



COMMONWEALTH *of* LEARNING

## Commonwealth of Learning Copyright Audit

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*With grateful acknowledgement to the following sources:*

*(1) Consumers International Asia Pacific -- Report on Copyright & Access to Knowledge, 2005*

*(2) Consumer Project on Technology & associates -- Draft text of the a2k treaty, 2005*

*(3) Alternative Law Forum -- Submission on Indian Copyright Law, 2006*

*(4) Wizards of OS working group around EUCD -- Best Practices Guide, 2006.*

*With thanks to Julien Hofman, Paul West, Dick Kawooya, Charles Batambuze & Denise Nicholson for suggestions and comments.*

### **COPYRIGHT LAW AND EDUCATION**

To a significant extent, copyright law governs the production, dissemination and consumption of knowledge and culture. In an “information society” it is particularly important to ensure that the gates of learning are kept wide open. It is in this context that an examination of copyright law with respect to education becomes crucial.

In previous communication from the Commonwealth of Learning, we noted that: “In view of the contemporary scenario where a complex arrangement of international treaties and agreements govern intellectual property, and where countries are under pressure to adopt stricter copyright laws through Free Trade Agreements, countries could benefit from conducting an audit of copyright laws to ensure that they take advantage of flexibilities in international agreements to safeguard and enhance access to learning content.”

When performing an audit of copyright law, it is essential to keep in mind international treaty obligations: particularly, the Berne Convention, the Agreement on trade-related aspects of intellectual property rights – which is consequent to membership at the World Trade Organisation, and more recent treaties such as the World Intellectual Property Organization’s Copyright Treaty. Taken together, they define the international copyright regime.

It is also essential to keep in mind that even from the perspective of the multifaceted international obligations that countries are subject to, there is yet great flexibility as to how copyright may be legislated, especially given national goals such as literacy and education. This last point is, unfortunately, not yet adequately known.

The following copyright law checklist is an attempt to help you at gaining a better understanding of not only how intellectual property affects education but also what countries have within their power to do, to increase access to education of quality at all levels.

## • COPYRIGHT LAW & INTERNATIONAL OBLIGATIONS

Copyright must reflect a balance of private-public interests. It must create adequate incentive to the producer while yet enabling (and not hampering) access by consumers. Particularly when applied within a developing country context, it is crucial to remember that while this audit is concerned with access to knowledge, it is also concerned with the equitably dispersed production of knowledge. It thus relies on a fundamental principle: access to knowledge in turn creates producers of knowledge.

1) The title of the law which regulates copyright : \_\_\_\_\_

2) Year from which copyright has been legislated nationally: \_\_\_\_\_

### •• The Berne Convention and the Agreement on trade-related aspects of intellectual property rights (TRIPs)

The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement on copyright, first adopted in Berne, Switzerland in 1886. As of writing, 162 countries are party to the Berne Convention. The Agreement on trade-related aspects of intellectual property rights is a trade rule that applies to all members of the World Trade Organisation (WTO), and incorporates the Berne Convention. As of writing, the WTO has 149 members.

3) Signatory to Berne Convention and/or bound by TRIPs? YES NO

### •• The Appendix to the Berne Convention

For developing countries joining the Berne Convention, access to copyrighted goods from developed countries was considered a problem. In response to this concern, the Appendix to the Berne Convention was formulated – a system to facilitate translation and reproduction of copyrighted works, without permission of rights-holders, and with compensation to them. The actual terms of the Appendix remain controversial, since any use of the Appendix is heavily regulated and requires strict procedures to be followed; moreover, translation into any major European language is not allowed – though such languages are used in many developing countries. However, the Appendix, while restricted to developing countries, is not mandatory. As of writing, the majority of developing countries who are Member States of the Berne Convention have not availed of the Appendix to the Berne Convention.

4) Availed of the Appendix to the Berne Convention? YES NO

5) Are there provisions in copyright law that follow the procedures laid out in the Appendix to the Berne Convention with respect to translation? YES NO

## •• World Intellectual Property Organisation (WIPO) Copyright Treaty

The WIPO Copyright Treaty (WCT) is an international treaty on copyright law that was formulated by WIPO in 1996. It is designed to provide additional protection for copyright as deemed necessary due to advances in information technology, and in that sense, is designed to supplement earlier copyright treaties and conventions. For instance, it ensures that computer programs are protected as literary works and that databases are protected; it also provides control over the rental and distribution of works in a manner not necessarily specified under the Berne Convention. Importantly, it prohibits circumvention of technological measures in accessing a work in the digital environment.

The WCT and its national legal interpretations such as the Digital Millennium Copyright Act (DMCA) in the US, have been controversial for potentially restricting access to knowledge and information, particularly in the context of the internet. As of writing, only 59 countries were party to the WCT.

6) Signatory to WCT?

YES NO

## • COPYRIGHT FLEXIBILITIES

Within the copyright system, and cognizant of international obligations that countries may be bound to, a wide variety of flexibilities are allowed in the legislation of copyright. In the national context, these flexibilities are therefore not only a sovereign right, but also a sovereign decision. While the following list of categories corresponds to both groups of users as well as groupings of similar clauses under copyright law, it is notional to the extent that the categories cut across each other, as do users and beneficiaries of the copyright system.

## •• Digital Rights Management

Digital Rights Management (DRM) is a term used for technologies that define and enforce parameters of access to digital media or software. Consequently, rights that are conferred by the law, under DRM, are enforced by the copyright holder through technological protection measures so as to prevent access to such digital media or software in a manner that would infringe the rights of the copyright holder. In most cases, DRM provisions are introduced in the law as a consequence of obligations under the WCT – however, there are several instances where countries yet to sign the WCT have introduced DRM provisions into national legislation.

However, DRM remains controversial, since it threatens the innovative possibilities opened up by the internet – by allowing copyright holders to restrict access to digital media or software under terms which would be currently permissible under copyright law; with implications thus, not only for legal, personal use but also for future innovation. Of particular concern are anti-circumvention provisions, that is, clauses in the law that make it illegal to circumvent technological protection mechanisms – even while, for instance, a customer is exercising fair use of a work.

7) Is there a provision around Digital Rights Management?

YES NO

8) Do copyright holders have the exclusive right to control dissemination (distribution and/or rental and/or communication/making available)? YES NO

9) Is there a provision around anti-circumvention? YES NO

10) Is circumvention allowed when exercising fair use/ fair dealing? YES NO

**•• Access to knowledge for teachers and students**

Recognizing the central role that learning plays in the economic, political and social life of nations, several countries around the world have adopted a specific set of copyright provisions for teaching and learning. Such provisions recognize that teaching and learning might often be conducted under sub-optimal conditions with scarce resources, and seek to provide flexibility in the classroom and outside to facilitate this essential process.

11) Are there any provisions specifically for teaching/education? YES NO

12) Specific education provisions:

Can a whole work be utilised in any way, for education? YES NO

Are there any restrictions on how a work can be used in education? YES NO

Are there any restrictions on where the work can be used (for e.g. at home)? YES NO

Is distance learning considered in the law? YES NO

Is e-learning considered in the law? YES NO

Are there any limits on number of copies of works or illustrations permitted? YES NO

13) Broad educational provisions:

Are there provisions for the educational use of all kinds of works protected by copyright in national legislation? YES NO

If NO

List the works for which educational provisions do not exist: (for e.g. performances, literary works, etc.) \_\_\_\_\_

## •• Access to knowledge from libraries and archives

Libraries and archives, taken together, are perhaps the most commonly accessed knowledge gateways anywhere in the world. The functioning of publicly accessible libraries and archives (including those not necessarily connected to an academic institution) crucially depends upon flexibilities in the copyright system to enable, expand and sustain access.

14) Are there specific provisions to address libraries/ archives? YES NO

15) Are there “public lending rights” or equivalent clauses? YES NO

16) For publicly accessible libraries/ archives:

Is the copying of whole works permitted? YES NO

Are there limits on the number of copies possible of whole works? YES NO

Do all publicly accessible libraries/ archives qualify? YES NO

Do commercial libraries/archives qualify? YES NO

Are there limits on copying by format (e.g. digital/ print)? YES NO

Are there provisions for the sharing of out-of-print works? YES NO

Are there provisions for format adaptation of works? (For e.g. print to digital) YES NO

Are there restrictions on the delivery of digital works to users? YES NO

## •• Access to knowledge for people with a disability

People with a sensory disability (such as those who are partially or wholly blind or deaf) face unusually high constraints in accessing knowledge. To some extent, new technologies create access opportunities – provided that they are regulated with foresight. A responsive system of copyright, which recognizes the knowledge needs of sensory disabled people (such as format adaptation) can create the requisite access, particularly when framed within flexible, expansive and simple procedures.

17) Are there any specific provisions for people with a disability? YES NO

18) Provisions for people with a disability:

Do provisions cover both organisations and individuals? YES NO

Is format adaptation (e.g. text to audio) permitted?	YES NO
Are there restrictions on format adaptation? (For e.g. are only some formats like Braille allowed?)	YES NO
Do permissions for format adaptation have to be applied for?	YES NO
Is remuneration of rights-holders required for such adaptation?	
In the case of individuals:	YES NO
In the case of institutions:	YES NO
Do the provisions extend to all users with sensory disability?	YES NO
Are there restrictions on sharing of such adapted material?	YES NO
Are there restrictions on export/ import of such adapted material?	YES NO

#### •• Media freedom and free expression

Copyright also plays a role in stimulating a free and fair media; an important point to consider given the increased use of audiovisual technology in teaching, the diverse ways in which learning takes place and the proliferation of media outlets and consumers, with recent advances in technology.

19) Is review of copyrighted works in media permitted?	YES NO
20) Can political speeches be reproduced in media?	YES NO
21) Can public lectures/ speeches be reproduced in media?	YES NO
22) Is file-sharing from peer-to-peer networks permitted?	YES NO
23) Can copyrighted work be excerpted in news reporting?	YES NO
24) Is there a provision for the “remixing” of sound recordings?	YES NO
25) Does the “remixing” of sound recordings require permission?	YES NO

## •• Parallel import

A parallel import refers to a copyrighted product placed on the market in one country, which is subsequently imported into a second country without the permission of the copyright holder in the second country. It is a system by which, for instance, anomalous price differentials (as they may exist between similar copyrighted goods across two countries) can be corrected in the public interest, especially when the copyrighted good in question is an essential good, such as a textbook.

26) Is the international exhaustion of copyright and/or first sale doctrine recognized in domestic copyright law? YES NO

27) Is parallel import of copyright material permitted? YES NO

## •• Compulsory licenses

A compulsory copyright license is an exception to copyright law that is typically explained as a safeguard for governments by which they might correct market failure. The issuance of a compulsory license usually suggests that the copyright holder has to grant rights over the material to another or others – either to the state or individual producer/s. Usually, the copyright holder does receive some remuneration, either set by law or determined through arbitration. Compulsory licenses are widely considered to be a crucial mechanism for creating access where the copyrighted work in question is unavailable or unaffordable, among other circumstances.

28) Is compulsory licensing provisioned for? YES NO

29) Is compulsory licensing:

Permitted for reproduction of works? YES NO

Permitted for adaptation (eg. translation) of works? YES NO

Permitted under circumstances of unavailability of work? (For e.g. no copies for sale locally, untraceable author, etc.) YES NO

Permitted under circumstances where the work is unaffordable? YES NO

Permitted under circumstances of inaccessibility of work? YES NO

Permitted under circumstances of anti-competitive behaviour? YES NO

30) Is anti-competitive behavior referenced in copyright law? YES NO

## •• Fair dealing

Fair dealing is a set of limitations and exceptions to copyright, found in many of the common law jurisdictions of the Commonwealth (and analogous to the concept of “fair use” in the USA). Fair dealing is a set of defenses against an action for infringement of copyright. In other words, fair dealing as a collective set of clauses is what enables everyday, ordinary use and sharing of copyrighted material in a manner that is permitted.

31) Is the principle of fair use/ fair dealing provisioned for? YES NO

32) Does the fair use / fair dealing provision encompass research and study? YES NO

If YES

Is “research” confined by non-commercial purpose? YES NO

Is “study” confined to private study? YES NO

33) Does the fair use / fair dealing provision encompass criticism and / or review? YES NO

34) Does the fair use / fair dealing provision encompass news reporting and / or reporting current events? YES NO

35) Does the fair use / fair dealing provision encompass professional advice? YES NO

36) Does the fair use / fair dealing provision encompass judicial proceedings? YES NO

37) Does the law specifically determine what amount of a work a user can use under fair use/ fair dealing (e.g., 10 pages, 10%, one chapter)? YES NO

38) Is the private copying of non-digital works permitted? YES NO

39) Is the private copying of digital works permitted? YES NO

40) Quotations:

Are there any restrictions on quotations? YES NO



Are there restrictions on what types of works can be quoted?	YES NO
Are there restrictions on the “public” nature of work quoted from?	YES NO
Are there restrictions on the length of the quotation?	YES NO
Are there restrictions on the purpose of a quotation?	YES NO

**•• Government works and legal proceedings**

Typically, governments are large producers of knowledge: from reports, surveys and statistics to funded projects in every academic discipline. Government-funded work may apply to individuals, academics and institutions. Government resources are public resources: and in many legislations it follows that any work thus carried out is in the public domain – meaning, regardless of some application of copyright, that such works are freely and easily accessible, and adaptable as necessary.

41) Government works:

Are all government works (i.e., works prepared by an officer or employee of the government as part of that person's official duties) in the public domain?	YES NO
Are all government-funded works in the public domain?	YES NO
Are there any restrictions on the use/ adaptation of government works? (Adaptations here include translations)	YES NO

42) Are judicial proceedings in the public domain? YES NO

**• GENERAL PROVISIONS**

An important flexibility that countries have is to set the copyright term for works, using the minimum permissible terms set out in international treaties. To consciously extend a copyright term beyond the minimum obligated, requires careful consideration regarding the effects from the delay in positing such works in the public domain.

43) Copyright term:

Greater than life of author plus 50 years for literary, dramatic, musical or artistic (excluding photographic) works?	YES NO
Greater than 50 years from the time such a work was made public or from time the work was made, for cinematographic works?	YES NO

Greater than 50 years from the time such a work was made public or from time the work was made, for sound recordings? YES NO

Greater than 50 years from the time such a work was made public, for anonymous/ pseudonymous/ posthumous works? YES NO

Greater than 25 years from the making of such a work, for photographic works? YES NO

44) Does “communication to the public” (or equivalent term) exclude private, non-commercial and/or educational communication? YES NO

45) Does “commercial rental” (or equivalent term) exclude non-profit lending or circulation of works, including the use of works in education? YES NO

46) Is relinquishment by the rights-holder/ owner, of all or certain rights granted under copyright, legally recognized through any public communication? YES NO

47) Is there any distinction anywhere in the law between domestic (national) works and foreign (international) works? YES NO

If YES

What are the specific purposes for which this differentiation is made (for e.g. in compulsory licenses, for registration, etc.) \_\_\_\_\_

## • INCENTIVES FOR THE PUBLIC DOMAIN

Other than taking advantage of flexibilities offered under the copyright system, countries have the option to encourage the production, usage and growth of tools such as free and open source software and material such as open access textbooks – thereby, providing official support to self-determined initiatives that spur access to knowledge.

Free and open source software is software which can be used, copied, studied, modified and redistributed without restriction. Open access refers to any material which is freely available (e.g. online) which can be reproduced, adapted and distributed.

48) Are there incentives for the use, production and dissemination of free and open source software within copyright law or elsewhere in national law/ policy? YES NO

49) Are there incentives for the use, production and dissemination of open access material (e.g. textbooks) within copyright law or elsewhere in national law/ policy? YES NO