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### Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright

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# BEYOND THE UNREALISTIC SOLUTION FOR DEVELOPMENT PROVIDED BY THE APPENDIX OF THE BERNE CONVENTION ON COPYRIGHT

*Alberto J. Cerda Silva*\*

## ABSTRACT

The standards of copyright protection promoted by the Berne Convention are highly problematic for developing countries because these countries need to ensure a wide dissemination of works for teaching, scholarship, and research purposes. In order to accommodate these needs and to promote accession to this Convention, the 1971 Paris Act of the Berne Convention, included an Appendix that allowed developing countries to issue compulsory licenses for translating and/or reproducing foreign works into languages of general use in their territories. Unfortunately, the Appendix has not met the needs of developing countries, which, instead, have relied on idiosyncratic solutions. Additionally, the instrument does not provide solutions for other needs, such as those of linguistic and cultural minorities, and it is arguable whether the Appendix applies online.

Section one of this paper provides background information on the needs of developing countries and shows how the Appendix of the Berne Convention tried to meet them. Section two analyzes the main limitations of the mechanism of compulsory licensing adopted by the Appendix. Although,

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the mere fact that the Appendix does not comply with its very purpose should be enough to warrant a new instrument, section three discusses two additional reasons in favor of adopting a new instrument to meet the needs of developing countries. In particular, this section focuses on general welfare and the economic benefits for authors and right holders. Finally, section four outlines the issues that should be included in a new instrument that effectively meets development needs.

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### I. INTRODUCTION

The standards of copyright protection promoted by the Berne Convention are highly problematic for developing countries because these countries need to ensure a wide dissemination of works for teaching, scholarship, and research purposes. In order to accommodate these needs and to promote accession to this Convention, the 1971 Paris Act of the Berne Convention included an Appendix that allowed developing countries

to issue compulsory licenses for translating and/or reproducing foreign works into languages of general use in their territories.

The increasing number of developing countries that have become parties to the Berne Convention may suggest that the mechanism provided by the Appendix meets some of the aforementioned needs. Reviewing domestic copyright legislations of those countries shows, however, that their laws do not rely on the provisions of the Appendix and have rather developed idiosyncratic solutions. Moreover, the Appendix does not address the needs of linguistic and cultural minorities in both developed and developing countries. It is also arguable whether the Appendix applies to online works. A new instrument should resolve these limitations by providing real solutions for the needs of developing countries and linguistic minorities. This paper proposes what issues should be included in that new instrument.

Section one of this paper provides background information on the needs of developing countries and shows how the Appendix of the Berne Convention tried to meet them. Section two analyzes the main limitations of the mechanism of compulsory licensing adopted by the Appendix. Although, the mere fact that the Appendix does not comply with its very purpose should be enough to warrant a new instrument, section three discusses two additional reasons in favor of adopting a new instrument to meet the needs of developing countries. In particular, this section focuses on general welfare and the economic benefits for authors and right holders. Finally, section four outlines the issues that should be included in a new instrument that effectively meets development needs.

## II. THE BERNE CONVENTION'S APPENDIX

In 1886, European countries agreed to provide a common minimum legal standard of protection for copyrighted works through the adoption of the Berne Convention for the Protection of Literary and Artistic Works.<sup>1</sup> Even though some non-European countries were parties to the Convention, they did so under their colonial status. The actual parties in interest were France, Germany, Italy, Spain, and the United Kingdom. As a result, the Convention reflects the interests of these latter countries in achieving an adequate level of protection, particularly with respect to their potential colonial markets. Since then, the Convention has undergone successive

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<sup>1</sup> Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (as revised in Paris, France, Jul. 24, 1971) [hereinafter Berne Convention].

revisions. The Berlin revision of 1908<sup>2</sup> is the most significant because it dispensed with formalities by adopting a system of automatic protection and set forth a minimum term of protection – the life of the author plus fifty years post mortem.<sup>3</sup>

The newly independent countries of the Americas also adopted their own system for protecting copyrights. Since 1889, through the Treaty of Montevideo and successive instruments,<sup>4</sup> countries in the Americas created more flexible system of protection to better suit their needs. The Inter-American system left domestic laws to determine the length of the term of protection and required registration of works for copyright protection.<sup>5</sup> Works that did not comply with these formalities were abandoned to the public domain. In addition, as a general policy, countries of the Americas refused European countries entry into the Inter American system, effectively denying protection to works by their former colonizers.<sup>6</sup> A more relaxed standard of protection and the refusal to protect European works are both signs of “differing interests regarding printed works.”<sup>7</sup> Countries in the Americas rejected European hegemony and claimed legal obstacles to adopt the European copyright model. In reality, however, these countries were convinced that this model was inconvenient for culture-importing countries.<sup>8</sup>

After World War II, the progressive decolonization of Africa and Asia diminished the efficacy of the Berne Convention. The Convention’s “colonial clause” was supposed to provide continuity of copyright protection in decolonized territories. The clause, however, was insufficient to meet this goal because it still required the new former colonies to either ratify or withdraw from the Convention.<sup>9</sup> Since the high standards of the

<sup>2</sup> Id. (as revised at Berlin, Germany, Nov. 13, 1908).

<sup>3</sup> Id. at art. 7 (as revised at Brussels, Belgium, Jun. 26, 1948) (this period became mandatory in the 1948 Brussels Act).

<sup>4</sup> Montevideo Copyright Convention on Literary and Artistic Property, Jan. 11, 1889, 171 C.T.S. 453.

<sup>5</sup> See Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, Jun. 22, 1946, O.A.S.T.S. No. 39 (showing that only in 1946 did the Inter-American System abolish the formalities).

<sup>6</sup> See Ulrich Uchtenhagen, *Acerca de la Historia de las Convenciones de Derechos de Autor Latinoamericanas*, in LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO 71, 78-80.

<sup>7</sup> Id.

<sup>8</sup> See Delia Lipszyc, *Esquema de la Protección Internacional del Derecho de Autor por las Convenciones del Sistema Interamericano*, in LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO, *supra* note 6, at 20; See also ARCADIO PLAZAS, *Estudios Sobre Derecho de Autor: Reforma Legal Colombiana* [Study on Author’s Rights: Legal Reform in Colombia], 102-03 (1984) (referring to a general “isolationism” of Latin-American countries in relation to their international commitments on copyright).

<sup>9</sup> *Berne Convention*, *supra* note 1, art. 31.

Convention did not meet the expectations of these new developing countries, they had little incentive to become parties.

At that time, and still today, developing countries need to disseminate knowledge on a wide basis. The artificial scarcity created by copyright law prevents the achievement of this goal. The high prices of works published overseas hamper the implementation of public policies for the extensive use of copyrighted works to promote educational, cultural, and technical development. Public purchases and voluntary licensing have not met those needs because the fees charged are unreasonable in the context of limited economic resources in developing countries. To become parties to the Berne Convention, developing countries required appropriate flexibilities for satisfying those needs.<sup>10</sup>

Although the Berne Convention does offer some flexibilities, these run short of meeting the needs of developing countries. For instance, the Convention allows access to copyrighted works through exceptions and limitations. Established in domestic legislations, exceptions and limitations dispense with the requirements of consent from and/or payment to the rights holders. These exceptions, however, are severely limited by the so-called *Berne three-step test* which establishes that exceptions must be (1) limited to special cases, (2) do not conflict with normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author.<sup>11</sup> This test prevents the extensive use of works by countries because, even if the policy rationale is more altruistic and urgent than providing mere entertainment in small restaurants,<sup>12</sup> the test arguably disallows massive use of copyrighted works with regards to education.

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<sup>10</sup> See Irwin A. Olian, Jr., *International Copyrights and the Need of Developing Countries: The Awakening at Stockholm and Paris*, 7 Cornell Int'l L. J. 81, 88-95 (1974) (describing the needs of developing countries by the time of the adoption of the Paris Act of the Berne Convention). See generally PETER DRAHOS AND JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 74-79, (2002) (describing historical and current challenges and limitations that developing countries face for accessing works in compliance with international instruments on copyright).

<sup>11</sup> See *Berne Convention*, *supra* note 1, art. 9(2) (permitting the reproduction of works under the expressed circumstances); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement] (adopting a similar test, but extending its scope beyond reproduction and requiring not unreasonably prejudicing the legitimate interests of the rights holder).

<sup>12</sup> See Panel Report, *United States – Section 110(5) of the US Copyright Act*, document WT/DS160/R (Jun. 15, 2000), available at [http://www.wto.org/english/news\\_e/news00\\_e/1234da.pdf](http://www.wto.org/english/news_e/news00_e/1234da.pdf) (deciding that this section infringes on the Berne-three step test when it releases restaurants and other businesses that play music for the public from paying royalties to the original artists under specific conditions).

Another flexibility provided by the Berne Convention to all its parties is the so-called “ten-year regime” clause, an optional early lapsing of protection for some works. The provision allows a State party to end the protection of the exclusive right of translation if a given work is not available in a language of general use in the said country within ten years from the work’s first publication.<sup>13</sup> As a result, the work enters into the public domain in that country and anyone is allowed to exploit it. This result may facilitate meeting the needs of developing countries because it enables the massive use of works for educational purposes. The “ten-year regime” flexibility, however, is not satisfactory for several reasons. First, this provision intends to entice countries to become part of the Berne Convention, not to meet the needs of developing countries. Countries are, in fact, only allowed to enjoy this exception by making a reservation when they become party to the Convention.<sup>14</sup> Second, nothing in the Convention prevents countries from retaliating against authors from countries that have implemented this provision.<sup>15</sup> Third, the mechanism provided by the “ten-year regime” is incompatible with special provisions in the Appendix that allow developing countries to issue compulsory licenses.<sup>16</sup> Last but not least, this flexibility delays access to works for a significant amount of time. Although a delay may not be a serious problem in social sciences and philosophy, it is unacceptable in other fields, such as technology, computer science, epidemiology, oncology, and medicine. As a result of those limitations, countries that become parties to the Berne Convention have rarely made the aforementioned reservation and, therefore, this exception has become useless.<sup>17</sup>

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<sup>13</sup> See *Berne Convention*, *supra* note 1, art. 30(2)(b) (setting special provisions on translation rights for acceding countries), Appendix, art. V (establishing that acceding developing countries can choose between the ten year regime and the compulsory licensing system set forth in the Appendix, but cannot combine those choices).

<sup>14</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 172 (1978) [hereinafter *WIPO Guide*] (ratifying that the ten-year regime is an available irrevocable choice that must be made at the time of ratifying or acceding to the Convention).

<sup>15</sup> See *Berne Convention*, *supra* note 1, art. 30(2)(b) (stating that “any country has the right to apply, in relation to the right of translation of works whose country of origin is a country availing itself of such a reservation, a protection which is equivalent to the protection granted by the latter country”).

<sup>16</sup> See *Berne Convention*, *supra* note 1, Appendix, art. V.

<sup>17</sup> See WIPO, *Berne Convention Contracting Parties and Notifications* <http://www.wipo.int/treaties/en/ip/berne/index.html> (last visited: Nov. 26, 2011) [hereinafter *Contracting Parties*] (showing that since the adoption of the 1971 Paris Act of the Berne Convention only a few countries have reserved the right to lapse protection for non-translated works: Slovenia and some successors of the former Socialist Federal Republic of Yugoslavia, namely, Bosnia and Herzegovina, Croatia, and Serbia).

In 1952, under UNESCO sponsorship, the Universal Copyright Convention was adopted to overcome the gap between the needs of developing countries and the protection promoted by the European nations.<sup>18</sup> This Convention provided a bridge to the higher standards of the Berne Convention by adopting some flexibilities, including exceptions, limitations, and a shorter term of protection.<sup>19</sup> The bridge, however, was one-way because it did not allow movement from the Berne Convention to the Universal Convention.<sup>20</sup> This solution was unsatisfactory because it did not encourage developing countries to join the Berne Convention standards and, at the same time, it did not prevent the few developing countries that were already parties from withdrawing from the Berne Convention. Therefore, working out a different solution became imperative.

A first attempt at agreeing on a mechanism to insert flexibilities into the Berne Convention was the 1967 Stockholm Act.<sup>21</sup> The flexibilities included in this protocol were based on the expiration of copyright protection for foreign works that were not translated into the relevant language of a given developing country.<sup>22</sup> The lack of ratification of the protocol, particularly by developed countries, quickly evidenced the Act's uselessness.<sup>23</sup> A second attempt concluded with the simultaneous adoption of almost identical modifications by the Universal Copyright Convention and their inclusion in the Appendix of the Berne Convention via the 1971 Paris Act.<sup>24</sup>

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<sup>18</sup> See Universal Copyright Convention, Appendix Declaration relating to Article XVII and Resolution concerning Article XI, Sep. 6, 1952, 68 Stat. 1030, 216 U.N.T.S. 132 [hereinafter UCC].

<sup>19</sup> See DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS 604-05, 751 (1999) (referring to the Universal Copyright Convention as a first step in the process of accessing to the Berne Convention); RICARDO ANTEQUERA, EL NUEVO DERECHO DE AUTOR EN VENEZUELA 572 (1994) (referring to the Universal Copyright Convention as a bridge to the Berne Convention).

<sup>20</sup> See *id.*; UCC *supra* note 18, Appendix Declaration on Article XVII.

<sup>21</sup> *Berne Convention*, *supra* note 1 (as revised at Stockholm, Jul. 14, 1967).

<sup>22</sup> For background, analysis and aftermaths of the Stockholm Act of the Berne Convention, see SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, 590-630 (1987); SAM RICKETSON AND JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 881-924 (2006); see generally CARLOS MOUCHET, EL DERECHO DE AUTOR INTERNACIONAL EN UNA ENCRUCIJADA (1969); Ndéné Ndiaye, *The Berne Convention and Developing Countries*, 11 COLUM.-VLA J.L. & ARTS 47 (1986-1987).

<sup>23</sup> See Peter DRAHOS and John BRAITHWAITE, *supra* note 10, at 77.

<sup>24</sup> See Eugen Ulmer, *The Revisions of the Copyright Conventions*, 2 INT'L REV. INTELL. PROP. AND COMPETITION L. 345, 347 (1971) (stating that "with isolated exceptions and apart from the arrangement of the two systems, the substantive provisions common to both Conventions (rules governing exception to the rights of translation and reproduction) were drafted in identical terms").

Ever since, both international instruments have provided developing countries with a mechanism of flexibilities that allows issuing compulsory licenses for translating and/or reproducing published copyrighted works, as explained below.<sup>25</sup>

The Appendix compulsory licensing system is specifically designed for developing countries. Countries interested in implementing the system need to qualify as developing countries according to the practices of the United Nations, and periodically notify the Director General of the World Intellectual Property Organization (WIPO).<sup>26</sup> In addition, even if the Appendix provisions were self-executing,<sup>27</sup> countries still need to incorporate several provisions into domestic law. For instance, rules determining the competent authority to issue licenses, application procedures, and safeguards for right holders, among others. Overall, to be fully operative, the mechanism adopted by the Appendix requires notifying the Director General of WIPO and implementing measures into domestic law.<sup>28</sup>

The competent authority of a given developing country may issue non-exclusive non-transferable compulsory licenses for<sup>29</sup> (a) translating a work into a language of general use in the country and publishing it in printed or other analogous form, for teaching, scholarship or research purposes;<sup>30</sup> and/or (b) reproducing a published work in printed or other analogous form for use in connection with systematic instructional activities.<sup>31</sup> For translation, there is a waiting period that varies depending on the language of the original work. For reproduction, the waiting period depends on whether the work is technical or not.

The Appendix adopts several safeguards in favor of right holders. In addition to the aforementioned requirements for obtaining a license for translating and/or reproducing a protected work, a potential licensee must be a national of the country that issues the license. Before obtaining a

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<sup>25</sup> *But see* Olian, *supra* note 10, at 109 (arguing that, in fact, even though the Convention introduced a regime for compulsory licensing in favor of developing countries, the Paris Act's ultimate goal was unifying the systems of the Berne Convention and the Universal Copyright Convention rather than designing a solution for developing countries).

<sup>26</sup> *Berne Convention*, *supra* note 1, Appendix, art. I (1) and (2).

<sup>27</sup> *See Berne Convention*, *supra* note 1, art. 36 (1) (setting forth that whether the provisions of Convention are self-executing is a determination of domestic law).

<sup>28</sup> *See PLAZAS*, *supra* note 8, at 166.

<sup>29</sup> Additionally, the Appendix set forth a compulsory license for broadcasting in developing countries on the underlying idea that those countries might take advantage of providing education through the broadcasting system. However, this licensing is not analyzed for purposes of this paper, which focuses on the translation and reproduction of printed material rather than on its broadcast.

<sup>30</sup> *See Berne Convention*, *supra* note 1, Appendix, art. II.

compulsory license, the potential licensee must find the right holder and try to obtain a voluntary license from her/him. After the compulsory license has been issued, works must indicate in each copy that they are available under the Appendix provisions. Additional regulations must ensure the quality of the translation, accuracy of the reproduction, and payment of a fair compensation consistent with royalty standards regarding freely negotiated licenses between persons in the two relevant countries. Except in some limited circumstances, exporting the work is prohibited. If the work becomes available at a reasonable price through the rights holder or if the country that issued the license no longer classifies as a developing country, the compulsory license must cease, but existing copies may be distributed until their stock is exhausted.<sup>32</sup>

The Appendix proscribes Convention Members from retaliating against countries that issue compulsory licenses.<sup>33</sup> This guarantee was unanimously agreed upon to prevent countries from resorting to the breach of their own obligations under the Convention in order to inhibit other countries from issuing these licenses.<sup>34</sup> Therefore, unlike the ten-year regime clause, right holders whose countries of origin have issued compulsory licenses should not fear lesser protection in other countries whose authors have been affected by the compulsory licenses issued by the right holder's own country.<sup>35</sup>

In sum, the Appendix of the Berne Convention intends to provide a solution for developing countries. The Appendix authorizes developing countries to issue non-exclusive and non-transferable licenses to translate and/or reproduce works published in printed or analogous forms for satisfying domestic educational and research needs. Issuing these licenses is subject to the condition that right holders receive fair compensation. In this sense, the Appendix enables developing countries to ensure a wider

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<sup>31</sup> See *Berne Convention*, *supra* note 1, Appendix, art. III.

<sup>32</sup> See *Berne Convention*, *supra* note 1, Appendix, arts. I (4), II (6), and III (6).

<sup>33</sup> See *Berne Convention*, *supra* note 1, Appendix, art. I(6)(a); see also UNESCO Conference for Revision of the Universal Copyright Convention, Paris, 1973, *Report of the General Rapporteur [sic] of the Universal Copyright Convention*, ¶¶ 58 – 59 [hereinafter *Revision of the Universal Copyright Convention 1973*] (explaining a similar implicit provision in relation with the compulsory licensing system granted by the Universal Copyright Convention).

<sup>34</sup> See Ulmer, *supra* note 24, at 356.

<sup>35</sup> See WIPO Diplomatic Conference for the Revision of the Berne Convention Paris, Jul. 5-24, 1971, *General Report of Paris Conference*, ¶ 28 [hereinafter *General Report of Paris Conference 1971*] (noting that this guarantee is without prejudice of the right of any country to apply the comparison of terms clause, also known as the rule of the shorter term).

dissemination of knowledge through textbooks, manuals, etc. for teaching, scholarship or research purposes.<sup>36</sup>

### III. LIMITATIONS OF THE APPENDIX MECHANISM

After some years in force, the Appendix apparently achieved its political goal of making the Convention more appealing to developing countries, which have adhered to it under the promise of benefiting from the provisions especially tailored for them. In 1970, the year before the adoption of the Appendix, there were only 58 signatory countries to the Convention. Of these, 21 were OECD members (all-OECD members except the United States), and 28 were European countries. Notably, after the adoption of the Appendix, as shown in figure 1, the number of parties has continuously increased through the years and expanded across the world. Today, the Convention has 164 Members.<sup>37</sup> This success may suggest the Appendix of the Berne Convention provided an effective solution for developing countries. Such a conclusion is inaccurate for the reasons explained below.

Developing countries have become parties to the Berne Convention because of the TRIPS Agreement. Until 1990, only 83 countries were parties to the Convention. The number has since then doubled due to the negotiations of what would become the World Trade Organization, which requires its members to join the Berne Convention. Therefore, a significant number of countries may have joined the Convention not because they agree with its standards but because they wish access markets for their agricultural goods.<sup>38</sup> Regardless of the reason for joining the Convention, when analyzing the real application and challenges of the Appendix, it becomes clear that the Appendix does not create a mechanism that developing countries can use to address the problems associated with their stage of development.

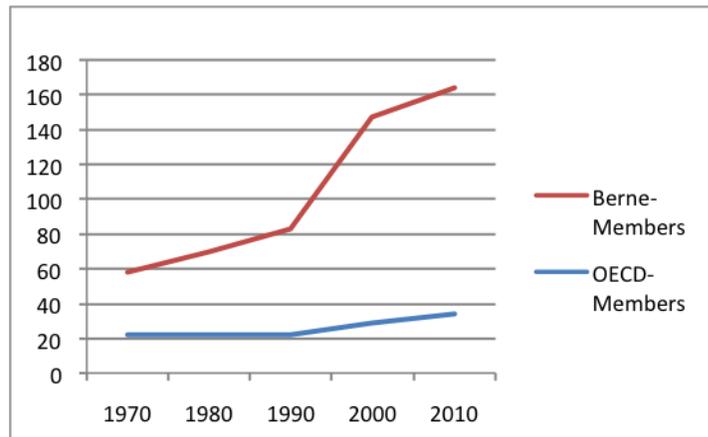
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<sup>36</sup> See *WIPO Guide*, *supra* note 14, at 153.

<sup>37</sup> *Contracting Parties*, *supra* note 17.

<sup>38</sup> See Peter Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371-79 (2006) (describing the four different narratives used to explain the origins of the TRIPS Agreement and why developing countries became parties).

Figure 1: Berne Convention and OECD Members, 1970 - 2010



SOURCE: WIPO and OECD websites, 2011.

The Appendix of the Berne Convention does not work because it does not meet the needs of developing countries. Instead, the Appendix comes across as an obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries. The following pages describe and analyze some objections to the provisions of the Appendix in order to inform a proposal for amending it –which is also discussed below.

#### A. *The Appendix Does Not Work for Developing Countries*

The assumption that developing countries already have a solution contrasts with the actual (non-)use of the Appendix and the relevant domestic copyright laws. First, only a handful of countries have notified the Director General of the WIPO of their interest in the Appendix provisions. Second, several countries that have introduced in their domestic law similar mechanisms to that of the Appendix have not notified the Director General of the WIPO of such adoption because of the mechanism's uselessness. Instead, countries have adopted idiosyncratic solutions into their domestic law to mitigate the limitations of the mechanism provided by the Berne Convention.

A small number of developing countries have availed themselves to use the flexibilities provided by the Appendix. As was mentioned before, countries must periodically notify the Director General of the WIPO which, in turn, allows them to issue compulsory licenses according to the Appendix.<sup>39</sup> In fact, as of 2011, the WIPO's online registry of notifications

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<sup>39</sup> Berne Convention, *supra* note 1, Appendix, art. I (1) and (2) (requiring the renew of self-availing by notification to the Director General of the WIPO each 10 years).

states that only 15 of the 164 parties of the Convention have availed themselves to enjoy the benefit of these compulsory licenses.<sup>40</sup> Most of these are from Asia and the Middle East,<sup>41</sup> plus one African and one Latin American country.<sup>42</sup> Most of these countries are newcomers to the international copyright forum that joined the Convention in the context of becoming parties to TRIPS and intended to benefit from the Appendix flexibilities.

Notifying WIPO, does not by itself make the compulsory licensing mechanism functional for a developing country. The mechanism must be properly implemented into domestic law. Several countries that have notified WIPO have yet to implement compulsory licensing for translation and/or reproduction into their domestic law. This is the case of Mongolia,<sup>43</sup> Oman,<sup>44</sup> Philippines,<sup>45</sup> Samoa,<sup>46</sup> Sri Lanka,<sup>47</sup> Uzbekistan,<sup>48</sup> and Yemen<sup>49</sup>

<sup>40</sup> See Notifications on the Berne Convention, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search\\_what=N&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=N&treaty_id=15) (last visited: May 15, 2011).

<sup>41</sup> VICTOR NABHAN, WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON LIMITATIONS AND EXCEPTIONS FOR COPYRIGHT FOR EDUCATIONAL PURPOSES IN THE ARAB COUNTRIES 56-57 (2009), available at [www.wipo.int/edocs/mdocs/copyright/en/scrr\\_19/scrr\\_19\\_6.doc](http://www.wipo.int/edocs/mdocs/copyright/en/scrr_19/scrr_19_6.doc) (identifying several countries that have implemented Appendix-like licensing systems into their domestic law, but clarifying that “scant or even non-existent” results, have rendered these systems “dead letter”).

<sup>42</sup> Availed countries are: Bangladesh, Cuba, Jordan, Mongolia, Oman, Philippines, Samoa, Sri Lanka, Sudan, Syria, Thailand, United Arabs Emirates, Uzbekistan, Vietnam, and Yemen.

<sup>43</sup> See Law of Mongolia on Copyright and Related Rights art 24, (Jan. 19, 1993) (setting for mere copyright exceptions and limitations, but any compulsory licensing for translation and reproduction).

<sup>44</sup> See Royal Decree No. 65/2008 Promulgating the Law on Copyright and Related Rights art. 20 of 17 May 2008 (Oman) (recognizing barely some extremely limited exceptions, essentially for reproductions, but any compulsory licensing).

<sup>45</sup> See Intellectual Property Code of the Philippines, Rep. Act No. 8293, §§ 176.1, 184-85, 237 (1997) (Phil), (setting for several exceptions, including one for public use by the government, the National Library, or by educational institutions; fair use exceptions; requiring governmental approval for using any work of the Government); See also, VICENTE AMADOR, INTELLECTUAL PROPERTY FUNDAMENTALS 398-99 (2007) (referring to the latter provision and expressing that that use “may” require payment of royalties); Jacinto D. Jimenez, *Intellectual Property Law in Philippines*, in 42 International Encyclopaedia of Laws 3, 43-48 (2007) (describing the wide system of limitations and exceptions in Philippine law, but no mention to a compulsory licensing system currently in force); RANHILIO CALLANGAN AQUINO, INTELLECTUAL PROPERTY LAW: COMMENTS AND ANNOTATIONS 109 (2006) (referring to § 239 that repealed the old copyright law, including a provision that authorized compulsory licensing for reprinting needed expensive foreign books). However, the Intellectual Property Code prescribes that Philippines shall avail itself of the special provisions regarding developing countries, including provisions for licenses grantable by competent authority under the Appendix.

<sup>46</sup> See *Copyright Act 1998* arts. 8 – 10, 1998 (Samoa) (providing some narrow exceptions for reproduction for education and research purposes, but no compulsory license); see also, Sue Farran, South Pacific Intellectual Property Law, 51 International

that barely have some copyright exceptions and limitations. Other countries that have notified WIPO, have implemented both exceptions and a compulsory licensing mechanism that differs significantly from the Appendix. For instance, the United Arab Emirates has a flexible compulsory licensing mechanism.<sup>50</sup> Sudan<sup>51</sup> and Syria<sup>52</sup> have a general compulsory licensing regime for using copyrighted works based on reasons of public interest. Cuba has a similar system that is royalty free;<sup>53</sup> Vietnam also has a similar system that does not mention payment.<sup>54</sup> Jordan has a public interest compulsory license that is limited to publication and republication, recognizes fair compensation,<sup>55</sup> and also a license system

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Encyclopaedia of Laws, Kluwer International, 1, 36 – 38 (2006) (discussing limitations and exceptions in the copyright law of South Pacific's countries, including Samoa, but omitting any mention to a Samoan compulsory licensing system).

<sup>47</sup> See Intellectual Property Act, No. 36 of 2003 (Sri Lanka); See also, D.M. KARUNARATNA, INTRODUCTION TO THE LAW OF COPYRIGHT AND RELATED RIGHTS IN SRI LANKA, 76 – 90 (2006) (analyzing limitations and exceptions, and fair use in Sri Lankan domestic law, but omitting any reference to a compulsory licensing system).

<sup>48</sup> See Law of the Republic of Uzbekistan on Copyright and Related Rights, art. 26, 2006 (reproducing an exception available in its previous copyright law that barely set forth an exception for purposes of research, criticism or information in the form of quotations from disclosed works in the original language or in translation).

<sup>49</sup> See Intellectual Property Law No. 19, 1994, art. 38 (Yemen) (setting for a compulsory license for public domain works, but any for translation).

<sup>50</sup> See Federal Law No. 7 of the Year 2002 Concerning Copyrights and Neighboring Rights (U.A.E.) art. 21 (setting forth a soft-regulated compulsory license for translation and/or reproduction of works).

<sup>51</sup> See Copyright and Neighboring Rights Protection Act 1996 (Sudan), §§ 14, 20(1) (setting forth several limited exceptions, essentially for reproduction, including one for translation for personal and private use and providing a compulsory license, according to which, in case of public interest, government may require right holder publication of a work, under sanction of order its publication with compensation)[hereinafter *Sudan Copyright Law*].

<sup>52</sup> See Law No. 12/2001 §§ 21, 37 of 27 Feb. 2001 (Copyright Law of Syria) (setting forth several exceptions that allow the reproduction of works in its source language or its translation, including some for educational and research purposes and adopting a compulsory license; in case of public interest, government may require right holder publication of a work, under sanction of order its publication with compensation).

<sup>53</sup> See Ley No. 14 del Derecho de Autor [Copyright Act], updated, art. 37, 1977 (Cuba) (setting forth a compulsory license without payment for public utility reasons).

<sup>54</sup> See Intellectual Property Law No. 50/2005/QH11, Nov. 29, 2005 (Viet.) arts. 7, 25, 42-43 (setting forth a compulsory license for using works based on reason of public interest, adopting an exception for reproduction, but not translation of works, remitting public domain to governmental regulation, and establishing works which copyright is hold by the state); see also, Decree No. 100/2006/ND-CP 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 (Sep. 21, 2006), art. 29 (Viet.) (clarifying that licenses and payments are required for state works, but not for public domain ones).

<sup>55</sup> See Law No. 22 of 1992 on the Protection of Copyright and its Amendments (Jordan), as amended by Amending Law No. 9 of 2005, art. 27.

similar to the Appendix mechanism.<sup>56</sup> The latter licensing system has been adopted by Bangladesh<sup>57</sup> and Thailand.<sup>58</sup> In sum, compulsory licensing in compliance with the Appendix has been implemented only in three of the countries that have notified WIPO: Jordan, Bangladesh, and Thailand.

The Appendix has not succeeded among the countries that have notified WIPO's General Director of their interest in using the mechanism. Only three of these fifteen developing countries have implemented the mechanism into domestic law. Additional research is needed to determine if those three countries are actually using the mechanism. It may be argued that developing countries have merely neglected renewing their notification to WIPO. The countries have actually implemented the mechanism into domestic law and are enjoying the benefits of the Appendix. Unfortunately, this is not the case. A review of the copyright laws of several developing countries in Africa and Latin America shows that they are not beneficiaries of the falsely generous Appendix provisions.

African countries do not use the Appendix mechanism.<sup>59</sup> Africa, as a continent, contributes 0.3% of the global book exports.<sup>60</sup> According to recent research on copyright regulation in eight African countries, only

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<sup>56</sup> See Law No. 22 of 1992 on the Protection of Copyright and its Amendments (Jordan), as amended by Amending Law No. 9 of 2005, art. 11 (setting forth a like-the-Appendix compulsory license for translating and/or publishing “*in a printed form or any other form*” to the Arabic language).

<sup>57</sup> See Copyright Act 2000 No. 28 of 2000 (as amended up to 2005) §§ 50-54 (Bangl.) (setting forth a compulsory license for using Bangladeshi works, adopting another compulsory license for Bangladeshi works by dead, unknown or his whereabouts is unknown to publish and translate them to any language and implementing the compulsory licensing system of the Appendix of the Berne Convention into domestic law); see also, MOHAMMAD MONIRUL AZAM, INTELLECTUAL PROPERTY, WTO, AND BANGLADESH, 197 – 201 (2008); and NAZMIN HOSSAIN AND SHARIFA AKTAR, INTELLECTUAL PROPERTY LAW 114-124 (2009).

<sup>58</sup> Copyright Act, B.E. 2537 (1994) (Thai.), §§ 54 – 55 (allowing government to issue compulsory licensing under requirements lightly more flexible than those of the Appendix of the Berne Convention); see also, Thailand, GLOBAL CONSUMERS NETWORK ON ACCESS TO KNOWLEDGE, BROADBAND, CONSUMER RIGHTS AND REPRESENTATION, <http://a2knetwork.org/reports2009/thailand> (last visited April 6, 2012) (reporting that these licenses are “very difficult to obtain”).

<sup>59</sup> See JOSEPH FOMETEU, WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON LIMITATIONS AND EXCEPTIONS FOR COPYRIGHT AND RELATED RIGHTS FOR TEACHING IN AFRICA 42 (2009), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130241](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241) (reporting some African countries that have adopted Appendix-like compulsory licenses, in spite of which not even one compulsory license has been issued).

<sup>60</sup> See CENTRO REGIONAL PARA EL FOMENTO DEL LIBRO EN AMÉRICA LATINA, EL CARIBE, ESPAÑA Y PORTUGAL (CERLALC), EL ESPACIO IBEROAMERICANO DEL LIBRO 2010, 100 (2010) [hereinafter *Fomento del Libro America Latina*].

Uganda has implemented the Appendix compulsory licensing system.<sup>61</sup> In spite of not even being a party to the Berne Convention, Uganda has implemented the Appendix provisions into its domestic law in addition to other copyright limitations.<sup>62</sup> Five other countries have barely implemented standard copyright limitations and exceptions: Ghana, Kenya, Mozambique, Morocco, and Senegal.<sup>63</sup> Meanwhile, as explained earlier, Egypt and South Africa have not implemented the Appendix mechanism. Rather, both have implemented an idiosyncratic solution.<sup>64</sup> Sudan is another country that adopted a peculiar solution that allows the government to order publishing a work based on public interest subject to royalty payments to the right holders.<sup>65</sup>

Developing Latin-American countries do not use the Appendix mechanism either.<sup>66</sup> According to the United Nations, in 2011, 33 of 35 countries of the Americas, all but the United States and Canada, qualify as developing countries and, accordingly, potential users of the Appendix mechanism.<sup>67</sup> But, according to WIPO's register, only Cuba currently uses the mechanism.<sup>68</sup> A brief collection of data for this paper shows, however, that six other countries in the region have implemented compulsory licenses for translation into their domestic laws despite not having notified WIPO. Some countries have adopted insubstantial provisions into their domestic laws that are ambiguous and insufficient to become operable. This is the

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<sup>61</sup> ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT 327 (Armstrong et al, eds., 2010).

<sup>62</sup> See Copyright and Neighboring Rights Act (2006) (Uganda), §§ 17 and 18 (setting forth a non-exclusive and non-transferable compulsory license for translation and/or reproduction of copyrighted works from foreign languages to English, Swahili or any Ugandan language), *see also*, Dick Kawooya, Ronald Kakungulu and Jeroline Akubu, Uganda, in ARMSTRONG ET AL., *supra* note 61, at 283, 288.

<sup>63</sup> See ACCESS TO KNOWLEDGE IN AFRICA, *supra* note 61, at 326-327.

<sup>64</sup> See, *infra* notes 112 – 116 and accompanying text (describing the Egyptian mechanisms); *see also infra* notes 94 – 97 and accompanying text (describing the South African provisions).

<sup>65</sup> See, *Sudan Copyright Law*, *supra* note 51 and accompanying text.

<sup>66</sup> See PLAZAS, *supra* note 8, at 211 (stating that, by the 80's, the Appendix of the Berne Convention had not have any application within Latin America and the Caribbean).

<sup>67</sup> U.N. Statistics Div., Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings (Apr. 26, 2011), <http://unstats.un.org/unsd/methods/m49/m49regin.htm#ftnc> (stating that “[t]here is no established convention for the designation of “developed” and “developing” countries or areas in the United Nations system”, but, in common practice, Canada and the United States are considered “developed”).

<sup>68</sup> Declaration by the Republic of Cuba Relating to Articles II and III of the Appendix to the Paris Act (1971), (Jun. 28, 2004), *available at* [http://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_238.html](http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_238.html)

case of El Salvador,<sup>69</sup> Honduras,<sup>70</sup> and Panama.<sup>71</sup> There is no evidence that these countries have issued any compulsory licenses. The laws of Colombia,<sup>72</sup> the Dominican Republic,<sup>73</sup> and Mexico,<sup>74</sup> in contrast, are better drafted and provide a sufficient legal regime for issuing compulsory licensing. There is no evidence, however, that these countries have issued any compulsory licenses either.

In spite of having implementing laws, neither Colombia nor Mexico uses the Appendix mechanism. The Colombian competent authority has failed to notify WIPO and argues that the mechanism provided by its domestic copyright law is no longer in force because of its own negligence.<sup>75</sup> As a

<sup>69</sup> See Decreto No. 604 Ley de Fomento y Protección de la Propiedad Intelectual [Law on the Promotion and Protection of Intellectual Property], art. 77, 1993, (El Sal.) (setting forth that the competent judge shall grant compulsory license for translation and reproduction set forth in international conventions ratified by the country, previous compliance with the requirements stated by them).

<sup>70</sup> See Decreto 4-99-E, 2000, Ley del Derecho de Autor y de los Derechos Conexos [Copyright and Neighboring Rights Act], art. 122, 2006 (Hond.) (providing that government, through the Administrative Office for Copyright and Neighbor Rights, could grant non-exclusive license for the reproduction and translation of foreign works according to the provisions of articles 2 and 3 of the Appendix of the Berne Convention).

<sup>71</sup> See Ley sobre el Derecho de Autor y Derechos Conexos [Copyright and Neighboring Rights Act], 1994, art. 84 (Pan.) (allowing the authority designed by decree to grant non-exclusive license to translate and reproduce foreign works for the purpose and in compliance with the requirements set forth by the Universal Copyright Convention and other international covenants ratified by Panama).

<sup>72</sup> See Ley sobre Derechos de Autor [Copyright Act], feb. 19, 1982, DIARIO OFICIAL [D.O] (Colom.), arts. 45 – 71 (setting forth a heavily regulated system of compulsory licenses for reproduction and translation of foreign works into Spanish). See also, MINISTERIO DE GOBIERNO (DE COLOMBIA), LOS DERECHOS DE AUTOR EN COLOMBIA (1982); and ERNESTO RENGIFO GARCÍA, PROPIEDAD INTELECTUAL: EL MODERNO DERECHO DE AUTOR 178 (1996).

<sup>73</sup> See L. No. 65-00 de Derecho de Autor [Copyright Act], agosto. 24, 2000, Diario Oficial (Dom. Rep.); and, Decreto N° 362-01 que establece el reglamento de aplicación de la Ley N° 65-00 sobre Derecho de Autor [Decree on Implementing Regulations of the Copyright Act], art. 24, mar. 14, 2001 (Dom. Rep.) (setting forth a regime for non-exclusive and non-transferable compulsory licenses to translate and reproduce foreign works for the purposes and in compliance with the requirements of such licenses, according to the international treaties in which the Dominican Republic is a party).

<sup>74</sup> See Ley Federal del Derecho de Autor [Federal Law on Copyright], Diario Oficial de la Federación [DO], 24 dic. de 1996, as consolidated jul. 2003 (Mex.), art. 147; and, Reglamento de la Ley Federal del Derecho de Autor [Regulation of the Federal Law of Copyright], Diario Oficial de la Federación [DO], 22 de mayo de 1998, as amended Sep. 14, 2005 (Mex.), arts. 38 – 43. See also, GABINO CASTREJÓN GARCÍA, TRATADO TEÓRICO-PRÁCTICO DE LOS DERECHOS DE AUTOR Y DE LA PROPIEDAD INTELECTUAL 102-105, (2001); and, FERNANDO SERRANO MIGALLÓN, NUEVA LEY FEDERAL DEL DERECHO DE AUTOR 163 (1998) (referring that even when the copyright act adopts a compulsory licensing bases on grounds of public interest, its regulation complies with international law).

<sup>75</sup> See DIRECCIÓN NACIONAL DE DERECHO DE AUTOR, mayo 21, 2010, Legal Opinion 1-2010-7340 (Colom.) (arguing that provisions of the copyright law on compulsory licenses

result, no compulsory license has ever been issued.<sup>76</sup> In the case of Mexico, whose last notification to WIPO took place in 1984, the North American Free Trade Agreement (NAFTA) set forth an additional requirement for issuing compulsory licenses. Under NAFTA, compulsory licenses shall not be issued if translation and reproduction needs can be met by voluntary actions of rights holder.<sup>77</sup> Nevertheless, the non-use of the mechanism has not been a serious problem because despite of its longstanding implementation into domestic law,<sup>78</sup> the mechanism was never used.<sup>79</sup> Although the reason for this lack of use is unclear, authorities suspect that costly paperwork and the limited scope of the licensing system undermined the mechanism's potential usefulness.<sup>80</sup>

Scholars tend to agree that the Appendix mechanism neither meets the expectations of developing countries, nor its own objectives. The mechanism has not produced any real improvement in access to copyrighted content,<sup>81</sup> which is a pervasive problem that persists in developing countries.<sup>82</sup> Among the main criticisms of the Appendix are its bureaucratic rules, its limited scope, and its excessive safeguards in favor of right

are inapplicable and unnecessary). *But see* Bassem AWAD, Moatasem EL-GHERIANI and Perihan ABOU ZEID, *Egypt*, in ARMSTRONG ET AL., *supra* note 61, at 49 (supporting, in an analogous case, the efficacy of the Egyptian mechanism of compulsory licensing, in spite of its compliance with omission of international commitments). The legal reasoning of the captured Colombian copyright authority is improper, because it subordinates efficacy of legislative measures to diligence of administrative officers in comply with international requirements; the compulsory license provided into domestic law is still valid, without prejudice of the possible international responsibility that the neglected omission of administrative authority may create for the country. In this case, this is prevented by the fact that the same authority omitted the self-availing requirement, supports the inapplicability of the compulsory license, and, plus, is the one in charge of issuing those license, in case.

<sup>76</sup> See RENGIFO GARCÍA, *supra* note 72, at 178 (stating that the provisions that implement the Appendix of the Berne Convention into the Colombian domestic law lack any actual application).

<sup>77</sup> See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1705.6, Dec. 17, 1992, 32 I.L.M. 289 (1993) (providing that state parties cannot issue these compulsory licenses when its need “could be met by the right holder's voluntary actions but for obstacles created by the party's measures”).

<sup>78</sup> See SERRANO MIGALLÓN, *supra* note 74, at 161 (stating that the compulsory licensing mechanism based on public interest has been available “since the first codification of the independent Mexico”).

<sup>79</sup> Telephone Interview with Marco A. Morales Montes, Legal Director, Instituto Nacional del Derecho de Autor (Mexico) (Apr. 4, 2011).

<sup>80</sup> *Id.*

<sup>81</sup> See DRAHOS & BRAITHWAITE, *supra* note 10, at 77.

<sup>82</sup> See Margaret Chon, *Copyright and capability for education: an approach 'from below'*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS 218, 218-49 (Tzen Wong and Graham Dutfield, eds., 2011), (referring the severe shortage of textbook in developing countries and arguing in favor of reforming the compulsory licensing system provided by the Appendix of the Berne Convention).

holders.<sup>83</sup> Instead of being an instrument for development, the Appendix has reduced the ability of developing countries to design public policies to enable a wide dissemination of knowledge. As a result, countries have implemented idiosyncratic flexibilities into their domestic law.

### *B. Developing Countries Are Doing It Their Own Way*

Countries have adopted a wide range of alternative solutions into their domestic law in order to mitigate the limitations and uselessness of the Appendix mechanism. Some of these solutions reach beyond the Convention's foresight. Some are based on copyright exceptions that may or may not comply with the *Berne three-step test*. In other cases, countries have adopted a mechanism of compulsory licensing much broader or more flexible than the Appendix. For instance, some countries allow licenses to prevent monopolies for the public interest. Several countries have a pool of mechanisms to allow access to copyrighted works for purposes of development. Some of these include copyright exceptions, a diversity of compulsory licenses, and even expropriation. A few countries have implemented a more radical measure whereby protected works that have not been translated enter into the public domain, legitimating the use of works by others.

Copyright exceptions and limitations are the main strategy developing countries seem to have adopted to meet their needs. In Chile, for example, a recent amendment to the copyright act includes three specific exceptions for translation:<sup>84</sup> personal use,<sup>85</sup> educational purposes,<sup>86</sup> and library patrons.<sup>87</sup> However, the requirements of the *Berne three-step test* forces exceptions provided by countries like Chile to remain too narrow to meet the intended purposes of the Appendix provisions.<sup>88</sup> As a result, those

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<sup>83</sup> See generally Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503 (2000) (reviewing critically the main provisions of the Appendix).

<sup>84</sup> See Law No.20.435, mayo 4, 2010, Diario Oficial [D.O.], (Chile); see also Daniel Alvarez, *The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law*, Policy Brief No. 12, International Centre for Trade and Sustainable Development, (2011) (briefly describing the whole legal reform).

<sup>85</sup> See *id.*, art. 71 R (authorizing the translation of work in foreign languages for personal use).

<sup>86</sup> See *id.*, art. 71 M (authorizing non-for profit translation of small fragments of works for including them into text books).

<sup>87</sup> See *id.*, art. 71 L (authorizing non-for profit libraries and archives to translate works into Spanish for researching purposes of their patrons, including its reproduction in quotations).

<sup>88</sup> In the case of Chile, during the legislative discussion of the amendment to the intellectual property act, a proposal was introduced to provide a compulsory licensing

exceptions satisfy highly limited purposes as they are usually subject to several conditions. For instance, there may be limitations on the quantity and quality of use based on the type of work and/or user; restrictions based on where work may be located and the circumstances in which the works may be used. As a result, using copyright exceptions and limitations alone is very limiting for developing countries in their quest for satisfying their development needs.

Some countries have adopted broader copyright exceptions and limitations that allow the translation and publication from one language to another. Whether this type of provisions comply with the Berne three-step test is a matter of debate. For example, China recently adopted a new copyright law that sets forth several provisions regarding translation.<sup>89</sup> One exception allows the translation and reproduction of brief excerpts for research and teaching.<sup>90</sup> A compulsory license allows using a work in textbooks.<sup>91</sup> Additionally, another exception allows the translations of Chinese authors' works from Han into the languages of minorities within the country.<sup>92</sup> The latter exception may infringe on the three-step test because it allows the translation of works without compensation to right holders. But the application of this exception is severely limited by the nationality of the author, the source and the target languages. Although these circumstances mitigate international conflicts that may arise from

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system similar to the Appendix, but it did not prosper because its adoption would require compliance with legal procedures related to the legislative process.

<sup>89</sup> Copyright Law of the People's Republic of China] as amended on Feb. 26, 2010 (People's Republic of China); *see also*, HONG XUE, INTELLECTUAL PROPERTY LAW IN CHINA 30 (2010).

<sup>90</sup> *See* [Copyright Law of the People's Republic of China], as amended on Feb. 26, 2010 (People's Republic of China), art. 22 (6) (authorizing translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, if works are not published for distribution); *see also*, Decree No. 468 Regulations on Protection of the Right of Communication through Information Network (adopted by the State Council, May 10, 2006)(China) art. 6.3 (making the exception available also for using a work on digital environments).

<sup>91</sup> *See* Copyright Law of the People's Republic of China, art. 23 as amended on Feb. 26, 2010 (People's Republic of China)(authorizing compilation of passages from a work and short written works, among others, for textbooks for compulsory and national education, under payment and excepting works whose authors have rejected in advance that use); *see also*, Decree No. 468 Regulations on Protection of the Right of Communication through Information Network art. 8 (adopted by the State Council, May 10, 2006)(China) (providing similar authorization for e-learning).

<sup>92</sup> *See* Copyright Law of the People's Republic of China, as amended on Feb. 26, 2010 art. 22 (11) (People's Republic of China); *see also*, Decree No. 468 Regulations on Protection of the Right of Communication through Information Network (adopted by the State Council, May 10, 2006) art. 6.5 (China) (providing analogous exception for digital environments).

China's violation of the three-step test, they also, prevent the exception from achieving the Appendix goals with respect to foreign authors and languages.

In addition to exceptions, some countries have adopted compulsory licensing schemes that are more permissive than the Appendix. As mentioned above, this is the case of the United Arab Emirates.<sup>93</sup> This also seems to be the case of South Africa.<sup>94</sup> In its copyright law, South Africa expressly included the translation of works when it authorizes any other exception, instead of adopting a case-by-case exception for translation.<sup>95</sup> The law also confers competence to the South African Copyright Tribunal to issue a compulsory license when a right holder has unreasonably refused to do so.<sup>96</sup> Additionally, the law allows the government to adopt regulations on circulation, presentation or exhibition of works, which scholars have argued would allow possible "non-voluntary licence schemes".<sup>97</sup>

Some countries have adopted a general compulsory license regime into their domestic laws that allows compulsory licenses on public interest grounds. This is the case of Sudan,<sup>98</sup> Syria,<sup>99</sup> and Bolivia. The latter, for instance, has adopted copyright exceptions and limitations in its domestic and Andean Community laws.<sup>100</sup> Although Bolivia has not implemented the Appendix mechanism, its copyright act authorizes compulsory licenses for

<sup>93</sup> See Federal Law No. 7 of the Year 2002 Concerning Copyrights and Neighboring Rights art. 21 (United Arab Emirates) (setting for a soft-regulated compulsory license for translation and/or reproduction of works).

<sup>94</sup> See Copyright Act 98 of 1978, as amended in 2002 (S. Afr.); see also, Tobias Schonwetter, Caroline Ncube and Pria Chetty, *South Africa*, in ARMSTRONG ET AL., *supra* note 61, at 243.

<sup>95</sup> Copyright Act 98 of 1978, as amended in 2002, § 12 (11) (S. Afr.) (adopting an exception for translation that embraces several other exceptions also set forth by law).

<sup>96</sup> Copyright Act 98 of 1978, as amended in 2002, §§ 29 – 36 (S. Afr.).

<sup>97</sup> Copyright Act 98 of 1978, as amended in 2002, § 45 (S. Afr.); see, Tobias Schonwetter, Caroline Ncube and Pria Chetty, *South Africa*, in ARMSTRONG ET AL., *supra* note 61, at 243.

<sup>98</sup> See Copyright and Neighboring Rights Protection Act 1996 (Sudan), § 14, 20(1) (setting forth several limited exceptions, essentially for reproduction, including one for translation for personal and private use and providing a compulsory license, according to which, in case of public interest, government may require right holder publication of a work, under sanction of order its publication with compensation).

<sup>99</sup> See Copyright Law of Syria, Law No. 12/2001 §§ 21, 37 of 27 Feb. 2001 (setting forth several exceptions that allow the reproduction of works in its source language or its translation, including some for educational and research purposes and adopting a compulsory license; in case of public interest, government may require right holder publication of a work, under sanction of order its publication with compensation).

<sup>100</sup> See Law No. 1322 art. 24, Apr. 27, 1992, *Gaceta Oficial* (Bolivia) (adopting copyright exceptions and limitation in domestic law); see also Andean Community Decision 351 Common Regime on Copyright and Neighboring Rights arts. 21, 22, 24-27, Dec. 21, 1993, *Official Gazette of the Andean Community* No.145 (adopting several mandatory copyright exceptions and limitations for Andean Community members).

the use of a copyrighted work on public interest grounds subject to a royalty payment.<sup>101</sup> There is no evidence, however, that the government has issued any of these licenses. Moreover, it is unclear the extent to which that provision of Bolivian domestic law prevails over the common copyright regime of the Andean Community,<sup>102</sup> to which Bolivia is party.<sup>103</sup>

Adopting the Appendix mechanism and a general compulsory license based on public interest grounds is a common strategy among some countries. For example, the Dominican Republic<sup>104</sup> and Jordan.<sup>105</sup> The copyright law of the Dominican Republic sets forth not only copyright exceptions and compulsory licensing inspired by the Appendix; it also establishes a general compulsory license.<sup>106</sup> According to Jordan's copyright law, the government may issue a compulsory license for using a work on public interest grounds and subject to a royalty payment. It is unclear, however, to what extent the overlap between public interest compulsory licenses and the Appendix mechanism deprives the latter of significance. If a country offers both compulsory licenses, there is no reason to use the Appendix provision because the public interest option achieves similar results with less paperwork and fewer requirements.

Several countries have gone even further to meet their development needs, by implementing a public interest "compulsory license" with no compensation for affected right holders. Cuba, for example, has notified WIPO to use the Appendix mechanism. Instead of implementing it, however, Cuba has adopted a real copyright exception with the same

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<sup>101</sup> See Law No. 1322 art. 25, Apr. 27, 1992, Gaceta Oficial (Bolivia) (authorizing the government to decree the use for public need of economic rights on a work of great cultural value for the country, or social or public interest, under previous fair compensation to its right holder).

<sup>102</sup> Common Regime on Copyright and Neighboring Rights, Decision No. 351, Andean Community (Dec. 17, 1993), 145 Official Gazette of the Andean Community, art. 32 (prescribing that, in any case, compulsory licenses set forth in domestic law of Andean Community members can exceed limitations allowed by the Berne Convention or the Universal Copyright Convention).

<sup>103</sup> Acuerdo de Cartagena [Cartagena Agreement], May 28, 1969, 8 I.L.M. 910 (creating the Andean Community, which currently is formed by Bolivia, Colombia, Ecuador, and Peru).

<sup>104</sup> See *supra* note 73 and accompanying text.

<sup>105</sup> See *supra* notes 55 and 56, and accompanying text.

<sup>106</sup> See L. No. 65-00 de Derecho de Autor [Copyright Act], art. 48, agosto 24, 2000, Diario Oficial (Dom. Rep.) (authorizing the government to decree the use for public need of economic rights on a work of great cultural, scientific, or educational value for the country, or social or public interest, under previous fair compensation to its right holder); see also Decreto N° 362-01 que establece el reglamento de aplicación de la Ley N° 65-00 sobre Derecho de Autor [Decree on Implementing Regulations of the Copyright Act], marzo 14, 2001 (Dom. Rep.), arts. 25 – 28 (regulating the requirements and procedures for issuing a public interest compulsory license).

purposes and safeguards of the Appendix mechanism, except for remuneration of right holders.<sup>107</sup> On the one hand, Cuban scholars and experts assure that the mechanism has been used primarily to overcome the U.S. embargo and has allowed an important number of translations, particularly in the fields of medicine and sciences.<sup>108</sup> On the other hand, critics of the Cuban solution have questioned its compliance with international standards.<sup>109</sup> An analogous mechanism is available in Vietnam's copyright law. There, the government can adopt restrictions, on exclusive rights, including compulsory licensing, without mention of any compensation.<sup>110</sup> Curiously, both Cuba and Vietnam have notified WIPO in order to use the Appendix mechanism, which raises concerns about the proper understanding that those countries have about the Appendix mechanism. In other words, those countries that have implemented the Appendix mechanism into their domestic laws hardly comply with any of its internationally sanctioned standards, procedures, and requirements.

Some countries have adopted the extinction of copyright protection of works that are not translated into domestic languages as another measure to meet their development needs. For instance, Egypt and Kuwait have adopted this mechanism.<sup>111</sup> In the Egyptian case, the law has set forth a compulsory licensing system that follows the Appendix philosophy in a

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<sup>107</sup> See, *supra* note 53 and accompanying text.

<sup>108</sup> Interview with Lillian Alvarez, Scholar and Legal Adviser on Copyright, (Cuba) (Jun. 28, 2010); see also, Julio Fernández Bulté, *Preface* to Lillian Alvarez, *El Derecho de Autor?: El Debate de Hoy* vii-xvi (2006) (recalling the decision of the Cuban government to use compulsory licenses for overcoming the book shortage created by the American blockade to the island).

<sup>109</sup> See Caridad del Carmen Valdés Díaz, *La Facultad de Reproducción*, in SELECCIÓN DE LECTURAS DE DERECHO DE AUTOR 65, 105 (Marta Moreno Cruz et al., 2000) (arguing that this exception exceeds the standards generally admitted on copyright and it is in disharmony with the Berne Convention, and reporting the challenge of the WIPO to that provision).

<sup>110</sup> See Intellectual Property Law No. 50/2005/QH11, Nov. 29, 2005 (Viet.), art. 7.3 (setting forth that government may prohibit or restrict exercise the exercise of rights or compel its licensing for guaranteeing “achievement of defense, security, people’s life-related objectives and other interests of the State and society”).

<sup>111</sup> See Law No. 64 of 1999 concerning Intellectual Property Rights, Dec. 29, 1999 (Kuwait), arts. 14, 16.1-2 (setting forth a compulsory license for the publication and republication of works by Kuwaiti authorship, providing copyright lapsing if translation into Arabic is not made available within five years of the date of first publication, and adopting a compulsory license for translating works before its possible copyright lapsing).

more simplified way.<sup>112</sup> The law has also established that copyright protection of works not translated into Arabic lapses after three years of the date of first publication.<sup>113</sup> If this is the case, the work enters into the public domain. At this point, interested parties can pay a fee for a license that allows the commercial and professional exploitation of the work.<sup>114</sup> Therefore, in theory, a compulsory license similar to the Appendix may be requested for translating works within three years of their publication; after that period, a public-domain license may be requested for translating works that have not been timely translated into Arabic.<sup>115</sup> Some scholars have raised a concern about this regulation's consistency with international law; however, the efficacy of the mechanism also has been contested, since it is almost unknown among domestic publishers and, in addition, the main public initiatives that translate works into Arabic do not rely on compulsory but voluntary licensing.<sup>116</sup>

The significant number of developing countries that have adopted idiosyncratic legal mechanisms for granting broader access to copyrighted works also suggests the inefficacy of the Appendix. This is not a desirable outcome for at least three reasons. First, it is unclear whether any of these idiosyncratic solutions is in compliance with international copyright instruments. This situation creates a risk of conflict before the WTO dispute settlement system. Second, precisely because of the risk of international

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<sup>112</sup> Law on the Protection of Intellectual Property Rights 82 of 2002, Official Gazette, Jun. 2, 2002 (Egypt), art. 170 (adopting a brief regulation for like-the-Appendix compulsory licensing) However, Egypt has not renewed its own self-availed notice to the WIPO Secretariat, the last of them was done in 1990 and was valid up to 1994. *See also*, Prime Minister Decree No. 497 of 2005 on Issuing the Executive Regulations for Book III Of Law No. (82) of 2002 on The Protection of Intellectual Property Rights (complementing the law on compulsory licensing for translation and reproduction of works).

<sup>113</sup> *See* Law No. 82 of 2002 (Protection of Intellectual Property Rights, Copyrights and Neighbouring Rights), *Official Gazette*, Jun. 2, 2002, art. 148, (Egypt) (providing "copyright... shall lapse with regards to the translation of that work into the Arabic language, unless the author or the translator himself exercises this right directly or through a third party within three years of the date of first publication of the original or translated work"); *see* Ahmed Abdel Latif, *Egypt's Role in the A2K Movement: An Analysis of Positions and Policies*, in, ACCESS TO KNOWLEDGE IN EGYPT: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 16, 39 (Nagla Rizk & Lea Shaver, eds. 2012).

<sup>114</sup> *See* Law No. 82 of 2002 (Protection of Intellectual Property Rights, Copyrights and Neighbouring Rights), *Official Gazette*, Jun. 2, 2002, art. 183 (Egypt) (requiring governmental license for commercial or professional exploitation of work, against payment of fees).

<sup>115</sup> *See* Hossam A. El Saghir, *Intellectual Property Law in Egypt*, in 53 International Encyclopaedia of Laws 3, 45-46, 65 (2009).

<sup>116</sup> *See* Bassem Awad, Moatasem El-Gheriani and Perihan Abou Zeid, *Egypt*, in ARMSTRONG ET AL., *supra* note 61, at 22, 49.

conflict, domestic authorities are discouraged from actually implementing those mechanisms. It appears as if both authorities and potential users are reluctant to take advantage of these mechanisms. Third, *sui generis* features of domestic solutions impair the emergence of uniform international standards and practices of both the publishing and educational sectors. More significantly, the variety of domestic provisions defeats the purpose of providing an effective solution for developing countries to ensure wider dissemination of knowledge.

In sum, the Appendix mechanism seems to provide a partial solution to less than a handful of developing countries that have notified WIPO's General Director of their intention to use of the mechanism. Significantly, no evidence of actual use has been found. Several other countries have not notified WIPO of their adoption of the mechanism because it has proven to be useless, while others have adopted idiosyncratic solutions into their domestic law. In general, data suggest that the Appendix of the Berne Convention has failed to meet the needs of developing countries.

### *C. The Appendix Does Not Provide a Solution for Minorities*

It is unclear whether the provisions of the Appendix of the Berne Convention apply to the languages of cultural minorities in developing countries. The Appendix authorizes compulsory licenses to translate works to languages in general use in the country that issues a license. Although the Appendix encompasses more than a country's official languages, it does not define what is a language in general use.<sup>117</sup> For example, between 2005 and 2009, according to the ISBN register, only 323 books were published in 14 native languages in all of Ibero-America (*i.e.*, Latin America, Portugal, and Spain).<sup>118</sup> In contrast, there are 64 native languages and several dialects in Colombia alone.<sup>119</sup> Clearly, the registered amount of publications cannot satisfy the needs of native communities. A new instrument that provides an adequate mechanism to meet the needs of developing countries must be expressly more flexible regarding the languages to which a work can be

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<sup>117</sup> See WIPO Diplomatic Conference for the Revision of the Berne Convention Paris, Jul. 5-24, 1971, *General Report of Paris Conference*, ¶ 34 (providing an authoritative interpretation of this requirement, by stating that a language could be one of general use in a given geographic region of the country, an ethnic group, and even a language generally use for particular purposes).

<sup>118</sup> See *Fomento del Libro America Latina*, *supra* note 60, at 62 (stating that 323 books were published between 2005 and 2009 in a native language, of them: 82,4% in Guarani; 4,3% in Quechua; and, 4,0% in Aymara).

<sup>119</sup> See *id.*, at 76.

translated. In particular, the new instrument should allow the translation of works into languages that are not in general use.

Access to copyrighted works for language minorities is an urgent issue in both developing and developed countries.<sup>120</sup> In Spain, for example, along with “Castilian” (the officially adopted regional language of Castile commonly known as Spanish), there are several other regional languages in use. Aranese, Basque, Catalan, Galician, and Valencian, among others were all banned during the long Franco dictatorship.<sup>121</sup> The communities that currently speak those languages cannot take advantage of the Appendix, because they are located in a developed country.<sup>122</sup> This is also an issue for the Navajo and Hawaiian populations of the United States, the Ladin and Slovene communities of Italy, the Inuit in Canada, and so on. Linguistic minorities in developed countries face serious challenges that mirror those faced by similar minorities in developing countries. This situation illustrates that the Appendix wrongly assumes that (1) development is homogeneous within the borders of a given country and (2) there are no special needs to be met in developed countries.

When copyright blocks the translation of works into a minority language, its native speakers are forced to adopt a more generally used language, possibly condemning the minority language to extinction.<sup>123</sup> This situation raises concerns regarding minorities’ right to identity, and protection of their cultural diversity. The Appendix has provided developing countries with flexibilities that facilitate their population’s access to works to improve social, economic, and cultural conditions. However, the Appendix does not provide analogous flexibilities for disadvantages communities within developed countries. If these communities face similar challenges, the Appendix should not be an obstacle for adopting an analogous solution.

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<sup>120</sup> See *Revision of the Universal Copyright Convention 1973*, *supra* note 33, ¶ 22 (reporting that Canada expressed similar concerns about the relativity of the concept of developed and developing countries).

<sup>121</sup> See JOSEP BENET, CATALUNYA SOTA EL RÈGIM FRANQUISTA: INFORME SOBRE LA PERSECUCIÓ DE LA LLENGUA I LA CULTURA DE CATALUNYA PEL RÈGIM DEL GENERAL FRANCO (1978); and, JOSEP BENET, L’ INTENT FRANQUISTA DE GENOCIDI CULTURAL CONTRA CATALUNYA (1995) (referring to the proscription of the Catalan language from the public space in favor of the Castilian during Franco’s dictatorship, and its effects on the language, the culture, and the identity of Catalan people).

<sup>122</sup> In 2009, 78.32% of the publications done in Spain were in Castilian; 9.55% in Catalan; 1.92% in Galician; 1.85% in Basque; 1.27% in Valencian; and 0.1% in other Spanish languages; see *Fomento del Libro America Latina*, *supra* note 60, at 60-61.

<sup>123</sup> See Peter Austin and Andrew Simpson, *Introduction*, in *Endangered Languages 5* (Peter Austin and Andrew Simpson eds., 2007) (reporting several studies that conservatively foresee at least the lost of 50% of language diversity in next century, a process that affects particularly Australia and the Americas).

Otherwise, the Appendix creates disadvantages for the very development of those communities. In other terms, the Appendix must adopt a comprehensive approach to development, not limited to developing countries, but to any community that requires copyright flexibility for meeting the needs of its members, being part of a developing or a developed country.

According to the recently adopted Convention on Cultural Diversity,<sup>124</sup> governments must protect and promote cultural diversity, including linguistic diversity as an essential component of the former. This convention does not have established any copyright requirements. Instead, the convention recognizes the importance of intellectual property to encourage the participation in cultural creativity.<sup>125</sup> Copyrights are essentially “private rights”,<sup>126</sup> while cultural diversity is humankind’s common heritage to be cherished and preserved for the benefit of all.<sup>127</sup> Therefore, if copyrights and cultural diversity were to come into conflict, cultural diversity arguably prevails over copyright.

Any new attempts to infuse the international copyright regime with flexibilities must be consistent with governmental obligations to protect and promote cultural diversity. Consequently, the Appendix must reconsider whether language access is only an issue for developing countries or a broader issue that also involves developed countries. This may become an urgent matter in coming years as a globalized environment accelerates the loss of cultural and linguistic diversity.

#### *D. The Appendix’s Application to Digital Works Is Unclear*

At the time the Appendix was adopted, the Internet and digitalization of content were not a reality, at least not in its current proportions. Today, by contrast, according to the International Telecommunication Union, there are

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<sup>124</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, Records of the General Conference 83 [hereinafter *Convention for Cultural Diversity*].

<sup>125</sup> See Thierry Desurmont, *Considerations on the Relationship between the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Protection of Authors’ Rights*, 208 REVUE INTERNATIONALE DU DROIT D’AUTEUR 2 (2006).

<sup>126</sup> See TRIPS Agreement, *supra* note 11, Preamble (“recognizing that intellectual property rights are private rights”).

<sup>127</sup> See Convention for Cultural Diversity, *supra* note 124, Preamble (*recognizing* “that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all”).

around two billion users around the world: thirty percent of the global population.<sup>128</sup> Technology allows the expeditious and inexpensive production and distribution of content. Ironically, digital content is asymmetrically available throughout the world, with people in developed countries having more access than people in developing countries. Although content can be produced at a low cost, technology itself remains expensive, particularly for developing countries. As a result, some developing countries have not prioritized their Internet-related public policies, even when these could increase access to knowledge. For these governments, Internet policy is an objective for the distant future. However, as the cost of technology decreases, people from less developed countries will likely enjoy the benefits of technological advances. Hence, the question arises: Does the Appendix mechanism of compulsory licensing apply to the online environment?

The Appendix of the Berne Convention may suggest that it does not provide a legal framework of flexibilities respect to digital works. The provisions of the Appendix expressly limit their application to the non-digital environment, as they expressly allow the translation and reproduction of a given work “*in printed or analogous forms of reproduction.*”<sup>129</sup> This clause suggests that digital forms of reproduction are excluded from the scope of the Appendix. This exclusion may explain why some Appendix provisions have a strong territorial character and seem inappropriate for digital environments. For instance, the requirement that nationals of the country issuing a license must do the translation;<sup>130</sup> the ban on exports;<sup>131</sup> the hypothesis of “*out of print*” editions;<sup>132</sup> the exhaustion of stock;<sup>133</sup> and *in situ* sales.<sup>134</sup>

Nevertheless, the Appendix provisions are fully operational in online

<sup>128</sup> See *Key Global Telecom Indicators for the World Telecommunication Service Sector*, INTERNATIONAL TELECOMMUNICATION UNION, [http://www.itu.int/ITU-D/ict/statistics/at\\_glance/KeyTelecom.html](http://www.itu.int/ITU-D/ict/statistics/at_glance/KeyTelecom.html) (last visited: May 15, 2011).

<sup>129</sup> See Berne Convention, *supra* note 1, Appendix, arts. II (1), II (2) (a), & III.7.

<sup>130</sup> See *id.* Appendix, arts. IV (4) (a) and IV (5) (assuming that translation services would be provided in situ within the same country that issues and takes advantages of the compulsory licenses).

<sup>131</sup> See *id.* Appendix, art. IV (4) (a) (excluding exporting would make no sense on digital environment).

<sup>132</sup> See *id.* Appendix, art. II (2) (b) (excluding digital copies of a work, since they would be out of print hardly, because of their easy reproduction).

<sup>133</sup> See *id.* Appendix, art. II (6) (excluding digital copies because the provisions would assume there is a physical stock susceptible of being exhausted, which would seem inconceivable in case of digital copies).

<sup>134</sup> See *id.* Appendix, art. III (2) (a) (excluding online sales, by requiring they have place in the country).

environments.<sup>135</sup> Neither the Convention nor any other subsequent international instruments on copyright, such as the TRIPS Agreement (1994) or the WIPO Internet Treaties (1996), has excluded the application of the Appendix to digital works and online environment. Moreover, the terms and provisions of the Appendix have a technologically neutral meaning. In other words, the Annex provisions refer to processes, such as translation and reproduction, rather than to a specific technology. Although the Appendix does include some limitations, these are not intended to exclude the online environment from the scope of the Appendix. Rather, these limitations sought to ensure that the Appendix flexibilities favor only developing countries. Several of these flexibilities set forth territorial or availability limitations that can be preserved through the use of technology. Therefore, when properly analyzed, the Appendix allows developing countries to take advantage of its provisions both on and off-line.

WIPO documents confirm that the Appendix may apply to online environments and that developing countries may, therefore, make use of digital technologies to implement its provisions. According to WIPO Guidelines, the phrase “*in printed or analogous forms of reproduction*” means that the mechanism applies to “similar” works, such as books and printed materials, as opposed to films and records.<sup>136</sup> Another clause of the Appendix ratifies this interpretation when it unequivocally distinguishes between “*in printed or analogous forms of reproduction*” and “*audio-visual forms.*”<sup>137</sup> Finally, interpreting the Appendix in light of its goals and purposes and in accordance with the Vienna Convention on the Law of Treaties,<sup>138</sup> the WIPO Guidelines state that what is ultimately important is “*the purpose of the translation, namely teaching, scholarship and research*”.<sup>139</sup> This statement suggests that as long as the use of the work achieves the intended purpose, the form of the work becomes irrelevant.

For international copyright scholars, whether the Appendix provisions apply to the online environment is a matter of debate. For authors writing at the time of the Appendix approval, its application to the digital environment

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<sup>135</sup> See FOMETEU, *supra* note 59, at 21-22 (stating that compulsory licenses for translation and/or reproduction set forth by the Appendix apply to “any work able of being printed”, and suggesting that it may apply to digital networks, if works were able of being controlled as the Appendix requires).

<sup>136</sup> See WIPO Guide, *supra* note 14, at 153.

<sup>137</sup> See Berne Convention, *supra* note 1, Appendix, art. III (7); *see also*, WIPO Guide, *supra* note 14, at 165.

<sup>138</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (recognizing the teleological interpretation of a treaty, thus is, “in the light of its object and purpose”).

<sup>139</sup> WIPO Guide, *supra* note 14, at 153.

was not even a topic in discussion.<sup>140</sup> However, for a majority of scholars the clause “*in printed or analogous forms of reproduction*” did not intend to exclude digital formats. Rather, the phrase sought to allow the translation and reproduction of any written work as opposed to recordings.<sup>141</sup> A competing interpretation of the Appendix provisions arose later, during the 1980s, claiming that the Appendix provisions prevent the translation and reproduction of works in digital format.<sup>142</sup> According to this odd interpretation, the word “analogous” means “the opposite of digital,” a meaning hardly plausible to the Appendix drafters in 1971.<sup>143</sup> Moreover, the

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<sup>140</sup> See e.g., DELIA LIPSZYC, *LA CONFERENCIA DE REVISIÓN DE LAS CONVENCIONES DE BERNA Y UNIVERSAL (PARIS – JULIO DE 1971): ENFOQUE ARGENTINO* (1975).

<sup>141</sup> See Ulmer, *supra* note 24, at 360, 369 (explaining that the purpose of the Appendix is prohibiting translation by means of recordings); S. M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 164, 171 (1983) (stating that the purpose of the Appendix is facilitate the translation of works, but not records and performances); NORDEMANN, VINCK, HERTIN & MEYER, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW: COMMENTARY WITH SPECIAL EMPHASIS ON THE EUROPEAN COMMUNITY* 302 (1990) (stating that the reproduction refers to any printing process, because the decisive point is that the work is visually perceivable); DESBOIS, FRANÇON, & KÉRÉVER, *LES CONVENTIONS INTERNATIONALES DU DROIT D’AUTEUR ET DES DROITS VOISINS* 295-297 (1976) (explaining that the wording of the Appendix attempts to exclude phonograms and films from compulsory licensing); see also, Henri Desbois, *La Conférence Diplomatique de Révision des Conventions de Berne et de Genève*, in 68 *REVUE INTERNATIONALE DU DROIT D’AUTEUR* 3, 38-39 (1991).

<sup>142</sup> See RICKETSON, *supra* note 22, at 638 (stating without foundations that compulsory licenses set forth in the Appendix do not apply to works embodied in a computer data base); SAM RICKETSON, *WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT* 33 (2003), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf) (suggesting that the compulsory licensing adopted by the Appendix of the Berne Convention does not apply to digital environment, but omitting again any reasoning supporting that suggestion); and, Sam RICKETSON and Jane C. GINSBURG, *supra* note 22, at 930 (saying compulsory licenses exclude works embodied in electronic form); see also, MIHÁLY FICSOR, *Copyright and Transfer of Knowledge*, in 17 *UNESCO COPYRIGHT BULLETIN* 6, 15 (1983) (suggesting that the rules of the Appendix do not apply to computer technologies, but supporting the need to extend them to new uses that serve the same purpose). *But see*, MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION, AND IMPLEMENTATION* 278-280 (2002) (mitigating its initial suggestion by admitting some narrow application of the Appendix provisions on digital networks); see also, MIHÁLY FICSOR, *LIMITACIONES Y EXCEPCIONES AL DERECHO DE AUTOR EN EL ENTORNO DIGITAL*, 32-33 (2008) (supporting his latter interpretation of the Appendix provisions).

<sup>143</sup> Those who argue the Appendix of the Berne Convention does not allow translation and reproduction of works in digital form relay heavily in the meaning of the word “analogous” as the opposite of digital. This meaning is misleading because: i) the Convention uses the word “analogous” in several other provisions with the purpose of allowing an extensive interpretation, no to exclude digital technologies; ii) in English, French and Spanish the first sense of the word analogous is similar, likely, or comparable; in fact, the usage of analogous as opposite of digital or computer technologies has not been

texts and reports of the Appendix of the Berne Convention and the Universal Copyright Convention do not support this interpretation.<sup>144</sup> Unfortunately, that foundationless restrictive interpretation has prevailed among scholars,<sup>145</sup> even among those who support the inclusion flexibilities for purposes of development.<sup>146</sup> As a result, there is a deeply rooted mistaken belief that the Appendix provisions do not apply to either digital works or the online environment.

The Appendix of the Berne Convention allows compulsory licenses for translation and/or reproduction of foreign digital works into languages of general use in developing countries. Its provisions do not prohibit licensing digital works, as that would defeat the very purposes of the Appendix. However, the Appendix would be a clearer and more useful legal

approved yet, at least by the Spanish Real Academy; iii) the dichotomy between analogous and digital took place only in the eighties, precisely when the restrictive interpretation of the provisions of the Appendix came up.

<sup>144</sup> As a matter of fact, the General Report of Paris Conference does neither support the exclusion of digital works nor provide an explanation of the Appendix of the Berne Convention in this point. Instead, the Report of the General Rapporteur of the Universal Copyright Convention analyzes its analogous provisions extensively. It explains that translation and reproduction refer to writings but exclude “sound recordings and any other form except one from which it can be read or other wise visually perceived.” *Compare General Report of Paris Conference 1971, supra* note 35, at ¶¶ 27 – 43, *with Revision of the Universal Copyright Convention 1973, supra* note 33, at ¶¶ 87 and 112.

<sup>145</sup> *See, e.g.,* Juan Carlos Monroy Rodríguez, *Necesidad de Nuevas Limitaciones o Excepciones para Facilitar la Digitalización y Puesta a Disposición de Obras Protegidas en el Marco de la Educación Virtual*, 14 REVISTA LA PROPIEDAD INMATERIAL 195 (2010) (suggesting that international instruments on copyright are limited to the non digital environment); JUAN CARLOS MONROY RODRÍGUEZ, WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON THE LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND RELATED RIGHTS FOR THE PURPOSE OF EDUCATIONAL AND RESEARCH ACTIVITIES IN LATIN AMERICA AND THE CARIBBEAN 48-49 & 237 (2009) *available at* [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130303](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130303) (excluding any applicability of the Appendix to works published in digital format and supporting his statement on Mihály Ficsor); *see also*, DANIEL SENG, WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON THE COPYRIGHT EXCEPTIONS FOR THE BENEFIT OF EDUCATIONAL ACTIVITIES FOR ASIA AND AUSTRALIA 16, 18 (2009), *available at* [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130249](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249) (stating that the Appendix does not apply to recordings nor works in electronic form based on Sam Ricketson and Jane Ginsburg’s work); RICARDO ANTEQUERA, LAS LIMITACIONES Y EXCEPCIONES AL DERECHO DE AUTOR Y LOS DERECHOS CONEXOS EN EL ENTORNO DIGITAL, WIPO Document (2005), *available at* [http://www.wipo.int/edocs/mdocs/lac/es/ompi\\_sgae\\_da\\_asu\\_05/ompi\\_sgae\\_da\\_asu\\_05\\_2.pdf](http://www.wipo.int/edocs/mdocs/lac/es/ompi_sgae_da_asu_05/ompi_sgae_da_asu_05_2.pdf) (omitting any mention to the Appendix of the Berne Convention and similar compulsory licenses in his analysis of exceptions and limitations applicable to the digital environment).

<sup>146</sup> *See e.g.,* FOMETEU, *supra* note 59, at 21, 22 (expressing doubts whether the provisions of the Appendix apply to digital works); *see also*, CLAUDE COLOMBET, GRANDES PRINCIPIOS DEL DERECHO DE AUTOR Y LOS DERECHOS CONEXOS EN EL MUNDO: ESTUDIO DE DERECHO COMPARADO 180 (1997) (suggesting doubts by expressing that several technologies have not been handled by the Berne Convention, including those related with information technology).

instrument if it unequivocally stated its full applicability to digital works and online environment to allow developing countries to take advantage of available technologies for a wider dissemination of knowledge.<sup>147</sup>

#### IV. A NEW INTERNATIONAL LEGAL INSTRUMENT IS NECESSARY TO MEET DEVELOPMENT NEEDS

As mentioned above, developing countries are not using the Appendix mechanism due to its bureaucratic requirements, limited advantages, and high transactional cost, among others. Moreover, the application of the Appendix in digital works and online environments is debatable, and it is also elusive for protecting linguistic minorities. The fact that the Appendix does not meet the needs of developing countries is by itself enough to justify a new and more effective instrument. This section, however, presents two additional arguments in favor of adopting a new Appendix for the Berne Convention. First, developed countries should provide proper flexibilities to developing countries for general welfare policy. Second, authors and right holders should consider the opportunities offered by an adequate international arrangement.

##### A. *Adopting Flexibilities to Advance Enforcement*

Most international instruments on intellectual property have focused on harmonizing the protection for right holders through substantive minimal legal standards. The Berne Convention, the TRIPS Agreement, and even the WIPO Internet Treaties have forced some uniformity onto aspects such as the range of exclusive rights granted to authors, the term of protection, the requirements for limitations and exceptions, among others. The actual enforcement of these internationally harmonized rights, however, has been left mainly to domestic law.

In recent years, developed countries have emphasized the need for an international regime for the effective enforcement of intellectual

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<sup>147</sup> *But see*, Law No. 22 of 1992 on the Protection of Copyright and its Amendments (Jordan), as amended by the Amending Law No. 9 of 2005, art. 11 (setting forth an Appendix-like compulsory license for translating and/or publishing “*in a printed form or any other form*” to the Arabic language); Decree No. 468 Regulations on Protection of the Right of Communication through Information Network (adopted by the State Council, May 10, 2006), (China) (providing compulsory licensing for translation and use of work on digital environment, but only respect to works by national authors).

property.<sup>148</sup> The European Union has agreed to a unified standard of intellectual property enforcement within its Internal Market.<sup>149</sup> The United States also has included standards of enforcement in its bilateral negotiations, particularly in all free trade agreements entered in the last decade.<sup>150</sup> Both the European Union and the United States, together with other developed economies, recently attempted to converge on an international instrument for enforcing intellectual property, the Anti-Counterfeiting Trade Agreement.<sup>151</sup> The United States is also negotiating similar provisions in the Trans-Pacific Partnership Agreement, an initiative that deepens free trade within the Pacific rim.<sup>152</sup> The enforcement of intellectual property, therefore, is a well-established issue in the international agenda of developed countries.

Developing countries, in contrast, have expressed different concerns. Focusing on intellectual property enforcement is not only counterproductive vis-à-vis their comparatively weaker economies; it also raises public policy and human rights concerns. As a result, developing countries have supported their own “Development Agenda” to obtain the flexibility that is currently lacking in the existing international legal framework. In this context, for example, proposals for treaties on the protection of traditional knowledge, copyright access for people with disabilities, and copyright exceptions for educational purposes have been introduced before the WIPO.<sup>153</sup> Developing countries have raised their voice to draw attention to

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<sup>148</sup> See e.g., G8 Hokkaido Toyako Summit Leaders Declaration Toyako Declaration on World Economy, July 8, 2008, ¶ 17, available at [http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714\\_en.html](http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714_en.html) (last visited: Mar. 27, 2012) (encouraging the negotiations of an international instrument for enforcing intellectual property; G8 includes Canada, France, Germany, Italy, Japan, Russia, United Kingdom, and United States).

<sup>149</sup> See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 47 (adopting a harmonizing regulation for intellectual property enforcement within the European Union).

<sup>150</sup> The United States has included similar provisions in FTAs with Singapore, Chile, Morocco, Australia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Dominican Republic, Bahrain, Oman, Peru, Colombia, Panama, and Korea. See *Free Trade Agreements*, U.S. TRADE REP., <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited May 15, 2011).

<sup>151</sup> See Anti-Counterfeiting Trade Agreement, preamble, Dec. 3, 2010, available at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>

<sup>152</sup> See Trans-Pacific Partnership – Intellectual Property Rights Chapter: Draft – Feb. 10, 2011 (unofficial leaked version), available at <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>

<sup>153</sup> See PROPOSAL BY BRAZIL, ECUADOR AND PARAGUAY, RELATING TO LIMITATIONS AND EXCEPTIONS: TREATY PROPOSED BY THE WORLD BLIND UNION (WBU), (WIPO Standing Committee on Copyright and Related Rights 2009) available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_18/sccr\\_18\\_5.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf); and, AFRICAN GROUP, DRAFT WIPO TREATY ON EXCEPTIONS AND LIMITATIONS FOR THE DISABLED,

the insufficiency of international intellectual property instruments on to meet development needs.

Although it may seem reasonable for developed countries to strive for an adequate level of enforcement for intellectual property, that is not the case for developing countries. If developed countries want developing countries to cooperate in the enforcement of intellectual property, it is necessary to work on an agenda that provides the latter with enough flexibility to meet their needs. Otherwise, the international regulation of intellectual property will accentuate current inequities, seriously risk its own legitimacy, and exclude developing countries from effective enforcement. Any enforcement agenda that does not include the interests of developing countries will be unable to count with their support. In this context, future negotiations of international copyright instruments must incorporate new flexibilities for development purposes, particularly in the case of the already forty-year old Paris Act of the Berne Convention.

#### *B. Providing Opportunities for Authors and Rights Holders*

Every time the adoption of new flexibilities for developing countries is discussed in international forums, copyright holders express their concern. The core of their objections is that, although the needs of developing countries are indeed urgent, it is unfair to ask authors to bear the burden of meeting those needs.<sup>154</sup> Right holders from developing countries also oppose the adoption of new flexibilities. In their view, new flexibilities may provide foreign authors with a competitive advantage that would ultimately undermine domestic creativity. These concerns overstate the potential damage and completely ignore the benefits of flexibilities for authors and rights holders.

Translating works into new languages does not only provide access to people and opportunities for countries, it also opens new markets for the authors of translated works. For example, an adequate mechanism of notification may allow authors and right holders to learn about opportunities for their works in foreign markets. This way, authors can focus their efforts on deciding whether to enter the given local market directly or to allow domestic licensees to do so through voluntary licenses. Even if the right

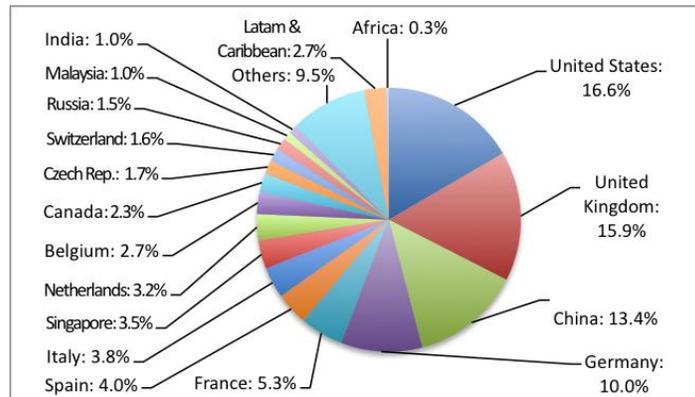
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EDUCATIONAL AND RESEARCH INSTITUTIONS, LIBRARIES (WIPO Standing Committee on Copyright and Related Rights 2011) available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_12.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf)

<sup>154</sup> See LIPSZYC, *supra* note 140, at 9, 42 (arguing that mechanisms such as the one adopted by the Appendix imply a subsidy from the authors to development); see also MOUCHET, *supra* note 22, at 75-78.

holder is not in a position to control the translation of works into a foreign language, she may still rely on domestic publishers subject to a guarantee for the fair payment of royalties. Overall, translating works offers authors and copyright holders the opportunity to assess the advantages of entering a certain market with the possibility of sharing the risk with an intermediary.

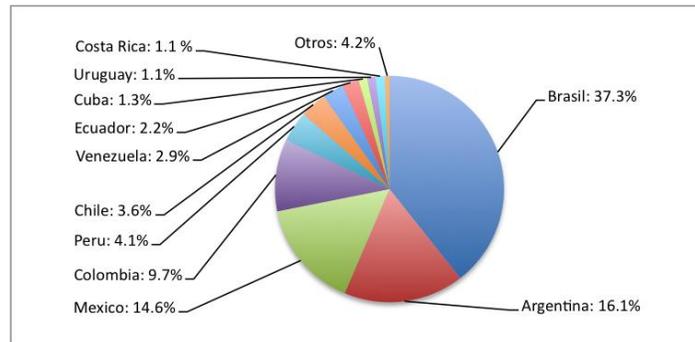
Figure 2: Top Book Exporting Countries by Market Share, 2009.



SOURCE: CERLALC, *El Espacio Iberoamericano del Libro* 2010.

A new regime of flexibilities may also provide opportunities for authors and right holders different from those available in large markets of developed countries. Although some developing countries have big markets, most have modest markets with small and medium size publishers, limited editions, and a reduced demand. The current mechanism adopted by the Appendix underestimates the limitations of most developing countries' markets and, instead, works under the assumption that these markets are as voluminous as those in developed countries. Figure 2 shows market size of top book exporting countries. In that pie chart, Latin America and the Caribbean represent barely 2.7% of the total, while African countries are only a 0.3%. Moreover, there are significant differences among developing countries' markets. For instance, Figure 3 shows that 77.7% of the Latin American book production is concentrated in four economies.

Figure 3: Latin American Production of Titles, 2009.



SOURCE: CERLALC, *El Espacio Iberoamericano del Libro* 2010.

To provide opportunities for authors and right holders, a new regime of flexibilities needs to recognize the limitations of developing countries' markets. For instance, as mentioned above, several Central American countries have compulsory licenses for translating and reproducing works that remain useless due in part to a lack of domestic publishers and reduced size of markets. In El Salvador, a country with around six million people, three of the only five existing publishing companies release less than twenty titles per year.<sup>155</sup> Similarly, in Chile, the average print run of a book is less than 500 copies.<sup>156</sup> The transactional costs of using the Appendix are too high for publishers from developing countries that operate in these small capacities and market sizes.

Despite market limitations of developing countries, there are two market concepts that help explain how developing countries still offer opportunities for authors and right holders: niche market and economies of scale. A niche market is a fraction of the market formed by a reduced number of consumers with similar and easily identifiable needs. For instance, readers of Mapudungun, a language spoken by around 500,000 people mainly in the Southern of Chile constitute a niche market.<sup>157</sup> The size of this specific

<sup>155</sup> See *Fomento del Libro America Latina*, *supra* note 60, at 75 (noting that, according to 2009 statistics, 68% of Latin-American publishers publish less than 20 books per year, and only 5% publish more than 100 books per year).

<sup>156</sup> See AGENCIA CHILENA INTERNACIONAL STANDARD BOOK NUMBER, INFORME ESTADÍSTICO 2010 35-36 (2011), available at <http://www.camaradellibro.cl/archivos/estadisticas/isbn2010.pdf> (stating that less than 500 copies per book has been the prevailing number in Chile during last decade, and it represents 53.57% of the 2010 production).

<sup>157</sup> See Fernando Zúñiga, *Mapudunguweylami am? "¿Acaso ya no hablas Mapudungun?": Acerca del Estado Actual de la Lengua Mapuche*, 105 ESTUDIOS PÚBLICOS 9, 9 (2007) (discussing the number of speakers of Mapudungun and concluding

market is extremely reduced when compared to a typical market in developed countries. Because of their size, large-scale providers usually disregard niche markets; this, in turn, allows small providers the opportunity to offer goods and services tailored for those consumers. Authors and right holders that cannot or do not wish to exploit niche markets on their own may do so through voluntary and/or compulsory licensees.

A niche market must be small enough to be disregarded by big providers, but big enough to appeal to small providers. For example, there are around 100,000 Guarani speakers in Argentina. This number is too small to incentivize the translation and reproduction of works. If the number of Guarani speakers and potential consumers increases, however, reproducing translated books may be attractive because the cost of unit production decreases when the number of produced units increases. For instance, if it were possible to compound Argentinean, Brazilian and Paraguayan Guarani speakers, we would be looking at a market of around 6 million potential readers.<sup>158</sup> This market would surely be attractive for some providers and, therefore, for authors and right holders of works translated into that language.

The mechanism of the Appendix should recognize the benefits of economies of scale that result from aggregating demand from different countries.<sup>159</sup> Unfortunately, this is not the case. First, the export of works produced under the Appendix mechanism is prohibited.<sup>160</sup> Although the Appendix provides for some exceptions to this ban, numerous requirements

that it is in such a linguistic precariousness that if no public policies and private initiatives address it in short-term the language may disappear).

<sup>158</sup> Paraguay has a singular situation in Latin America in which a native language is mainstream. Of more than 6 million habitants, 90% speak Guarani while only 55% speak Spanish. Guarani is also the main native language in the publishing sector in Latin America, around 80% of the books published in native languages in the region between 2005 and 2009 were in Guarani, totaling 258 titles. See *Fomento del Libro America Latina*, *supra* note 60, at 62, 66.

<sup>159</sup> See FOMETEU, *supra* note 59, at 43 (suggesting that exportation should be allowed to countries with “*similar level of development which are not covered by the original copies and which have made the declaration required by the Appendix.*”); see also, Revision of the Universal Copyright Convention 1973, *supra* note 33, at ¶ 32 (referring to an African proposal for allowing developing countries having a common language to obtain a joint compulsory license, which was not approved).

<sup>160</sup> See Berne Convention, *supra* note 1, Appendix, art. IV (4) (a); see STEWART, *supra* note 141, at 164 (stating that the intended purpose of this restriction was preventing works produced in developing countries from being available in markets of developed countries and undercutting authorized copies there). However, the restriction on exporting applies not only when sending works from a developing to a developed country but from any country to another.

have made the exceptions effectively inoperable.<sup>161</sup> Second, although offshore printing is technically allowed,<sup>162</sup> overcoming border measures can be extremely difficult for works reproduced under a license issued by foreign authorities. These types of limitations diminish the possibility of using an economy of scale approach to countries that share a language. For instance, small Portuguese speaking countries<sup>163</sup> cannot import works translated and reproduced into Portuguese in Brazil under a compulsory license issued by Brazilian authorities.<sup>164</sup> Spanish-speaking countries of the Americas, French-speaking countries of Africa, and Arabic-speaking countries of the Middle East are in the same situation.

Some scholars from developing countries argue that mechanisms such as the Appendix force domestic authors to compete with foreign authors on unfavorable terms.<sup>165</sup> This argument is wrong, if not misleading. Its proponents erroneously assume that works available under a compulsory license do not generate copyright royalties for right holders. Those works, however, must pay royalties. The Berne Convention requires payment of

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<sup>161</sup> Berne Convention, *supra* note 1, Appendix, art. IV (4) (c).

<sup>162</sup> Berne Convention, *supra* note 1, Appendix, arts. IV (4) (a) and IV (5) (setting forth that publication and reproduction under compulsory license are valid only in the country that has issued the license, but omitting any mention to printing); *see* LIPSZYC, *supra* note 140, at 17 - 26 (referring that Argentina proposed an express restriction off shore printing, but it did not prosper); Roger Fernay, *Paris 1971 ou les aventures d'un "package deal"*, in 70 REVUE INTERNATIONALE DU DROIT D'AUTEUR 3, 32-33 (1971) (referring to the possibility of printing overseas as a concession in favor of developing countries that lack manufacturing capacities); FOMETEU, *supra* note 59, at 25 (mentioning that overseas printing is allowed by the Appendix, but subject to some restrictions); and, ULMER, *supra* note 24, at 357-359, 362 (stating the exportations are forbidden in principle, but allowed in some cases, such as when countries lack capacities); *See also*, General Report of Pais Conference 1971, *supra* note 35, ¶ 40; Revision of the Universal Copyright Convention 1973, *supra* note 33, ¶¶ 74, 114 and 115; and, WIPO, *supra* note 14, p. 168. *But see* FICSOR, *Copyright and Transfer of Knowledge*, *supra* note 142, at 11 (stating that copies must be printed in the developing country that issued the license).

<sup>163</sup> Four of the eight countries that have Portuguese as an official language are not parties of the Berne Convention: Angola, Mozambique, Sao Tome e Principe, and Timor-Leste.

<sup>164</sup> For accuracy, Brazil does not have any specific exception or compulsory licensing system for purposes of translation and reproduction of works in foreign language into Portuguese or any other native language. *See* Pedro de Paranaguá Moniz, *Excepciones y Limitaciones al Derecho de Autor en Brasil: Logrando un Equilibrio entre la Protección y el Acceso al Conocimiento*, in ACCESO A LA CULTURA Y DERECHOS DE AUTOR 55-62 (Alberto Cerda Silva ed., 2008) (referring to the lack of Appendix-like compulsory licensing in Brazilian copyright law, but the convenience of adopting this system in spite of its complexities); *See also*, Pedro Mizukami *et al*, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, en Shaver, Lea (ed.), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development*, (London, Bloomsbury, 2010), pp. 41-78.

compensation according to “standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned.”<sup>166</sup> Calculating royalties according to the formula established in the Appendix is highly restrictive. The rates of developed countries drive average royalty rates up which increases the cost of access for developing countries. Moreover, higher rates undermine a wide dissemination of knowledge and ultimately force developing countries to give up a given content. Abiding by domestic royalties should not damage the interests of foreign authors and other right holders. Domestic royalties simply are sources of income the authors are not receiving because their works are not exploited in domestic markets abroad. Then, using this formula would not harm domestic right holders either; in terms of copyright royalties, they would be competing on an equal plain with foreign authors.

Detractors of flexibilities for developing countries argue that facilitating the translation and reproduction of works into foreign languages may destroy booming markets for the main colonial languages: English, French, and Spanish. Although there is no data available about the actual size and functioning of those markets as a whole, there is data about some specific countries. It is fair to say that the main book exporting countries are in the best position to become the main translation producers, because they have broader manufacturing and publishing capacities. As figure 2 showed, the United States controls more than 16% of the exports.<sup>167</sup> In contrast, less than 3% of the US’ entire production are translations.<sup>168</sup> Moreover, according to data collected by the University of Rochester, in 2010 only 317 books translated into English were published; 48 of those were originally written in Spanish.<sup>169</sup> The United Kingdom, the world’s second largest book

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<sup>165</sup> See Lipszyc, *supra* note 140, at 44 (supporting this argument, by expressing that, “unprotected foreign works substitute domestic ones”).

<sup>166</sup> Berne Convention, *supra* note 1, Appendix, art. IV.6 a) (i).

<sup>167</sup> See *Fomento del Libro America Latina*, *supra* note 60, at 172.

<sup>168</sup> See THREE PERCENT: A RESOURCE FOR INTERNATIONAL LITERATURE AT ROCHESTER UNIVERSITY, <http://www.rochester.edu/College/translation/threepencent/index.php?s=database> (last visited: May 16, 2011) (suggesting, however, that 3% is a number a little high, since it may include not only first-time translated books, but also books that have been printed and translated several time, such as classical literature).

<sup>169</sup> In 2008, 362 translated books were published into English, 48 of them were originally written in Spanish; in 2009, 357 translated books were published into English, 62 of them were originally written in Spanish. See THREE PERCENT: A RESOURCE FOR INTERNATIONAL LITERATURE AT ROCHESTER UNIVERSITY, <http://www.rochester.edu/College/translation/threepencent/index.php?s=database> (last visit: May 16, 2011) (limiting statistics to original translations published or distributed in the United States).

exporter with a 15,9% market share,<sup>170</sup> only published 93 books translated from Spanish in 2007.<sup>171</sup> These numbers suggests that, even in the case of main colonial languages that enjoy the benefits of economies of scale, voluntary licenses for translation are still limited. These numbers also indicate that the existing international legal framework does not facilitate translations from one language to another.

Available data from Latin-American countries shows that translations are few and mostly of works written originally in English. In 2008, of 46,993 books published in Brazil, 6,626 were translations into Portuguese and 60.1% of these were from English sources.<sup>172</sup> The same year, of 6,469 books published in Mexico, only 164 were translations into Spanish, and 66% of these were from English sources.<sup>173</sup> Similarly, in 2010, 5,107 books were published in Chile; 302 of them were translations into Spanish, 77.5% of which from originals in English.<sup>174</sup> The relatively high numbers of translations from English in Brazil may be explained because few countries speak Portuguese and, therefore, Brazil cannot satisfy its domestic demand with books published in other countries. English is the main language translated into Spanish and Portuguese in Latin American because English is the predominant language in technical and commercial fields.<sup>175</sup>

The absence of book translations in developing countries impairs public access and, consequently, the satisfaction of development needs. The lack of translations is also detrimental for authors and right holders who cannot tap new markets to exploit their works. A new international legal instrument must allow properly functioning market niches and economies of scale to cure this deficiency.

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<sup>170</sup> See *Fomento del Libro America Latina*, *supra* note 60, at 101.

<sup>171</sup> See Oficina Económica y Comercial de España en Londres, *Las traducciones de libros del español al inglés en Reino Unido aumentan un 50% en tres años* (Dec. 5, 2007), available at [http://www.icex.es/icex/cda/controller/pageICEX/0,6558,5518394\\_5519005\\_5604470\\_4036437,00.html](http://www.icex.es/icex/cda/controller/pageICEX/0,6558,5518394_5519005_5604470_4036437,00.html) (referring an increase of 50% from 2004, when only 63 translations were made, to 2007).

<sup>172</sup> See *Fomento del Libro America Latina*, *supra* note 60, at 43, 84.

<sup>173</sup> *Id.*

<sup>174</sup> See AGENCIA CHILENA INTERNATIONAL STANDARD BOOK NUMBER, *supra* note 156, at 12, 30.

<sup>175</sup> See *Fomento del Libro America Latina*, *supra* note 60, at 99 (referring to a 2010 study by Index Translationum that states English is the predominant source language with 55% of the translations).

## V. WORKING ON A NEW INSTRUMENT TO MEET DEVELOPMENT NEEDS

The Appendix of the Berne Convention intended to meet the needs of developing countries by providing access to copyrighted works to facilitate their development. Unfortunately, the Appendix failed.<sup>176</sup> Although scholars tend to agree on the inefficacy of the Appendix, there is no agreement about how this inefficacy can be overcome. Some scholars have expressed skepticism on whether the Convention can be changed to meet the needs of developing countries. This group suggests that a solution must be found in other forums or international instruments.<sup>177</sup> Other scholars, instead, have argued in favor of modifying the Convention to meet development needs.<sup>178</sup>

Based on the current Appendix mechanism, this section outlines a proposal for a new instrument that meets development needs. This proposal recommends extending the scope of beneficiaries, diversifying the legal mechanisms that provide flexibility, reducing and simplifying the bureaucratic requirements, embracing technology opportunities, allowing exports, and improving the capacity building of the competent international organization. Lastly, the section considers several factors to take into account in choosing an international forum for advancing the proposal.

A. *Expanding the Scope of Beneficiaries*

Development needs are not exclusive to developing countries. Different minority groups, but linguistic minorities in particular, require special copyright flexibilities in both developing and developed countries.

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<sup>176</sup> See also RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886 – 1986*, *supra* note 22, at 663 (making similar argument when evaluating the usefulness of the Appendix). *But see* WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 268 ¶ 5.204 (2<sup>nd</sup> ed. 2004), *available at* <http://www.wipo.int/about-ip/en/iprm/> (suggesting that the Appendix may favorably influence negotiation and may lead to increased scope for voluntary licensing), *and* Mihály FICSOR, *supra* note 142, at 10-11 (refusing the argument that the Appendix has favored voluntary licensing and arguing, instead, that developing countries seem trapped in the complex and bureaucratic rules of the Appendix and raises doubts about the actual existence of these compulsory licenses).

<sup>177</sup> See, e.g., Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 800 (2003) (arguing that the Berne Convention does not meet the needs of developing countries, that any radical reforms may affect the foundations of the system as it, and, therefore, the Berne Convention should be repealed); ALAN STORY, *AN ALTERNATIVE PRIMER ON NATIONAL AND INTERNATIONAL COPYRIGHT LAW IN THE GLOBAL SOUTH: EIGHTEEN QUESTIONS AND ANSWERS* 63 (2009); DRAHOS & BRAITHWAITE, *supra* note 10, at 78 (stating that if developing countries were to meet their needs, “they would have to do so outside the Berne system.”)

Therefore, the Appendix made a mistake when it limited the scope of its intended flexibilities to developing countries.

A new instrument must adopt a more holistic approach that recognizes that development challenges have an effect in countries at all levels of development. This approach would allow the expansion of copyright flexibilities to communities that cannot fully realize the potential of its members, regardless of the country where the community is located. The issue of formulating international intellectual property regulations that cut across development lines is not new. For instance, TRIPS allowed countries, regardless of their development status, to issue compulsory licenses to manufacture pharmaceutical products.<sup>179</sup> This solution arose as a result of the recognition that manufacturing capacities are essentially relative and, therefore, they do not correspond to either developed or developing countries alone. To some extent, the aforementioned “ten-year regime” clause of the Berne Convention also recognizes the mistake of distinguishing between developing and developed countries when providing copyright flexibilities. This provision allows any accessing country to substitute the exclusive right of translation for the lapsing of copyright if a work is not available in a language in general use in the said country within ten years from its first publication. Unfortunately, because of its severe restrictions, this special regime has become useless too.<sup>180</sup>

It may be argued that domestic law rather than international instruments should address the challenges faced by particular communities within a country. This approach might be effective in some cases. For instance, China allows the translation from the dominant Han into any other minority nationality language within the country. This type of domestic solution, however, has a local scope. The Chinese mechanism is limited to works of Chinese authorship, because the Appendix protects foreign authors. It would be difficult for China to extend its pro-access policy to works of foreign authorship and remain compliant with its international commitments through the Appendix or by implementing a copyright exception.

An adequate solution to address development needs, particularly in the

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<sup>178</sup> See, e.g. CHON, *supra* note 82, at 218-249.

<sup>179</sup> See WTO General Council, *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 and Corr.1 (Aug. 30, 2003), available at [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm), See also, Carlos Correa, *Implications of the Doha Declaration on the Trips Agreement and Public Health*, 12 WORLD HEALTH ORGANIZATION HEALTH ECONOMICS AND DRUGS SERIES 23 (2002) available at <http://apps.who.int/medicinedocs/en/d/Js2301e/>.

<sup>180</sup> See *supra* notes 13 – 16 and its accompanying text.

case of oppressed minorities, should go beyond the governmental issuance of compulsory licenses. An effective solution must allow minority members to apply for compulsory licenses directly to an international organization in order to bypass the limitations or negligence of their government. Currently, there are several mechanisms that authorize nationals to appeal directly to an international organism, such as the Inter-American Human Rights Commission, UNESCO, and even WIPO itself.

In sum, a new instrument for providing flexibilities for development must not be limited to developing *countries*. Rather, a new instrument should encompass developing *communities*. Moreover, a new instrument should establish a mechanism for minorities to obtain compulsory licenses from their government or an international body if their government neglects or denies unreasonably their request.

### *B. Diversifying the Available Mechanisms*

The Appendix of the Berne Convention sets forth a system of compulsory licensing for the translation and reproduction of copyrighted works for educational and researching purposes.<sup>181</sup> In one case, the Appendix emphasizes that the use must be non-profit.<sup>182</sup> This system of licensing does not authorize free use. Instead, the Appendix authorizes compulsory uses with a just compensation to right holders.<sup>183</sup> Again, the Appendix has a reduced scope and real impact because it does not authorize the for-profit exploitation of a copyrighted work, even when a licensee must pay compensation to the right holder.

Compulsory licensing could be a reasonable solution for commercial and/or for-profit uses of a copyrighted work. The Appendix does not allow for those kinds of uses and adopts instead a torturous solution for essentially non-profit translation and reproduction. The Appendix creates an absurd situation where some countries, instead of implementing the Appendix mechanism to provide a wide dissemination of content, have adopted exceptions and limitations that run short of meeting that purpose because they are subject to the three-step test.<sup>184</sup> Moreover, the Appendix creates the paradox that some developing countries have worse conditions of access to copyrighted works than developed countries.<sup>185</sup> At the same time, the

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<sup>181</sup> See Berne Convention, *supra* note 1, Appendix, arts. II.5 and III.7 b.

<sup>182</sup> See *id.*, at art. II.9(a)(iv)

<sup>183</sup> See *id.*, at art. IV.6(a)

<sup>184</sup> See *supra* notes 84-92 and accompanying text.

<sup>185</sup> See, e.g., CHON, *supra* note 82, at 218-249 (referring the paradox that the U.S. and some European Union countries provide better conditions of access under exceptions than those available for inhabitants of developing countries).

Appendix has produced the unintended effect that most developing countries have restricted themselves to adopt a solution based on limitations and exceptions to copyright.

A new attempt to provide flexibilities for the translation and reproduction of works for satisfying development needs must make a reasonable distinction between for-profit and not-for-profit uses. For example, a new instrument should (1) limit compulsory licensing (*i.e.*, compensated authorization) to translation and reproduction for commercial purposes; and (2) adopt exceptions and limitations (*i.e.*, free authorizations) for translation and reproduction for personal, educational, research, and other non-commercial purposes. Assuming the cost of licensing is fair in a for-profit entrepreneurship, but may overwhelm not-for-profit initiatives. The Appendix should acknowledge that difference, even when that distinction can be unclear in borderline activities.

It has been said that a compulsory licensing system is not efficient because it leads to stagnation as it erodes the needed flexibilities of any legal regime.<sup>186</sup> That is only partially true. The traumatic experience of the United States with the everlasting compulsory license for mechanical reproduction is probably the paradigm of that argument.<sup>187</sup> However, in comparative law it is possible to find compulsory licensing regimes that are much more flexible, both in their pricing and procedure.<sup>188</sup> Therefore, preserving a compulsory licensing system does not necessarily mean adopting a mechanism that cannot adapt to new challenges.

In addition to exceptions and compulsory licenses, the “ten-year regime” should be more flexible. Currently, this clause allows the lapsing of copyright if a work is not available in a language of general use in a given country ten years from its first publication. There are four modifications that can render this provision more effective. First, reducing the term in which the work must be available in the mentioned language. Second, allowing any developing country to abide by the provision, either at adherence to the Convention or later. Third, guaranteeing compatibility with

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<sup>186</sup> See Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies": Property Rights, Contracts, and Markets*, 508 POL’Y ANALYSIS 1, 9 (2004) (stating that “compulsory licensing has led to price stagnation”).

<sup>187</sup> See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1308-1316 (1996) (arguing against compulsory licensing based on the U.S. local experience with the mechanical compulsory license for copyrighted music).

<sup>188</sup> See, e.g., LIPSZYC, *supra* note 19, at 243-244 (mentioning that fee for using works under compulsory licensing can be determined by a legal norm, by an administrative authority, or a court).

the provision on compulsory licenses for translation and/or reproduction of works. Fourth, banning retaliation against authors whose countries of origin have implemented this mechanism. These amendments may partially satisfy the need developing countries have to widely disseminate works for purposes of teaching, scholarship, and research.

### *C. Providing an Unequivocal Solution for Digital Environments*

The applicability of the Appendix to digital environments is, to say the least, unclear. While the Berne Convention provides a standard for evaluating the adoption of copyright limitations and exceptions in the context of new technologies, its Appendix does not provide uncontested rules to allow developing countries to take advantage of new opportunities in technology. Instead, the myth of the Internet as the perfect borderless photocopy machine has pervaded legal literature and prejudicing policy makers against flexibilities for the digital environment.

In contrast to the early beginnings of digital networks, today's Internet is a space as susceptible to regulation as any other non-digital environment. In addition to legal and contractual rules, an increasing number of technological measures contribute to control and discipline the behavior of Internet users. It is technically possible to control accessing, using, and copying contents. It is also possible to adjust the online experience to the local legal framework of a certain geographical location.<sup>189</sup> Moreover, anonymity is certainly no longer a default feature of online communications.

In addition to the experience of Yahoo!, Google, and iTunes with geographical localization systems, it may be extremely useful to survey the experiences of other initiatives that provide public access to copyrighted contents. To comply with copyright constraints, those initiatives adopted sophisticated operational models. For example, Open Library is an initiative that negotiated particular terms of licensing with publishers to make books available online. An interesting feature of this initiative is that digital books behave just like paper books: they are susceptible to temporal public borrowing; multiple copies are not available simultaneously; each book is only available to a single person on a one-by-one system. Users must go to a participating library or other places with accredited IP connections to download books on their devices for a specific period of time, after which access to the books is deactivated. Currently, Open Library works in several

public and university libraries throughout the United States, Canada and, recently, Guatemala. The Open Library initiative suggests that, with proper technological and legal support, developing countries may provide broader access to copyrighted material for their population.

However, the international legal framework is still somewhat evasive of the possibility of providing a mechanism that allows using digital environments as platforms to access copyrighted material in developing countries. If voluntary licenses are not granted, the Appendix seems insufficient to meet development needs. A new international instrument must clearly state its application to digital environments,<sup>190</sup> and unequivocally allow digital reproduction and online access. Moreover, a new international legal instrument must establish limitations and conditions of such access, specify the status online automatic translation services, and govern the technological measures that control access and use of copyrighted material.

An effective solution to provide legal flexibilities for using works on online environments must take into account the risk of improper use of technologies. Therefore, developing countries should implement regulation that prevents illegal use of copyrighted works. Denying access for some cases may be fair if it is, instead, properly provided in others. In this sense, a new mechanism must balance the competitive interests of authors, right holders, users, and communities. In creating such a balance, the price that developing countries may be forced to pay is the provision of protection and effective enforcement in cases of illegal use of copyrighted material.

#### *D. Simplifying Legal Paperwork and Requirements*

The Appendix of the Berne Convention delivers a compulsory licensing system for developing countries that is extremely bureaucratic because it was created on the suspicion that developing countries would misapply the flexibilities.<sup>191</sup> To prevent such theoretical abuse, the Appendix adopted several restrictions that apply both at the international and domestic levels. This superposition of requirements makes the framework labyrinthine. The system is plagued with categories of works, terms, languages, and so on. As

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<sup>189</sup> See JACK GOLDSMITH AND TIM WU, WHO CONTROLS THE INTERNET: ILLUSIONS OF A BORDERLESS WORLD 49-63 (2008) (discussing the increasing use of geo-identification technologies on the Internet as a measure for making the networks controllable).

<sup>190</sup> See *supra* notes 128-147 and accompanying text.

<sup>191</sup> Compare Berne Convention, *supra* note 1, Appendix (setting forth an overregulated system of compulsory licensing) with Berne Convention, *supra* note 1, art. 9 (2) (adopting a more general and simple system for copyright limitations and exceptions).

a result, one scholar has qualified this regime as “unworkable.”<sup>192</sup>

At the international level, a developing country that wants to enjoy the provisions of the Appendix must not only notify WIPO’s General Director, it must also renew this notification periodically.<sup>193</sup> When countries have not complied with the notification process at the international level, it is unclear whether individuals can obtain a license according to domestic law.<sup>194</sup> This is the case for publishers in Latin American countries that have implemented the Appendix mechanism without notifying WIPO.

At the national level, countries must implement the Appendix provisions into their domestic law. As a result, countries must carefully adopt a complex system of rules on categories of works, languages, terms, quality of translations, etc. Potential licensees have to handle that confusing regulation. In addition, it is necessary to create a procedure for appearing before judicial or administrative authorities that generally lack experience regarding these matters.

Overall, such requirements discourage national publishers from developing countries from using the Appendix mechanism. These requirements add new and significant publishing costs to those already in existence, such as remuneration to translators and compensation to right holders. In the small markets of developing countries, the additional cost of Appendix mandated procedures to obtain a compulsory license substantially increases the final cost of any publishing initiative. As a result, transactional costs make the Appendix mechanism unviable.

A new international instrument must provide developing countries with an uncomplicated mechanism through the following measures. Unnecessary bureaucratic paperwork, such as the WIPO notice renewals should be deleted. Instead, the mechanism can adopt a more straightforward notification procedure similar to the one set forth for compulsory licensing in TRIPS.<sup>195</sup> Other improvements could include standardizing rules, particularly on terms and categories of work, and removing protectionist measures for colonial languages.<sup>196</sup>

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<sup>192</sup> Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007); *see also* Ndéné Ndiaye, *The Berne Convention and Developing Countries*, 11 COLUM.-VLA J.L. & ARTS 47 (1986-1987); RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES IN THE DIGITAL ENVIRONMENT 25-26 (2005), *available at* [http://www.iprsonline.org/unctadictsd/docs/Okediji\\_Copyright\\_2005.pdf](http://www.iprsonline.org/unctadictsd/docs/Okediji_Copyright_2005.pdf). *But see*, RICKETSON and GINSBURG, *supra* note 22, at 956-960.

<sup>193</sup> Berne Convention, *supra* note 1, Appendix, arts. I.1 and I.2.

<sup>194</sup> *See supra* note 75.

<sup>195</sup> *See supra* note 179.

<sup>196</sup> *See* FOMETEU, *supra* note 59, at 43 (suggesting the simplification of procedure,

Technology could help improve the system. As noted previously, the new international instrument must state clearly its application to digital works and online environment. Similarly, the instrument must incorporate technology to facilitate its application, management, and issuance of licenses. An online, open, and comprehensive system of information similar to the one available for domain name system could achieve this goal.<sup>197</sup> Such a database would allow public and global research of and notification to authors and copyright holders of works susceptible of being licensed. Such system would also enable local authorities to coordinate their actions and facilitate communications between potential licensees and licensors. Finally, this database would introduce transparency in the functioning of the system, which so far is missing from the Appendix.

### *E. Allowing Exportations*

The Appendix mechanism ban on the exportation of works is excessive. The ban originally intended to prevent works produced under compulsory license to flood markets around the world. The ban has, however, undermined the use of the mechanism in countries that lack manufacturing capacities and in countries with small markets. Although the Appendix allows overseas printing,<sup>198</sup> this measure is not useful when the market of the licensor country is small. The Appendix also sets forth exceptions that allow works to be exported from one country to another.<sup>199</sup> But these exceptions have lost their effect because they are extremely narrow and bureaucratic.<sup>200</sup>

A new mechanism for development must recognize the advantages of economies of scale, particularly for small developing economies, and allow the export of works produced under compulsory licenses. Some authors in favor of exportations have limited their support to developing countries that have issued compulsory licenses.<sup>201</sup> However, if the new mechanism seeks to meet development needs rather than only the needs of developing countries, exports should not be limited to developing countries. For instance, the export of certain goods would contribute to meeting the needs of developing communities in developed countries, such as Amharic or

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reducing the period of immunity and eliminating the waiting period).

<sup>197</sup> Whois is the Internet protocol that allows identifying, and sometimes contacting, the assignee of a given domain name.

<sup>198</sup> See *supra* note 162.

<sup>199</sup> See Berne Convention, *supra* note 1, Appendix, art. IV (4) (a).

<sup>200</sup> See *id.* art. IV (4) (c).

<sup>201</sup> See *supra* note 158.

Mapudungun speakers in the United States. Moreover, requiring licensing from a new country when the work is already available creates unnecessary bureaucracy, redundancy of efforts, and artificial barriers for the free flow of goods.

The new mechanism must also remove obstacles for the free flow of copyrighted goods. Traditionally, custom authorities have had power to limit the flow of goods that infringe on intellectual property only in the exporting or importing countries. In recent years, however, customs authorities' competence over in-transit goods has expanded.<sup>202</sup> If the new mechanism allows exportation, then customs authorities from in-transit countries should not interfere with the free flow as long as the works comply with customs regulations of the exporting and importing countries.

#### *F. Improving Institutional Support*

Competent international organizations on copyright must play a more relevant role in implementing a solution for development in order to ensure a wide dissemination of knowledge. Despite the high expectations of the 1970s, under the Appendix, WIPO has played only a minor role on this matter.<sup>203</sup> The mere fact that the Appendix mechanism is still misunderstood by its beneficiaries and that there has not been any critical study about it provide enough evidence of WIPO's precarious involvement. For those who have been involved with WIPO capacity building programs, the absence of assistance on flexibilities for developing countries is astonishing.<sup>204</sup>

A well-drafted mechanism should specify the role of an international institution in capacity building of publishers, distributors, booksellers, authors and right holders from countries or communities that wish to benefit from the new flexibilities. In addition, the competent international organization must also provide technical assistance to governments in the incorporation of flexibilities into domestic law. Moreover, the international entity could play a more active role in providing technological and financial

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<sup>202</sup> See e.g., Anti- Anti-Counterfeiting Trade Agreement, art. 16, Dec. 3, 2010, available at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf> (authorizing countries to adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control, even acting *ex officio*).

<sup>203</sup> See OLIAN Jr., *supra* note 10, at 110 (suggesting a more active role for WIPO in implementing a solution for developing countries by facilitating contact between interested parties and payment of royalties).

<sup>204</sup> The author took part as speaker in the XII WIPO/SGAE Regional Academic Course, Derecho de Autor y Derechos Conexos para Países de América Latina, Santiago de Chile, Oct. 9-13, 2006.

support, advice on good practices, and critical analysis on the effective functioning of the system.

The competent international organization should also be able to improve access to copyrighted works by developing countries and communities. For example, the organization could issue compulsory licenses on its own right. Doing so would contribute to a wider dissemination of knowledge in countries where governments are reluctant or negligent in issuing licenses or lack the capacity to implement the international instrument. Moreover, internationally issued licenses would relieve some of the pressure that developing countries experience when they attempt to implement flexibilities into their domestic laws.

### *G. Choosing an International Forum*

Choosing the best forum for adopting a new international instrument flexibilities for development requires considering political and legal issues, timing and the schedules of the different possible forums. Rather than providing a firm answer to this question, this section reflects some of the advantages and disadvantages of the different alternatives.

The first temptation is to consider revising the Appendix, and possibly the Universal Copyright Convention, because they both regulate the compulsory licensing in favor of developing countries. However, modifying them would be extremely complex because it would entail the organization of a conference and unanimous approval.<sup>205</sup> The 1971 Paris Conference required preparation that started practically at the very end of its previous 1967 Stockholm Conference. Since then, several attempts to update the Berne Convention have failed, even when they counted on the right holders support. Developed countries have circumvented the complexities of modifying the Berne Convention by adopting new instruments before WIPO and WTO. The Berne Convention has become a fossil that reminds us of the copyright standard of the industrial era. Any improvement must follow another path.

Another possibility is adopting a new international instrument on flexibilities for development before WIPO. Currently this international organism, part of the United Nations system, works on several proposals

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<sup>205</sup> See ARPAD BOGSCH, *THE FIRST HUNDRED YEARS OF THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 67 (1986) (suggesting that the very success of the Berne Convention has become the cause of its stagnation because its modification requires the agreement of broad number of countries).

regarding international instruments on copyright.<sup>206</sup> So far, the most advanced proposal concerns granting access to copyrighted works for people with disabilities. In spite of its narrow purposes, developed countries have strongly opposed this proposal. This experience suggests that an instrument with a broader purpose, such as providing flexibilities for development needs, may face enormous resistance in that forum.

The WTO is yet another alternative. This international organization already has experience providing flexibilities in the enforcement of TRIPS. The WTO allows countries to issue a compulsory license for pharmaceutical products in case they lack the capacity to manufacture them. Although this exception was originally a temporary mechanism,<sup>207</sup> it later became a permanent modification to TRIPS.<sup>208</sup> In this sense, the WTO shows a successful adoption of flexibilities and some level of commitment in evaluating their implementation and functioning in both TRIPS and the domestic law of WTO members. Moreover, TRIPS has an enforcement mechanism that is lacking in the Berne Convention. Finally, TRIPS also has a larger number of members than the Berne Convention, which suggests a wide base of potential application for a new instrument.

Adopting an international instrument that provides flexibilities to meet development needs may take a long time. This is more likely if developed countries show the resistance they did during the negotiations that concluded with the adoption of the Appendix. Therefore, it may be advisable to work initially on a narrower instrument. For instance, seeking an agreement at the regional or sub-regional level, such as within the Common Market of the South<sup>209</sup> or the South American Community of Nations.<sup>210</sup> This narrower approach may create important opportunities for granting wider access to sources of knowledge with some additional

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<sup>206</sup> For instance, on access for people with disabilities, on exceptions and limitations for education, on traditional knowledge, and on protection for broadcast organizations, among others.

<sup>207</sup> See WTO General Council, *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 and Corr.1 (Aug. 30, 2003) available at [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm).

<sup>208</sup> See WTO General Council, *Decision on the Amendment of the TRIPS Agreement*, WT/L/64 (Dec. 6, 2005) available at [http://www.wto.org/english/tratop\\_e/trips\\_e/wtl641\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm).

<sup>209</sup> See Treaty for the Constitution of a Common Market between the Republic of Argentina, the Federate Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay (Asuncion Treaty), Mar. 26, 1991, 30 I.L.M. 1044 (initiating the regional integration of the economies of Argentine, Brazil, Paraguay, and Uruguay).

<sup>210</sup> See South American Community of Nations Constitutive Treaty, May 23, 2008 available at <http://www.comunidadandina.org/INGLES/csn/treaty.htm> (initiating a process of regional integration between South American countries).

positive externalities. For example, empowering regional and native cultures by promoting the preservation of their linguistic heritage. Currently, 16% of the translations published in Brazil are from books initially available in Spanish;<sup>211</sup> that number may increase under an adequate instrument. Language minorities from neighboring countries also may enjoy the benefits of economies of scale, such as between Mapudungun speakers of Argentina and Chile; Guarani speakers of Argentina, Brazil, and Paraguay; Aymara speakers of Bolivia, Chile, and Peru, and so on.

Although not fully satisfactory, a regional instrument may be a first step to adopt an international instrument that provides enough flexibility for a wider dissemination of knowledge.

## VI. FINAL REMARKS AND CONCLUSIONS

The Appendix of the Berne Convention intended to provide some flexibility for developing countries in order to meet their needs for a wider dissemination of knowledge. The Appendix's system of compulsory licensing, however, has proven to be inefficient. Developing countries have not adopted the bureaucratic and limited mechanism of the Berne Convention. Rather, many of these countries have devised idiosyncratic solutions in their domestic laws. In addition, the Appendix creates legal uncertainty about its application to the online environment. Furthermore, the Appendix falls short of providing solutions that effectively meet development needs, particularly those of cultural and linguistic minorities. These criticisms should be enough to encourage the adoption of a new solution for developing countries. However, adopting such a mechanism may also allow the advancement of general welfare goals related to the protection of intellectual property by developed countries. A new mechanism may even lead to new opportunities for authors and right holders.

Any new solution for addressing the needs of developing countries must be informed by the lessons learned from the failure of the Appendix of the Berne Convention. For instance, a new international instrument must

- Extend the scope of provisions to both developing *countries* and developing *communities* in developed

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<sup>211</sup> See *Fomento del Libro America Latina*, *supra* note 60, p. 84.

countries.

- Provide diverse legal mechanisms, beyond nationally issued compulsory licenses, for a variety of purposes.
- Reduce paperwork, bureaucracy, and unnecessary safeguards that have made the system in force completely unworkable.
- Take advantage of the opportunities offered by technology both for development purposes and for facilitating the functioning of the system itself.
- Engage competent international organizations to play a more active role in empowering countries and communities to take advantage of the system, providing technical assistance and capacity building, among other responsibilities.

In its more than forty years in force, the Appendix has failed to meet the needs of developing countries. A compromise is urgently required in the international copyright law to allow less developed countries and communities to participate in the global progress of culture, science, and technology.