸ Fiji,⁸¹⁹ New Zealand⁸²⁰ and Singapore⁸²¹ recognize a similar exception to exempt the infringement of copyright and performance rights in the making of audio visual works or sound tracks as part of media studies. In addition, New Zealand has gone further to recognize this exception in relation to language studies and correspondence courses.⁸²²

d) School Textbooks and Public Interest

652. Countries such as China,⁸²³ Japan,⁸²⁴ Iran,⁸²⁵ and the Republic of Korea⁸²⁶ have exceptions to permit the use of works for purposes of publishing school textbooks. These are (normally) pursuant to the provision of textbooks for non-tertiary instruction, although the exceptions vary as to the entities entitled to the benefit of the exception (such as the relevant

⁸⁰² Australian Copyright Act, s. 28(6)-(7).

⁸⁰³ Brunei Copyright Order, ss. 36(2), 39.

⁸⁰⁴ New Zealand Copyright Act 1962, s. 21(6) (Cook Islands).

⁸⁰⁵ Fiji Copyright Act, ss. 44(6), 46, 172(1), 174.

⁸⁰⁶ Japanese Copyright Act, Art. 34.

⁸⁰⁷ New Zealand Copyright Act, ss. 178, 188.

⁸⁰⁸ New Zealand Copyright Act 1962, s. 21(6) (Niue).

⁸⁰⁹ Korean Copyright Act, Art. 25(2).

⁸¹⁰ Singapore Copyright Act, s. 23(4).

⁸¹¹ Australian Copyright Act, s. 200(2) (records of sound broadcasts originally intended for educational purposes), 200(2A) (records of sound broadcasts for educational purposes).

⁸¹² Brunei Copyright Order, s. 39.

⁸¹³ Fiji Copyright Act, ss. 46, 174.

⁸¹⁴ New Zealand Copyright Act, ss. 48, 179.

⁸¹⁵ Philippines Intellectual Property Code, s. 184.1(f).

⁸¹⁶ Singapore Copyright Act, s. 115.

⁸¹⁷ Malaysian Copyright Act, s. 13(2)(g).

⁸¹⁸ Brunei Copyright Order, Second Schedule, para. 4(1).

⁸¹⁹ Fiji Copyright Act, ss. 44(6) and 172(1).

⁸²⁰ New Zealand Copyright Act, ss. 45(1), 177(1).

⁸²¹ Singapore Copyright Act, s. 115A.

⁸²² New Zealand Copyright Act, s. 45(3).

⁸²³ Copyright Law of China, Art. 23.

⁸²⁴ Japanese Copyright Act, Art. 33.

⁸²⁵ Iranian Copyright Act, Arts. 9 and 10 (limited to works and school books “already” reproduced, published, printed and issued).

⁸²⁶ Korea Copyright Act, Art. 25(1).

ministry in charge of education, the schools, the teachers and instructors or the publishers). The use of such works is normally subject to the payment of remuneration to rightholders.⁸²⁷

653. The Philippines⁸²⁸ has an exception in its copyright legislation to permit the use of a work by the Government or educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use. A similar exception can be found in the copyright legislation of Mongolia⁸²⁹ to permit a state agency in Mongolia to requisition an author's work for immediate public interest (where the agency failed to reach an agreement with the author), subject to payment of remuneration. In Pakistan, a similar exception permits a governmental or statutory institution, in the public interest, to obtain a compulsory license to reprint, translate, adapt or publish any textbook on a non-profit basis.⁸³⁰

e) School Rentals

654. With the introduction of the rental rights pursuant to Article 11 of TRIPS, some countries have deemed it necessary to preserve the right of schools and their libraries to rent copies of works to their students and staff for non-profit educational purposes. Countries that have expressly recognized this exception are Fiji,⁸³¹ Japan,⁸³² and New Zealand.⁸³³

f) Computer Programs and Computing Technology

655. Although computer programs are essentially functional works, they are recognized as literary works and afforded copyright protection in copyright legislation. Given their unique characteristics, some countries in their copyright legislation such as Australia,⁸³⁴ India,⁸³⁵ Japan,⁸³⁶ Philippines,⁸³⁷ Singapore,⁸³⁸ and Thailand,⁸³⁹ have recognized exceptions to facilitate the research and study of computer programs and their associated technologies.

g) Examinations

656. Countries which have recognized exceptions for the use of works or their adaptations as part of examination questions or in answer to such questions include Australia,⁸⁴⁰ Brunei,⁸⁴¹

⁸²⁷ Cf. Iranian Copyright Act, Arts. 9 and 10.

⁸²⁸ Philippines Intellectual Property Code, s. 184.1(h).

⁸²⁹ Mongolian Copyright Act, Art. 13.

⁸³⁰ Pakistan Copyright Ordinance, s. 36.

⁸³¹ Fiji Copyright Act, s. 73.

⁸³² Japanese Copyright Act, Art. 38(4), (5).

⁸³³ New Zealand Copyright Act, s. 79.

⁸³⁴ Australian Copyright Act, ss. 47B, 47D, 47E, 47F.

⁸³⁵ Indian Copyright Act, s. 52(1)(ab), (ac).

⁸³⁶ Japanese Copyright Act, Arts. 10(3), 47-2(1), 113-2.

⁸³⁷ Philippines Intellectual Property Code, s. 185).

⁸³⁸ Singapore Copyright Act, ss. 35A, 35B, 35C.

⁸³⁹ Thai Copyright Act, s. 35.

⁸⁴⁰ Australian Copyright Act, s. 200(1)(b).

⁸⁴¹ Brunei Copyright Order, s. 36(3).

Cook Islands,⁸⁴² Fiji,⁸⁴³ India,⁸⁴⁴ Japan,⁸⁴⁵ Malaysia,⁸⁴⁶ New Zealand,⁸⁴⁷ Niue,⁸⁴⁸ Pakistan,⁸⁴⁹ Republic of Korea,⁸⁵⁰ Singapore,⁸⁵¹ Solomon Islands,⁸⁵² and Thailand.⁸⁵³

h) Importation

657. It would appear⁸⁵⁴ that the Philippines,⁸⁵⁵ recognizes an exception in its copyright legislation to permit an educational institution to import up to 3 copies of a work not available in the Philippines for use by any educational society or institution, or for any state school, college, university or free public library in the Philippines, through the proxy of the importation of such copies by individuals.

i) Residual Uses Exception

658. Some countries also have a residual exception to deal with uses by educational institutions that are not expressly excepted in copyright legislation. Countries with this formulation include Australia.⁸⁵⁶

Limitations and Restrictions

659. Article 10(2) of the Berne Convention affords Berne member states considerable flexibility in formulating “legislation ... 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.” In this regard, section 7(1)(c) of the Tunis Model Law appears to implement the full breadth of the education exception, both in terms of the rights and the works excepted. Thus, section 7(1)(c) exempts the “utilization” of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching, and includes within its ambit the “communication” for teaching purposes of the work broadcast for use in schools,

⁸⁴² New Zealand Copyright Act 1962, s. 21(4) (Cook Islands).

⁸⁴³ Fiji Copyright Act, ss. 47, 172(2).

⁸⁴⁴ Indian Copyright Act, s. 52(1)(h)(ii), (iii).

⁸⁴⁵ Japanese Copyright Act, Art. 36.

⁸⁴⁶ Malaysian Copyright Act, s. 13(2)(ff).

⁸⁴⁷ New Zealand Copyright Act, ss. 49, 177(2).

⁸⁴⁸ New Zealand Copyright Act 1962, s. 21(4) (Niue).

⁸⁴⁹ Pakistan Copyright Ordinance, s. 57(1)(h).

⁸⁵⁰ Korean Copyright Act, Art. 32.

⁸⁵¹ Singapore Copyright Act, ss. 52A, 115B.

⁸⁵² Solomon Islands Copyright Act, s. 35(1)(b).

⁸⁵³ Thai Copyright Act, s. 32(8).

⁸⁵⁴ For a more detailed discussion of this provision and the interpretational difficulties associated with it, please refer to the main text at *supra*, note 580.

⁸⁵⁵ Philippines Intellectual Property Code, s. 184.1(i).

⁸⁵⁶ Australian Copyright Act, s. 200AB(3).

education, universities and “professional training”.⁸⁵⁷ However, many countries implement additional limitations and restrictions to their educational exceptions, perhaps to conform these exceptions to the benchmarks of the three-step test, or perhaps to better integrate individual educational exceptions into the holistic framework of their copyright legislation.

a) *Limits as to Extent of Use of Works and Exclusive Rights*

660. As noted above, section 7(1)(c) of the Tunis Model Law exempts for teaching purposes the utilization of a work or its communication. Most countries follow this formulation. However, some countries such as Bhutan,⁸⁵⁸ Palau,⁸⁵⁹ Papua New Guinea,⁸⁶⁰ Samoa,⁸⁶¹ and Tonga⁸⁶² who have adapted their education exception from section 7(1)(c) of the Tunis Model Law, explicitly limit the scope of this exception to *reproductions* only. In contrast, countries such as Cambodia,⁸⁶³ Malaysia,⁸⁶⁴ Nepal,⁸⁶⁵ Philippines,⁸⁶⁶ and Sri Lanka,⁸⁶⁷ who have modelled their exceptions from, or have exceptions similar to, section 7(1)(c) of the Tunis Model Law do not have such limitations. For instance, section 13(2)(f) of the Malaysian Copyright Act reads:

(2) Notwithstanding subsection (1), the right of control under that subsection does not include the right to control -

(f) the inclusion of a work in a broadcast, performance, showing or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair practice: [emphasis added]

661. On the assumption that exceptions that merely enable the reproduction of a work or the supply of copies for teaching purposes do not encompass the communication of the same work, countries reviewed in this study have dealt with the issue of exempting educational activities from any infringement of the communication rights of rightholders in one of two ways. They can either provide for a general exception to cover all utilizations of works for educational purposes, or they can provide specific exceptions to permit the use of works in broadcasts, performances, films, sound recordings, and public shows and displays, or to expressly enable distance learning. This study has tentatively identified the countries that have adopted the former approach as Indonesia,⁸⁶⁸ and Micronesia.⁸⁶⁹ In addition to the

⁸⁵⁷ UNESCO and WIPO, Commentary: Tunis Model Law on Copyright for Developing Countries, para. 47.

⁸⁵⁸ Bhutan Copyright Act, s. 12(1)(a);

⁸⁵⁹ Paluan Copyright Act, s. 9(a).

⁸⁶⁰ Papua New Guinea Copyright and Neighbouring Rights Act, s. 11(a).

⁸⁶¹ Samoan Copyright Act, s. 10(1)(a).

⁸⁶² Tongan Copyright Act, s. 11(1)(a).

⁸⁶³ Cambodian Law on Copyright and Related Rights, Art. 29(a).

⁸⁶⁴ Malaysian Copyright Act, s. 13(2)(f).

⁸⁶⁵ Nepalese Copyright Act, s. 18(1)(a).

⁸⁶⁶ Philippines Intellectual Property Code, s. 184.1(e).

⁸⁶⁷ Sri Lanka Copyright Act, s. 13(a)(iii).

⁸⁶⁸ Indonesia Copyright Act, Art. 15(a).

countries identified in the previous paragraph, countries that have adopted the latter approach are Australia,⁸⁷⁰ China,⁸⁷¹ Japan,⁸⁷² Mongolia,⁸⁷³ New Zealand,⁸⁷⁴ South Korea,⁸⁷⁵ Singapore,⁸⁷⁶ and Thailand.⁸⁷⁷ Of course, this analysis cannot neither be authoritative nor conclusive on the issue of whether that country's copyright exception enables the communication of works for teaching purposes because the interpretation of each country's copyright legislation is a matter for the courts of each country.

b) Mode and Place of Instruction

662. Still others may impose limits on the particular mode or nature of instruction, such as face-to-face teaching. Countries with this restriction in their education exceptions are Bhutan,⁸⁷⁸ Palau,⁸⁷⁹ Papua New Guinea,⁸⁸⁰ Samoa,⁸⁸¹ and Tonga⁸⁸². Likewise, some exceptions in countries such as New Zealand,⁸⁸³ are expressly limited in their application to the instructional use of a work at an educational establishment or on its premises. Countries which restrict their education exception to reproduction or do not have a separate exception to enable the communication, broadcast or digital dissemination of teaching resources could potentially find that their adoption of distance and e-learning will be limited, unless alternative solutions such as licensing are found.

663. Some countries specify that the use of a work for a course of instruction need not be done within the physical confines of an educational institution. For instance, section 57(1)(h) of the Pakistan Copyright Ordinance reads:

57. (1) The following acts shall not constitute an infringement of copyright, namely:

(h) the reproduction or adaptation of a literary, dramatic, musical or artistic work

[Footnote continued from previous page]

⁸⁶⁹ Micronesia Copyright Act, s. 107 (exempting any teaching use as part of fair use).

⁸⁷⁰ Australian Copyright Act, Parts VA, VB (e.g. s. 135ZMB).

⁸⁷¹ China Regulation on the Protection of the Right to Network Dissemination of Information 2006, Article 6(3).

⁸⁷² Japan Copyright Act, Arts. 34, 35(2).

⁸⁷³ Mongolian Copyright Act, Art. 14(1) para. (1) and Art. 23(2).

⁸⁷⁴ New Zealand Copyright Act, s. 2 (definition of "instruction" as giving or receiving a lesson either in person or *by correspondence*).

⁸⁷⁵ Korean Copyright Act, Art. 25(2).

⁸⁷⁶ Singapore Copyright Act, ss. 51, 52.

⁸⁷⁷ Thai Copyright Act, s. 32(6) (excepting "communication" as a form of exhibition or display of a work by a teacher).

⁸⁷⁸ Bhutan Copyright Act, s. 12(1)(b).

⁸⁷⁹ Paluan Copyright Act, s. 9(b).

⁸⁸⁰ Papua New Guinea Copyright and Neighbouring Rights Act, s. 11(b).

⁸⁸¹ Samoan Copyright Act, s. 10(1)(b).

⁸⁸² Tongan Copyright Act, ss. 11(1)(b), 26(c).

⁸⁸³ New Zealand Copyright Act, s. 178 (exempting the playing or showing of a sound recording, film, broadcast or cable programme at an educational establishment).

(i) in the course and for the sole purpose of instruction, *whether at an educational institution or elsewhere*, where the reproduction or adaptation is made by a teacher or a pupil otherwise than by the use of a printing process; ... [emphasis added]

664. Nonetheless, it should be noted that section 57(1)(h) of the Pakistan Copyright Ordinance is still limited in its application to excepting reproductions and adaptations. For reasons noted above, this could pose an impediment to the application of the exception to distance learning programmes.

665. The New Zealand Copyright Act provides a model for the implementation of exceptions can accommodate distance learning.⁸⁸⁴ Another example is provided in section 21 of the copyright laws of the Cook Islands and Niue (adopting the New Zealand Copyright Act 1962), which reads:

(4) The copyright in a literary, dramatic, musical, or artistic work is not infringed by reason only that the work is reproduced, or an adaptation of the work is made,

(a) In the course of instruction, whether at a University or school or elsewhere or by correspondence, where the reproduction or adaptation is made by a teacher or student; ...

(6) The copyright in a sound recording, cinematograph film, television broadcast, or sound broadcast is not infringed by reason only that, in the course of instruction at a University or school or elsewhere,...

c) Eligibility Requirements

666. As noted in the discussions above regarding Article 10(2) of the Berne Convention, the conference delegates at the Stockholm Conference preferred the word “teaching” to include teaching at all levels of educational institutions, but exclude teaching available to the general public. To this effect, most countries reviewed in this study have imposed various eligibility requirements to limit the availability of the exceptions to specific institutions, namely educational institutions. Some have defined an “educational institution” as an institution that is regulated under their education legislation.⁸⁸⁵ Some have adopted terms to differentiate between tertiary education (universities and colleges) and non-tertiary education (primary, secondary and high schools).⁸⁸⁶ (This distinction between “schools” and tertiary institutes may be used to sanction different extents of permissible reproduction, to facilitate more extensive free multiple copying for pre-tertiary education.⁸⁸⁷) Others have included as

⁸⁸⁴ New Zealand Copyright Act, s. 2 (definition of “instruction” as giving or receiving a lesson either in person or *by correspondence*).

⁸⁸⁵ See e.g. Malaysian Copyright Act, s. 3 (defining “educational institution” as that under the Malaysian Education Act 1961); New Zealand Copyright Act, s. 2 (defining “educational establishment” as, *inter alia*, one under the New Zealand Education Act 1989).

⁸⁸⁶ Fiji Copyright Act, ss. 2(1) (“educational establishments” defined to mean tertiary, private training and government training institutions), 43(2) (“schools”); New Zealand Copyright Act 1962, s. 21(8) (“school” and “University”) (Cook Islands, Niue); Korean Copyright Act, Art. 25(4).

⁸⁸⁷ See e.g. Fiji Copyright Act, ss. 43 and 44 (copying in tertiary institutions is subject to the “fair dealing” test).

eligible institutions various schools of learning such as nursing schools, medical schools and hospitals and teacher education centres.⁸⁸⁸ Still others have adopted a piecemeal system for the inclusion of specified institutions that provide courses for study or training for particular professions or occupations.⁸⁸⁹

667. In contrast, some countries such as Brunei⁸⁹⁰ elect not limit the application of the exception to educational institutions (the Brunei Copyright Order provides a statutory definition for an “educational establishment”), explicitly preferring instead the formulation “course of instruction”. This potentially extends the exception to non-formal and vocational instructions. Likewise, some exceptions do not expressly identify the institutions or users who are eligible to rely on the exception. For instance, Article 23 of the Copyright Law of China enables “[a]nyone who compiles or publishes textbooks for the purpose of implementing the nine-year compulsory education or State education planning” programme to rely on the exception (subject to payment of the prescribed remuneration). Presumably those entitled to rely on the exception will include national education administrators, educational institutions, authors and publishers alike.

⁸⁸⁸ See e.g. Australian Copyright Act, s. 10 (definition of “educational institution”); Singapore Copyright Act, s. 7 (definition of “educational institution”).

⁸⁸⁹ See e.g. Australian Copyright Act, ss. 10 (definition of “educational institution”), 10A(4). Cf. Sri Lanka Copyright Act, s. 13(a)(iii) (including “professional training” institutes).

⁸⁹⁰ Brunei Copyright Order, s. 36; cf. ss. 37(1)(a), 38(1), 39(1), 40(1), 135(1), 148, 151, 152, 177 (defining an “educational establishment”).

668. Many of the countries such as Bhutan,⁸⁹¹ Cambodia,⁸⁹² Japan,⁸⁹³ Papua New Guinea,⁸⁹⁴ Samoa,⁸⁹⁵ Tonga,⁸⁹⁶ and Vietnam⁸⁹⁷ simply delineate the term “educational institutions” or “educational establishments” by requiring that these be “non-profit” institutions or establishments or that the instructional activities “do not lead directly or indirectly to commercial gain”.

669. In the copyright exceptions of other countries, the exceptions refer to participants such as “teachers”, “scientific researchers” and “students” instead of institutions. Examples of this approach can be found in China,⁸⁹⁸ India,⁸⁹⁹ Indonesia,⁹⁰⁰ Solomon Islands,⁹⁰¹ Thailand,⁹⁰²

d) Insubstantial Reproductions and Communications

670. It is also noteworthy that Article 10(2) of the Berne Convention permits the utilization of the work for purposes of teaching illustration “to the extent justified by the purpose”, a formulation that is also adopted in section 7(1)(c) of the Tunis Model Law. However, countries such as Bhutan,⁹⁰³ Nepal,⁹⁰⁴ Palau,⁹⁰⁵ Papua New Guinea,⁹⁰⁶ Samoa,⁹⁰⁷ Tonga,⁹⁰⁸ have expressly limited the use of the exception to “a short part” of a published work. Conversely, countries such as Cambodia,⁹⁰⁹ Malaysia,⁹¹⁰ Philippines,⁹¹¹ and Sri Lanka,⁹¹² contain no such limitations. For instance, section 184.1(e) of the Philippines Intellectual Property Code reads:

184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:

⁸⁹¹ Bhutan Copyright Act, s. 12(1)(b).

⁸⁹² Cambodia Law on Copyright and Related Rights, Art. 29(b).

⁸⁹³ Japan Copyright Act, Art. 35(1).

⁸⁹⁴ Papua New Guinea Copyright and Neighbouring Rights Act, s. 11(b).

⁸⁹⁵ Samoan Copyright Act, s. 10(1)(b).

⁸⁹⁶ Tongan Copyright Act, s. 11(1)(b).

⁸⁹⁷ Vietnam Law on Intellectual Property, Art. 25(1)(a); Vietnamese Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights (2006), Art. 25(1).

⁸⁹⁸ Copyright Law of China, Art. 22(6).

⁸⁹⁹ Indian Copyright Act, s. 51(1)(h)(i).

⁹⁰⁰ Indonesian Copyright Act, Art. 15(c) (“lecturers”).

⁹⁰¹ Solomon Islands Copyright Act, s. 35(1)(a).

⁹⁰² Thai Copyright Act, s. 32(6).

⁹⁰³ Bhutan Copyright Act, s. 12(1)(a).

⁹⁰⁴ Nepalese Copyright Act, s. 18(1)(a).

⁹⁰⁵ Paluan Copyright Act, s. 9(a).

⁹⁰⁶ Papua New Guinea Copyright and Neighbouring Rights Act, s. 11(a).

⁹⁰⁷ Samoan Copyright Act, s. 10(1)(a).

⁹⁰⁸ Tongan Copyright Act, s. 11(1)(a).

⁹⁰⁹ Cambodia Copyright Act, Art. 29(a).

⁹¹⁰ Malaysian Copyright Act, s. 13(2)(f).

⁹¹¹ Philippines Intellectual Property Code, s. 184.1(e).

⁹¹² Sri Lanka Copyright Act, s. 13(a)(iii).

(e) The inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use: Provided, That the source and of the name of the author, if appearing in the work, are mentioned; [emphasis added]

671. Likewise, section 13(a)(iii) of the Sri Lanka Copyright Act reads:

13. Notwithstanding the provisions of section 10, the following uses of a protected work, either in the original languages or in translation, shall be permissible without the author's consent—

(a) in the case of any work that has been lawfully published—

(iii) the utilization of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast or televised for use in schools, education, universities and professional training: [emphasis added]

672. To the extent that the aforesaid provisions are the general education exceptions in the countries' copyright legislation, an exception applicable only to a "short part" of a work for illustration purposes seems to be much narrower than the prescription in Article 10(2) of the Berne Convention that the utilization be "to the extent justified by the purpose", which would have permitted the use of the whole of a work in appropriate circumstances.⁹¹³ For instance, it would be hard to envisage how a "short part" of a work of poetry and musical compositions could be used in a meaningful way for illustrative teaching purposes.

e) Multiple Copies, Reprographic and "Non-reprographic" Reproductions

673. There is some academic dispute as to whether coursepacks fall within the scope of Article 10(2) of the Berne Convention. As noted above, Professors Ricketson and Ginsburg take the view that an "academic coursepack" would *not* be exempted by Article 10(2).⁹¹⁴ A less negative view of the compatibility of coursepacks with Article 10(2) is taken by Professor Goldstein, especially in conjunction with the book and periodical guidelines that publisher and user groups have reached in the United States regarding the making of multiple copies of literary, musical and audiovisual works for classroom uses that would be acceptable to both sides.⁹¹⁵

674. Perhaps it is for this reason that the view has developed that there should be *express* provision for the making of multiple copies of works (such as coursepacks and handouts) for educational purposes in copyright legislation, separate from the provisions that deal with the "illustrative use" of works in classrooms (such as lectures and instructional materials). Thus, some countries have enacted provisions to *explicitly* permit the (unremunerated) making of

⁹¹³ See main text at *supra*, note 18.

⁹¹⁴ See *supra* note 22 and main text.

⁹¹⁵ Goldstein, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW & PRACTICE (2001), at 302-303.

copies of works for purposes of instruction. Examples are Australia,⁹¹⁶ Brunei,⁹¹⁷ Cook Islands⁹¹⁸ China,⁹¹⁹ Fiji,⁹²⁰ Indonesia,⁹²¹ Japan,⁹²² Micronesia,⁹²³ Nepal,⁹²⁴ Niue,⁹²⁵ Republic of Korea,⁹²⁶ Philippines,⁹²⁷ Singapore,⁹²⁸ (The cases of Papua New Guinea and Samoa are discussed below). However, quantitative and qualitative limits are placed on the extent of the work that can be copied, or the number of copies that can be reproduced. Other conditions may also attach to the application of the exception. The following table summarizes some of these limits:

Limit as to extent of work that can be copied	Limit as to number of copies	Other conditions
“1% for each quarter of the year” ⁹²⁹	“in small quantities” ⁹³⁰	“no payment other than for cost of production” ⁹³¹
“not more than 2 pages or not more than 1% of the total pages in the edition” ⁹³²	“no more than 1 copy to any student or staff” ⁹³³	“does not prejudice the normal interest of the author” ⁹³⁴
“not more than 5 pages of a work or not more than 5% of a work” ⁹³⁵		“limited reproduction” ⁹³⁶
“not more than one chapter of the literary, dramatic, musical or artistic work, or 10% of the work, whichever is less” ⁹³⁷		“not where such reproduction is likely to unreasonably prejudice the interest of the copyright holder in the light of the type and the usage of the work as well as the number of copies

⁹¹⁶ Australia Copyright Act, ss. 135ZG and 135ZMB.

⁹¹⁷ Brunei Copyright Order, s. 40.

⁹¹⁸ New Zealand Copyright Act 1962, s. 21(1) (Cook Islands).

⁹¹⁹ Copyright Law of China, Art. 22(6).

⁹²⁰ Fiji Copyright Act, s. 44.

⁹²¹ Indonesian Copyright Act, Art. 15(e).

⁹²² Japanese Copyright Act, Art. 35(1).

⁹²³ Micronesia Copyright Act, s. 107.

⁹²⁴ Nepalese Copyright Act, s. 18(1)(b).

⁹²⁵ New Zealand Copyright Act 1962, s. 21(1) (Niue).

⁹²⁶ Korean Copyright Act, Art. 25(2).

⁹²⁷ Philippines Intellectual Property Code, s. 185.

⁹²⁸ Singapore Copyright Act, s. 51.

⁹²⁹ Brunei Copyright Order, s. 40(2).

⁹³⁰ Copyright Law of China, Art. 22(6).

⁹³¹ New Zealand Copyright Act 1962, s. 21(1)(d) (Cook Islands, Niue).

⁹³² Australian Copyright Act, s. 135ZG(3).

⁹³³ Fiji Copyright Act, s. 43(3)(b); New Zealand Copyright Act 1962, s. 21(1)(c) (Cook Islands).

⁹³⁴ Indonesian Copyright Act, Art. 15(a).

⁹³⁵ Singapore Copyright Act, s. 51(3).

⁹³⁶ Indonesian Copyright Act, Art. 15(e).

⁹³⁷ Fiji Copyright Act, s. 44(2).

		and the manner of reproduction” ⁹³⁸
“no more than one article in a periodical” ⁹³⁹		fair use factors ⁹⁴⁰
“no more than a reasonable portion of the work” ⁹⁴¹		prohibition against any further publication or distribution of such reproductions ⁹⁴²
“to the extent deemed necessary” for use in the course of the lesson or for purpose of class teaching ⁹⁴³		attribution of source ⁹⁴⁴
“some portion of the work” ⁹⁴⁵		collective license is not available and no knowledge or awareness of license ⁹⁴⁶
“to the extent deemed inevitable in the light of the nature of a work and the purpose and manner of its exploitation” ⁹⁴⁷		

Table 13: Conditions for Exceptions permitting the making of Multiple Copies of Works

[Footnote continued from previous page]

⁹³⁸ Japanese Copyright Act, Art. 35(1).

⁹³⁹ New Zealand Copyright Act 1962, s. 21(1)(b) (Cook Islands); Singapore Copyright Act, s. 52(5), (7B).

⁹⁴⁰ Micronesia Copyright Act, s. 107.

⁹⁴¹ Australian Copyright Act, s. 135ZL; New Zealand Copyright Act 1962, s. 21(1)(b) (Cook Islands); Singapore Copyright Act, s. 52.

⁹⁴² Copyright Law of China, Art. 22(6).

⁹⁴³ Japanese Copyright Act, Art. 35(1); Korean Copyright Act, Art. 25(2).

⁹⁴⁴ Copyright Law of China, Arts. 22(6), 23.

⁹⁴⁵ Nepalese Copyright Act, s. 18(1)(b).

⁹⁴⁶ Brunei Copyright Order, s. 40(3); Fiji Copyright Act, ss. 43(1), 44(1).

⁹⁴⁷ Korean Copyright Act, Art. 25(2).

675. The exceptions in section 107 of the Micronesian Copyright Act and section 185 of the Philippines Intellectual Property Code should be singled out for mention because the conditions for permitting the making of multiple copies of works proceeds on the “fair use” factors. These will be discussed below, under the section on “Private or Personal Uses or Fair Dealing”.

676. Other countries have given express recognition to the use of multiple copies of a work for educational purposes by way of a *reprographic process*, by which copies of a work can be made for distribution to the teachers and students. The formulation of the statutory bar may vary from an express reference to “reprographic reproduction” to “reprographic process” and from “printing process” to an implied reference to “an appliance designed or adapted for the production of multiple copies”.⁹⁴⁸ The latter formulation is arguably wider than “reprographic process”, for it arguably encapsulates devices such as computers and other electronic devices which produce multiple copies of works without reprography. The inherent tension in defining this expression with precision, and yet take into account technical developments for making multiple reproductions, is well illustrated by Article 15(e) of the Indonesian Copyright Act, in its formulation of a “limited reproduction”, which reads:

Provided that the sources are fully cited, the following shall not be deemed as Copyright infringement:

(e). limited reproduction of a work other than computer program limitedly [sic] by using any means whatsoever or by employing a similar process by a public library, scientific or educational institution and documentation;

677. Countries such as Brunei,⁹⁴⁹ Pakistan,⁹⁵⁰ Solomon Islands,⁹⁵¹ have formulated a broad education exception in their copyright legislation that generally *bars* reprographic reproductions, but permit them in certain specific situations that restrict their usage. Typical situations are the use of reprographic reproductions for insubstantial parts of a work.⁹⁵² The availability of a collective license may also operate as a bar to these permitted reprographic uses.⁹⁵³

678. Conversely, in some countries such as Bhutan,⁹⁵⁴ Cambodia,⁹⁵⁵ New Zealand,⁹⁵⁶ Palau,⁹⁵⁷ Tonga,⁹⁵⁸ reprographic reproductions are expressly *allowed*. However, the reproduction is subject to conditions which can be summed up in the following table:

⁹⁴⁸ Australian Copyright Act, s. 200(1)(a); Solomon Islands Copyright Act, s. 35(1)(a).

⁹⁴⁹ Brunei Copyright Order, s. 36(1), (3).

⁹⁵⁰ Pakistan Copyright Ordinance, s. 57(1)(h).

⁹⁵¹ Solomon Islands Copyright Act, s. 35(1)(a).

⁹⁵² See e.g. Brunei Copyright Order, s. 40.

⁹⁵³ See e.g. Brunei Copyright Order, s. 40.

⁹⁵⁴ Bhutan Copyright Act, s. 12(1)(b).

⁹⁵⁵ Cambodian Copyright Act, Art. 29(b).

⁹⁵⁶ See New Zealand Copyright Act, s. 44(1), (3). Cf. s 44(2).

⁹⁵⁷ Palauan Copyright Act, s. 9(b).

⁹⁵⁸ Tongan Copyright Act, s. 11(1)(b).

Limit as to type or extent of work that can be copied	Limit as to number of copies or frequency of copying	Other conditions
only short works such as separated articles, newspaper articles or short extracts ⁹⁵⁹	reproductions be infrequent or isolated ⁹⁶⁰	“face-to-face” classroom use ⁹⁶¹
(Work/edition of 3 pages or fewer): 50% of work/edition ⁹⁶² (Work/edition of more than 3 pages): not more than 3% or 3 pages of work/edition ⁹⁶³	copied part of work/edition may not and no other part of same work/edition may, within 14 days of copying, be copied again ⁹⁶⁴	reprographic reproduction must only be “to the extent justified by the purpose” ⁹⁶⁵
		collective license is not available ⁹⁶⁶
		no charge for supply of copy ⁹⁶⁷
		attribution of the source ⁹⁶⁸

Table 14: Conditions for Exceptions permitting the making of Multiple Copies of Works by way of Reprographic Process

679. In contrast, countries such as Papua New Guinea,⁹⁶⁹ and Samoa,⁹⁷⁰ would subject the reproduction of short works for educational purposes to similar restrictions,⁹⁷¹ without prescribing that the reproductions be reprographic reproductions.

⁹⁵⁹ Cambodian Copyright Act, Art. 29(b); Tongan Copyright Act, s. 11(1)(b); Palauan Copyright Act, s. 9(b).

⁹⁶⁰ See e.g. Bhutan Copyright Act, s. 12(1)(b); Palauan Copyright Act, s. 9(b); Tongan Copyright Act, s. 11(1)(b)

⁹⁶¹ Bhutan Copyright Act, s. 12(1)(b); Palauan Copyright Act, s. 9(b); Tongan Copyright Act, s. 11(1)(b).

⁹⁶² New Zealand Copyright Act 1994, s. 44(4).

⁹⁶³ New Zealand Copyright Act 1994, s. 44(3)(f) (ignoring the transition provisions in s. 44(3)(f)(i)).

⁹⁶⁴ New Zealand Copyright Act 1994, s. 44(6).

⁹⁶⁵ Palauan Copyright Act, s. 9(b); Tongan Copyright Act, s. 11(1)(b).

⁹⁶⁶ See e.g. Bhutan Copyright Act, s. 12(1)(b); Palauan Copyright Act, s. 9(b); Tongan Copyright Act, s. 11(1)(b).

⁹⁶⁷ New Zealand Copyright Act, s. 44(3).

⁹⁶⁸ Bhutan Copyright Act, s. 12(2); Cambodian Copyright Act, Art. 29(b); Palauan Copyright Act, s. 9(b); Tongan Copyright Act, s. 11(1)(b).

⁹⁶⁹ Papua New Guinea Copyright and Neighbouring Rights Act, s.11(1)(b). Cf. s. 12(a) (only a single copy by reprographic reproduction can be made by public institutions).

⁹⁷⁰ Samoan Copyright Act, s. 10(1)(b).

⁹⁷¹ Papua New Guinea Copyright and Neighbouring Rights Act, s.11(1)(b) (short works; isolated reproduction; license); Samoan Copyright Act, s. 10(1)(b) (short works; isolated reproduction; collective license).

680. Some countries such as Australia,⁹⁷² New Zealand⁹⁷³ and Singapore⁹⁷⁴ have exceptions that prescribe different conditions for educational reproductions, depending on whether they are made by way of reprographic or non-reprographic processes. It is also notable that countries such as Australia,⁹⁷⁵ Fiji,⁹⁷⁶ and Singapore,⁹⁷⁷ have “non-reprographic” exceptions in their copyright legislation that serve as open-ended exceptions to permit the use of works for educational purposes in circumstances which will not otherwise fall within one of the enumerated exceptions in copyright legislation. However, some uncertainty remains as regards the exact scope of such exceptions.⁹⁷⁸

681. Most of the other countries surveyed in this study however do not expressly refer to the technologies used for making multiple copies of works.

Copyright Licensing Schemes

Rationale for Licensing Schemes

682. Why do countries such as Bhutan,⁹⁷⁹ Brunei,⁹⁸⁰ Fiji,⁹⁸¹ Palau⁹⁸² and Tonga⁹⁸³ put in place a statutory exception for the reprographic use of a work for educational purposes, but only to legislate to have it displaced when a collective license is available? These countries may have been influenced by the view that the making of unremunerated multiple copies of works for educational purposes is not “compatible with fair practice” and that it is only by subjecting these uses to voluntary or compulsory licensing schemes where remuneration is paid to the authors that the use is fair.⁹⁸⁴ Subjecting these exceptions to remuneration arrangements will also meet possible objections that the exception will otherwise breach the confining strictures of the three-step test, namely, conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interest of the author, particularly where the country is both a member of the Berne union as well as a WTO member state.⁹⁸⁵ But as the discussions above have noted, there is by no means consensus for this view, because the contrary view finds just as much support, namely, that an exception that is permitted under Article 10(2) already

⁹⁷² See Australian Copyright Act, Parts VA and VB. Cf. s. 200(1)(a).

⁹⁷³ See New Zealand Copyright Act, s. 44(1), (3). Cf. s 44(2).

⁹⁷⁴ See Singapore Copyright Act, ss. 51, 52. Cf. s. 50A.

⁹⁷⁵ Australian Copyright Act, s. 200(1)(a).

⁹⁷⁶ Fiji Copyright Act, s. 44(5).

⁹⁷⁷ Singapore Copyright Act, s. 50A.

⁹⁷⁸ See discussion, *supra*, at para. 100.

⁹⁷⁹ Bhutan Copyright Act, s. 12(1)(b).

⁹⁸⁰ Brunei Copyright Order, s. 40(3).

⁹⁸¹ Fiji Copyright Act, ss. 43(1), 44(1).

⁹⁸² Palauan Copyright Act, s. 9(b).

⁹⁸³ Tongan Copyright Act, s. 11(1)(b).

⁹⁸⁴ See discussion, *supra* note 23 and the main text.

⁹⁸⁵ See e.g. Preamble 35, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. L 167, 22.6.2001, at 10.

conforms to the three-step test, which simply disallows member states from expanding their current exceptions beyond its strictures.⁹⁸⁶

683. Be that as it may, the parallel availability of a licensing scheme to enable educational institutions to make copies for educational purposes represents an important milestone in the development of a country's copyright industry. As standards of literacy improve with better education and as local authors, writers and teachers respond to such market demands and invest in the development of local literature, pressures will be placed on governments to protect the nascent local copyright industry. An equitable licensing arrangement represents a formula to enable a balance to be reached to allow educational institutions continued lawful access to such literature, and at the same time provide local authors, writers and teachers with the necessary economic incentives to continue to support the local copyright industry.⁹⁸⁷

684. Given the breadth of use of copyright works by educational institutions, it would be impractical, if not impossible, for each institution to ask for permission directly from authors and publishers for all the works used. Many of these works are foreign works with multiple authors and overseas publishers.⁹⁸⁸ In response to the need to license such works in an efficient way, authors and publishers have established collective management organizations ("CMOs") to act as intermediaries and facilitate the process of securing the necessary copyright clearance. The following table summarizes the situation in some of the Asia-Pacific countries reviewed in this study as regards the availability of a CMO that is set up to manage the collective reprographic rights of authors and publishers in these countries (known in turn as a reprographic rights organization ("RRO")).

Country	RRO established?	Name of RRO
Australia	Y	Copyright Agency Limited (CAL)
Bangladesh	N	
Brunei	N	
Cambodia	N	
China	Y	Chinese Written Works Copyright Society (China) (CWWCS) Hong Kong Reproduction Rights Licensing Society (HK) (HKRRLS)
Fiji	N	
India	Y	Indian Reprographic Rights Organization (IRRO)
Indonesia	Y	Yayasan Reproduksi Cipta Indonesia (YRCI, formerly YCBI)
Japan	Y	Japan Academic Association for Copyright Clearance (JAACC) Japan Reprographic Rights Centre (JRRC)
Mongolia	N	
Myanmar	N	
New Zealand	Y	Copyright Licensing Limited (CLL)

⁹⁸⁶ See discussion, *supra* note **Error! Bookmark not defined.** and the main text.

⁹⁸⁷ International Federation of Reprographic Rights Organizations ("IFRRO"), COLLECTIVE MANAGEMENT IN REPROGRAPHY 14 (2005) [hereinafter *IFFRO – Collective Management*]

⁹⁸⁸ *IFFRO – Collective Management* 8.

Philippines	Y	Filipinas Copyright Licensing Society, Inc. (FILCOLS)
Republic of Korea	Y	Korean Reprographic and Transmission Rights Association (KRTRA)
Samoa	N	
Singapore	Y	Copyright Licensing and Administration Society of Singapore (CLASS)
Thailand	N	

*Table 15: List of RROs in the Asia-Pacific*⁹⁸⁹

Types of Licensing Schemes

685. Three types of copyright licensing schemes are possible: voluntary collective licensing, voluntary licensing with legislative support and a compulsory or statutory licensing.

a) Voluntary Collective Licensing

686. Under a voluntary collective licensing scheme, the RRO issues licenses to reproduce copyright material on behalf of the rightholders who have granted mandates to the organization to act on their behalf.⁹⁹⁰ These mandates may be obtained from national authors as well as by way of bilateral agreements with the RROs operating in other countries, based on the principle of reciprocal representation.⁹⁹¹ This ensures that a national RRO will be in a position to issue licenses to reproduce not just domestic copyright material but also foreign copyright material. At the same time, just as the bilateral agreements oblige a national RRO to apportion the collected license fees with the foreign RROs in proportion to the domestic usage of foreign copyright material, the bilateral agreements also enable a national RRO to receive license fees for the overseas use of the domestic copyright material from the respective foreign RRO.

687. Although the scheme is one of voluntary licensing, a statutory regime may be put in place to support it and secure its fair operation to the authors, to the licensees and to the collecting society. Known as a voluntary licensing scheme with legislative support,⁹⁹² many countries have such a scheme in their copyright legislation or have provisions for a specialized body (e.g. a Copyright Tribunal) to deal with issues arising from voluntary licensing and collecting societies. These include Australia,⁹⁹³ Brunei,⁹⁹⁴ Cambodia,⁹⁹⁵ China,⁹⁹⁶ Cook Islands,⁹⁹⁷ Fiji,⁹⁹⁸ India,⁹⁹⁹ Japan, Kiribati,¹⁰⁰⁰ Malaysia,¹⁰⁰¹ Nepal,¹⁰⁰² New

⁹⁸⁹ Information is supplied by Ms. Caroline Morgan, Copyright Agency Ltd, Australia, on behalf of IFFRO.

⁹⁹⁰ *IFFRO – Collective Management*, at 15.

⁹⁹¹ *Id.*

⁹⁹² *IFFRO – Collective Management*, at 18.

⁹⁹³ Australian Copyright Act, Part VI, Division 3 (setting up a Copyright Tribunal to determine licenses and license schemes, especially Subdivision H).

⁹⁹⁴ Brunei Copyright Order, Chapter VII, ss. 134, 135, 148(2).

⁹⁹⁵ Cambodian Law on Copyright and Related Rights, Chapter IV.

⁹⁹⁶ China, Regulation on the Collective Administration of Copyright 2004, Order of the State Council of the People's Republic of China (No. 429).

Zealand,¹⁰⁰³ Niue,¹⁰⁰⁴ Pakistan,¹⁰⁰⁵ Republic of Korea,¹⁰⁰⁶ Singapore,¹⁰⁰⁷ Thailand,¹⁰⁰⁸ Vietnam¹⁰⁰⁹. For instance, in Japan, the Special Law on Management Business of Copyright and Neighbouring Rights, which came into effect in 2001, provided for the regulation of collective societies for the management of musical, literary and dramatic works, to secure the fair operation of collective societies by subjecting them to reporting and public notice duties.¹⁰¹⁰

688. Brunei¹⁰¹¹ and Fiji¹⁰¹² are examples of countries that have a voluntary licensing scheme that is embedded within a legislative framework that expressly applies the scheme to reprographic reproductions by educational institutions. For instance, sections 134 and 135 of the Brunei Copyright Order read:

LICENSES FOR REPROGRAPHIC COPYING

134. Where a reference or application is made to the Copyright Tribunal under this Chapter relating to the licensing of reprographic copying of published literary, dramatic, musical or artistic works, or the typographical arrangement of published editions, it shall have regard to —

(a) the extent to which published editions of the works in question are otherwise available;

(b) the proportion of the work to be copied; and

(c) the nature of the use to which the copies are likely to be put.

LICENSES FOR EDUCATIONAL ESTABLISHMENTS WHERE WORKS INCLUDED IN BROADCASTS OR CABLE PROGRAMMES

[Footnote continued from previous page]

⁹⁹⁷ New Zealand Copyright Act 1962, Part V (Cook Islands) (establishing a Copyright Tribunal with jurisdiction to resolve disputes pertaining to license schemes).

⁹⁹⁸ Fiji Copyright Act, Part X.

⁹⁹⁹ Indian Copyright Act, Chapter VII (copyright societies).

¹⁰⁰⁰ U.K. Copyright Act 1956, Part IV (Kiribati).

¹⁰⁰¹ Malaysian Copyright Act, Parts IVA (copyright licensing) and V (Copyright Tribunal).

¹⁰⁰² Nepal Copyright Act, ss. 30 (Copyright Registrar), 39 (royalty collecting body).

¹⁰⁰³ New Zealand Copyright Act, Parts 8 (copyright licensing), 10 (Copyright Tribunal).

¹⁰⁰⁴ New Zealand Copyright Act 1962, Part V (Niue) (establishing a Copyright Tribunal with jurisdiction to resolve disputes pertaining to license schemes).

¹⁰⁰⁵ Pakistan Copyright Ordinance, Chapter VI (performing rights societies).

¹⁰⁰⁶ Korean Copyright Act, Chapters 7 (copyright management services), 8 (Copyright Commission).

¹⁰⁰⁷ Singapore Copyright Act, Part VII (Copyright Tribunal), Division 3 (inquiries by and applications and references to Tribunal).

¹⁰⁰⁸ Thai Copyright Act, Chapter 4 (Copyright Committee).

¹⁰⁰⁹ Vietnam Law on Intellectual Property, Chapter VI.

¹⁰¹⁰ Japan, Law on Management Business of Copyright and Neighbouring Rights 2004, Art. 1.

¹⁰¹¹ Brunei Copyright Order, ss. 134, 135.

¹⁰¹² Fiji Copyright Act, ss. 154, 155.

135. (1) *This section applies to references or applications under this Chapter relating to licenses for the recording by or on behalf of educational establishments of broadcasts or cable programmes which include copyright works, or the making of copies of such recordings, for educational purposes.*

(2) *The Copyright Tribunal shall, in considering what charges (if any) should be paid for a license, have regard to the extent to which the owners of copyright in the works included in the broadcast or cable programme have already received, or are entitled to receive, payment in respect of their inclusion.*

689. Another example of a country with a well-developed voluntary licensing system for the making of multiple reprographic copies is New Zealand. As noted above, section 44(3) of the New Zealand Copyright Act permits multiple reprographic copies of works to be made for instructional purposes in educational establishments, but the extent of the copying is limited to 3 pages or 3% of the work or edition, or 50% of the work if it has fewer than 3 pages. On the other hand, the license offered by the Copyright Licensing Limited (“CLL”), the RRO for New Zealand, grants to educational institutions as licensees, *inter alia*, the following rights:

- Copying the whole or any part of an article, or more than one article from the same issue of a periodical where each of those articles is on the same subject matter
- Copying up to 10% of a work (other than an article) or 1 chapter of the work, whichever is greater
- Copying up to 15 pages of the whole or part of a single work contained in a collection notwithstanding that such works may be separately published
- Reprographic copying of up to and including the whole of an out of print work subject to prior confirmation with CLL¹⁰¹³

690. In addition, the license provides that copying of the materials may be done by reprographic or electronic means, with the licensees being required to use their best endeavours to ensure that the copies are, among others, not placed on networks as to be publicly accessible or accessible other than to students and authorized persons,¹⁰¹⁴ distribute electronic copies on a secure system¹⁰¹⁵ and take appropriate action to investigate alleged breaches of the license and ensure its compliance.¹⁰¹⁶ This is subject to payment of NZ\$20 (for degree and post-graduate courses) and NZ\$10 (for non-degree courses) for each “equivalent full time student” (“EFTS”) enrolled with the licensee each academic year.¹⁰¹⁷

691. Another important feature of the license offered by CLL is in the relatively unqualified indemnity.¹⁰¹⁸ It protects educational institutions as licensees from and against all claims, actions, proceedings and liabilities, including legal costs, arising out of copying by authorized persons (the academic and general staff and their agents of the educational institution) of *all copyright works in hard copy format*¹⁰¹⁹ (except for some excluded works such as works

¹⁰¹³ CLL license is supplied by Ms Caroline Morgan, Copyright Agency Ltd, Australia, on behalf of IFFRO.

¹⁰¹⁴ NZ Copyright Licensing Limited Reprography License for Schools (2009), Sch. 1, Cl. 4.3.

¹⁰¹⁵ NZ Copyright Licensing Limited Reprography License for Schools (2009), Sch. 1, Cl. 5.

¹⁰¹⁶ NZ Copyright Licensing Limited Reprography License for Schools (2009), Sch. 1, Cl. 4.5.

¹⁰¹⁷ NZ Copyright Licensing Limited Reprography License for Schools (2009), Cl. 4.2.

¹⁰¹⁸ NZ Copyright Licensing Limited Reprography License for Schools (2009), Cl. 10.1.

¹⁰¹⁹ NZ Copyright Licensing Limited Reprography License for Schools (2009), Cl. 4.2.

downloaded from the Internet, printed music, loose maps and charts, unpublished religious orders of service, New Zealand newspapers, inhouse business and organizational journals and publications, illustrations that are not part of a published work, privately owned and unpublished works, theses, dissertations and student papers and any work on which the copyright owner has prominently stipulated that it may not be copied under any copyright license¹⁰²⁰). This indemnity can be extremely valuable to a large and diverse institution such as a tertiary educational institution in which it may be important to manage the risks arising from possible actions for copyright infringement and it may likewise be difficult to monitor the activities of its academic and general staff.

b) Voluntary Licensing with Legislative Support

692. A second class of voluntary licenses is those where licensing is supported by legislation to extend the effects of a copyright license offered by a CMO to also cover non-represented rightholders. This ensures that the licenses offered to licensees provide full coverage of all the rightholders in that given category of works. Known as an “extended collective license”, laws will extend the agreements between users and a CMO representing a substantial number of rightholders in a category of works will be extended by law to all rightholders in that category.¹⁰²¹

693. Examples of legislative provisions adopting a similar formulation can be found in the Brunei Copyright Order¹⁰²² and the Fiji Copyright Act. Section 159 of the Fiji Copyright Act provides:

POWER TO EXTEND COVERAGE OF SCHEME OR LICENSE

159.-(1) This section applies to-

... [an applicable licensing scheme or license]

so far as the scheme provides for the grant of licenses, or the license is a license authorising the making by or on behalf of an educational establishment for the purposes of instruction of reprographic copies of a published literary, dramatic, musical or artistic work, or of the typographical arrangement of a published edition.

(2) If it appears to the Minister with respect to a scheme or license to which this section applies that-

(a) works of a description similar to those covered by the scheme or license are unreasonably excluded from it; and

(b) making them subject to the scheme or license would not conflict with the normal exploitation of the works or unreasonably prejudice the legitimate interests of the

¹⁰²⁰ NZ Copyright Licensing Limited Reprography License for Schools (2009), Sch 2.

¹⁰²¹ IFFRO – Collective Management, at 18.

¹⁰²² Brunei Copyright Order, s. 148.

copyright owners, the Minister may by order provide that the scheme or license extends to those works.

694. A minister seeking to make such an order must provide the copyright owners, licensing body, representatives of educational establishments and any other relevant persons and organizations with the opportunity to make representations before the order can be finalized.¹⁰²³

695. A variant of this approach is a compulsory collective management arrangement, where rightholders are legally obliged to make claims only through a CMO.¹⁰²⁴ This safeguards the position of users as individual rightholders cannot make claims against them. Such an approach appears to be adopted in the Republic of Korea in conjunction with a statutory license (discussed below) for multiple copying by tertiary institutes of education and for the exploitation of textbooks.¹⁰²⁵

c) *Compulsory or Statutory Licensing with Remuneration*

696. Under a compulsory or statutory licensing scheme, the copyright legislation provides a license to an eligible user to copy or use a work for the prescribed purposes and subject to the prescribed conditions. Although no consent from the rightholders is required, the rightholders are given a statutory right of remuneration, which *may* be collected by a collecting society such as a reprographic rights organization.¹⁰²⁶ Where the amount of the remuneration is determined by statute, it is commonly referred to as a “statutory license”.¹⁰²⁷ If rightholders can negotiate the royalty rate with the users, the license is commonly referred to as a “compulsory license”.¹⁰²⁸

697. Countries with a regime for establishing a statutory license with a remuneration scheme for payment for educational reprographic copying are Australia,¹⁰²⁹ Republic of Korea,¹⁰³⁰

¹⁰²³ Fiji Copyright Act, s. 159(3), (4), (5).

¹⁰²⁴ IFFRO – Collective Management, at 20.

¹⁰²⁵ Korean Copyright Act, Art. 25(6).

¹⁰²⁶ See IFFRO – Collective Management, at 20. Many countries have such provisions to deal with the use of sound recordings and use in broadcasts. It is beyond the scope of this Paper to deal with these statutory provisions. See e.g. Papua New Guinea Copyright and Neighbouring Rights Act, s. 23 (equitable remuneration for use of sound recordings).

¹⁰²⁷ IFFRO – Collective Management, at 20.

¹⁰²⁸ *Id.*

¹⁰²⁹ Australian Copyright Act, Parts VA and VB.

¹⁰³⁰ Korean Copyright Act, Art. 25(4) (providing that remuneration is required of tertiary institutes that reproduce, publicly perform, broadcast or conduct interactive transmissions of a work deemed necessary for the purpose of class teaching and persons who intend to exploit the same and the work in textbooks). Cf. IFFRO, (KRTRA) Korea Reprographic and Transmission Rights Association, at <http://www.ifrro.org/show.aspx?pageid=members/rrodetails&memberid=33> (suggesting that Korea operates a voluntary licensing scheme without any legal backup in the Korean Copyright Act). *Contra* KRTRA, Legal Remunerations: Copyrighted Work, at <http://www.copyright.or.kr/jsp/english/NormalCtrl.jsp?L=3&M=1> (noting that Art. 25(1) requires a person who intends to exploit a work shall pay remuneration to the copyright owner when it may be reproduced in textbooks, and that KRTRA has been authorized by the Minister of

and Singapore,¹⁰³¹ China,¹⁰³² Japan,¹⁰³³ and the Republic of Korea,¹⁰³⁴ have legislative provisions that require the reproduction of copyright material in school textbooks to be subject to remuneration of the author (“remuneration as provided” under the Copyright Law of China,¹⁰³⁵ “amount of which will be fixed each year by the Commissioner of the Agency for Cultural Affairs”,¹⁰³⁶ “according to the criteria for compensation as determined and published by the Minister of Culture and Tourism” under the Korean Copyright Act¹⁰³⁷).

698. The Australian experience is particularly illuminating because it is one of the earliest countries in the Asia-Pacific to implement a statutory license scheme for educational copying. Pursuant to the regime in the Australian Copyright Act which provides a remunerated statutory regime for educational institutions to be administered by declared CMOs, two societies have been declared for this purpose: Screenrights for sound recordings and films, and the Copyright Agency Limited (CAL) for all other works.

699. As described above,¹⁰³⁸ the Australian statutory scheme authorizes the reproduction and communication of generally “reasonable portions” of works in hard copy or digital form (including works that are originally in digital form) by educational institutions. The scheme also requires that the equitable remuneration for use of works under the scheme be first determined by agreement between the institutions and the collecting society and, failing agreement, by the Australian Copyright Tribunal.¹⁰³⁹

700. Although some guidance has been afforded as to how equitable remuneration is to be determined in the Australian Copyright Tribunal (Procedure) Regulations 1969,¹⁰⁴⁰ this has been regarded by the Australian Copyright Tribunal itself as a matter of “judicial

[Footnote continued from previous page]

Culture, Sports and Tourism under the Korean Copyright Act to collect and distribute remuneration for this purpose).

¹⁰³¹ Singapore Copyright Act, s. 52.

¹⁰³² Copyright Law of China, Art. 23 (compulsory national education program); Regulation on the Implementation of the Copyright Law of the People’s Republic of China 2002, Art. 22.

¹⁰³³ Japanese Copyright Act, Arts. 33 (reproduction in school textbooks subject to compensation to author), 34 (broadcast in school education programs), 71 (compensation to be fixed by Commissioner in consultation with the Council for Cultural Affairs). Cf. IFFRO, JRRC (Japan Reprographic Rights Center), at <http://www.iffro.org/show.aspx?pageid=members/rrodetails&memberid=28> and (JAACC) Japan Academic Association for Copyright Clearance, at <http://www.iffro.org/show.aspx?pageid=members/rrodetails&memberid=79> (suggesting that Japan operates a voluntary licensing scheme without any legal backup in the Japanese Copyright Act).

¹⁰³⁴ Korean Copyright Act, Art. 25(4) (providing that remuneration is required of tertiary institutes that reproduce, publicly perform, broadcast or conduct interactive transmissions of a work deemed necessary for the purpose of class teaching and persons who intend to exploit the same and the work in textbooks).

¹⁰³⁵ Copyright Law of China, Art. 23.

¹⁰³⁶ Japanese Copyright Act, Art. 33(2).

¹⁰³⁷ Korean Copyright Act, Art. 25(4).

¹⁰³⁸ See *supra*, note 226ff and the accompanying main text.

¹⁰³⁹ Australian Copyright Act, ss 135ZV(1), 135ZW(1) and 135ZWA(1).

¹⁰⁴⁰ Australian Copyright Tribunal (Procedure) Regulations 1969, reg. 25B(1).

estimation”¹⁰⁴¹ to determine remuneration that is equitable, fair and reasonable.¹⁰⁴² Thus in *Copyright Agency Ltd. v. Dept. of Education of N.S.W.*, Sheppard J. P. remarked:

*It follows that the equitable remuneration which needs to be determined is the remuneration which will equitably, that is fairly, compensate the owner for the loss of the exclusive right which he has to reproduce a given work or a substantial part thereof... It is important to emphasize that no question of the right of any other person, for example, a publisher, unless he happens to be the owner of the copyright, is involved. It is purely a question of arriving at equitable remuneration for the author.*¹⁰⁴³

701. In this decision, to work out what is an equitable remuneration, the Australian Copyright Tribunal took into account the industry royalty rates for publications, the free copying permissions granted to many institutes of learning, the transient nature of such photocopied reproductions for educational purposes, and the circumstances in which copying for educational and instructional purposes may be discouraged if the figure awarded is excessive.¹⁰⁴⁴ Based on all these considerations, the Australian Copyright Tribunal, under the then section 53B of the Australian Copyright Act, assessed the equitable remuneration at 2 Australian cents per page for each page copied. A subsequent Tribunal decision adjusted this basic rate to 4 cents per page for universities and institutes of higher learning, with higher rates prescribed for coursepacks, artistic works, print music and slides, subject to revisions based on inflation.¹⁰⁴⁵ A similar basic rate of 4 cents per page for schools, subject to inflationary revisions (which works out to an amount marginally higher than that for universities) was also prescribed by another Tribunal in 2002,¹⁰⁴⁶ which reiterated that setting a rate that is too high would diminish the use of the statutory license and inhibit the proper education of Australian students.¹⁰⁴⁷ There is currently an application before the Copyright Tribunal regarding the rates to be set for the reproduction and communication of electronic works for educational purposes.

702. Pursuant to these determinations by the Australian Copyright Tribunal, the educational institutions in Australia entered into separate licensing agreements with CAL. For university use, CAL has recently reached a A\$70 million commercial agreement with Universities Australia, the industry body representing the university sector in Australia, to enable academic staff across 37 universities to photocopy, download and distribute copyright

¹⁰⁴¹ *Copyright Agency Ltd. v. Dept. of Education of N.S.W.*, [1985] ACopyT 1, [33], [104] (Austl. Copyright Tribunal) (“*First Schools’ case*”).

¹⁰⁴² *Id.*, [24], [74], [102].

¹⁰⁴³ *Copyright Agency Ltd. v. Dept. of Education of N.S.W.*, [1985] ACopyT 1, [24] (Austl. Copyright Tribunal).

¹⁰⁴⁴ *Copyright Agency Ltd. v. Dept. of Education of N.S.W.*, [1985] ACopyT 1 (Austl. Copyright Tribunal).

¹⁰⁴⁵ *Copyright Agency Ltd. v. University of Adelaide*, [1999] ACopyT 1 (Austl. Copyright Tribunal).

¹⁰⁴⁶ *Copyright Agency Ltd. v. Queensland Dept. of Education*, [2002] ACopyT 1, [87] (Austl. Copyright Tribunal).

¹⁰⁴⁷ *Copyright Agency Ltd. v. Queensland Dept. of Education*, [2002] ACopyT 1, [85] (Austl. Copyright Tribunal). The higher rate (taking into account inflation) for schools than universities was justified by the Tribunal on the basis of the greater utility of the licensed copies for students in schools than in universities. *Id.*

materials between 2008 and 2010.¹⁰⁴⁸ Negotiations are currently underway between CAL and the representative body for most Australian primary and secondary schools for a similar agreement for the period commencing January 2010.¹⁰⁴⁹

703. The Mongolian Copyright Act arguably contains a compulsory license provision, though it is described as the requisitioning of the author's work for public interest purposes.¹⁰⁵⁰ It however, does provide that the state or its competent organizations and the author are to first negotiate an agreement for compensation, failing which the work is requisitioned, and disputes as to the compensation and remuneration will be resolved by the Mongolian courts.¹⁰⁵¹

d) Licensing Schemes for Developing Countries under the Berne Convention Appendix

704. Various developing countries reviewed in this study have availed themselves of the facilities provided in the Appendix to the Berne Convention. Thus Bangladesh, India,¹⁰⁵² Mongolia, Philippines,¹⁰⁵³ Sri Lanka have availed themselves of Articles II and III of the Appendix and Thailand¹⁰⁵⁴ has availed herself of Article II of the Appendix. These countries have implemented statutory licensing schemes for the translation and publication of foreign literary and dramatic works, and for the publication of "affordably" priced local editions of literary and scientific works for teaching, scholarship and research purposes.

705. This study has not been able to discover any provisions in the copyright laws of Mongolia¹⁰⁵⁵ or the Philippines or the legal instruments issued by these countries for implementing the facilities in the Appendix. But as regards the laws of those countries that have implementation provisions, India and Thailand stand out for their detailed laws and rules. As Articles II and III of the Appendix set out detailed provisions and conditions which have to be satisfied before the countries and the licensees can avail themselves of these licenses, there is little substantive variation in the implementing provisions of the copyright laws of the aforesaid countries reviewed. On the other hand, the implementation provisions in Sri Lanka appear to be broader than what is provided in the Appendix, in that it derogates from the author's translation rights without affording the author any compensation in exchange.¹⁰⁵⁶ It also does not implement the procedural mechanism set out in Article II which has to precede the grant of a translation license. It remains to be seen if this provision identified in this study is the correct provision for Sri Lanka's implementation of Article II of the Appendix.

¹⁰⁴⁸ CAL, CAL Announces \$70 million agreement (Jan. 8, 2008), at:

<http://www.copyright.com.au/assets/documents/CALannounces70m.pdf>

¹⁰⁴⁹ This information is kindly provided by Ms Caroline Morgan, General Manager, Corporate Relations, CAL.

¹⁰⁵⁰ Mongolia Copyright Act, Art. 13.

¹⁰⁵¹ *Id.*

¹⁰⁵² Indian Copyright Act, ss. 32 (license to produce and publish translations), 32A (license to produce and publish local editions).

¹⁰⁵³ Philippines Intellectual Property Code, s. 237.

¹⁰⁵⁴ Thai Copyright Act, s. 54.

¹⁰⁵⁵ This study has not been able to establish if the relevant provision is Article 13 of the Mongolian Copyright Act (requisition of work for public interest purposes).

¹⁰⁵⁶ Sri Lanka Code of Intellectual Property, s. 15.

706. Other countries that have implemented compulsory translation and reproduction licenses outside the auspices of the Appendix to the Berne Convention are China,¹⁰⁵⁷ Indonesia,¹⁰⁵⁸ Malaysia,¹⁰⁵⁹ and Pakistan.¹⁰⁶⁰

707. For a detailed examination of all these provisions, please refer to the respective provisions in Part II of this study.

Quotation Exceptions

Approaches to Formulation of Quotation Exceptions

708. All the countries reviewed in this paper have exceptions that pertain to quotations. As noted above, quotations for scientific, critical, informatory and educational purposes fall within the scope of Article 10(1) of the Berne Convention. Hence educational exceptions that involve the making of quotations of works for instructional purposes may be formulated on the basis of Article 10(1). There are two distinct ways in which this exception is formulated.

709. Half of the countries surveyed have exceptions that mirror Article 10(1). This is the approach adopted in section 7(1)(b) of the Tunis Model Law on Copyright, which reads:

SECTION 7 - FAIR USE

[T]he following uses of a protected work, either in the original language or in translation, are permissible without the author's consent:

(1) in the case of any work that has been lawfully published:

(b) the inclusion, subject to the mention of the source and the name of the author, of quotations from such work in another work, provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries;

710. Countries with exceptions modeled on this approach are Bhutan,¹⁰⁶¹ Cambodia,¹⁰⁶² China,¹⁰⁶³ Japan,¹⁰⁶⁴ Iran,¹⁰⁶⁵ Malaysia,¹⁰⁶⁶ Mongolia,¹⁰⁶⁷ Palau,¹⁰⁶⁸ Papua New Guinea,¹⁰⁶⁹

¹⁰⁵⁷ Copyright Law of China, Art. 22(11) (translation of Chinese works into minority nationality languages).

¹⁰⁵⁸ Indonesian Copyright Act, Art. 16.

¹⁰⁵⁹ Malaysian Copyright Act, s. 31.

¹⁰⁶⁰ Pakistan Copyright Ordinance, ss. 36, 37. Cf. s 57(2) (exempting translations and adaptations of excepted works).

¹⁰⁶¹ Bhutan Copyright Act, s. 11.

¹⁰⁶² Cambodian Copyright Act, Arts. 25.

¹⁰⁶³ Copyright Law of China, Art. 22(2).

¹⁰⁶⁴ Japanese Copyright Act, Arts. 32(1).

¹⁰⁶⁵ Iranian Copyright Act, Art. 7.

¹⁰⁶⁶ Malaysian Copyright Act, s. 13(2)(a).

¹⁰⁶⁷ Mongolia Copyright Act, Arts. 14(2), 16(5).

¹⁰⁶⁸ Palauan Copyright Act, s. 8.

Philippines,¹⁰⁷⁰ Republic of Korea,¹⁰⁷¹ Sri Lanka,¹⁰⁷² Samoa,¹⁰⁷³ Thailand,¹⁰⁷⁴ Tonga,¹⁰⁷⁵ and Vietnam.¹⁰⁷⁶ Notably, the quotation exceptions for Iran and Korea expressly refer to the making of quotations for educational purposes. For instance, Article 7 of the Iranian Copyright Law reads:

Article 7. It is permissible to quote from published works and to refer to them for, literary, scientific, technical or educational purposes, and in criticism or praise, provided that the sources of quotations are mentioned and the customary limitations are observed.

NB. Mentioning the sources of quotations, in cases where the work is reproduced for use in educational institutions by teachers employed thereat, is not necessary, provided there is no monetary gain involved.

711. Likewise, Article 28 of the Korean Copyright Act reads:

ARTICLE 28 (QUOTATIONS FROM WORKS MADE PUBLIC)

It shall be permissible to make quotations from a work already being made public; provided that they are within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice. [emphasis added]

712. The other countries, predominantly (but not exclusively) those following the Anglo-Saxon tradition, formulate a “quotation” exception not as an “activity-related” exception to permit the quotation of works, but as a “purpose-related” exception to permit quotations for specified purposes. Almost all of the countries in this category refer to the “fair dealing” or “fair use” of the work for the purposes of “criticism or review”, with a broad interpretation given to this expression (as explained by caselaw in some of the countries reviewed above). Countries which have adopted the latter formulation are Australia,¹⁰⁷⁷ Brunei,¹⁰⁷⁸ Cook Islands,¹⁰⁷⁹ Fiji,¹⁰⁸⁰ India,¹⁰⁸¹ Kiribati,¹⁰⁸² Indonesia,¹⁰⁸³ Micronesia,¹⁰⁸⁴ New Zealand,¹⁰⁸⁵

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¹⁰⁶⁹ Papua New Guinea Copyright and Neighbouring Rights Act, s. 10.

¹⁰⁷⁰ Philippines Intellectual Property Code, s. 184.1(b).

¹⁰⁷¹ Korean Copyright Act, Art. 28.

¹⁰⁷² Sri Lanka Code of Intellectual Property, s. 13(a)(ii).

¹⁰⁷³ Samoan Copyright Act, s. 9.

¹⁰⁷⁴ Thai Copyright Act, s. 33.

¹⁰⁷⁵ Tongan Copyright Act, s. 10.

¹⁰⁷⁶ Vietnam Law on Intellectual Property, s. 25(1)(b).

¹⁰⁷⁷ Australian Copyright Act, ss. 41, 103A.

¹⁰⁷⁸ Brunei Copyright Order, s. 34(1).

¹⁰⁷⁹ New Zealand Copyright Act 1962, ss. 19, 20 (Cook Islands).

¹⁰⁸⁰ Fiji Copyright Act, s. 41.

¹⁰⁸¹ Indian Copyright Act, s. 52(1)(a)(ii).

¹⁰⁸² U.K. Copyright Act 1956, ss. 6(2), 9(2) (Kiribati).

¹⁰⁸³ Indonesian Copyright Act, Art. 15(a).

¹⁰⁸⁴ Micronesia Copyright Act, s. 107.

¹⁰⁸⁵ New Zealand Copyright Act, ss. 42, 176.

Nepal,¹⁰⁸⁶ Pakistan,¹⁰⁸⁷ Singapore,¹⁰⁸⁸ and Solomon Islands.¹⁰⁸⁹ In this regard, it is noteworthy that Iran¹⁰⁹⁰ (set out above) is both formulated as a “quotation” exception as well as an “activity-related” exception.

Limitations and conditions

a) “Compatible with Fair Practice”, “Fair Use”, “Reasonableness”

713. Most of the countries modeled on the “activity-related” approach (“quotation” exception) follow the requirements of Article 10(1) closely: they require that the quotation be “compatible with fair practice”, “fair use”¹⁰⁹¹ or observe “customary limitations”¹⁰⁹² and that the extent of the quotation be “reasonable”¹⁰⁹³ or “does not exceed the extent justified by the purpose”. Variations on this formulation have been observed. For instance, the Cambodian Copyright Act provides that quotations be “justified by the critical, polemical, pedagogical, scientific or informative nature of that work.”¹⁰⁹⁴ The Copyright Law of China provides that there be “appropriate quotations from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point.”¹⁰⁹⁵

714. On the other hand, the countries modeled on the “purpose-related” approach require that the quotation be for a specific form – “criticism or review” – and that the extent and use of the quotation be a “fair dealing” or “fair use” for this purpose. The Indonesian Copyright Act, for instance, uses the formulation “provided that it does not prejudice the normal interest of the author”.¹⁰⁹⁶ A notable exception is Mongolia, where Article 16 of the Mongolian Copyright Act simply provides that:

In the following cases it shall be permissible to make for the public benefit, without the author's consent and without payment of any remuneration, a reproduction of part of a work which has already been made available to the public, provided that mention shall be made of the source and of the name of the author:

(5) reproduction for use in research and for literary criticism;

¹⁰⁸⁶ Nepalese Copyright Act, s. 17.

¹⁰⁸⁷ Pakistan Copyright Ordinance, s. 57(1)(a)(ii).

¹⁰⁸⁸ Singapore Copyright Act, ss. 36, 110.

¹⁰⁸⁹ Solomon Islands Copyright Act, s. 7(1)(b).

¹⁰⁹⁰ Iranian Copyright Act, Art. 7.

¹⁰⁹¹ Philippines Intellectual Property Code, s. 184.1(b).

¹⁰⁹² Iranian Copyright Act, Art. 7.

¹⁰⁹³ Thai Copyright Act, s. 33.

¹⁰⁹⁴ Cambodian Copyright Act, Arts. 25.

¹⁰⁹⁵ Copyright Law of China, Art. 22(2).

¹⁰⁹⁶ Indonesian Copyright Act, Art. 15(a).

b) Attribution

715. There is generally also a requirement for attribution of the quotation. The exception is Micronesia,¹⁰⁹⁷ but that could be explained on the basis that the “criticism” exception is part of the omnibus “fair use” exception in its copyright legislation, where other uses which may fair do not attract an attribution requirement. Furthermore, it could be contended that the fair use factors spelt out in section 107 are not exhaustive, and that attributing a quotation of a work for purposes of criticism will generally contribute positively towards making the use “fair”.

c) Extent of Quotation

716. Some countries such as Bhutan,¹⁰⁹⁸ Cambodia,¹⁰⁹⁹ Palau,¹¹⁰⁰ Papua New Guinea,¹¹⁰¹ Samoa,¹¹⁰² Tonga,¹¹⁰³ circumscribe their “quotation” exception by requiring that only a “short part” of the work be quoted. Thailand¹¹⁰⁴ uses the formulation “in part” which achieves the same result, which is to prevent a whole work from being quoted. To a lesser extent, Pakistan¹¹⁰⁵ prescribes various presumptions as regards what constitutes a fair dealing with a work for the purposes of criticism or review. As noted in the description above regarding Article 10(1) of the Berne Convention, the current version of Article 10(1) expressly removes the quantitative restriction to “short quotations” in the Brussels Act, and only prescribes the requirement that the extent of the quotation be “compatible with fair practice”.¹¹⁰⁶

717. Some countries such as Bhutan,¹¹⁰⁷ Palau,¹¹⁰⁸ Papua New Guinea,¹¹⁰⁹ Samoa,¹¹¹⁰ Tonga,¹¹¹¹ also circumscribe their “quotation” exceptions to “reproductions”. Other countries such as Fiji¹¹¹² and Nepal¹¹¹³ limit their “criticism or review” exceptions to copying or reproduction. These would appear to delimit the scope of the Article 10(1) exception, especially as regards the expression “lawfully made available to the public” which suggests that quotations can be used not just in books, articles, visual works and other printed matter, but also presented and communicated in lectures, performances and broadcasts.¹¹¹⁴ In contrast, Article 14(2) of the Mongolian Copyright Act expressly reserves for the person

¹⁰⁹⁷ Micronesia Copyright Act, s. 107.

¹⁰⁹⁸ Bhutan Copyright Act, s. 11.

¹⁰⁹⁹ Cambodian Copyright Act, Arts. 25.

¹¹⁰⁰ Palauan Copyright Act, s. 8.

¹¹⁰¹ Papua New Guinea Copyright and Neighbouring Rights Act, s. 10.

¹¹⁰² Samoan Copyright Act, s. 9.

¹¹⁰³ Tongan Copyright Act, s. 10.

¹¹⁰⁴ Thai Copyright Act, s. 33.

¹¹⁰⁵ Pakistan Copyright Ordinance, s. 57(1)(a)(ii), explanation to clause (a).

¹¹⁰⁶ *Supra* note 40 and accompanying text.

¹¹⁰⁷ Bhutan Copyright Act, s. 11.

¹¹⁰⁸ Palauan Copyright Act, s. 8.

¹¹⁰⁹ Papua New Guinea Copyright and Neighbouring Rights Act, s. 10.

¹¹¹⁰ Samoan Copyright Act, s. 9.

¹¹¹¹ Tongan Copyright Act, s. 10.

¹¹¹² Fiji Copyright Act, s. 41.

¹¹¹³ Nepalese Copyright Act, s. 17.

¹¹¹⁴ *Supra* note 39 and the accompanying text.

making a reproduction of a work for literary criticism purposes to make a public communication of a work without the author's consent and without payment of any remuneration. Likewise, provision is made in the Regulation on the Protection of the Right to Network Dissemination of Information 2006 of China for the dissemination of quotations of works, without the author's consent and without payment of any remuneration. Article 6 provides:

Article 6 Where anyone provides any work through the information network under any of the following circumstances, he may be exempted from obtaining the owner's permission as well as paying the relevant remunerations thereto:

(1) Where an appropriate portion of any published works is quoted in the works one provides to the general public for the purpose of introducing or commenting on any work or elaborate [sic] any issue;

Private or personal uses or "fair dealing"

Approaches to the formulation of "Personal Use" or "Fair Dealing" exceptions

718. Almost all the countries reviewed in this study recognize copyright exceptions that permit the use of a work for nominal purposes in which the impact on the market for the work is minimal. There are a variety of approaches towards formulating such exceptions, but all of them have to be "confined to certain special cases" which "do not conflict with the normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests of the author", as spelt out in Article 9(2) of the Berne Convention and subsequently adopted in Article 13 of TRIPS and in the WIPO Internet Treaties. A typical exception will pertain to the personal and private use of a work for accomplishing an individual's personal research or studies, as opposed to its collective use for a profit-making purpose.¹¹¹⁵ This is the "personal or private use" formulation adopted in section 7(i)(a) of the Tunis Model Law on Copyright, which reads:

Section 7 – Fair use

[T]he following uses of a protected work, either in the original language or in translation, are permissible without the author's consent:

(i) in the case of any work that has been lawfully published:

(a) the reproduction, translation, adaptation, arrangement or other transformation of such work exclusively for the user's own personal and private use;

719. Countries that have adopted this approach are Bhutan,¹¹¹⁶ Cambodia,¹¹¹⁷ China,¹¹¹⁸ Iran,¹¹¹⁹ Japan,¹¹²⁰ Mongolia,¹¹²¹ Nepal,¹¹²² Pakistan,¹¹²³ Palau,¹¹²⁴ Papua New Guinea,¹¹²⁵ Republic of Korea,¹¹²⁶ Samoa,¹¹²⁷ Sri Lanka,¹¹²⁸ Thailand,¹¹²⁹ and Tonga.¹¹³⁰

¹¹¹⁵ Commentary, Tunis Model Law on Copyright for Developing Countries, para. 44.

¹¹¹⁶ Bhutan Copyright Act, s. 10.

¹¹¹⁷ Cambodian Copyright Act, Art. 24.

¹¹¹⁸ Copyright Law of China, Art. 22(2) ("private study, research or self-entertainment").

720. Another formulation is that adopted primarily (but not exclusively) by countries of the Anglo-Saxon heritage, which uses the formulation of “fair dealing” or “fair use” to describe an “equitable rule of reason”¹¹³¹ that sanctions the use of a copyright work in a reasonable manner without the consent of the copyright owner”.¹¹³² Exceptions pertaining to the use of a work for criticism or review, news reporting, teaching, scholarship and research are typically brought within its rubric. In an earlier section of this paper, the quotation exceptions for criticism or review were discussed as part of the “fair dealing” or “fair use exception”.

721. In turn, two distinctly separate formulations of the “fair dealing” or “fair use” exceptions have been adopted by the countries reviewed in this study. The majority of the countries - Australia,¹¹³³ Brunei,¹¹³⁴ Cook Islands,¹¹³⁵ Fiji,¹¹³⁶ India,¹¹³⁷ Kiribati,¹¹³⁸ Malaysia,¹¹³⁹ New Zealand,¹¹⁴⁰ Niue,¹¹⁴¹ Philippines,¹¹⁴² Solomon Islands,¹¹⁴³ and Tuvalu¹¹⁴⁴ - have chosen to recognize aspects of “fair dealing” such as that for “research or study” and “criticism or review” (as reviewed above) as separate exceptions in their copyright legislation. However, three of the countries reviewed in this study, namely Micronesia,¹¹⁴⁵ Singapore,¹¹⁴⁶ and Philippines,¹¹⁴⁷ have opted for the U.S. style, “fair use” exception and formulated an “open-ended”, omnibus exception of “fair use” (or “fair dealing”) in their copyright legislation, qualified only by the “fair use” factors.

[Footnote continued from previous page]

¹¹¹⁹ Iranian Copyright Act, Art. 11.

¹¹²⁰ Japanese Copyright Act, Art. 30.

¹¹²¹ Mongolia Copyright Act, Art. 15(1).

¹¹²² Nepalese Copyright Act, s. 16.

¹¹²³ Pakistan Copyright Ordinance, s. 57(1)(a)(i).

¹¹²⁴ Palauan Copyright Act, s. 7.

¹¹²⁵ Papua New Guinea Copyright and Neighbouring Rights Act, s. 8.

¹¹²⁶ Korean Copyright Act, Art. 30.

¹¹²⁷ Samoan Copyright Act, ss. 8, 24(a).

¹¹²⁸ Sri Lanka Code of Intellectual Property, s. 13(a)(i).

¹¹²⁹ Thai Copyright Act, s. 32(2).

¹¹³⁰ Tongan Copyright Act, s. 8.

¹¹³¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

¹¹³² Horace G Ball, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1994).

¹¹³³ Australian Copyright Act, ss. 40, 103.

¹¹³⁴ Brunei Copyright Order, s. 33.

¹¹³⁵ New Zealand Copyright Act 1962, ss. 19, 20 (Cook Islands).

¹¹³⁶ Fiji Copyright Act, s. 42.

¹¹³⁷ Indian Copyright Act, s. 39, 52(1)(a)(i) (“fair dealing ... for private use”).

¹¹³⁸ U.K. Copyright Act 1956, ss. 6(1), 9(1) (Kiribati).

¹¹³⁹ Malaysian Copyright Act, s. 13(2)(a).

¹¹⁴⁰ New Zealand Copyright Act, s. 43.

¹¹⁴¹ New Zealand Copyright Act 1962, ss. 19, 20 (Niue).

¹¹⁴² Philippines Intellectual Property Code, s. 187.

¹¹⁴³ Solomon Islands Copyright Act, s. 7(1)(a).

¹¹⁴⁴ U.K. Copyright Act 1956, ss. 6(2), 9(2) (Tuvalu).

¹¹⁴⁵ Micronesia Copyright Act, s. 107.

¹¹⁴⁶ Singapore Copyright Act, ss. 35, 109.

¹¹⁴⁷ Philippines Intellectual Property Code, s. 185.1.

722. (For purposes of this study, this section will not discuss the various “private importation” exceptions in the copyright legislation of the reviewed countries. Please refer to the relevant exceptions for the respective countries in Part II of this study. Likewise, many countries recognise exceptions to permit libraries and archives to make copies of works for the research or study purposes of its users.¹¹⁴⁸ Likewise, there may be exceptions to permit researchers to access unpublished works in libraries and archives and publish them.¹¹⁴⁹ These will not be addressed in this Study as they have been the subject matter of another WIPO study.¹¹⁵⁰)

Limitations and conditions

a) Eligibility for Individuals and Natural Persons

723. Some uncertainty exists as to whether the “private use” and “fair dealing” exceptions apply to corporations. The concerns stem from the fact that corporations (as legal entities) may embark on a large-scale use of works for commercial purposes and towards commercial gain. While it could be argued that this is implied with reference to countries adopting the “private” or “personal use” exception, some countries have sought to resolve this ambiguity. Countries such as Bhutan,¹¹⁵¹ Cambodia,¹¹⁵² Palau,¹¹⁵³ Philippines,¹¹⁵⁴ and Samoa,¹¹⁵⁵ specifically provide that only a “physical person” or a “natural person” is entitled to rely on the exception. Other countries such as Japan,¹¹⁵⁶ and Republic of Korea,¹¹⁵⁷ provide that the exception may be enjoyed for “personal use or family use” or use within a “limited circle”.

724. This approach is not limited to the countries adopting the “private” or “personal use” exception. Though less common in countries adopting the “fair dealing” or “fair use” exception, examples can be found in Brunei (“researcher or student”),¹¹⁵⁸ and Fiji.¹¹⁵⁹ Thus, section 42 of the Fiji Copyright Act reads:

Copying a work for the purposes of research or private study by an individual does not infringe copyright in a literary, dramatic, musical or artistic work, ...
[emphasis added]

725. In contrast, section 44 of the Fiji Copyright Act reads:

¹¹⁴⁸ See e.g. Australian Copyright Act, s. 49; Bhutan Copyright Act, s. 13; Brunei Copyright Order, ss. 42, 43; Cambodian Copyright Act, Art. 25,

¹¹⁴⁹ See e.g. Australian Copyright Act, Part III, Division 5; Fiji Copyright Act, ss. 48-49, 53; India, s. 52(1)(p); U.K. Copyright Act 1956, s. 7 (Kiribati, Tuvalu), New Zealand Copyright Act, ss. 51-52, 56; Pakistan Copyright Ordinance, s. 57(1)(p); Singapore Copyright Act, ss. 47, 112.

¹¹⁵⁰ See WIPO Study on Libraries and Archives.

¹¹⁵¹ Bhutan Copyright Act, s. 10.

¹¹⁵² Cambodian Copyright Act, Art. 24.

¹¹⁵³ Palauan Copyright Act, s. 7.

¹¹⁵⁴ Philippines Intellectual Property Code, s. 187.

¹¹⁵⁵ Samoan Copyright Act, ss. 8, 24(a).

¹¹⁵⁶ Japanese Copyright Act, Art. 30.

¹¹⁵⁷ Korean Copyright Act, Art. 30.

¹¹⁵⁸ Brunei Copyright Order, s. 33.

¹¹⁵⁹ Fiji Copyright Act, s. 42.

Copying by an educational establishment for the purposes of research or private study by an individual does not infringe copyright in a literary, dramatic, musical or artistic work... [emphasis added]

726. However, in some circumstances, it could be the educational institution that makes copies of a work to support the research or private study by an individual. That such activities could fall within the rubric of “fair use” may be illustrated by the exceptions in Micronesia,¹¹⁶⁰ and Philippines,¹¹⁶¹ which expressly refer to “teaching, including multiple copies for classroom use”. In addition, the first “fair use” factor (discussed below) requires an assessment of “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”.¹¹⁶² The first “fair use” factor thus applied would largely circumscribe any large scale commercial usage of works by corporations but permit some form of multiple copying of works for educational purposes, subject, of course, to satisfying the other “fair use” factors.

b) Excluded Categories of Works

727. To further address concerns that the “private or personal use” exceptions are not abused, some countries such as Bhutan,¹¹⁶³ Cambodia,¹¹⁶⁴ Nepal,¹¹⁶⁵ Palau,¹¹⁶⁶ Papua New Guinea,¹¹⁶⁷ Philippines,¹¹⁶⁸ Samoa,¹¹⁶⁹ and Tonga¹¹⁷⁰ have excluded certain classes of works from the scope of the exception. These are works of architecture, reprography of the whole or a substantial part of books or musical works in the form of notation, the whole or a substantial part of digital databases, and computer programs. Likewise, Fiji,¹¹⁷¹ India,¹¹⁷² exclude computer programs from the scope of its “fair dealing” exception.

c) Reprography, Controlled Technologies and Licensing

728. Many of the same countries above - Bhutan,¹¹⁷³ Cambodia,¹¹⁷⁴ Nepal,¹¹⁷⁵ Palau,¹¹⁷⁶ Papua New Guinea,¹¹⁷⁷ Philippines,¹¹⁷⁸ Samoa,¹¹⁷⁹ and Tonga¹¹⁸⁰ - also exclude from the

¹¹⁶⁰ Micronesia Copyright Act, s. 107.

¹¹⁶¹ Philippines Intellectual Property Code, s. 185.

¹¹⁶² Cf. Malaysian Copyright Act, s. 13(2)(a) (“non-profit research or private study”).

¹¹⁶³ Bhutan Copyright Act, s. 10.

¹¹⁶⁴ Cambodian Copyright Act, Art. 24.

¹¹⁶⁵ Nepalese Copyright Act, s. 16.

¹¹⁶⁶ Palauan Copyright Act, s. 7.

¹¹⁶⁷ Papua New Guinea Copyright and Neighbouring Rights Act, s. 8.

¹¹⁶⁸ Philippines Intellectual Property Code, s. 187.

¹¹⁶⁹ Samoan Copyright Act, ss. 8, 24(a).

¹¹⁷⁰ Tongan Copyright Act, s. 8.

¹¹⁷¹ Fiji Copyright Act, s. 42.

¹¹⁷² Indian Copyright Act, s. 39, 52(1)(a)(i).

¹¹⁷³ Bhutan Copyright Act, s. 10.

¹¹⁷⁴ Cambodian Copyright Act, Art. 24.

¹¹⁷⁵ Nepalese Copyright Act, s. 16.

¹¹⁷⁶ Palauan Copyright Act, s. 7.

scope of their “private or personal use” exceptions, the reprography of the whole or a substantial part of books or musical works in the form of notation. They are joined by Japan,¹¹⁸¹ and the Republic of Korea,¹¹⁸² in proscribing the use of publicly-installed automatic reproduction machines for reprographic purposes as “private or personal use”.

729. It is of interest to note a similar qualification to the “fair use” exception in the Fiji Copyright Act. Section 42(1) exempts from copyright infringement any copying of a literary, dramatic, musical or artistic work by an individual for the purpose of research or private study, unless there is a collective license available of which the individual is or should be aware under which the copying can be done.¹¹⁸³ How this works will presumably be as follows. For instance, if the educational institution has entered into a voluntary license with an RRO to permit its staff and students to make copies of works, a staff member who makes a copy of the work will not be entitled to copy the work for purposes of “research or private study”, because the staff member “should be aware” of the collective license “under which the copying can be done”, but a student who may not be so aware may be able to rely on the exception.

730. The practical operation of this exception however gives rise to some serious issues of application. For instance, if the license only permits the staff member to copy 10% of a work as a reasonable portion, is the staff member denied his right to make a more complete copy of the same work for purposes of “research or private study”? Also, the nuances of the interpretation of complex copyright licensing provisions may be lost on staff and students of a large educational establishment, let alone the fact that most of them may not be legally trained or be copyright specialists. So what is the expected yardstick in which the exception is displaced when an individual “is or should be aware” of the collective license? Should he be required to just be aware, or to be made reasonably aware, of the existence of the license or its detailed provisions and operations?

731. In contrast, the solution regarding the licensing of reproductions and other home uses of reprographic equipment is solved in an elegant manner, albeit one that requires the co-operation of all the parties concerned. While some may criticize the levy system imposed in Japan on the home use of digital audio and video recording equipment and media¹¹⁸⁴ as being broadbrush and indiscriminate, it does have the merit of a reasonably low tariff rate and offers compensation to the rightholders for the large scale reproduction of their content by home users in the exercise of their “private and personal use” rights.

[Footnote continued from previous page]

¹¹⁷⁷ Papua New Guinea Copyright and Neighbouring Rights Act, s. 8.

¹¹⁷⁸ Philippines Intellectual Property Code, s. 187.

¹¹⁷⁹ Samoan Copyright Act, ss. 8, 24(a).

¹¹⁸⁰ Tongan Copyright Act, s. 8.

¹¹⁸¹ Japanese Copyright Act, Art. 30(1)(i).

¹¹⁸² Korean Copyright Act, Art. 30.

¹¹⁸³ See also, *supra* note 946 and the accompanying text.

¹¹⁸⁴ Japanese Copyright Act, Art. 30(2).

d) Types of “Private Use” or “Fair Dealing”

732. Some countries like Bhutan,¹¹⁸⁵ Cambodia,¹¹⁸⁶ Mongolia,¹¹⁸⁷ Nepal,¹¹⁸⁸ Palau,¹¹⁸⁹ Papua New Guinea,¹¹⁹⁰ Philippines,¹¹⁹¹ Samoa,¹¹⁹² and Tonga¹¹⁹³ have formulated their “private and personal use” exceptions rather narrowly as pertaining to only the *reproduction* of works. Likewise, Fiji¹¹⁹⁴ refers only to the “*copying*” of a work as part of “fair dealing”. Most other countries do not so constrain their “private and personal use” exceptions.¹¹⁹⁵ For instance, section 13(a)(i) of the Sri Lanka Code of Intellectual Property reads:

13. Notwithstanding the provisions of section 10, the following uses of a protected work, either in the original languages or in translation, shall be permissible without the author’s consent—

(a) in the case of any work that has been lawfully published—

(i) the reproduction, translation, adaptation, arrangement or other transformation of such work exclusively for the user’s own personal and private use; [emphasis added]

733. The “private and personal use” exception in the Japanese Copyright Act¹¹⁹⁶ is to the same effect.

734. Given the new types and uses of works in the digital environment, some countries like Australia have gone further to recognize specific private or personal uses such as format shifting.¹¹⁹⁷

¹¹⁸⁵ Bhutan Copyright Act, s. 10.

¹¹⁸⁶ Cambodian Copyright Act, Art. 24.

¹¹⁸⁷ Mongolia Copyright Act, Art. 15(1).

¹¹⁸⁸ Nepalese Copyright Act, s. 16.

¹¹⁸⁹ Palauan Copyright Act, s. 7.

¹¹⁹⁰ Papua New Guinea Copyright and Neighbouring Rights Act, s. 8.

¹¹⁹¹ Philippines Intellectual Property Code, s. 187.

¹¹⁹² Samoan Copyright Act, ss. 8, 24(a).

¹¹⁹³ Tongan Copyright Act, s. 8.

¹¹⁹⁴ Fiji Copyright Act, s. 42.

¹¹⁹⁵ The Brunei Copyright Order draws a nuanced distinction between the general exception of “fair dealing”, and circumstances in which the “copying” exception may be lost. *See* Brunei Copyright Order, s. 33(1), (2). *Cf.* Brunei Copyright Order, s. 33(3).

¹¹⁹⁶ Japanese Copyright Act, Art. 30.

¹¹⁹⁷ Australian Copyright Act, ss. 43C, 47J, 109A, 110AA.

e) Extent of “Private Use” or “Fair Dealing”

735. As noted above, many countries - Bhutan,¹¹⁹⁸ Cambodia,¹¹⁹⁹ Nepal,¹²⁰⁰ Palau,¹²⁰¹ Papua New Guinea,¹²⁰² Philippines,¹²⁰³ Samoa,¹²⁰⁴ and Tonga¹²⁰⁵ - exclude from the scope of their “private or personal use” exceptions, the reprography of “the whole or a substantial part” of books, musical works in the form of notation and databases. For countries adopting the “fair dealing” formation, the extent of the work used or copied would obviously also impact on the issue of whether the dealing is “fair”.

736. Legislation could also place limits on the *number of copies* that could be made (“limited to the making [by an individual] of one copy of the ... work, or the same part of a work, on any one occasion”¹²⁰⁶, “where the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose”¹²⁰⁷).

737. Countries like Australia,¹²⁰⁸ Fiji,¹²⁰⁹ Singapore,¹²¹⁰ Philippines,¹²¹¹ and New Zealand,¹²¹² have expressly adopted the “fair use” factors to determine if the dealing in the work is fair. One of the factors requires a consideration of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”.

738. Given the open-ended nature of the fair dealing test, countries may seek to introduce legislative certainty by prescribe limits as to *what amounts to a “fair dealing” in relation to certain works* (e.g. “one article in a periodical or articles on the same subject matter on the same occasion”,¹²¹³ “one chapter of a work”,¹²¹⁴ “not more than 10% of the work or edition”¹²¹⁵ etc. Countries with such presumptive rules are Australia,¹²¹⁶ Fiji,¹²¹⁷ Pakistan¹²¹⁸ and Singapore.¹²¹⁹ By operating as presumptions, they serve as useful practical guides for individual users such as staff and students, but at the same time, they do not preclude the

¹¹⁹⁸ Bhutan Copyright Act, s. 10.

¹¹⁹⁹ Cambodian Copyright Act, Art. 24.

¹²⁰⁰ Nepalese Copyright Act, s. 16.

¹²⁰¹ Palauan Copyright Act, s. 7.

¹²⁰² Papua New Guinea Copyright and Neighbouring Rights Act, s. 8.

¹²⁰³ Philippines Intellectual Property Code, s. 187.

¹²⁰⁴ Samoan Copyright Act, ss. 8, 24(a).

¹²⁰⁵ Tongan Copyright Act, s. 8.

¹²⁰⁶ Fiji Copyright Act, s. 42(3).

¹²⁰⁷ Brunei Copyright Order, s. 33(3)(b).

¹²⁰⁸ Australian Copyright Act, ss. 40, 103.

¹²⁰⁹ Fiji Copyright Act, s. 42.

¹²¹⁰ Singapore Copyright Act, ss. 35, 109.

¹²¹¹ Philippines Intellectual Property Code, s. 185.1.

¹²¹² New Zealand Copyright Act, s. 43.

¹²¹³ Fiji Copyright Act, s. 42(4).

¹²¹⁴ Fiji Copyright Act, s. 44(2)(a).

¹²¹⁵ Fiji Copyright Act, ss. 42(5), 44(2)(b).

¹²¹⁶ Australian Copyright Act, ss. 40, 103.

¹²¹⁷ Fiji Copyright Act, s. 42.

¹²¹⁸ Pakistan Copyright Ordinance, s. 57(1)(a)(i) explanation.

¹²¹⁹ Singapore Copyright Act, ss. 35, 109.

possibility that a longer extract or copy may still be held (though not deemed) to be a “fair dealing” pursuant to the “fair use” factors.

739. As previously noted, under section 107 of the U.S. Copyright Act, where the “fair use” factors were derived, rightholders and educational institutions operate under a set of agreed guidelines which delineate the scope and extent of multiple reproduction of printed material, music and audio-visual material. These are the 1976 Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals and the Guidelines for Educational Uses of Music. The Guidelines operate in a manner that is largely similar to the presumptions of fair dealing that have been noted above.

740. The guidelines offered as regards books and periodicals are summarized below:

<p>I. Single copy for teachers</p>	<p>(i) A chapter from a book; (ii) An article from a periodical or newspaper; (iii) A short story, short essay or short poem, whether or not from a collective work; (iv) A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.</p>
<p>II. Multiple copies for classroom use (not to exceed one copy per student in a course)</p>	<p>Copying to meet the tests of brevity, spontaneity and cumulative effect</p> <p>Test of brevity:</p> <p>(i) Poetry Complete poem of less than 250 words on not more than 2 pages Not more than 250 words from longer poem (Numerical limit may be expanded to complete unfinished line of poem)</p> <p>(ii) Prose Complete article, story or essay, less than 2500 words An excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words (Numerical limit may be expanded to complete unfinished line of prose)</p> <p>(iii) Illustration One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue</p> <p>(iv) “Special” works Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Notwithstanding (ii), such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.</p> <p>Test of spontaneity:</p>

	<p>(i) Copying is at the instance and inspiration of the individual teacher, and</p> <p>(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.</p> <p>Test of cumulative effect:</p> <p>(i) The copying of the material is for only one course in the school in which the copies are made.</p> <p>(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.</p> <p>(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.</p> <p>[The limitations stated in (ii) and (iii) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]</p> <p>Each copy to include a notice of copyright</p>
<p>III. Prohibitions as to I and II</p>	<p>A. Copying may not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.</p> <p>B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.</p> <p>C. Copying shall not:</p> <ol style="list-style-type: none"> 1. substitute for the purchase of books, publisher's reprints or periodicals; 2. be directed by higher authority; or 3. be repeated with respect to the same item by the same teacher from term to term. <p>D. No charge may be made to the student beyond the actual cost of the photocopying.</p>

Table 16: Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with respect to Books and Periodicals between the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America and the Association of American Publishers (19 Mar. 1976).

741. The guidelines offered as regards audio-visual works are summarized below:

<p>A. Permissible</p>	<p>1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement</p>
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Uses	copies shall be substituted in due course.
	2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.
	3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
	4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
	5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)
B. Prohibitions	1. Copying to create or replace or substitute for anthologies, compilations or collective works
	2. Copying of or from works intended to be “consumable” in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.
	3. Copying for the purpose of performance, except as in A(1) above.
	4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.
	5. Copying without inclusion of the copyright notice which appears on the printed copy.

Table 17: Agreement on Guidelines for Educational Uses of Music between the Music Publishers’ Association of the United States, Inc., the National Music Publishers’ Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision (30 Apr. 1976).

742. A detailed analysis of the guidelines is outside the scope of this study, especially in the light of U.S. caselaw that has variously qualified section 107.¹²²⁰ Please refer to the WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities by Professor Raquel Xalabarder for North America, Europe, Caucasus, Central Asia and Israel.

743. It should be added that the 1976 Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals and the Guidelines for Educational Uses of Music were sought to be supplemented with the 1996 Fair Use

¹²²⁰ See e.g. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881 (2nd Cir. 1994); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996). Cf. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2nd Cir. 2008).

Guidelines for Educational Multimedia,¹²²¹ guidelines that were negotiated by authors, publishers and educational institutions at the Conference on Fair Use. However, it has turned out to be impossible for consensus to be reached in other areas, such as the use of works for distance learning.¹²²² For these reasons, the exact scope of section 107 as applied to the making of multiple copies of works for educational purposes remains to be seen.

f) The Three-step Test

744. Countries may further subject the private or personal copying exception to the delimiters of the three-step test. Examples of this “double-barrelled” approach are Bhutan,¹²²³ Cambodia,¹²²⁴ Palau,¹²²⁵ Papua New Guinea,¹²²⁶ Samoa,¹²²⁷ and Tonga.¹²²⁸ It could however be inquired if this additional step introduced more certainty to the application of the “private or personal” use exception, or whether it could be subject to the same criticisms of uncertainty and flexibility that the “fair use” factors have attracted.

Technological measures and education exceptions

745. At the time of the conduct of this study, 16 of the countries surveyed in this study have provisions in their laws to deal with the issue of technological measures. These are Australia,¹²²⁹ Bhutan,¹²³⁰ Cambodia,¹²³¹ China,¹²³² Indonesia,¹²³³ Japan,¹²³⁴ Malaysia,¹²³⁵ Nepal,¹²³⁶ New Zealand,¹²³⁷ Palau,¹²³⁸ Papua New Guinea,¹²³⁹ Republic of Korea,¹²⁴⁰ Samoa,¹²⁴¹ Singapore,¹²⁴² Tonga,¹²⁴³ and Vietnam.¹²⁴⁴

¹²²¹ Fair Use Guidelines For Educational Multimedia, at <http://www.utsystem.edu/OGC/IntellectualProperty/ccmcguid.htm>.

¹²²² CONFU, An Interim Report to the Commissioner (Dec. 1996), at <http://www.uspto.gov/web/offices/dcom/olia/confu/report.htm>.

¹²²³ Bhutan Copyright Act, s. 10.

¹²²⁴ Cambodian Copyright Act, Art. 24.

¹²²⁵ Palauan Copyright Act, s. 7.

¹²²⁶ Papua New Guinea Copyright and Neighbouring Rights Act, s. 8.

¹²²⁷ Samoan Copyright Act, ss. 8, 24(a).

¹²²⁸ Tongan Copyright Act, s. 8.

¹²²⁹ Australian Copyright Act, Div. 2A, s. 116AN.

¹²³⁰ Bhutan Copyright Act, s. 31(1).

¹²³¹ Cambodia Law on Copyright and Related Rights, Art. 62.

¹²³² China Regulation on the Protection of Right of Network Dissemination 2006, Art. 12(1).

¹²³³ Indonesia Copyright Act, Art. 27.

¹²³⁴ Japanese Copyright Act, Arts. 30(1)(ii), 120-2.

¹²³⁵ Malaysian Copyright Act, s. 36(3).

¹²³⁶ Nepal Copyright Act, s. 25(1)(e).

¹²³⁷ New Zealand Copyright Act, s. 226.

¹²³⁸ Palau Copyright Act, s. 22(a)(1), (2) (technological measures), (3) (rights management information).

¹²³⁹ Papua New Guinea Copyright and Neighbouring Rights Act, s. 29(1)(a), (b) (technological measures), (c), (d) (rights management information).

¹²⁴⁰ Korean Copyright Act, Art. 124.2(2).

¹²⁴¹ Samoan Copyright Act, s. 28(1)(i).

¹²⁴² Singapore Copyright Act, Part XIII.A.

746. Even fewer of these countries have enacted legislation that deals expressly deal with the conflict that may arise between the reliance on an educational exception to use or make accessible a work for instructional purposes, and the possible circumvention or breach of technological measures that the rightholders use to protect the works. Some examples of the solutions deployed by these countries follow.

747. For instance, Australia¹²⁴⁵ and Singapore¹²⁴⁶ have exceptions that permit educational institutions to circumvent access control technological protection measures for the purpose of making acquisition decisions about the work protected by technological measures. Section 116AN of the Australian Copyright Act reads:

[Footnote continued from previous page]

¹²⁴³ Tongan Copyright Act, s. 30(1).

¹²⁴⁴ Vietnam Law on Intellectual Property, Art. 198.1(a).

¹²⁴⁵ Australian Copyright Act, s. 116AN(8).

¹²⁴⁶ Singapore Copyright Act, s. 261D(1)(a).

Exception—libraries etc.

(8) *Subsection (1) [which provides for a remedy for a copyright owner or exclusive licensee to bring an action against a person who does an act that results in the circumvention of access control technological protection measures] does not apply to the person if:*

(a) the person circumvents the access control technological protection measure to enable the person to do an act; and

(b) the person is:

(i) a library (other than a library that is conducted for the profit, direct or indirect, of an individual or individuals); or

(ii) a body mentioned in paragraph (a) of the definition of archives in subsection 10(1), or in subsection 10(4); or

(iii) an educational institution; and

(c) the act will be done for the sole purpose of making an acquisition decision in relation to the work or other subject-matter; and

(d) the work or other subject-matter will not be otherwise available to the person when the act is done. [emphasis added]

748. Article 12 of the Regulation on the Protection of the Right to Network Dissemination of Information 2006 of China provides for the circumvention of technological measures of published works for the network dissemination of the circumvented work to “a small number of people that engage in teaching or scientific research ... for the purpose of teaching or scientific research”, provided that the “techniques, devices or components of the technical measures [for circumvention] shall not be provided to any other person”.

749. Many of the other countries surveyed deal with this issue in an indirect fashion. Countries like Bhutan,¹²⁴⁷ Cambodia,¹²⁴⁸ Nepal,¹²⁴⁹ New Zealand,¹²⁵⁰ Palau,¹²⁵¹ Papua New Guinea,¹²⁵² Republic of Korea,¹²⁵³ Samoa,¹²⁵⁴ and Tonga¹²⁵⁵ define the act of infringement of technological measures narrowly to encompass only the commercial dealings such as the manufacture or importation of any device or means specifically designed or adapted to circumvent technological measures.

750. Other countries link the rights given to protect against the circumvention of technological measures to the infringement of copyright in the work protected by

¹²⁴⁷ Bhutan Copyright Act, s. 31(1).

¹²⁴⁸ Cambodia Law on Copyright and Related Rights, Art. 62.

¹²⁴⁹ Nepal Copyright Act, s. 25(1)(e).

¹²⁵⁰ New Zealand Copyright Act, s. 226.

¹²⁵¹ Palaun Copyright Act, s. 22(a)(1), (2) (technological measures), (3) (rights management information).

¹²⁵² Papua New Guinea Copyright and Neighbouring Rights Act, s. 29(1)(a), (b) (technological measures), (c), (d) (rights management information).

¹²⁵³ Korean Copyright Act, Art. 124.2(2).

¹²⁵⁴ Samoan Copyright Act, s. 28(1)(i).

¹²⁵⁵ Tongan Copyright Act, s. 30(1).

technological measures. Thus, Article 2(1)(xx) of the Japanese Copyright Act defines a “technological protection measure” as follows:

(xx) "technological protection measures" means electronic, magnetic or other measures not discernible by human senses ([all of the aforementioned measures being collectively referred to]in the next item as "electromagnetic means")used to prevent or deter acts that would constitute infringements of the moral rights of author or copyrights as provided for in Article 17, paragraph (1) or the moral rights of performer as provided for in Articles 89, paragraph (1) or the neighboring rights as provided for in Article 89, paragraph (6) ([all of the aforementioned rights being] hereinafter in this item collectively referred to as "copyright, etc.") ...

751. Since it would not be an infringement of copyright to use the work pursuant to the educational exceptions in the Japanese Copyright Act, presumably it would not be a breach of law¹²⁵⁶ to circumvent technological protection measures towards the same end. A rule to the same effect is found in Australia,¹²⁵⁷ Malaysia,¹²⁵⁸ Republic of Korea,¹²⁵⁹ Singapore¹²⁶⁰ and Vietnam.¹²⁶¹ Thus section 36(3) of the Malaysian Copyright Act bars any circumvention of technological measures that are used by authors to restrict acts “which are not authorized by the authors concerned *or permitted by law*”. Article 124.2(2) of the Korean Copyright Act only deems an act of providing technologies, services or products for the primary purpose of neutralizing technological protection measures “without legitimate rights” to be an infringement of copyright. And Article 198.1 of the Vietnam Law on Intellectual Property only provides intellectual property rightholders “the right to apply ... technological measures *to prevent acts of infringing* upon intellectual property rights”.

752. But even if it is not an infringement of copyright to use a work protected by technological measures pursuant to the education exceptions in copyright legislation, if such a use can only proceed by way of circumventing the technological measures, educational institutions, teachers and students may not have the skills or the means to be able to do so. The solution offered in section 226 of the New Zealand Copyright Act is interesting. Section 226(2) provides:

(2) The person referred to in subsection (1) of this section [against whom the person issuing the copy-protected works to the public may sue for copyright infringement] is a person who—
(a) Makes, imports, sells, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or
(b) Publishes information intended to enable or assist persons to circumvent that form of copy-protection,—

¹²⁵⁶ In Japan, the circumvention of technological protection measures is a penal offence. See Japanese Copyright Act, Art. 120-2(i), (ii).

¹²⁵⁷ Australian Copyright Act, s. 116AN(9) (exempting an act of circumvention if it will not infringe the copyright in a work or other subject matter, but this act must be prescribed by regulations).

¹²⁵⁸ Malaysian Copyright Act, s. 36(3).

¹²⁵⁹ Korean Copyright Act, Art. 124.2(2).

¹²⁶⁰ Singapore Copyright Act, s. 261B(3)(c), (d).

¹²⁶¹ Vietnam Law on Intellectual Property, Art. 198.1(a).

knowing or having reason to believe that the devices, means, or information will be used to make infringing copies. [emphasis added]

753. This implies that it is legal for a person to commercially provide circumvention devices to schools and other educational institutions for the purpose of circumventing copy-protected works for educational purposes (for which these uses will qualify under an education exception). Examples of these that come to mind will be copy-protected digital works such as ebooks and electronic databases.

CONCLUSION

754. The principal objective of this study is to describe the state of the law in national legislations regarding issues of copyright exceptions for educational activities. While the study has been primarily of a descriptive nature, in the conclusion, the author will make some broad observations and highlight some issues regarding the formulation and implementation of educational exceptions.

755. All of the 32 countries (out of 40 countries assigned to this study) with copyright legislations surveyed in this study have some form of exception for the benefit of educational activities. Most of these are formulated based on Article 10(2) of the Berne Convention. Although the details may differ, the first group of countries has exceptions that mirror the approach in Article 10(2), which is to provide a general exception to sanction the utilization of any work by way of illustration in publications, broadcasts or sound or visual recordings for teaching, to the extent justified by the purpose. This includes the use of a work for instructional communication. However, four countries have expressly limited their exceptions to reproductions only, and five have imposed the requirement of face-to-face teaching. This is likely to create an issue as regards the application of these exceptions for distance and e-learning.

756. The second group of countries has implemented the Article 10(2) exception through the enumeration of excepted aspects of educational activities as exceptions. The attendant conditions for these exceptions can vary in detail, but the excepted activities are chrestomathies, abstracts, educational performances and broadcasts, school textbooks, school rentals and examinations. In the absence of a general or catch-all exception in their legislation, countries adopting the “enumeration” approach may need to constantly update their copyright exceptions to deal with new uses of works as part of educational instruction. Given the increasing breadth and variation of educational curriculum, the choice of using a residual educational use exception based on the three-step test seems like a good solution.

757. Six countries have limited the use of their education exception to “a short part” of a work, despite the fact that Article 10(2) of the Berne Convention contains no such prescription.¹²⁶² Although this parallels the exceptions in some countries that sanction the making or communication of an insubstantial part of a work for instructional purposes, this again could potentially limit the utility of their education exception, in the absence of some other exception or licensing arrangement to permit educational institutions to take more than a “short part” of a work for instructional purposes, provided that the extent of the part copied is justified by the purpose and the use is compatible with fair practice. Likewise, only nine countries have expressly recognized that teaching-related activities may involve the communication of works and not just their reproduction.

758. The problem of multiple copying of works, principally by educational institutions for instructional purposes, will continue to be a difficult one for many countries. The myriad of approaches and solutions adopted show that a workable solution for each country will depend on the maturity of the publishing as well as the education market in that country. The two

¹²⁶² Consumers International, *Comparative Price Study: A comparative survey of book prices in Thailand, Indonesia and the United States*, COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS xi (2006).

main considerations are the substantiality of copying (how much) and the status of the educational institutions (by whom). Many countries permit multiple insubstantial copying of works, even by way of reprographic processes. Others differentiate between multiple copying for pre-tertiary education and tertiary education, with two countries absolving multiple copying at the pre-tertiary level, because of the importance of basic universal education, whereas one country has different licensing prices for pre-tertiary and tertiary education. Hence multiple copying of substantial extents of works by tertiary institutes is likely to attract the most objection from authors and publishers, for which the compulsory or statutory licensing solution may afford an equitable solution for both the publishing industry and the education industry. However, the licensing of works (including digital works) for digital dissemination is likely to prove contentious, even if there are only four countries that have expressly provided for it in their copyright legislation.

759. Although six countries reviewed in this study (Bangladesh, India, Mongolia, Philippines, Sri Lanka and Thailand) have availed themselves of the facility in the Appendix to the Berne Convention, only four of them (Bangladesh, Mongolia, Philippines, Sri Lanka) have availed themselves of both Articles II and III, one of them of Article II (Thailand) and it would seem that India has allowed her notification to lapse. Other countries that have implemented compulsory translation and reproduction licenses outside the auspices of the Appendix are China, Indonesia, Malaysia and Pakistan. This study has not been provided with sufficient empirical data to draw conclusions about the effectiveness of the compulsory reproduction and translation licensing schemes, whether in the Appendix or in national copyright legislation.¹²⁶³ As such, it would be difficult to draw any meaningful conclusions from the aforesaid observations alone. This is unfortunate, because the scheme would appear to be a delicately managed compromise between publishers and educators, and because there should be information to show that many students from developing countries in Asia have benefited from the availability of low-cost editions of books, even those published by the original publishers to meet such educational needs.

760. Likewise, while there is a group of countries that has formulated “quotation” exceptions that are based on Article 10(1) of the Berne Convention, a second group of countries has formulated the exception based on one specific aspect of the use of quotations – for purposes of criticism or review. Again, as previously noted, many of the same countries circumscribe their quotation exceptions by only enabling a “short part” of a work to be quoted, contrary to the language in Article 10(1).

761. Most countries have exceptions that exempt the personal or private use of works for research or private study purposes. However, concerns about book piracy have led a first group of eight countries that have broad “personal or private use” exceptions to exclude from the scope of their exceptions the reprography of the whole or a substantial part of books or musical works. The second group of countries addresses this problem with the concept of “fair use” that creates opportunities for individualistic determinations of permissible usage in each case. The tension between the potential for “fair use” to serve as a residual exception to permit unanticipated uses of works that add to social utility and to create much harm from its misuse by end users and consumers to collectively make multiple copies of works is

¹²⁶³ Cf. Consumers International, *Comparative Price Study: A comparative survey of book prices in Thailand, Indonesia and the United States*, COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS 41 (2006), at Appendix 1.

unfortunately a tension that is inherent in the very principle of “fair use” itself (that of a relatively open-ended rule) which can be ameliorated with the recognition of various presumptions of “fair use” where the extent of the work copied is small or determined by the nature of the work e.g. an article in a periodical. The advent of the digital environment and widespread availability of digital reproduction tools is unfortunately going to exacerbate the problem, and the solution adopted in Japan as regards a levy on digital audio and video recording machines and their media may be an alternative to be considered. Nonetheless, it may be difficult to replicate the success of the Japanese model, which is premised on low but reasonable levies on machines and media and the co-operation between the manufacturers and the collecting societies.

762. The most surprising part of this study (at least to the author) is that no less than 16 countries in the countries surveyed in this study have updated their copyright legislation with provisions to deal with technological measures. However, only a few have provisions to deal with the issue of possible breach of laws protecting the breach of technological measures for educational purposes. The growing proliferation of electronic books, compilations and databases that are digitally protected may pose challenges for educational institutions seeking to provide access to these legitimately acquired resources for instructional purposes (for instance, to enable multiple access or to make multiple copies of such works for distribution, when the technological measures only permit one copy to be made). There could also be concerns that works in the public domain would be protected by technological measures and this would hinder access to such works in schools and educational institutions. In the absence of licenses to permit the same, the laws of some of the countries surveyed seem to provide some leeway to ensure that technological measures do not displace the carefully nuanced and balanced educational exceptions in copyright laws. But more transparency and clarity as regards the implementation of these technological measures is certainly important. And laws such as those examined in this part of the study represent a signal to the industry that this is necessary and vital to the continued efficacy of the exceptions in copyright as a balance between the interests of rightholders, end users and society.

763. The final remark is that the complexities in this area of legislating for educational exceptions stem largely from the changes that technology is bringing to the field of education. New methods of instruction and new ways to disseminate and access knowledge and information present new opportunities for educators, researchers and students. This in turn drives new innovations and creates new markets for authors, scholars and publishers. In such an environment, both the education and the publishing industry should strive to work more closely together, facilitated by rules and policies that make this possible, because both can and should stand to benefit from the increasing size of the education market made possible by technology. After all, the relationship between both industries has always been, and will always be, a symbiotic one.

[Appendix follows]

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APPENDIX: TABLE SHOWING THE STATUS OF INTERNATIONAL COPYRIGHT AND RELATED-RIGHTS INSTRUMENTS IN ASIA-PACIFIC COUNTRIES

Country	Copyright Legislation	Contracting Party to Berne Convention	Declaration by Contracting Party relating to Appendix to Paris Act (1971)	Contracting Party to Rome Convention	WTO Membership (Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS))	Contracting Party to WIPO Copyright Treaty 1996	Contracting Party to WIPO Performances and Phonograms Treaty 1996
Afghanistan	No copyright legislation						
Australia	<u>Copyright Act 1968 (taking into account amendments up to Act No. 113 of 2008)</u>	April 14, 1928		September 30, 1992	1 January 1995	July 26, 2007	July 26, 2007
Bangladesh	<u>Copyright Act 2005 (Act No. 14 of 2005) on May 18, 2005, amending the Copyright Act 2000 (Act No. 28 of 2000) or [LINK]</u>	May 4, 1999	Berne Notification No. 234 Articles II and III: from 4 February 1999 to ... Articles II and III: from 10 October 2004 to 10 October 2014		1 January 1995		
Bhutan	<u>Copyright Act of the Kingdom of Bhutan 2001</u>	November 25, 2004					
Brunei Darussalam	<u>Emergency (Copyright) Order, 1999</u>	August 30, 2006			1 January 1995		
Cambodia	<u>Law on Copyright and Related Rights 2003</u>			Signed	13 October 2004		
China	<u>Copyright Law (Order No. 58 [2001] of the President dated 27 Oct 2001 and [LINK]</u>	October 15, 1992			11 December 2001	June 9, 2007	June 9, 2007
Cook Islands	<u>Adopted and applied the New Zealand Copyright Act of 1962 and New Zealand Design Act of 1953</u>						
Democratic People's Republic of Korea		APRIL 28, 2003					
Fiji	<u>Copyright Act No. 11 of 1999</u>	December 1, 1971		April 11, 1972	14 January 1996		
India	<u>Copyright Act, 1957 (as last amended by the Copyright (Amendment) Act, 1994 (No. 38 of 1994) and [LINK]</u>	April 1, 1928	Berne Notification No. 108 Articles II and III: from 10 October 1974 to 10 October 1984 Berne Notification No. 110 Articles II and III: from 10 October 1984 to 10 October 1994	Signed	1 January 1995		
Indonesia	<u>Law No. 19 of July 29, 2002 on Copyright</u>	September 5, 1997			1 January 1995	March 6, 2002	February 15, 2005
Iran Islamic Republic of	<u>Copyright Law of January 12, 1970</u>						

Country	Copyright Legislation	Contracting Party to Berne Convention	Declaration by Contracting Party relating to Appendix to Paris Act (1971)	Contracting Party to Rome Convention	WTO Membership (Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS))	Contracting Party to WIPO Copyright Treaty 1996	Contracting Party to WIPO Performances and Phonograms Treaty 1996
Japan	<u>Copyright Law (Law No. 48 of May 6, 1970)</u>	July 15, 1899		October 26, 1989	1 January 1995	March 6, 2002	October 9, 2002
Kiribati	<u>Copyright Ordinance (Cap 16) Revised 1980</u> U.K. Copyright Act 1956						
Lao People's Democratic Rep.	No English translation available						
Malaysia	<u>Copyright Act 1987 No. 332</u> or [LINK] or [LINK] or [LINK]	October 1, 1990			1 January 1995		
Maldives	No copyright legislation found				31 May 1995		
Marshall Islands	No copyright legislation found on PaCLII						
Micronesia, the Federated States of	<u>Code of the Federated States of Micronesia - Title 35. Chapter 1: Copyrights</u>	October 7, 2003					
Mongolia	<u>Copyright Law of June 22, 1993, incorporating the Law (1997) Amending the Copyright Law</u>	March 12, 1998	Berne Notification No. 178 Articles II and III: from 12 March 1997 to ... Berne Notification No. 237 Articles II and III: from 10 October 2004 to 10 October 2014		29 January 1997	October 25, 2002	October 25, 2002
Myanmar	(possibly) U.K. Copyright Act 1911				1 January 1995		
Nauru	U.K. Copyright Act 1956						
Nepal	<u>Copyright Act 2002</u>	January 11, 2006			23 April 2004		
New Zealand	<u>Copyright Act 1994</u> or Link	November 1, 1912			1 January 1995		
Niue	New Zealand Copyright Act 1962						
Pakistan	<u>Copyright Ordinance No. XXXIV of 1962 (as amended by Copyright (Amendment) Ordinance, 2000 dated 29 September 2000)</u>	July 5, 1948			1 January 1995		
Palau	<u>Republic of Palau Copyright Act of 2003</u>						
Papua New Guinea	<u>Copyright and Neighbouring Rights Act 2000</u>				9 June 1996		
Philippines	Copyright (Civil Code), Code, 18/06/1949, No. 386 <u>Intellectual Property Code of the Philippines - Part IV 1998</u>	August 1, 1951	Berne Notification No. 235 Articles II and III: from 10 October 2004 to ...	September 25, 1984	1 January 1995	October 4, 2002	October 4, 2002
Republic of Korea	<u>Copyright Act (Act No. 3916 of December 30, 1989, as last amended by Act No. 5015 of December 6, 1995) and LINK</u>	August 21, 1996		March 18, 2009	1 January 1995	June 24, 2004	March 18, 2009
Samoa	<u>Copyright Act 1998</u>	July 21, 2006					
Singapore	<u>Copyright, Act (Cap. 63, 2006 Rev Ed)</u>	December 21, 1998			1 January 1995	April 17, 2005	April 17, 2005

Country	Copyright Legislation	Contracting Party to Berne Convention	Declaration by Contracting Party relating to Appendix to Paris Act (1971)	Contracting Party to Rome Convention	WTO Membership (Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS))	Contracting Party to WIPO Copyright Treaty 1996	Contracting Party to WIPO Performances and Phonograms Treaty 1996
Solomon Islands	<u>Copyright Act (Revised Edition 1996)</u>				26 July 1996		
Sri Lanka	<u>Intellectual Property, Act (Code), 08/08/1979 (2000), No. 52 (No. 40)</u>	July 20, 1959	Berne Notification No. 248 Articles II and III: from 27 Sept 2005 to 10 October 2014		1 January 1995		
Thailand	<u>Copyright Act B.E. 2537 (1994)</u>	July 17, 1931	Berne Notification No. 167 Article II: from 2 September 1995 to 10 October 2004 Berne Notification No. 239 Article II: from 10 October 2004 to 10 October 2014		1 January 1995		
Timor-Leste							
Tonga	<u>Copyright Act 2002 (Act 12 of 2002)</u>	June 14, 2001			27 July 2007		
Tuvalu	<u>Copyright Ordinance (Cap. 60 of 1973) or [LINK]</u>						
Vanuatu	<u>U.K. Copyright Act 1956</u>						
Viet Nam	<u>Law on Intellectual Property No. 50/2005/QH11 of November 29, 2005</u> <u>Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights</u>	October 26, 2004		March 1, 2007	11 January 2007		

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