

Beiter, Klaus D.

**Article — Published Version**

Extraterritorial human rights obligations to “civilize” intellectual property law: Access to textbooks in Africa, copyright, and the right to education

The Journal of World Intellectual Property

**Provided in Cooperation with:**

John Wiley & Sons

*Suggested Citation:* Beiter, Klaus D. (2020) : Extraterritorial human rights obligations to “civilize” intellectual property law: Access to textbooks in Africa, copyright, and the right to education, The Journal of World Intellectual Property, ISSN 1747-1796, Wiley, Hoboken, NJ, Vol. 23, Iss. 3-4, pp. 232-266,  
<https://doi.org/10.1111/jwip.12150>

This Version is available at:

<https://hdl.handle.net/10419/230135>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



<http://creativecommons.org/licenses/by/4.0/>

# Extraterritorial human rights obligations to “civilize” intellectual property law: Access to textbooks in Africa, copyright, and the right to education

Klaus D. Beiter<sup>1,2</sup> 

<sup>1</sup>Faculty of Law, North-West University,  
Potchefstroom, South Africa

<sup>2</sup>Max Planck Institute for Innovation and  
Competition, Munich, Germany

## Correspondence

Klaus D. Beiter, Faculty of Law, North-West  
University, Private Bag X6001, Internal  
Box 431, Potchefstroom 2520, South Africa.  
Email: [Klaus.Beiter@nwu.ac.za](mailto:Klaus.Beiter@nwu.ac.za)

## Funding information

National Research Foundation of South Africa,  
Grant/Award Number: 111697

## Abstract

Printed textbooks remain crucial for education, particularly in developing countries. However, in many of these countries, textbooks are unavailable, too expensive, or not accessible in local languages. Cheaply (translating and) reproducing textbooks would be a strategy. However, reprography is highly regulated under copyright law. Copyright also adds to the cost of textbooks. The availability, accessibility, and acceptability of learning materials constitute elements of the right to education under international human rights law (IHRL). Extraterritorial state obligations (ETOs) under IHRL—obligations of states, in appropriate circumstances, to observe the human rights of those beyond their borders—could assume a key function in “civilizing” intellectual property (IP) law. This Article demonstrates the significance of ETOs for IP law by focusing on the issue of how ETOs under the right to education of IHRL prescribe requirements that international copyright law must comply with to facilitate access to textbooks in schools and universities. Drawing on the expert Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural

This is an open access article under the terms of the Creative Commons Attribution License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

© 2020 The Authors. *The Journal of World Intellectual Property* published by John Wiley & Sons Ltd

Rights of 2011, and applying the well-known typology of state obligations to respect, protect, and fulfill human rights, the ETOs concept is introduced and 20 typical ETOs relevant in this context are identified. The discussion relates to the situation in developing countries more generally, focuses, however, on Africa.

#### KEYWORDS

access to textbooks, Africa, copyright, developing countries, extraterritorial state obligations, intellectual property rights, right to education

## 1 | COPYRIGHT LAW AND ACCESS TO TEXTBOOKS IN DEVELOPING COUNTRIES

Printed textbooks are crucial for education, particularly in developing countries. Hard-copy materials remain important in schools and universities (Isiko Štrba, 2012, p. 202; Ncube, 2017a, p. 129).<sup>1</sup> In developing countries, information and communication technology often is not available or accessible (Story, 2003, p. 797). Hence, only one in five people in Sub-Saharan Africa used the internet in 2017 (Mahler, Montes, & Newhouse, 2019, p. 1).<sup>2</sup> Constraints result from lack of electricity, computer illiteracy, high costs of internet services, and the difficulty of provision in rural areas (Mahler et al., 2019, p. 4). Other problems of accessibility relate to the fact that, generally, open access is not a common feature, peer-to-peer platforms are not quite legal, access is restricted by technological protection measures (TPMs) which summarily negate permissible copyright limitations and exclusions, and the circumvention of TPMs is often a crime. Altogether, therefore, digital content does not prove to be a wondrous solution, wherefore the textbook remains important. It remains “extremely important” in the countries of the global South (Story, 2003, p. 797).

However, “textbooks are a rare commodity in most developing countries. One book per student (in any subject) is the exception, not the rule, and the rule in most classrooms is, unfortunately, severe scarcity or the total absence of textbooks” (Askerud, 1997, p. 16).<sup>3</sup> Where textbooks are available in developing countries, they are often very expensive, and, accordingly, unaffordable. A newspaper article of 2014 thus reported for South African university students the high cost of textbooks meant that many students could not buy all the books they needed for their studies (Nkosi, 2014). Some textbooks may be available, but not in the relevant local languages in which they are needed. As for Africa, UNESCO notes for reading books in children's languages a scarcity in all African languages and the virtual absence of books in many key languages (UNESCO Global education monitoring report, 2016, p. 190).<sup>4</sup> All this is problematic, of course, where access to textbooks is held covered by the human right to education.

The lack of access to textbooks in developing countries has many reasons. There is a lack of reliable data on student enrollments; teaching and learning material systems are poorly managed due to a lack of trained manpower or good communication facilities; in upper secondary and higher education there is a continued dependence on expensive imported textbooks; financing is “inadequate, irregular, and unpredictable”; and distribution and school storage systems are dysfunctional (Read, 2015, p. 13).<sup>5</sup> Moreover, textbook procurement is uncompetitive and bribery by suppliers not uncommon (International Commission on Financing Global Education Opportunity, 2016, pp. 66–67). However, copyright must also be considered a reason inhibiting access to textbooks.<sup>6</sup>

Where textbooks are unavailable, too expensive, or not available in relevant local languages, their cheap (translation and) reproduction by governments, educational institutions, or libraries would be a solution.

However, “reprography, which, from a developmental perspective, could facilitate access is often seen from the perspective of “piracy” and is highly regulated” (Ramcharan, 2013, p. 65). Copyright also affects the price at which textbooks can be provided (Helfer & Austin, 2011, p. 318). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires World Trade Organization (WTO) members to put in place a system of copyright protection in accordance with most of the provisions of the Berne Convention for the Protection of Literary and Artistic Works of 1971.<sup>7</sup> Under the Berne Convention, the reproduction and translation of literary and artistic works are the exclusive rights of the copyright holder.<sup>8</sup> Anyone else seeking to reproduce or translate such works, or larger portions thereof, requires the copyright holder's consent. Copyright holders might not be traceable or refuse consent. Where they grant consent, they usually require the payment of a licensing fee. Especially in the developmental context, these factors tend to impede access to textbooks. The exact extent of copyright as an impeding factor in relation to other impeding factors is difficult to assess. Yet, one must agree with Laurence Helfer and Graeme Austin, where they state that, “even so, analysis ... must also take account of situations in which intellectual property (IP) law may make a real difference to the provision of learning materials, and, in turn, the realization of the human right to education” (Helfer & Austin, 2011, p. 357).<sup>9</sup>

International copyright law does make provision for certain limitations and exceptions to copyright protection to safeguard the public interest in access to works that enjoy copyright protection, also for educational purposes. However, as the discussion will show, limitations and exceptions relevant to education hardly countenance the bulk provision of learning materials, this, as it were, being what is needed in developing countries. Moreover, the compulsory licensing scheme under the Appendix to the Berne Convention, conceived to serve bulk provision for educational purposes in developing countries, has proven ineffective in practice.

## 2 | “CIVILIZING” IP LAW THROUGH EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS

More than 20 years ago, Philip Altbach remarked that

*the time has come to recognize that the production of books and journals is more than a business, and that trade in knowledge and knowledge products is somehow different than commerce in automobiles or coconuts. Those who control knowledge distribution have a responsibility [emphasis added] to ensure that knowledge is available throughout the world at a price that can be afforded by the Third World.*

(Altbach, 1996, p. 26).

However, whose responsibility is referred to here? Who controls knowledge distribution? Would this be the big publishing firms operating from countries of the Global North, individual, especially developed states, inter-governmental organizations such as the WTO or the World Intellectual Property Organization (WIPO) as such, states as members of such organizations, especially those influential in the formulation of copyright policy by such organizations—or more or all of these? As has been pointed out, and as will further be explained below, access to textbooks forms part of the human right to education. However, where, due to strict copyright laws imposed by a developing state, access to textbooks in that state is obstructed—and the right to education in that state therefore at peril—it does not really make sense to brand that state a human rights violator where the ultimate reason for the violation has a different, global, international source. The application of mere territorial human rights paradigms clearly does not suffice in a globalized world characterized by a harsh North–South divide.

The present context is one where TRIPS norms are increasingly considered minimum standards inviting expansive interpretations of copyright and other IP rights. Bilateral and plurilateral free trade agreements (FTAs) oblige developing states to provide for enhanced levels of IP rights protection, extending beyond TRIPS. WIPO pursues an unabated agenda of “harmonizing” global IP law. Developed states urge those states yet to attain more

advanced stages of socio-economic development to slavishly replicate the developed states' intricate IP systems. In this context, access to textbooks—in the same way as technological development, food security, access to essential medicines, participation in cultural life, or sustainable traditional community life, as goods similarly threatened by IP rights—will remain a distant dream in the developing world unless a novel approach to obligations and accountability is adopted. All those wielding power in the design and implementation of global copyright and other IP law should no longer remain beyond the reach of human rights just because their conduct does not harm those within their own physical (or conceptual) territory. Actors whose conduct may have a detrimental effect on the enjoyment of the human rights of those beyond such territory must, in certain circumstances at least, be considered to bear human rights obligations with regard to those people far away.

While it has been held that business enterprises should “respect internationally recognized human rights, wherever they operate” (Ruggie, 2011, Annex, Guiding Principle 23(a)) and that international organizations have human rights obligations “under, *inter alia*, general international law and international agreements to which they are parties” (Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2011, Principle 16),<sup>10</sup> the discussion here will focus on “extraterritorial state obligations” under international human rights law (IHRL) (in this sense, abbreviated ETOs here). IP law has so far refrained from endorsing the ETOs concept, the notion that states, in appropriate circumstances, hold human rights obligations toward those living beyond their own territory. In particular, international assistance and co-operation obligations are implicated in this regard. This reluctance is regrettable if it is borne in mind that most IP, including copyright law originates at the international level. This is the level of state interaction, where each state, through the role it chooses to play in shaping and enforcing international IP law and policy, can advance or obstruct human rights in other states. It is in this context, therefore, that ETOs, also those arising under the right to education, could assume a key function in “civilizing” IP law.<sup>11</sup>

The purpose of the discussion that follows is to demonstrate the significance of ETOs for IP law by recourse to the right to education as an example. The question is, in what way does the latter right, as protected by IHRL, by virtue of its extraterritorial application, prescribe requirements that international copyright law must comply with to facilitate access to textbooks in schools and universities. Section 6 will provide an introduction to the ETOs concept. Section 7 will then attempt to identify typical ETOs under the right to education in the Berne, TRIPS, and FTA context that safeguard access to textbooks.<sup>12</sup> The provisions of the expert Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) and the familiar classification of states' human rights obligations as obligations to respect, protect, and fulfill human rights will help structure this part of the discussion. This exercise can, and should, be repeated for other fields of IP law in potential conflict with IHRL as well. The next two sections, Sections 3 and 4, will, however, first outline the constraints of current copyright law in facilitating access to textbooks. Section 5 will explain in what ways access to textbooks should be held covered by the right to education as protected by IHRL.

The discussion relates to issues of accessibility in developing countries generally, but, in particular, the critical lack of access to textbooks in education in Africa motivated this study. The term “textbook” as used in the Article may mean typical textbooks designed for instructional use in schools and universities (or larger portions of such textbooks), all other books that may have an educational purpose (or larger portions of such books), or both. In the present context, the reference is not so much to scholarly literature for pure research purposes. The reference is further to printed textbooks. The term “learning materials,” by contrast, would be wider, including notably digital content too.<sup>13</sup>

### 3 | CONSTRAINTS OF CURRENT COPYRIGHT LAW: LIMITATIONS AND EXCEPTIONS

Copyright is to serve as an incentive for the creation of knowledge or culture. Recourse to such knowledge or culture by others occurs against a reward being paid to the author. In accordance with the orthodox underpinnings

of copyright law, the fact that the skill, labor, and judgment extended in producing new works is rewarded, is considered as crucial in leading to the production of literary, artistic, and other creative works that will enhance learning in society.<sup>14</sup> However, the mere availability of such works does not, of course, mean that everyone will also have access to these. There will be those unable to pay the reward. There will further be instances in which types of use of a work do not justify the lengthy process of obtaining author consent and/or the payment of any, or “the full,” reward. International copyright law provides for certain limitations and exceptions (L&Es) to copyright protection to safeguard the public interest in access to works that enjoy copyright protection, also for educational purposes. L&Es may allow use without the author’s consent, but against (a potentially reduced) payment, or they may entail use without consent and without a reward. Remuneration becomes relevant where, and to the extent that, without this, the copyright holder’s right of economic exploitation would be unreasonably prejudiced.<sup>15</sup> Far-reaching entitlements to use that would usually only be available under contractual terms may further be awarded under a “compulsory license.” This is a very special type of L&E. As understood here, “compulsory licenses” are granted by a designated national agency in exceptional cases of urgency justifiable in the public interest. They must be specifically applied for and entail an obligation to pay fair remuneration.<sup>16</sup>

Arts. 9 and 10 of the Berne Convention, for example, contain L&Es relevant in this context. Art. 9(2) allows the reproduction of literary or artistic works in circumscribed circumstances.<sup>17</sup> On the basis of art. 9(2), states parties could enact provisions that would permit students to make limited copies from textbooks (available in the library of an educational institution, for example) for purposes of personal or private use, research, or study. It may well be asked whether this could also cover students using such copies from typical or any other textbooks in class. If this is not private, it may yet be personal use.

Art. 10(1) permits quotations from a literary or artistic work. Obviously, a quotation signifies a limited portion of a work.<sup>18</sup> Of significance for education is the teaching L&E in art. 10(2). This permits the utilization of literary or artistic works “by way of illustration” in, for example, publications “for teaching.” Such use may take place “to the extent justified by the purpose” and must be “compatible with fair practice.”<sup>19</sup> Use “by way of illustration” indicates that passages of a work or an entire small work may be used (Ricketson & Ginsburg, 2006, para. 13.45; Senftleben, 2004, p. 234).<sup>20</sup> “Teaching” means noncommercial teaching in educational institutions from the elementary up to the advanced level (Gervais, 2017, p. 93; Ricketson & Ginsburg, 2006, para. 13.45). Sam Ricketson and Jane Ginsburg note the restrictive nature of the accepted interpretation, as it excludes adult education courses not offered by the formal educational institutions themselves and also adult literacy campaigns (Ricketson & Ginsburg, 2006, para. 13.45). “Teaching” could further be interpreted not to include distance education as this does not take place within the physical location of an educational institution.<sup>21</sup> Beyond the requirement of “fair practice,” art. 10(2) does not impose any restriction on the number of copies that may be made (para. 13.45). “Fair practice” would, however, entail that, where large numbers of copies are made for use in class by individual students, the *amount* copied will be “a highly relevant factor” (para. 13.45). Martin Senftleben maintains that art. 10(2) permits the use of all works, except those “intended for the use in schools, like a schoolbook,” as, in this instance, “the utilisation for teaching constitutes a major source of royalty revenue” (Senftleben, 2004, p. 198).<sup>22</sup>

Art. 9(2) permits the limited reproduction of works. The provision, as drafted in the wake of the 1967 revision of Berne, sets out the famous three-step test of copyright law. States parties may accordingly enact national L&Es that permit the reproduction of works. Under art. 9(2), such permission may only apply:

1. “in certain special cases,”
2. if reproduction “does not conflict with a normal exploitation of the work,” and
3. if it “does not unreasonably prejudice the legitimate interests of the author.”

L&Es under art. 10 are *leges speciales*. Yet, their inclusion of a test of proportionality and a reference to “fair practice” suggest a close link to reasoning under the three-step test, which requires a balance between the interests of right holders, those of users, and those of the wider public to be established (Gervais, 2017, p. 93;

Ricketson & Ginsburg, 2006, para. 13.45).<sup>23</sup> In any event, art. 13 of TRIPS now makes the three-step test applicable to L&Es in copyright law more generally. While the three-step test could be read constructively and dynamically as “a clause not merely limiting limitations, but empowering contracting States to enact them, subject to the proportionality test that forms its core and that fully takes into account, *inter alia*, fundamental rights and freedoms and the general public interest,” the reality is that it is widely read restrictively as “imposing limits on the “erosion” of copyright” (Hugenholtz & Okediji, 2008, p. 25). The WTO itself, for example, does not construe the test holistically with an emphasis on the third leg, which stresses compromise between diverse interests, but initially focuses on its first leg, interpreting this very literally as requiring L&Es to be “narrow in quantitative as well as a qualitative sense” (United States—Section 110(5) of the U.S. Copyright Act, 2000, para. 6.109). Contesting such disempowering readings of the test, a group of respected copyright law experts, in a formal statement of 2008, held that “certain interpretations of the Three-Step Test at international level [are] undesirable,” and that “national courts and legislatures have been wrongly influenced by restrictive interpretations of that Test” (Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law, 2008, p. 711).

In the developing world, it is also problematic that L&Es under international copyright law are not compulsory. This renders many a developing country vulnerable to accepting the deceptive promises by developed states of funds for “capacity building” to help setting up copyright structures in return for not making use of the L&Es and not undertaking copyright law reforms that would adequately address issues of access (Okediji, 2017, p. 481). In the extreme, developed states might communicate outright threats of retaliation (pp. 480–481). Moreover, the flexibility of international L&Es means that they must be concretized at the national level. This is a daunting exercise for countries that lack the institutional capacity to do so (p. 480). Further, and fundamentally, even a benevolent construction of the above L&Es in terms of conventional copyright law wisdom will not solve problems of legitimate access as such for the masses. Ruth Okediji explains it as follows:

*Limitations and exceptions to IP rights certainly can address specific challenges, but rarely are they sufficient to meet the development-related challenges—such as bulk access to educational works—facing many least-developed and developing countries. ... Existing limitations and exceptions available in international copyright law, and in many domestic copyright laws, do not extend to institutional, community or group needs.*

(Okediji, 2018, p. 34).

The L&Es would permit spontaneous, occasional use (Gervais, 2017, p. 93). The L&Es would not, however, permit educational institutions photocopying (substantial portions of) a textbook and making that available for free or cheaply to students, or including it in a course pack. In more developed states, it is customary for educational institutions to conclude use agreements with collecting societies that regulate utilization under the L&Es, and beyond these, against remuneration. However, even these agreements would usually not provide for bulk access. Quite apart from that, educational institutions in developing countries frequently lack the necessary capacity and resources to conclude such agreements (Chon, 2007, p. 831). In general, the collecting society model appears ill-suited for developing countries in the short to medium term (Commission on Intellectual Property Rights, 2003, p. 99). Collecting societies are expensive and bureaucratic, have a propensity to wield significant market power, and in developing countries happen to collect far more royalties for IP right holders from rich countries than for local creators (pp. 98–99).

Beyond permissions to translate that may be covered under the above L&Es, the Berne/TRIPS system does not provide for special L&Es for translation. It is true that there are certain special provisions that would allow the translation of books. However, these are either irrelevant today—to wit, the clause on the so-called “ten-year regime”—or have proven unworkable in practice—thus, the provisions of the Appendix to the Berne Convention. The latter, envisioning a compulsory licensing scheme for developing countries, merit separate discussion under the following heading.<sup>24</sup> In terms of the 10-year regime, an author's translation rights with regard to a specific language expire, if, 10 years after the first publication of the original work, no translation into that language has been



effected by the author or with his or her authorization.<sup>25</sup> While the 10-year regime, in principle, could have facilitated large-scale access to works for educational purposes (concurring Silva, 2013, p. 585),<sup>26</sup> it has become irrelevant today as it could only be made applicable, in certain instances, on ratification of, or accession to, the Berne Convention of 1971. It may also be noted that 10 years is a very long time for works of the natural and physical sciences and of technology, where knowledge becomes outdated very quickly (pp. 585–586).<sup>27</sup>

The absence of L&Es for translation is highly problematic. The former U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, points out that whereas speakers of the world's major languages may choose from among “millions of books,” speakers of local languages have access to “very few” (Shaheed, 2014, para. 68). It is not only the limited size of the linguistic communities to which local language speakers belong, but more significantly the overall socio-economic situation of these communities, regularly characterized by general structural disadvantage, that has the effect that there usually does not exist a major publishing market for the languages spoken (Shaver, 2014, p. 117).<sup>28</sup> This is certainly true for the African context, where, in the production of materials, local languages are ignored in favor of English, French, or Portuguese (Story, 2003, p. 798). The absence of L&Es for translation is problematic from a nondiscrimination perspective, as it disproportionately affects those not speaking a globally used language.<sup>29</sup> However, it also poses a substantial barrier to the right to take part in cultural life (Shaheed, 2014, para. 68) and further disregards the needs of linguistic groups for whom the ability to translate works into their own languages is essential for education (para. 69).

In the same way that there is no single, broad international education L&E, none exists for libraries (including those of schools or universities). A 2017 WIPO study recognizes that L&Es for libraries “are fundamental to the structure of copyright law” (Crews, 2017, para. 6) and “serve public interests by permitting libraries to make socially beneficial uses of copyrighted works” (para. 8). Countries currently provide for L&Es that allow libraries to make copies of mostly shorter works for individual readers or researchers on request, or that permit reproduction for preservation or replacement purposes (para. 7). However, yet again, what is needed, at any rate in developmental contexts, is an L&E for libraries (and, generally, all kinds of cultural institutions and literacy-enhancing centers or initiatives) that could ensure access to works on a large scale (broadly in this sense Okediji, 2017, pp. 479–480, 491–492). At present, a library cannot produce multiple copies of a textbook, or larger portions within, to satisfy demands for access by poorer students or other readers.

## 4 | CONSTRAINTS OF CURRENT COPYRIGHT LAW: THE BERNE APPENDIX

The Appendix to the Berne Convention of 1971 (also made a part of TRIPS)<sup>30</sup> provides for a compulsory licensing scheme, permitting translation or reproduction of a (whole) work against compensation without the consent of the copyright holder. Developing countries, as per U.N. definition, may avail themselves of the arrangements of the scheme.<sup>31</sup> They must notify their intention to do so to WIPO.<sup>32</sup> The scheme must then be implemented domestically. Licenses are to be granted by a “competent authority.”<sup>33</sup> Whereas the L&Es discussed above relate to entitlements to utilize portions of a copyrighted work of which one holds a legitimate copy, the Berne Appendix is precisely about access to legitimate copies; it is about bulk access in developing countries, that is, the provision of multiple copies of a work at affordable prices (Okediji, 2006, p. 15). Compulsory licensing under the Appendix is subject to complicated rules, however. Translation and reproduction licenses are governed separately.

A *translation license* may be applied for if, 3 years after the first publication of a work, no translation into the relevant local language (“a language in general use” in the developing country) has been published (anywhere in the world) by, or with the consent of, the holder of the right of translation.<sup>34</sup> A license may only be granted “for the purpose of teaching, scholarship or research.”<sup>35</sup> A *reproduction license* may be applied for if, after 5 years<sup>36</sup> of the first publication of a particular edition of a work, copies of such edition have not been distributed in the developing country to the general public, or in connection with systematic instructional activities, at a normal price in that



country, by, or with the consent of, the holder of the right of reproduction.<sup>37</sup> A license may only be granted “in connection with systematic instructional activities.”<sup>38</sup> “Teaching” (translation license) or “instruction” (reproduction license) includes noncommercial elementary as well as advanced teaching (similarly, Ricketson & Ginsburg, 2006, paras. 14.68, 14.86). However, it seems neither license can be used to provide access beyond “organized” education.<sup>39</sup> Hence, they cannot be relied on to stock local libraries or community centers—which may play a crucial role in informal education—with (multiple) copies of (translated) textbooks (in this vein, Ncube, 2017b, p. 270).<sup>40</sup> Furthermore, reproduced copies cannot be made available for free to students. The Appendix requires the charging of the normal or a lower price.<sup>41</sup>

Where a translation or reproduction license is applied for, the Appendix further requires a grace period to elapse, beyond the time-limits mentioned, before the license may be granted.<sup>42</sup> This is to allow the copyright holder to have a translation published at a price normal for the developing country, or to have copies of an edition distributed in that country at a normal price, within that period to avoid a license being granted.<sup>43</sup> Accordingly, the grace period is meant to give the original copyright holder every opportunity to supply the local market concerned (Okediji, 2006, p. 15). Moreover, it should also be noted that if an author chooses to exercise his or her moral right to withdraw all copies of the work or the specific edition from circulation, no license can be granted,<sup>44</sup> suggesting that in certain cases, works could be completely out of reach of users in developing countries (p. 15).

It appears that it is the states themselves, or state-owned enterprises, that may apply for licenses under the Appendix (Helfer & Austin, 2011, p. 338).<sup>45</sup> Importantly, a license may only be granted if it has been shown that the copyright holder has been approached and has denied consent, or, that, after due diligence, the copyright holder could not be traced.<sup>46</sup> The Appendix provides for just compensation to be paid to copyright holders.<sup>47</sup> Licenses usually do not extend to the export of copies and they permit publication within the granting country only.<sup>48</sup> Export and import licenses would, however, be of vital importance in developmental contexts (Silva, 2013, pp. 617–619, 628–629). Developing countries will often lack manufacturing capacities or have a book market which is too small to justify publication in the circumstances (p. 628).

The Appendix has not been a success. Only 18 countries worldwide have made declarations relating to the Appendix so far.<sup>49</sup> In 2013, only 3 countries could be identified as having implemented the mechanism into domestic law (Silva, 2013, p. 594). As for Africa, only 4 countries (Algeria, Egypt, Niger, and Sudan) have made declarations relating to the Appendix.<sup>50</sup> It seems only Uganda, not even a party to the Berne Convention, has implemented the mechanism (Kawooya, Kakungulu, & Akubu, 2010, pp. 283, 288). Simultaneously—as may be confirmed for developing states generally—various African states, beyond the Appendix framework, provide for arrangements adjusting those of the Appendix to develop highly idiosyncratic national solutions (Fometeu, 2009, p. 42; Silva, 2013, pp. 590–605).<sup>51</sup> As Alberto Cerda Silva describes it, “developing countries are doing it their own way” (Silva, 2013, p. 598). On the one hand, it remains a question whether the respective arrangements are in compliance with international copyright law (p. 604). On the other, domestic authorities, fearing that they are not, do not, in fact, implement them (p. 604). As for Africa, for instance, “research ... did not reveal any license granted within the framework of these provisions” (Fometeu, 2009, p. 42).

Sam Ricketson and Jane Ginsburg comment that “it is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix” (Ricketson & Ginsburg, 2006, para. 14.106). Silva holds that

*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.*

(Silva, 2013, p. 590).

Ruth Okediji is also very outspoken. “By all accounts,” she says, the Berne Appendix has been “a failure” (Okediji, 2006, p. 15).<sup>52</sup> Effective application of the arrangements depends on developing countries enacting

specific legislation and establishing an elaborate administrative implementation system, requiring expertise and resources already scarce in most of these countries (Ncube, 2017b, p. 273). The discussion above has illustrated the complex and onerous requirements associated with the use of the Appendix—waiting periods of up to 7 years, additional grace periods, notification to the copyright holder—and the many other limitations of the Appendix. Overall, the text conveys the impression that the granting of compulsory licenses is to be avoided by all means.

## 5 | THE RIGHT TO EDUCATION AND ACCESS TO TEXTBOOKS

The right to education is a “hybrid” right, evidencing characteristics of civil and political, economic, social and cultural, and group or solidarity rights—therefore, of all three generations of human rights (Beiter, 2006, pp. 37–43). It covers classical freedoms in education (first generation rights), encompasses positive state duties to set up a comprehensive education system (second generation rights), and—very important in the context of this discussion—also implicates the right to development (and other third generation rights). In his recent book on *Development and the Right to Education in Africa*, Azubike Onuora-Oguno accordingly emphasizes the “inextricable link” between the right to education and the right to development (Onuora-Oguno, 2019, p. 45).<sup>53</sup> The right to education, understood as a right to development, entitles nations—and simultaneously individuals and certain groups such as minorities or indigenous peoples within a state—vis-à-vis their own state and the community of states collectively, to meaningfully participate in achieving, and to enjoy, their freely chosen socio-economic, cultural, and political progress<sup>54</sup> through education. The right to education is, moreover, an “empowerment right,” that is, a human right whose enjoyment constitutes a prerequisite for the exercise of most other human rights (Beiter, 2006, pp. 28–30).

The most prominent formulation of the right to education in IHRL is that found in art. 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966). If a common denominator exists in the way that international human rights treaties, such as the ICESCR, protect the right to education, then it looks as follows:<sup>55</sup> there is usually a provision defining the aims of education, notably emphasizing that education should be directed to “the full development of the human personality” (e.g., ICESCR, art. 13(1)). Then there would be a provision calling upon states parties to make education at the primary, secondary, tertiary, and fundamental or adult levels available and accessible to varying degrees. State obligations would be formulated in a more rigorous fashion for the lower or basic levels and a less rigorous fashion for the higher or advanced levels (e.g., ICESCR, art. 13(2)(a)–(e)). Where the provision of infrastructure and resources reflects the social or positive aspect of the right to education, the typical texts on the right to education would usually further contain provisions setting out the freedom or negative aspect of the right to education—respect for parental freedoms, respect for the freedom to set up private educational institutions, and so on (e.g., ICESCR, art. 13(3), (4)). The right to education in its developmental dimension is particularly evident in art. 28(3) of the Convention on the Rights of the Child of 1989.<sup>56</sup> This states:

*States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.*

Reverting to the social or positive aspect of the right to education, specifically the issue of available, free education: primary education must usually be compulsory and available free to all (ICESCR, art. 13(2)(a)).<sup>57</sup> Secondary education must be made “generally available” and “accessible to all”; higher education must be made “equally accessible to all, on the basis of [academic] capacity”—in both instances accessibility is to be advanced “by every appropriate means, and in particular by the progressive introduction of free education” (ICESCR, art. 13(2)(b), (c), respectively). In accordance with accepted human rights doctrine, the obligation that compulsory and free primary education be available to all is a so-called minimum core obligation (CESCR General Comment

No. 13, 1999, para. 57).<sup>58</sup> This means that should primary education not be generally available, compulsory, and free, this constitutes a prima facie violation of the right to education (para. 59).<sup>59</sup> Further, while states parties enjoy a certain measure of discretion when it comes to determining means and pace of making secondary and higher education free, they are not allowed to take deliberately retrogressive measures in as far as (progressively) free education is concerned. Deliberately retrogressive measures in the provision of education are forbidden as a matter of principle (para. 45).<sup>60</sup> Consequently, introducing or increasing costs in secondary or higher education constitutes a prima facie violation of the right to education (Beiter, 2006, pp. 387–389, 400–401, 457–458, 572–573, 592, 594, 650–651). Any justification for either type of prima facie violation—noncompliance with a minimum core obligation or deliberately retrogressive measures—would have to be related to legitimate pressing concerns and the full use of the maximum resources available to a state party (CESCR General Comment No. 3, 1990, paras. 9, 10; CESCR General Comment No. 13, 1999, paras. 45, 57).

To dwell on the social or positive aspect of the right to education a bit further: The U.N. Committee on Economic, Social and Cultural Rights (CESCR)—the independent expert body supervising implementation of the ICESCR—in its authoritative interpretation of art. 13 of the Covenant, General Comment No. 13, points out that education at all levels must be, *inter alia*, available, accessible, and acceptable (para. 6).

“Availability” refers to the provision of schools and teachers, and, as the Committee stresses, also teaching materials and facilities such as a library (para. 6(a)). Already in 1981, a study had found that—compared to other potential correlates of school achievement, such as teacher-training, class size, or teacher salaries—the availability of books is particularly consistently associated with higher levels of achievement (Heyneman, Farrell, & Sepulveda-Stuardo, 1981, p. 227). Subsequent studies have confirmed this (Read, 2015, p. 33).<sup>61</sup> However, textbooks are scarce in Africa. The textbook famine in Africa has been referred to above.<sup>62</sup> As for the situation of libraries of educational institutions in Africa, the overall situation is sobering as well. University libraries are typically in a poor state (Commission on Intellectual Property Rights, 2003, p. 103). For libraries in secondary schools, the World Bank in 2008 reports

*seriously inadequate funding, with little or no government financial support. ... Where library stock exists it is generally old and often irrelevant to current curricula and teacher/student interests. More often than not there is virtually no appropriate stock available at all and there are rarely budgets for stock upgrading or replenishment.*

(World Bank, 2008, pp. 71–72).

“Accessibility” refers to the abolition or reduction of school or university fees and also to the elimination of other impediments to access, such as race or gender discrimination (CESCR General Comment No. 13, 1999, para. 6(b)). Hence, the cost of textbooks should also not constitute an impediment to access. The question, of course, is whether “free” education in art. 13(2) actually includes textbooks. The Committee has held that “free” means

*[the absence of] fees imposed by the Government, the local authorities or the school, and other direct costs. ... Indirect costs ... can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.*

(CESCR General Comment No. 11, 1999, para. 7).<sup>63</sup>

Textbooks are an example of an indirect cost. The Committee's Concluding Observations—which comment on a state party's compliance with Covenant obligations, following submission by that state party, in regular intervals, of a report elaborating on its implementation of the Covenant—seem to show that the Committee requires states parties to make textbooks at the secondary (or higher) level progressively, and at the primary level immediately, free for students. The Committee has thus called upon a state party to “gradually reduce the costs of secondary education, e.g. through subsidies for textbooks” (CESCR Concluding Observations Macedonia, 2008, para. 47).

Regarding another state party, the Committee categorically stated that it “is concerned about indirect costs in primary education, such as for textbooks” (CESCR Concluding Observations Tanzania, 2012, para. 26). Those acquainted with the Committee’s working methods will know that, whenever the Committee “expresses its concern” at a situation, this may be considered indicative of a *prima facie* violation of human rights. The reality of textbook cost for the African continent has been described as follows:

*Primary textbooks are dominantly funded by the state even though budgets are widely considered to be inadequate, irregular, and unpredictable. ... Secondary textbooks are more widely subject to parental contributions even though a majority of parents probably cannot afford the costs of the specified textbooks and this has a clear impact on the quality of education that can be achieved. ... [There is a] continued dependence, particularly at upper secondary grades, on imported textbooks carrying developed world overheads and profit expectations.*

(Read, 2015, pp. 13, 68).

Copyright contributes to cost and severely complicates reprography. Specifically, with copyright in mind, a study has suggested that, rather than procuring textbooks through (international) competitive bidding, it would be advantageous if textbooks were developed by subject experts identified by state agencies and went through “an extensive, well-defined consultation and evaluation process,” to ensure adequate attention is paid to quality of content. Such an approach would eliminate the publisher as a middleman and enable the government to retain copyright, making reprints cheaper (Fredriksen, Brar, & Trucano, 2015, p. 104).

“Acceptability” means that education itself must conform to established human rights standards, be relevant, of good quality, and culturally appropriate (CESCR General Comment No. 13, 1999, para. 6(c)). Quality includes, *inter alia*, “a focus on the quality ... of teaching and learning ... materials” (ComRC General Comment No. 1, 2001, para. 22). Acceptability further entails that opportunities for instruction in the mother tongue must be maximized (Beiter, 2006, p. 493). Note may thus be taken of the Organization for Security and Co-operation in Europe’s (OSCE) important Hague Recommendations Regarding the Education Rights of National Minorities of 1996, a document purporting to be a consolidation of international legal obligations relating to the education rights of national minorities—that is, of the various language and cultural groups in any state (Hague Recommendations Regarding the Education Rights of National Minorities, 1996, p. 3). For primary education, it is stipulated that “the curriculum should ideally be taught in the minority language” (Recommendation 12), for secondary education that “a substantial part of the curriculum should be taught through the medium of the minority language” (Recommendation 13), and for higher education that there should be “access to tertiary education in [one’s] own language,” in accordance with need and student numbers (Recommendation 17). A World Bank report of 2005 points out, research shows that first language instruction resulted in increased access and equity, improved learning outcomes, reduced repetition and dropout rates, socio-cultural benefits, and lower overall costs (Bender, Dutcher, Klaus, Shore, & Tesar, 2005). Obviously, textbooks in the relevant language will play a crucial role in this context. As a recent World Bank study, based on research evidence, remarks, “for textbooks to be effective they must be not only available but also ... in a language that is widely understood by students and teachers” (Read, 2015, p. 33). Yet, close to 40 percent of the world’s population do not have access to education in their mother tongue and, therefore, are “potentially negatively affected” by official policy on language in education (Walter & Benson, 2012, p. 282). While 599 languages, including the “global” or known languages, are used in education, 7670 are not (p. 283). Hence, UNESCO reminds states that “the production and distribution of teaching materials and learning resources and any other reading materials in mother tongues should be promoted” (UNESCO Guidelines on Language and Education, 2003, p. 31, Principle I(II)). In 2015, the CESCR, in its Concluding Observations, had expressed its concern at the situation of minority education in a state party. *Inter alia*, the Committee was concerned at “a shortage of textbooks in minority languages” (CESCR Concluding Observations

Tajikistan, 2015, para. 37). Again, the language of “concern” indicates that human rights (seem to) have been violated.

## 6 | ETOs UNDER IHRL

With the right to education prominently protected in art. 13 of the ICESCR, note should be taken of art. 2(1) of the Covenant, which could be seen as embodying the notion of ETOs to fulfill the right to education and other Covenant rights. It lays down the general obligation of states parties to progressively realize Covenant rights—therefore also the right to education in art. 13—“individually and through international assistance and co-operation.”<sup>64</sup> Philip Alston and Gerard Quinn, in a ground-breaking 1987 article on the nature and scope of state obligations under the Covenant—while pointing out that the Covenant’s travaux préparatoires seem not to provide a basis for “hard law” obligations of state parties to render international assistance and co-operation (Alston & Quinn, 1987, pp. 188–191)—assert that, “in the context of a given right it may, according to the circumstances, be possible to identify obligations to co-operate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant” (p. 191). Moreover, trends in the arena of international development co-operation could subsequently require a reinterpretation in support of legal obligations (pp. 191–192).

In 1990 the CESCR, in its influential General Comment No. 3, held that international co-operation for development is “an obligation ... particularly incumbent upon those States which are in a position to assist others” (CESCR General Comment No. 3, 1990, para. 14). In arriving at this conclusion, the Committee relied, inter alia, on arts. 55 and 56 of the U.N. Charter. While art. 55(c) mentions the promotion of “universal respect for, and observance of, human rights” as a U.N. goal in the sphere of socio-economic development, art. 56 lays down the “pledge” of U.N. members “to take joint and separate action in co-operation with the Organization” for the achievement of this and the other goals of art. 55. Commenting on the right to education in art. 13, this author has previously emphasized that, unless such a purposive interpretation of the Covenant’s assistance and co-operation obligations is adopted, the full realization of economic, social, and cultural rights in developing states might well never be achieved (Beiter, 2006, p. 380 n.35). In as far as the actual provision of development aid is concerned, it has since 1970 been recognized that donor states should allocate 0.7 percent of their gross national income to official development assistance (ODA) (Development Assistance Committee [DAC], 2016).

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), a document prepared by a group of experts in international law, addressing all three dimensions of human rights obligations, recognizes that states have obligations to respect, protect, and fulfill civil, political, economic, social, and cultural rights within their territories and extraterritorially (Maastricht Principles, 2011, Principle 3).<sup>65</sup> ETOs encompass:

- (a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and
- (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

(Maastricht Principles, 2011, Principle 8).<sup>66</sup>

ETOs to *fulfill* entail positive duties, and encompass, on the one hand, obligations to *facilitate*, requiring states to create an international enabling environment that allows for the realization of human rights in other states, and, on the other, obligations to *provide*, requiring states to provide financial, technical, co-operative, and other assistance, according to ability, where human rights in another state can otherwise not be guaranteed.<sup>67</sup> Less contentious than ETOs to fulfill are negative duties to respect and positive duties to protect human rights extraterritorially. ETOs to *respect* oblige states to refrain from conduct that nullifies or impairs the enjoyment of human rights (e.g., by

reversing their levels of realization) of persons outside their territories, or which impairs the ability of other states to respect, protect, and fulfill human rights.<sup>68</sup> ETOs to *protect* oblige states to protect individuals outside their territories against infringements of their rights as may be perpetrated by various private actors. In cases where a sufficient nexus exists between a state and the private actors concerned, these actors' anticipated conduct, or the harm they might cause, protection is to occur by regulating the conduct of private actors through legal standard-setting, or administrative, investigative, adjudicatory, or other measures. Where, due to the absence of a sufficient nexus, regulation is not possible, states should, to the extent possible, influence the conduct of private actors.<sup>69</sup>

Extraterritorial jurisdiction arises by virtue of the fact that either: a state exercises authority or effective control over foreign territory; its conduct produces "foreseeable" human rights effects in other territory; or, regarding international assistance and co-operation, it is in a position to assist and co-operate (Maastricht Principles, 2011, Principle 9).<sup>70</sup> In accordance with the latter, the Maastricht Principles identify the obligation of states "that are in a position to do so" separately and jointly to provide international assistance (Principle 33). The duty to provide concrete assistance and co-operation is triggered by the related request of a state in need thereof (Principle 35).<sup>71</sup> Assistance and co-operation is to be rendered commensurate with capacity, resources, and influence (Principle 31). Any assistance and co-operation rendered must itself observe international human rights standards, prioritize vulnerable groups, focus on minimum core obligations, and avoid retrogressive measures (Principle 32(c), (a), (b), (d), respectively).<sup>72</sup> In General Comment No. 13 on art. 13 of the ICESCR, the CESCR reaffirms "the obligation of States parties in relation to the provision of international assistance and co-operation for the full realization of the right to education" (CESCR General Comment No. 13, 1999, para. 56).

Four provisions laid down in the Maastricht Principles are of particular importance in a discussion of global copyright regulation and access to textbooks. Principle 15 states:

*As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.*<sup>73</sup>

The first sentence points out that a state, as a member of an international organization, such as WIPO or the WTO, must do "what it reasonably can" to ensure that the organization as a whole acts in compliance with any human rights obligations of that state. Hence, that state's conduct, within the organization, will be measured against human rights standards. The second sentence makes it clear that a state cannot relinquish any human rights obligations it has accepted by establishing, or by becoming a member of, an international organization that exercises competences formerly exercised by the state individually. Hence, the state must ensure that the international organization is set up and functions in accordance with the human rights obligations of that state. The CESCR, it may be noted, has stated specifically with regard to the right to education in art. 13 that "states parties have an obligation to ensure that their actions as members of international organizations ... take due account of the right to education" (CESCR General Comment No. 13, 1999, para. 56).

Principle 17 provides that "States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations."<sup>74</sup> In other words, states would have to ascertain, for example, whether copyright treaties to be adopted by WIPO, or any FTAs regulating copyright they are to become a party to, are consistent with their human rights obligations and do not jeopardize human rights domestically or abroad. WIPO treaties, TRIPS, and FTAs would have to be interpreted and applied in accordance with states' human rights obligations. If need be, treaties must be amended. This applies to both Berne and TRIPS as well. In the context of discussing states parties' assistance and co-operation obligations under the ICESCR in relation to the right to education, the CESCR states that, "in relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education" (CESCR General Comment No. 13, 1999, para. 56).

Principle 29 stipulates:

*States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.*

*The compliance with this obligation is to be achieved through, inter alia:*

- (a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;*
- (b) measures and policies by each State in respect of its foreign relations, including actions within international organizations, and its domestic measures and policies that can contribute to the fulfillment of economic, social and cultural rights extraterritorially.<sup>75</sup>*

Principle 29 describes what have been termed ETOs to *facilitate* above. Compliance with this specimen of ETOs to fulfill “does not necessarily require resources or international aid” (Ziegler, 2005, para. 57). There is, therefore, no easy defence for states not to comply with these ETOs. In the context of global copyright regulation and access to textbooks, ETOs to facilitate play, as the next section will show, an important role.<sup>76</sup> Letter (a) reiterates ideas found in Principle 17, but also introduces the notion of states elaborating joint safeguard policies that buttress interpretations of the law supporting human rights, or of states adopting soft or hard law instruments that strengthen existing, or create new, standards protective of human rights. Letter (b) recognizes “humanitarian internationalism” as the legal duty of each state. Each state must, in its foreign relations, follow “a pattern of persistent principled politics” aimed at “implant[ing] a slowly emerging legitimacy norm—universal human rights” (Brysk, 2009, Chapter 1). Relevant unilateral domestic measures and policies must also be adopted to promote human rights extraterritorially.

Finally, Principle 14 requires that “States must conduct prior assessment ... of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights.”<sup>77</sup> Although also applicable to, for example, Berne or TRIPS, this principle assumes specific significance in relation to FTAs, which often regulate copyright and other IP matters. FTAs should, prior and subsequent to their conclusion, be subjected to human rights impact assessments, also in respect of their extraterritorial effects, to ensure human rights, including the right to education, are observed.<sup>78</sup> These assessments will indicate whether provisions need to be modified or deleted. Appropriate safeguard clauses may have to be included. A concluded FTA may even have to be terminated.<sup>79</sup>

## 7 | IDENTIFYING TYPICAL ETOs UNDER THE RIGHT TO EDUCATION IN THE INTERNATIONAL COPYRIGHT CONTEXT THAT SAFEGUARD ACCESS TO TEXTBOOKS

ETOs to *respect, protect, and fulfill* (covering obligations to *facilitate* and *provide*) the right to education under IHRL in the Berne, TRIPS, and FTA context, directed at safeguarding access to textbooks, include, inter alia, the obligations set out in this section. Although the obligations are presented as 20 separate ETOs here, there may be a measure of overlap between them in practice. Alternatively, fulfilling a certain obligation, may modify the nature of fulfillment for another. For the sake of easier reading, the 20 ETOs have been grouped into five clusters. The formulation of isolated ETOs (or “sub” ETOs) has been highlighted in each instance.



## 7.1 | Respecting and protecting the right to education

1. *Respect*: WIPO members should not engage in any conduct in WIPO nullifying or impairing the enjoyment of the right to education in any member, or impairing that member's ability to respect, protect, and fulfill the right to education. They must refrain from supporting policies or measures, or agreeing to provisions in (or adopting) copyright treaties, that have any such consequences. Likewise, WTO members should not engage in any conduct in the WTO—and they must refrain from supporting WTO-TRIPS policies or measures—having such consequences.

2. *Respect*: Powerful WTO members should not compel developing members to subordinate to (assailable) conceptions of copyright protection that jeopardize access to textbooks. As has been noted, given the three-step test is now part of TRIPS, an instrument with “teeth,” enacting domestic L&Es has become a risky and uncertain affair—policy-makers in developed countries will often communicate threats to their counterparts in developing countries (Okediji, 2017, p. 480). Developing states must be held entitled to fully utilize the potential of open-ended provisions (e.g., those restating the three-step test) and specific flexibilities provided for (e.g., compulsory licenses or parallel imports) in Berne and TRIPS to protect the public interest in education. Such an interpretation accords with the TRIPS objectives in art. 7 and the public interest principles of TRIPS in art. 8 of TRIPS and also the right to education of IHRL.

The overarching aim of art. 7 of TRIPS is to achieve balance in IP law between the creation and dissemination of technology and knowledge, rights of IP right holders and users, and the rights and duties of IP right holders. Art. 8(1) of TRIPS states that members “may ... adopt measures necessary ... to promote the public interest in sectors of vital importance to their socio-economic ... development.” Arts. 7 and 8 should play a crucial role in tempering TRIPS and TRIPS-plus law (Yu, 2009). However, as the emphasis in this Article is on the *direct* effect of norms *outside* international IP law on IP law, arts. 7 and 8 do not stand at the center of the discussion. In practice, however, they remain relevant. Arts. 7 and 8 constitute “points of entry” for IHRL concerns into the international IP regime. The argument made here is that temperation (even if achieved via arts. 7 and 8) may (also) be said to be a direct requirement under an external ETO norm.<sup>80</sup>

3. *Protect*: Developed states should, to the extent possible, ensure that publishers sufficiently linked to their sphere of control, or whose conduct they can influence, do not exploit copyright to the detriment of students, parents, and teachers in developing states, for example by charging excessive prices for textbooks.<sup>81</sup> Excessive pricing is facilitated by foreign firms being dominant in local book markets. Developed states should adopt rules for differential pricing, allowing for a reasonable profit, but requiring prices to correlate to percentages of per capita GNI expended for books, thus taking into account the circumstances of the countries concerned. Anticompetitive conduct “elsewhere” is as reprehensible as anticompetitive conduct “at home,” especially if it threatens human rights.

## 7.2 | A road map, human rights impact assessments, reforming the Berne Appendix and TRIPS, and bulk access

4. *Facilitate*: Each state should adopt policies, a road-map, as it were, with respect to its actions within the WIPO or WTO context, setting out how it can contribute to protecting the right to education, and other human rights, in that context. This is not to accord a(n) (unwarranted) mandate to WIPO or the WTO to realize human rights, but rather to ensure that, where these organizations' conduct could have an impact on human rights, it should advance these, namely by preserving each state's ability itself to respect, protect, and fulfill human rights. The stated road-map should incorporate principles on voting or consensus behavior, regular dialogue with developing countries, proactive measures for reform or norm clarification, co-operative approaches in respect of countries struggling to comply with Berne or TRIPS, and so on.

5. *Facilitate: WIPO and WTO members should* subject WIPO treaties, such as the Berne Convention, and TRIPS to regular human rights impact assessments, to identify potential need for reform (reinterpretation or textual reform), directed at protecting the right to education or other human rights. The former U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, thus urges that international copyright instruments should be subjected to human rights impact assessments (Shaheed, 2014, para. 94). These instruments “should never impede the ability of States to adopt exceptions and limitations that reconcile copyright protection with ... human rights, based on domestic circumstances” (para. 95).

6. *Facilitate: WIPO members should* initiate, promote, and help realize a reform of the compulsory licensing scheme of the Berne Appendix to make this work for developing states: the distinction between translation and reproduction licenses should be eliminated and the simultaneous application for both licenses under the same conditions be allowed; waiting and grace periods should be abolished; seeking consent of the copyright holder should be dispensed with; licenses should be available with respect to informal education as well (stocking public libraries, community centers, and so on); licenses should be available when the author chooses to withdraw all copies of the work or the specific edition from circulation; distribution of free copies should be legitimate; just compensation to the copyright holder should be moderate and only paid to the extent that the latter loses any market opportunity; and publication should be permitted in another country for export to the country in need (see also Fometeu, 2009, p. 43; Okediji, 2006, p. 29; Silva, 2013, pp. 626–629).<sup>82</sup> Altogether, procedures should be simplified and the instrument reflect “good will” on the part of developed countries.

7. *Facilitate: WTO members should* initiate, promote, and help realize a reform of TRIPS that safeguards the right to education and other human rights.<sup>83</sup>

Annette Kur and others propose, for example, that art. 7 “Objectives” should include a reference to “the larger public interest ... in education” (Kur & Levin, 2011, pp. 463–464).<sup>84</sup> Better yet would be an explicit reference here to all those human rights, including education, relevant in the TRIPS context. The authors propose a new art. 8a, seeking “a fair balance between private economic interests and the larger public interest as well as the interests of third parties” (p. 465)<sup>85</sup> and setting out a more empowering version of the three-step test for IP law, which puts the stress on what is now the third leg of the test and proceeds on the premise that users *may use* protected subject matter *provided* this “does not unreasonably prejudice the legitimate interests of the right holder” (pp. 465–466).<sup>86</sup>

According to the authors, art. 13 on L&Es in copyright law should provide for a mandatory L&E with respect to “use made for the purpose of ... illustration for teaching ... to the extent that this is necessary for the relevant purpose” (optional in Berne) (pp. 470–471, 559–560),<sup>87</sup> a mandatory L&E with respect to “acts of reproduction made by publicly accessible libraries, educational establishments, ... which are necessary for these institutions to perform their tasks” (missing in Berne) (pp. 470–471, 562–563),<sup>88</sup> and an open clause permitting other enacted restrictions of copyright subject to the (redrafted) arts. 7 to 8b (also missing in Berne) (pp. 472, 565).<sup>89</sup> The latter clause was to serve as a reminder that countries were entitled, even expected, to adopt “more detailed and far-reaching limitations” than those in a mandatory catalogue—as long as they were compatible with the more generous three-step test proposed (p. 565).<sup>90</sup>

8. *Facilitate:* It has been stated above that the right to education has traits of the right to development.<sup>91</sup> It is vital that international IP law be designed in such a way as to allow each country to utilize the “policy space” it needs to address development objectives (e.g., Abdel-Latif, 2015, p. 614).<sup>92</sup> Especially in developing countries, L&Es will be necessary that can facilitate bulk access to textbooks. Explicitly worded L&Es for educational institutions that countries may rely on to achieve such access may have to be made available in “the TRIPS context.” The civil society draft Access to Knowledge Treaty of 2005 proposes as L&Es, on the one hand, the free use by educational institutions of works as *secondary readings* for enrolled students;<sup>93</sup> on the other, their use of works as *primary instructional materials* in return for equitable remuneration, if these materials are not made readily available by right holders at a reasonable price.<sup>94</sup>

Quite generally, “remuneration-based L&Es” (also termed “statutory licenses”) are a potent device in facilitating access. In instances where access would ordinarily affect the typical market for a product (as in the case of bulk usage of primary teaching materials), far-reaching entitlements to use, without consent, conferred by legislation could yet be considered legitimate if important welfare interests in a state are at stake and if such permission is subject to fair remuneration being paid (which could also be done by the state directly rather than by educational institutions). Where in such circumstances of public urgency no such market would be affected (as broadly in the case of secondary teaching materials), there is no reason not to grant far-reaching entitlements to use *for free*. In many developing countries—it should be kept in mind—what constitutes “a reasonable price” for “primary instructional materials,” and any remuneration thus due, will have to take into account the fact that the market for such materials will be rather weak, if not nonexistent (see also Suthersanen, 2005, p. 12).<sup>95</sup>

Consequently, as an adjunct to the obligation in Point 7, the right to education—specifically conceived as a right to development—requires that *WTO members should* initiate, promote, and help realize a reform of TRIPS that permits recourse to L&Es that can facilitate a bulk provision of textbooks in educational institutions.

### 7.3 | The WIPO, the WTO, treaty interpretation, development aid, and technical assistance

9. *Facilitate: WIPO members should* initiate, promote, and help implement processes and, where necessary, reforms, that enhance conformity between WIPO structures and agendas and IHRL, the latter, of course, guaranteeing the right to education and the right to development. Therefore, at the initiative of essentially developing states, WIPO adopted the WIPO Development Agenda in 2007, a policy framework to ensure its activities take into account the special needs of developing countries.<sup>96</sup> The Agenda's 45 Recommendations emphasize the importance of a robust public domain (WIPO Development Agenda Recommendations, 2007, Recommendations 16 and 20), access to knowledge for developing states (Recommendation 19), and norm-setting activities related to L&Es by WIPO backing development goals (Recommendation 22(d)).<sup>97</sup> The Development Agenda may potentially become a suitable basis for strengthening the public interest in international IP law.<sup>98</sup> It is the actual implementation of the recommendations that will determine whether the Development Agenda effectively contributes to access to knowledge (Abdel-Latif, 2010, pp. 119–120) and other Agenda goals. WIPO is busy examining questions regarding two possible international instruments on L&Es for education and libraries.<sup>99</sup>

10. *Facilitate: WTO members should* initiate, promote, and help implement processes, and, where necessary, reforms, that enhance conformity between WTO structures and agendas and IHRL, the latter guaranteeing the right to education and the right to development. It is widely agreed that the WTO reveals a development deficit (see, e.g., U.N. High Commissioner for Human Rights, 2004, para. 38).<sup>100</sup> Relying on arts. 7 and 8 of TRIPS and ETOS under IHRL, the Council for TRIPS should support development on maximum standards, L&Es, and right holders' obligations<sup>101</sup>—inter alia to ensure quality education for all and national development through education remain achievable goals. For example, concerning right holders' responsibilities, Christophe Geiger proposes as a general guiding principle, a duty of right holders to disseminate as widely as possible protected works and to exploit them (Geiger, 2017, p. 93). As part of its monitoring mandate, the TRIPS Council should assess the impact of TRIPS rules and policies on development.<sup>102</sup> WTO members bear responsibility for ensuring that the right to education, as normatively enhanced by the right to development, is mainstreamed into WTO structure and practice.

11. *Facilitate: WTO members should* initiate, promote, and help adopt and implement safeguard policies (or at least promote a consistent practice) in terms of which the Council for TRIPS and WTO adjudicatory bodies are to interpret TRIPS law in conformity with WTO members' obligations under IHRL. Arts. 7 and 8 of TRIPS play a seminal role in interpreting TRIPS. Inter alia, the Vienna Convention on the Law of Treaties requires treaty terms to be interpreted in their context. The context includes “any relevant rules of international law applicable in the relations between the parties” (Vienna Convention, art. 31(3)(c)). As Henning Grosse Ruse-Khan explains, arts.

7 and 8 function as integration principles (Grosse Ruse-Khan, 2016, paras. 13.03–13.58). They are a tool for integrating the objectives pursued by other international agreements (para. 13.44). In this way, the right to education in art. 13 of the ICESCR—not least in its developmental dimension (policy space for educational development)—becomes relevant to interpreting TRIPS. However, in the context of the present discussion, the notion of ETOs adds a novel aspect. The obligation of “systemic integration” flows no longer only from the rules of treaty interpretation, but *may also be said to result from ETOs under IHRL*. In the latter version of the obligation, though, human rights add priority.<sup>103</sup>

12. *Provide: Developed states* that are in a position to do so, *should*, in accordance with the requests of developing states in need, make available funds to the latter as part of their ODA, to contribute toward the cost of remuneration rights of (foreign or global) copyright holders as referred to under Point 8 (Section 7.2) above, the cost of any compulsory licenses under the Berne Appendix, and the cost of (especially imported) textbooks generally.

13. *Provide: Developed states* that are in a position to do so, *should*, in accordance with the requests of developing states in need, make available technical assistance to the latter, aiding them in setting up IP and copyright protection systems that satisfy the requirements of international IP and human rights law (for example, advising on L&Es for education that facilitate adequate access to textbooks).

## 7.4 | Three-step test, limitations and exceptions for education, TRIPS flexibilities, and FTAs

14. *Facilitate: WIPO and WTO members* should initiate, promote, and help adopt and implement a joint WIPO/WTO policy or soft law instrument calling for a balanced interpretation of the three-step test and providing doctrinal clarity and concrete guidelines on how to apply the test in a way that protects the interests of authors, users, and the wider public, and, generally, safeguards important human rights concerns.<sup>104</sup> This would be additional to any actual reformulation of the test in hard law (notably TRIPS).<sup>105</sup> It has been noted that

*various alternative approaches have been developed in literature and applied by national courts, including an understanding of the three-step test as a refined proportionality test, the use of its abstract criteria as factors to be weighed in a global balancing exercise and a reverse reading of the test starting with the last, most flexible criterion.*

(Geiger, Gervais, & Senftleben, 2014, p. 626).

The test should be understood holistically with an emphasis on the third leg. Conflict with the normal (economic) exploitation of a work (the subject of inquiry of the second leg) should be one, admittedly an important, consideration among many—these also including access to education—in assessing whether use unreasonably prejudices the legitimate interests of the right holder. It may be overridden where vital economic, social, or cultural needs justify this, specifically if some form of remuneration is paid by someone. The first leg should treat use by others as a normal incidence of copyright, *unless* exclusion is legitimate. Accepting the ETO to create and read international IP law in accordance with human rights, it will be readily apparent that the three-step test must *perfectly mirror* the demands of human rights. Or, stated differently: the three-step test must permit any such use as constitutes an entitlement under human rights. Naturally, a solution that is legitimate in a developing country need not be so in an industrialized country.

15. *Facilitate:* There needs to be clarity on which L&Es for education are permissible, which are to be mandatory, and what their respective scope should be, to adequately protect the right to education. This might be addressed as part of revising, or re-enacting, Berne (Gervais, 2017)<sup>106</sup> and/or TRIPS (Kur & Levin, 2011).<sup>107</sup> Increasingly, however, there are calls for a separate international instrument on L&Es (Hugenholtz & Okediji, 2008),

or even specific instruments on L&Es for education and libraries (Shaheed, 2014, para. 109).<sup>108</sup> Yet others propose recourse to “an international intellectual property *“acquis”*” (Dinwoodie & Dreyfuss, 2015, p. 122),<sup>109</sup> which, in a sense, refers to something like a “document” of basic, “best,” or “proven” principles.

There need to be robust personal or private use, teaching and education, library and literacy, and translation L&Es (potentially remuneration-based in certain cases). As for the current teaching L&E, this should mature into a comprehensive *education* L&E benefiting noncommercial educational institutions. It must cater for utilizing the whole of a work in appropriate circumstances (Consumers International, 2006, p. 29). Interestingly, Margaret Chon has suggested with regard to art. 10(2) of the Berne Convention that developing states should, based on a principle of substantive equality, fully exhaust that provision's potential “to create access to works for educational purposes that may counterbalance [a] lack of bulk access to textbooks” (Chon, 2007, pp. 837–839, citation at p. 838).<sup>110</sup> The L&E must cover reproduction right, translation right, and adaptation right – perhaps even the right of communication to the public (Consumers International, 2006, p. 30). It must permit utilization in distance education (p. 30). *Library and literacy* L&Es should, likewise, facilitate bulk provision to serve wider, also informal, education needs in appropriate circumstances.

It has sensibly been suggested that there should be “local language limitations,” generally—that is, also beyond the educational context—permitting translations into neglected local languages (Ncube, 2017b, pp. 275–276; similarly, Basalamah, 2000, p. 535).<sup>111</sup> There should further be a general provision in terms of which exclusive translation rights regarding a work terminate for a specific language in a country, if, let's say, 3 or 5 years after first publication, the work has not been made available in that language in the country concerned (similarly, Ncube, 2017b, pp. 274–275; Silva, 2013, pp. 585–586, 624–625).

Moreover, a *fair use* provision makes sense. “Fair use” means an open clause exemption to copyright protection, which generally and in light of broad criteria covers uses that may be considered “fair,” as adjudged on a case by case basis (ultimately by the courts).<sup>112</sup> A fair use provision in national legislation should benefit access to knowledge protected by copyright (Consumers International, 2006, pp. 27–28). Elements of “fair use” could be combined with those of “fair dealing” (“fair dealing” enumerating more narrowly what may be considered “fair” forms of use) to facilitate access to copyrighted materials for purposes of education (Isiko Štrba, 2012, pp. 111–157, 163–164). With regard to fair use, it has thus been suggested that courts should perhaps presume educational use to be fair (Samuelson, 2009, p. 2587). Where use does not fall within the scope of specific provisions but fulfills the requirements of the general provision, such use would be allowed, even though national legislation did not specifically contemplate such use, to benefit access to copyright-protected knowledge (Consumers International, 2006, pp. 27–28). Prominent writers have argued in favor of an international fair use doctrine unfettered by the three-step test (Okediji, 2000).<sup>113</sup> Fair use, by reason of its generality, has a strained relationship with the three-step test (pp. 117–121).<sup>114</sup> However, fair use would survive scrutiny under the test in its “compassionate,” human rights-aligned version as referred to under the previous point.

Altogether, the relevant ETO for this point might be formulated as follows: *WIPO and WTO members should initiate, promote, and help adopt and implement an exposition of L&Es for education—as part of a revised, or re-enacted, Berne and/or TRIPS agreement, and/or in a separate, soft or hard law general or cluster, or “basic (best) principles,” international document—that adequately protects access to educational materials as part of the right to education.*<sup>115</sup>

16. *Facilitate: WTO members should initiate, promote, and help adopt and implement a policy or soft law instrument on TRIPS and educational materials (akin to the Doha Declaration on the TRIPS Agreement and Public Health, adopted at the WTO Ministerial Conference in 2001) that encourages developing states to fully utilize the flexibilities provided for under TRIPS, notably compulsory licenses and parallel imports, to protect the right to education (e.g., Staudinger, 2015).*

Though the use of compulsory licenses in the field of copyright beyond the Berne Appendix is not expressly dealt with in TRIPS, developing states are not prohibited from using compulsory licenses beyond the Berne Appendix (e.g., Isiko Štrba, 2012, pp. 157–164; Okediji, 2006, p. 18).<sup>116</sup> This must be considered especially true for

as long as the Appendix is dysfunctional. A national body might grant licenses in cases of an abuse of copyright (e.g., anticompetitive conduct involving the charging of excessive prices for specific textbooks, unreasonably refusing a translation or reproduction license, or offering it for an unreasonable fee or on other unreasonable terms)<sup>117</sup> or situations of serious undersupply of textbooks, where granting such licenses would be in the public interest.<sup>117</sup> In case of default on the part of national agencies, it should be possible, in certain cases, to approach an international body—for instance, WIPO—for a compulsory license (similarly, Silva, 2013, p. 623).<sup>118</sup>

As for parallel imports, developing states should enact international exhaustion rules that would facilitate parallel imports of cheaper copyright-based educational materials, for example those that pass muster under the provisions on fair use in other countries (Chon, 2007, p. 839). Developed states are likely to exert pressure on developing states to enact national exhaustion rules that safeguard the exclusive right of IP right holders to import and sell, or otherwise distribute, articles based on their IP right produced and sold abroad. The effect of art. 6 of TRIPS, however, is to leave it to WTO members to choose either regime of exhaustion for any field of IP law. Developing states can, therefore, not be forbidden to opt for a regime in terms of which copyright entitlements are exhausted once textbooks have been produced and sold in another country, thus permitting parallel imports of such textbooks.

17. *Facilitate: WTO members should elaborate, interpret, and apply FTAs regulating copyright in a manner consistent with their international human rights obligations.* Prior and subsequent to their conclusion, *WTO members should* subject FTAs to human rights impact assessments, also in respect of their extraterritorial effects. These days, many FTAs provide for levels of IP protection exceeding those envisaged under TRIPS. In so doing, they may pose a threat to the right to education and other human rights. By way of example, Morocco has concluded an FTA with the United States containing TRIPS-plus provisions. The term of copyright protection is 70 rather than 50 years, parallel imports are not allowed, and more precise standards forbidding the circumvention of TPMs (digital works) are stipulated.<sup>119</sup> Many FTAs erode the policy space that is provided on the multilateral level (Grosse Ruse-Khan, 2011, p. 364). They further lead to a fragmentation of the international regulatory system (the famous “spaghetti bowl”), with powerful states strategically creating inconsistencies with IHRL (Yu, 2012, pp. 1090–1091). Consequently, many FTAs undermine human rights, including those to education and development.

However, as a result of obligations within and outside international IP law, “TRIPS ... does not only create a “floor” of minimum protection, but opens the door to ceilings which place a binding maximum level [on] the protection of IP” (Kur & Grosse Ruse-Khan, 2008, p. 68). In light of arts. 7 and 8 of TRIPS and ETOs under IHRL, FTAs should never impose limitations on utilizing flexibilities available under TRIPS that could be relied on to safeguard access to educational materials. L&Es for education may not be eroded. The three-step test must find its most empowering application. Infringements of copyright not occurring on a commercial scale should not be criminalized. Where necessary, provisions in FTAs need to be modified or deleted, appropriate safeguard clauses be included, or agreements as a whole be terminated.

## 7.5 | Reporting obligations, obligations of conduct and result, and questioning copyright as such

18. *Facilitate:* At the moment, TRIPS countries are only required to report on their compliance with IP protection prescribed by TRIPS to the Council for TRIPS.<sup>120</sup> ETOs under the right to education, and other economic, social, and cultural rights, entail that *WTO members should* expand the reporting mechanism, requiring TRIPS countries, in regular intervals, to report on their use of L&Es and flexibilities, available under TRIPS, to safeguard the development goals of arts. 7 and 8 of TRIPS (also access to knowledge or textbooks), as normatively enhanced by IHRL (including the right to education and the right to development), for consideration by the TRIPS Council (similarly, Okediji, 2018, pp. 64–65). The Council should adopt recommendations, advising members on how to optimally use the policy space available under TRIPS to protect development, including in the sphere of education.

19. *Facilitate*: From the analysis so far it is apparent that, in the present context, the duty to *facilitate* is prominent as an ETO under the right to education at the level of *fulfilling* rights. In the above examples, these duties are, to use the International Law Commission's well-known distinction between obligations of conduct and result (International Law Commission Yearbook, 1977, pp. 11–30),<sup>121</sup> obligations of conduct linked to a broader obligation of result. The latter prescribes the *result* to be achieved: *States should* create an international enabling environment conducive to the fulfillment of the right of access to textbooks. The former prescribe, with varying degrees of urgency, the *specific type of conduct* to be followed, as elucidated above.<sup>122</sup>

Thus, for example, a reform of the Berne Appendix (or equivalent conduct) may be considered “prescribed” conduct. Achievement of the result—conditions facilitating access to textbooks—may, in general, of course, also be advanced through other forms of conduct not specifically prescribed as described above. That these are not specifically prescribed does not mean that meaningful other measures, whatever they would be, must not also be taken. To identify possible measures, thinking outside the box is desirable. Hence, one may see the typical textbook for what it is, an instrumentality to achieve certain learning outcomes, rather than a work of great originality.<sup>123</sup> Consequently, copyright protection for such works might well be restricted to, let's say, 3 years. During that period, the publisher can materialize the larger share of anticipated profits, while, after this period, books would not yet be out of date. However, would this maintain the incentive of (private) publishers to produce textbooks? State subsidies to, or tax relief for, publishers are conceivable measures to maintain this. The right to education, per definition, requires the state to realize—that is, to pay for—the education system. In any event, the state should assume a more prominent role in textbook production and, wherever possible, retain copyright.

In sum, therefore, beyond specific conduct identified as mandatory in creating an international enabling environment conducive to the fulfillment of the right of access to textbooks, *states should* also, separately and jointly, take all such other deliberate, concrete, and targeted steps, they deem appropriate, as would contribute to creating such an environment.

20. *Facilitate*: Daniel Gervais has recently argued in favor of a “middle way” in international IP law, a way that “make[s] the system work for all stakeholders, taking due account of the fact that each country or region needs some room to calibrate their IP regime to their own situation” (Gervais, 2016, pp. 136–137). To a large extent, the above discussion has made suggestions in line with the proposal for a middle way. It is not clear at all, however, whether the current copyright system can be made to work for all in the end. The legitimacy crisis of copyright runs deep.

IP rights have become mere investment-protecting devices, with little social benefit (Geiger, 2015, p. 662).<sup>124</sup> As Christophe Geiger highlights, copyright has lost its quality as *an access right*. There would, accordingly, be

*the need to rethink copyright to adapt its rules to its initially dual character: 1) of a right to secure and organize cultural participation and access to creative works (access aspect); and 2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his works (protection aspect).*

(Geiger, 2017, p. 75).

These days, most authors do not benefit from copyright. Profits essentially accrue to “large, impersonal and unlovable corporations” (Ginsburg, 2002, p. 62). On a more fundamental level, copyright may even be too alien a construct for countries of the South. Rosemary Coombe notes:

*The range of Western beliefs that define intellectual and cultural property laws ... are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world's peoples.*

(Coombe, 1998, p. 247).



Recently, courts—such as, for instance, the European Court of Human Rights—have shown an enhanced willingness to assess the rules of copyright law against freedom of expression more generally.<sup>125</sup> A wholesale subjection of the IP, including the copyright system—and its proprietary premise that justifies exclusion—to a review in light of economic, social, cultural, and group or solidarity rights by legislators and courts, however, has so far not taken place. An assessment in light of these rights, with their emphasis on access—facilitating health care, food security, education, cultural participation, socio-economic development, and so on—could potentially require questioning copyright as an institution, and its replacement by an alternative system, altogether (similarly, Okediji, 2018, p. 37).<sup>126</sup> It should be appreciated that a system that respects the moral and material interests of creators, but simultaneously facilitates access, *can* look very different from current copyright law (e.g., Story, Darch, & Halbert, 2006, p. 53).<sup>127</sup>

In light of these observations, it remains to be seen whether the suggestions made in this Article are sufficient to secure access rights. As the ETOs set out in Points 1–19 are complied with, *states should*, over time, monitor progress toward achievement of the access goals. Failing sufficient progress, a global obligation necessitating that *states should* undertake more drastic reforms is triggered. In this instance, *states should* reassess international copyright law and its embedment in the related world trade system in principle. As radical as it may sound, if necessary, *they should* do away with the current system altogether and substitute it with an alternative system. Also these are ETOs arising under the right to education, the right to development, and other international human rights.

## 8 | ETOs AND THE FUTURE OF IP LAW

It is sometimes said that much of what could be achieved by human rights in IP law will be neutralized by the fact that IP rights themselves have been promoted to the rank of human rights. This has thus recently been lamented passionately by Ruth Okediji (2018). In this writer's view, this fear seems exaggerated. Most IP rights are held by companies, that is, juristic persons. The CESCR, in its General Comment No. 17, in which it analyses the right of everyone “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,” as laid down in art. 15(1)(c) of the ICESCR, makes it clear that this right can be held by *natural* persons or groups of *natural* persons *as creators* only (CESCR General Comment No. 17, 2006, para. 7). The IP claims of natural persons or groups of natural persons attain human rights status to the extent that they relate to works that can be considered expressions of creative urges and skills intimately bound up with the human dignity and personality of the creator or creators. Juristic persons—and this includes all publishing companies—are neither natural persons nor “creators” in this sense. Regarding the latter point, their IP claims are either only acquired from natural persons (the companies being mere “holders” of copyright), alternatively, if their IP claims flow from works that are self-generated, these claims are not (as they cannot be) rooted in human dignity. The rights of juristic persons are, therefore, not protected under art. 15(1)(c). The Committee draws express attention to this truth (para. 7). In addition, authors' rights as human rights are subject to an important definitional limitation that clearly distinguishes them from typical IP rights: They only give rise to a claim to such protection of material interests as is necessary to enjoy an *adequate* standard of living (para. 15). This implies a fairly *modest* level of remuneration. As for all human rights, human dignity is the point of reference. Respecting human dignity never requires—in fact, often will demand countering—material extravagance. Alternatively, is it not possible to rely on the right to property in support of strong IP protection? The right to property, while not found in the U.N. Human Rights Covenants,<sup>128</sup> is protected in the various regional human rights treaties.<sup>129</sup> Under the European Convention on Human Rights, claims based on the right to property may even be raised by juristic persons.<sup>130</sup> Yet, two things should constantly be kept in mind in this context: first, property in human rights law is always a socially constricted concept. Secondly, the “fundamental” rights of a company can never be “human” rights, and can, therefore, not rank on a par with actual human rights, such as the right to education. However, these are issues that should be discussed in more detail at a future point.

This said, it should be noted that the right to education may be subjected to limitations, also those resulting from copyright law. However, for this to succeed, the strict requirements of a limitation clause, such as art. 4 of the ICESCR, need to be complied with. Of the latter, the CESCR emphasizes that it “is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State” (CESCR General Comment No. 13, 1999, para. 42). In terms of art. 4, limitations must be “determined by law,” “compatible with the nature of ... rights,” and “solely for the purpose of promoting the general welfare in a democratic society.” What is of significance here is that non-discriminatory access to education is part of the core, the nature of the right to education (Beiter, 2006, p. 458). Therefore, when any copyright law has the effect of denying access to textbooks to *disadvantaged students*, the limitation will likely not be compatible with the nature of the right to education, and thus fail under art. 4.

Ignoring to add the missing dimension of ETOs under IHRL in a globalized world will render human rights largely impotent. As has been stated correctly, “human rights have been locked up behind domestic bars to prevent their universal application to globalization and its much needed regulation. Extraterritorial obligations ... unlock human rights” (ETO Consortium). Thus unlocked, human rights can also “civilize” IP law. The ETOs concept, meanwhile, enjoys considerable support among scholars and among members of the U.N. human rights treaty bodies. This Article focused on ETOs under the right to education that could harness copyright and promote access to printed textbooks in schools and universities in developing countries, notably in Africa. The analysis should be deepened and extended to include other fields of IP law in potential conflict with IHRL as well. Future analyses should give consideration to issues that could not be addressed here. It needs to be explained why exactly IHRL prevails over other international law.<sup>131</sup> The consequences for the debate of recognizing a potential basis of some IP claims themselves in human rights law must be examined, and so must be those flowing from the fact that human rights may (sometimes) be subjected to restrictions in terms of limitation clauses. ETOs for each human right need to be defined with precision. It must be explained when noncompliance amounts to a *prima facie* violation of human rights. Grounds of justification need to be elucidated. Issues of jurisdiction, remedies, relief, and fora of enforcement require further clarification.

More than 20 years back, Peter Drahos had provided this advice to developing countries:

*Given the track record of the United States and the EU, developing countries can expect very few concessions on IP issues in either a bilateral or multilateral context. They will have to look to self-help on these issues and operate on the assumption that the global IP ratchet will continue to be worked by the United States and the EU in their economic interests, with only minimal consideration being given to the interests of developing countries.*

(Drahos, 2002, p. 789).

Now, almost 25 years later, a form of self-help promises to be fruitful—the reliance on ETOs. The ETOs concept has developed to an extent where these obligations should become part of the strategy of developing countries in asserting their development needs globally more forcefully, as a matter of human rights. Developing countries should, separately and jointly, rely on ETOs to legally enforce changes in global IP, including copyright law that protect access to knowledge and textbooks, the right to education, the right to development, and all other human rights.

## ACKNOWLEDGMENT

This article is based on research supported in part by the National Research Foundation of South Africa (Grant Number: 111697).

## ENDNOTES

<sup>1</sup> “Developing countries depend primarily on printed copies of copyrighted works, as opposed to electronic works, for educational purposes. Therefore, the textbook represents the most important source of information” (Isiko Štrba, 2012, p. 202). “In the Global South ... bulk hard copies [of learning materials] are required” (Ncube, 2017a, p. 129).

<sup>2</sup> The authors rely here on data of the International Telecommunications Union.

- <sup>3</sup> This remains true today. For Sub-Saharan Africa, see, for example, International Commission on Financing Global Education Opportunity (2016), p. 66 ("In many [Sub-Saharan African] countries, textbooks are underfunded, priced too high, unavailable to many students, or poorly used") or UNESCO Global education monitoring report (2016), p. 190 ("In some sub-Saharan African countries, few primary school students have personal copies of textbooks").
- <sup>4</sup> The report refers here to an inventory of reading materials from 11 Sub-Saharan African countries.
- <sup>5</sup> The author mentions these and other reasons for the lack of access to textbooks in Sub-Saharan African countries.
- <sup>6</sup> Various publications have addressed the conflict between copyright and access, or the right, to education in the past. In lieu of many sources, see, for example, Bannerman (2016, pp. 53–79), Chon (2007), Dutfield and Suthersanen (2008, pp. 282–298), Foster (2015), Helfer and Austin (2011, pp. 316–363), Ramcharan (2013, pp. 65–71), Staudinger (2015), and Story (2002).
- <sup>7</sup> TRIPS, Part II, Section 1 (Copyright and Related Rights), art. 9(1).
- <sup>8</sup> Berne Convention, art. 8 (author's exclusive right of translation), art. 9(1) (author's exclusive right of reproduction).
- <sup>9</sup> See also Story (2003), p. 799 ("Copyright problems take a clear second or third place as an access hurdle. Nevertheless, copyright definitely creates a further barrier to access"). Specifically, in addressing higher education, see Commission on Intellectual Property Rights (2003), p. 103 ("Copyright is not the only issue ... but high prices of books and materials ... are still important parts of a worsening crisis").
- <sup>10</sup> On the Maastricht Principles, see note 65. Both WIPO and the WTO as such would thus be required to obey human rights obligations that are binding on them under customary international law or that form part of the general principles of law recognized by civilized nations. Moreover, while the WTO is not a U.N. specialized agency, WIPO is. As such, it has an obligation to obey the principles of the U.N. Charter, one of these being respect for human rights as provided for in art. 1(3) of the Charter. U.N. Charter, art. 1(3).
- <sup>11</sup> Elsewhere, this author elaborates on the notion of "civilizing" IP, specifically copyright law, by relying on the concept of the "constitutionalization" of IP law "from below." This links the ETOs framework to de facto hierarchies in, and the decentralized enforcement of, international law. See Beiter (in press), Section VIII. The article also expands on the individual ETOs identified in Section 7 of this article. On hierarchies in international law, and their frequent association with human rights, see also Beiter (2016, pp. 470–475) and all the sources cited there.
- <sup>12</sup> For a discussion of the topic of ETOs in relation to international IP law, specifically TRIPS, see Beiter (2016). This is the first, and it seems only, explicit discussion so far of this topic. There is an interesting book chapter by Ruth L. Okediji addressing the responsibility of the WTO, that of host and home states of corporations for these corporations' conduct, and that of corporations themselves. The source of obligations is, however, it seems, seen essentially in the goals and objectives of TRIPS itself. Okediji (2007). For a wider analysis of ETOs arising under the right to education, see Beiter (2017).
- <sup>13</sup> See Helfer and Austin (2011, pp. 318–319), who discuss differences between the terms "textbooks" and "learning materials."
- <sup>14</sup> This is a standard assumption of IP law. "Modern economic arguments ... assume that the motivation toward creativity will be strengthened through the use of property rights in abstract objects and weakened by their absence" (Drahos, 1996, p. 27). Specifically as regards copyright law, however, empirical evidence does not conclusively prove this point (Sprigman, 2018).
- <sup>15</sup> On "remuneration-based L&Es," see specifically Point 8 in Section 7.2. "Remuneration-based L&Es" are sometimes also termed "statutory licenses," with (ordinarily) statutory law granting "automatic" authorization to use a work against remuneration in these cases.
- <sup>16</sup> On "compulsory licenses," see the discussion of the Appendix to the Berne Convention in Section 4 and further the aspects raised in Point 6 in Section 7.2 and Point 16 in Section 7.4.
- <sup>17</sup> See the description of the three-step test of copyright law, as embodying these circumscribed circumstances, further below in this section.
- <sup>18</sup> The making of quotations must be "compatible with fair practice" and "their extent [must] not exceed that justified by the purpose," Berne Convention, art. 10(1). The source and the name of the author are to be mentioned, art. 10(3).
- <sup>19</sup> Hence, to cite the provision as a whole: states parties may "permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice," Berne Convention, art. 10(2). Again, the source and the name of the author are to be mentioned, art. 10(3).
- <sup>20</sup> Ricketson and Ginsburg (2006) thus state that the words "by way of illustration" "would not exclude the use of the whole of a work in appropriate circumstances," mentioning the example of a short literary work, such as a poem or short story (para. 13.45).

- <sup>21</sup> Story (2003) points out that this problematic interpretation is variously chosen (p. 798). Ricketson and Ginsburg (2006) argue that there is “no reason” to exclude distance education (para. 13.45).
- <sup>22</sup> In effect, Senftleben's argument is that the use of primary instructional materials would conflict with “a normal exploitation of the work” and would thus not comply with the second leg of the three-step test of copyright law (Senftleben, 2004, pp. 197–198). He further holds that all permitted uses covered by art. 10(2) should be modestly remunerated (pp. 234, 240).
- <sup>23</sup> “To determine fairness [under art. 10(2)], a WTO panel would likely apply a rule of reason compatible with the three-step test” (Gervais, 2017, p. 93). Art. 10(2) “would require consideration of the criteria referred to in article 9(2)” (Ricketson & Ginsburg, 2006, para. 13.45).
- <sup>24</sup> See Section 4.
- <sup>25</sup> Berne Convention, art. 30(2).
- <sup>26</sup> Silva (2013) states that the scheme “may facilitate meeting the needs of developing countries because it enables the massive use of works for educational purposes” (p. 585).
- <sup>27</sup> See Silva (2013, pp. 585–586), who discusses the various shortcomings of the arrangements. Generally, for a comprehensive understanding of the ten-year regime, see Ricketson and Ginsburg (2006, paras. 11.15–11.18, 11.25, 17.27[f][iii]).
- <sup>28</sup> Shaver (2014) states that “copyright protection is likely to be an ineffective incentive system for the production of works in “neglected languages” spoken predominantly by poor people” (p. 117).
- <sup>29</sup> Current copyright law's effect of discriminating on the ground of language has been described by Lea Shaver. For South Africa, she says that copyright protection is failing in its intended purpose. “[The publishing] industry effectively serves only a tiny sliver of society ... affluent English speakers. ... Very few books are being produced in the needed languages ... [spoken by] ... the disadvantaged majority” (Shaver, 2014, p. 135).
- <sup>30</sup> TRIPS, art. 9(1).
- <sup>31</sup> Berne Convention, app. art. I(1).
- <sup>32</sup> App. art. I(1). Broadly, a declaration in this regard is valid for 10 years and may be renewed. App. art. I(2).
- <sup>33</sup> App. arts. II(1), III(1).
- <sup>34</sup> App. art. II(2)(a). In certain cases, the waiting period is less than 3, but at least 1 year. App. art. II(3).
- <sup>35</sup> App. art. II(5).
- <sup>36</sup> App. art. III(3). The waiting period is 3 years for works of the natural and physical sciences and of technology. It is 7 years for works of fiction, poetry, drama and music and for art books. App. art. III(3)(i), (ii), respectively.
- <sup>37</sup> App. art. III(2)(a).
- <sup>38</sup> App. art. III(2)(a).
- <sup>39</sup> “Scholarship,” as an adjunct to “teaching” (translation license), appears to mean “*organised* [emphasis added] educational activities” beyond “instructional activities ... in ... schools, colleges, and universities” (Ricketson & Ginsburg, 2006, para. 14.68). “Systematic instructional activities” (reproduction license) appear to cover forms of “out-of-school education” (para. 14.86). In both instances, the reference seems to be to types of systematic, *non-formal* (not informal) education. Systematic instructional activities further do not encompass research (para. 14.86).
- <sup>40</sup> Ncube (2017b) points out that uses do not cover cultural enrichment or literacy (p. 270).
- <sup>41</sup> Berne Convention, app. art. III(2)(a).
- <sup>42</sup> App. arts. II(4)(a), III(4)(a), (b), respectively. The grace period is between 3 and 9 months. App. arts. II(4)(a), III(4)(a), (b), respectively.
- <sup>43</sup> App. arts. II(4)(b), III(4)(c), respectively. If these measures take place after a compulsory license has been granted, the license will terminate. Existing copies may, however, be distributed. App. arts. II(6), III(6), respectively.
- <sup>44</sup> App. arts. II(8), III(4)(d), respectively.
- <sup>45</sup> Some of the preparatory works indicate that private companies or charitable organizations were also considered entitled to apply. See Ricketson and Ginsburg (2006, paras. 14.63, 14.81), who refer to the various views in this regard.
- <sup>46</sup> Berne Convention, app. art. IV(1). There are documentation requirements where the copyright holder could not be found. The applicant must send copies of the application to a “national or international information center” specified by the government of the country in which the publisher is believed to have the principal place of business. App. art. IV(2).

- <sup>47</sup> App. art. IV(6)(a)(i).
- <sup>48</sup> App. art. IV(4). Offshore printing (not publishing) appears permissible, though. Overcoming border measures may, however, be a complicated issue. On the legitimacy of offshore printing, see Silva (2013, p. 618) and the various sources cited there.
- <sup>49</sup> This information has been drawn from the website of WIPO, [https://www.wipo.int/treaties/en/SearchForm.jsp?search\\_what=N](https://www.wipo.int/treaties/en/SearchForm.jsp?search_what=N), accessed March 13, 2019.
- <sup>50</sup> This information has been drawn from the website of WIPO, [https://www.wipo.int/treaties/en/SearchForm.jsp?search\\_what=N](https://www.wipo.int/treaties/en/SearchForm.jsp?search_what=N), accessed March 13, 2019 (Algeria [1994–2004, 2012–2014, 2014–2024], Egypt [1984–1994], Niger [1974–1984], Sudan [2004–2014]).
- <sup>51</sup> Silva (2013) reports on developing countries generally, his comments also covering African states (pp. 590–605). Fometeu (2009) reports specifically on African states (p. 42). Countries in this group of African states include Angola, Central African Republic, Republic of the Congo (Brazzaville), Malawi, Mali, Nigeria, Rwanda, South Africa, and Togo (p. 42).
- <sup>52</sup> For similar views, see, for example, Basalamah (2000), p. 546 (observing notably “lack of consistence ... with the developing countries’ needs”); Chon (2007), p. 835 (remarking that the Appendix “contains provisions so complex and arcane that very few developing countries have been able or willing to take advantage of them,” and further that its provisions are unworkable, unfair, and require compensation for educational use that is covered by fair use in the United States); Commission on Intellectual Property Rights (2003), p. 104 (concluding, “it is clear to us that the special provisions ... as set out in the Appendix, have not been effective”); Fometeu (2009), p. 6 (holding that “these licenses have been undermined by an extremely complex procedure which hampers their implementation”); or Story (2003), pp. 768–769 (making the sobering statement that “the one addition made to Berne ... which purported to improve the situation of poor countries—incorporation of the Paris Appendix—has certainly not done so”).
- <sup>53</sup> Onuora-Oguno (2019) stresses “the need to drive development in Africa by relying on the place of an enhanced access to quality education” (p. 2).
- <sup>54</sup> This definition perhaps broadly reflects the present-day *acquis* of wisdom as to the gist of the right to development. For a good analysis of the right to development, see, for example, Sengupta (2002). “The right-holder may be a collective ..., but the beneficiary of the exercise of the right has to be the individual. ... The collective right ... [is] ... built on individual rights” (pp. 862–863).
- <sup>55</sup> For a comprehensive discussion of the protection of the right to education by international law, including by relevant human rights treaties, see Beiter (2006).
- <sup>56</sup> Arts. 28 and 29 of the Convention on the Rights of the Child protect the right to education.
- <sup>57</sup> Beiter (2006) argues that a holistic reading of art. 13(2)(a) and (b) of the ICESCR in light of other relevant international legal norms requires also lower secondary education (the seventh to ninth year of schooling, that is, schooling up to the age of 15 years) to be compulsory and available free to all *without extensive delay* (pp. 303, 390, 519). The highest standard in respect of free education is that set out in the Council of Europe’s Revised European Social Charter (1996), obliging states parties to provide “a free primary and secondary education” (art. 17(2)).
- <sup>58</sup> Beiter (2006) argues that compulsory and free education for all up to the age of 15 years (thus including lower secondary education) should be held to constitute the minimum core obligation (pp. 643–647). See also note 57.
- <sup>59</sup> Minimum core obligations are imposed because, not guaranteeing minimum essential levels of socio-economic provision deprives socio-economic rights of their *raison d’être* (CESCR General Comment No. 3, 1990, para. 10). Noncompliance with a minimum core obligation automatically constitutes a *prima facie* violation of rights (para. 10).
- <sup>60</sup> Deliberately retrogressive measures are forbidden in the provision of any socio-economic benefit protected by socio-economic rights (CESCR General Comment No. 3, 1990, para. 9).
- <sup>61</sup> “The evidence for the impact of textbook provision on student achievement in repeated research studies over the past 40 years is overwhelmingly positive” (Read, 2015, p. 33).
- <sup>62</sup> See note 3 and accompanying text.
- <sup>63</sup> This statement, made in relation to primary education, is to be read with CESCR General Comment No. 13 (1999), paras. 10, 14, 20, making the definition of “free” in General Comment No. 11 applicable to primary, secondary, and higher education, respectively.
- <sup>64</sup> Art. 2(1) of the ICESCR states: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

- <sup>65</sup> For a reproduction of, and commentary to, the Maastricht Principles, see De Schutter et al. (2012). For commentary on Principle 3, see De Schutter et al. (2012, pp. 1090–1096). The Maastricht Principles may be regarded as reflective of the teachings of the most highly qualified publicists as a subsidiary means in determining rules of international law in the sense of art. 38(1)(d) of the Statute of the International Court of Justice. Meanwhile, there exists a notable body of literature on ETOs in the field of human rights. Academic books on ETOs that also address ETOs in the field of economic, social, and cultural rights include Coomans and Kamminga (2004); Coomans and Künnemann (2012); Gibney and Skogly (2010); Gondek (2009); Karimova (2016); Langford, Vandenhole, Scheinin and Van Genugten (2013); Salomon (2007); Salomon, Tostensen and Vandenhole (2007); Skogly (2006); Vandenhole (2015). For a list of articles, books, and documents, see also the website of the ETO Consortium, a network of human rights-related civil society organizations and academics advancing the cause of ETOs under IHRL, at <https://www.etoconsortium.org>.
- <sup>66</sup> Principle 8 (Definition of extraterritorial obligations). For commentary on Principle 8, see De Schutter et al. (2012, pp. 1101–1104).
- <sup>67</sup> These definitions are broadly based on those proposed by a former U.N. Special Rapporteur on the Right to Food, Jean Ziegler, who specifically also uses the terms “fulfill,” “facilitate,” and “provide” in this regard (Ziegler, 2005, paras. 57, 58). See also Maastricht Principle 29 (Obligation to create an international enabling environment) and Principle 33 (Obligation to provide international assistance), as reflecting obligations to facilitate and to provide, respectively. In as far as compliance by states with their international human rights obligations *within their respective territories* is concerned, obligations to fulfill are usually categorized as positive obligations to facilitate (installing frameworks or systems, enabling individuals to exercise rights), to provide (making available actual hand-outs, money, and social assistance to individuals in case of need), and to promote (raising public awareness concerning rights, preparing the ground for subsequent realization). See, for example, Ssenyonjo (2009, pp. 25–26), who broadly provides these definitions.
- <sup>68</sup> This definition is broadly based on Maastricht Principle 20 (Direct interference) and Principle 21 (Indirect interference).
- <sup>69</sup> This definition is broadly based on Maastricht Principle 24 (Obligation to regulate), Principle 25 (Bases for protection), and Principle 26 (Position to influence).
- <sup>70</sup> Principle 9 (Scope of jurisdiction) mentions these three bases for jurisdiction. For commentary on Principle 9, see De Schutter et al. (2012, pp. 1104–1109).
- <sup>71</sup> As it were, where a state “is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory ... it has the obligation to seek international assistance and cooperation” (Principle 34).
- <sup>72</sup> On minimum core obligations and deliberately retrogressive measures, see also notes 59 and 60.
- <sup>73</sup> Principle 15 (Obligations of States as members of international organizations). For commentary on Principle 15, see De Schutter et al. (2012, pp. 1118–1120).
- <sup>74</sup> Principle 17 (International agreements). For commentary on Principle 17, see De Schutter et al. (2012, pp. 1122–1124).
- <sup>75</sup> Principle 29 (Obligation to create an international enabling environment). For commentary on Principle 29, see De Schutter et al. (2012, pp. 1146–1149).
- <sup>76</sup> See Section 7.
- <sup>77</sup> Principle 14 (Impact assessment and prevention). For commentary on Principle 14, see De Schutter et al. (2012, pp. 1115–1118).
- <sup>78</sup> For an examination of methodologies for human rights impact assessments of IP rights in FTAs, see Forman and MacNaughton (2015). In a prominent instance, the CESCR has clearly called upon a state party to undertake a human rights impact assessment of TRIPS-plus provisions that could adversely affect human rights in partner countries (CESCR Concluding Observations Switzerland, 2010, para. 24).
- <sup>79</sup> See De Schutter (2011, Addendum, Guiding Principle 3.3.), underlining that the right of denunciation or withdrawal is implied in any trade agreement where this is necessary to comply with human rights obligations.
- <sup>80</sup> See also Point 11 in Section 7.3, addressing the interrelation between the rules of treaty interpretation, “systemic integration,” and ETOs.
- <sup>81</sup> See Helfer and Austin (2011, p. 336), who observe that “higher prices may be caused by the failure of multinational publishers to engage in differential pricing.”
- <sup>82</sup> These authors make these or similar suggestions.

- <sup>83</sup> Graeme Dinwoodie and Rochelle Dreyfuss argue that, in so far as a modification of TRIPS is unrealistic, relevant actors should rather direct their endeavors at compiling “an international intellectual property *acquis*”—a set of basic principles that form the background norms animating the intellectual property system” (Dinwoodie & Dreyfuss, 2015, p. 122). In a way, even this might, perhaps, qualify as a “reform” of TRIPS. “Reform” is a broad term and may cover different courses of action.
- <sup>84</sup> TRIPS, proposed art. 7(a)(i).
- <sup>85</sup> TRIPS, proposed art. 8a(1).
- <sup>86</sup> TRIPS, proposed art. 8a(2).
- <sup>87</sup> TRIPS, proposed art. 13(1)(c)(ii).
- <sup>88</sup> TRIPS, proposed art. 13(1)(d). As for the library L&E, “members may make reproduction dependent on payment of fair remuneration to the right holders”—proposed art. 13(1)(d).
- <sup>89</sup> TRIPS, proposed art. 13(3).
- <sup>90</sup> More extensive yet would be an (additional) international fair use clause. On “fair use,” see Point 15 in Section 7.4.
- <sup>91</sup> See Section 5, first paragraph.
- <sup>92</sup> Abdel-Latif (2015), making this claim, ultimately grounds it in the right to development.
- <sup>93</sup> Treaty on Access to Knowledge (proposed) (2005), art. 3-1(a)(iii).
- <sup>94</sup> Treaty on Access to Knowledge (proposed) (2005), art. 3-1(a)(iv).
- <sup>95</sup> “No lost market opportunity” (Suthersanen, 2005, p. 12).
- <sup>96</sup> For some detail on the WIPO Development Agenda, see, for example, Abdel-Latif (2015, pp. 619–625).
- <sup>97</sup> Specifically highlighting WIPO’s potential role under the Development Agenda with regard to norm-setting activities related to L&Es to facilitate access to textbooks in developing states, see Isiko Štrba (2012, pp. 179–200).
- <sup>98</sup> See May (2007), who broadly argues that the Development Agenda will help WIPO socialize international IP law.
- <sup>99</sup> See also note 115 and generally Point 15 in Section 7.4.
- <sup>100</sup> “Understood in terms of the right to development, many of the [WTO] meta-structures leave much to be desired” (U.N. High Commissioner for Human Rights, 2004, para. 38).
- <sup>101</sup> See Yu (2009), who makes the argument in light of arts. 7 and 8 of TRIPS (pp. 1034–1037).
- <sup>102</sup> Generally in favor of impact studies on development in the TRIPS context, see Yu (2009, pp. 1037–1038).
- <sup>103</sup> See note 11.
- <sup>104</sup> In this regard, the Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law (2008), formulated by international copyright law experts, may serve as a tentative blueprint. Christophe Geiger proposes that “this initiative should now be taken one step further and that a legal instrument should be integrated into international law” (Geiger, 2009, p. 628).
- <sup>105</sup> See also Point 7 in Section 7.2 with regard to the three-step test.
- <sup>106</sup> Gervais (2017) provides a blueprint of “a new Act” of the Berne Convention.
- <sup>107</sup> Kur and Levin (2011) provide a blueprint of proposed “amendments” to TRIPS.
- <sup>108</sup> “WIPO members should support the adoption of international instruments on copyright exceptions and limitations for libraries and education. ... A core list of minimum required exceptions and limitations ... and/or an international fair use provision, should also be explored” (Shaheed, 2014, para. 109).
- <sup>109</sup> On this suggestion, see also note 83.
- <sup>110</sup> Some form of remuneration by, for example, the state may be apposite in instances of particularly wide usage of primary instructional materials (typical textbooks).
- <sup>111</sup> Basalamah (2000) argues that translations into the languages of least-developed countries should be covered by fair use (p. 535).
- <sup>112</sup> For a comprehensive discussion of the fair use doctrine as applicable in the United States, see Aufderheide and Jaszi (2018).
- <sup>113</sup> Such a doctrine (or clause) goes beyond an international open clause permitting additional, nationally enacted, specified forms of dealing with a protected work subject to the three-step test, as alluded to in Point 7 in Section 7.2. It should be appreciated that both options could apply cumulatively.



- <sup>114</sup> Okediji (2000) argues that a U.S.-style fair use clause would be too indeterminate, too broad, and that it would nullify and impair benefits reasonably accruing under TRIPS (WTO Dispute Settlement Understanding, art. 26), so as not to survive scrutiny under the three-step test of Berne or TRIPS (pp. 117–121).
- <sup>115</sup> In favor of a soft law modality (at any rate for now), see, for example, Hugenholtz and Okediji (2008, p. 49) or Isiko Štrba (2012, pp. 198–200). WIPO's Standing Committee on Copyright and Related Rights is at the moment examining questions regarding two possible international instruments on L&Es for educational activities and libraries. For the studies compiled thus far and other relevant information, see the website of the Standing Committee at <https://www.wipo.int/policy/en/scrr>.
- <sup>116</sup> Isiko Štrba (2012) argues that the use of compulsory licenses beyond the Berne Appendix is something developing countries could explore (pp. 157–164). Okediji (2006) holds that, as the Berne Convention provides for equitable remuneration schemes in certain areas, it also does not rule out compulsory licenses (p. 18).
- <sup>117</sup> Armstrong, De Beer, Kawooya, Prabhala, and Schonwetter (2010) thus state that a national copyright tribunal could be awarded the power to grant compulsory licenses (p. 344).
- <sup>118</sup> It must be possible for language and culture “minority members to apply for compulsory licenses directly to an international organization in order to bypass the limitations or negligence of their government” (Silva, 2013, p. 623).
- <sup>119</sup> U.S.-Morocco Free Trade Agreement, arts. 15.5.5, 15.5.2, 15.5.8.
- <sup>120</sup> TRIPS, art. 63(2) read with art. 68.
- <sup>121</sup> According to the International Law Commission, broadly, obligations of conduct expect states to undertake a specific course of conduct; obligations of result expect states to achieve a particular result through conduct, the nature of, and the means required for which, are left to state discretion (International Law Commission, 1977, pp. 11–30).
- <sup>122</sup> See Points 4–11, 14–18 (and 19–20) (Section 7).
- <sup>123</sup> Very sensibly, Christophe Geiger proposes that traditionally rather lax tests for assessing whether copyright protection should arise with regard to a specific work, be replaced with a more onerous test, requiring a work to be the result of “a creational process in which the freedom of the creator has been superior to imposed necessities ... [and not to] cause unjustified harm to legitimate public interests” (Geiger, 2017, p. 101). Applying this test, most primary instructional materials would hardly qualify for any (or extensive) copyright protection.
- <sup>124</sup> Geiger (2015), p. 662 (referring to “investment-protection mechanisms” often without “social value”).
- <sup>125</sup> See, for example, the pronouncements of the European Court of Human Rights in *Ashby Donald v. France* (2013) and *Neij and Sunde Kolmisoppi v. Sweden* (2013).
- <sup>126</sup> At any rate, this is how Ruth Okediji could be interpreted, where she says that “the vision of human dignity reflected in ... economic, social, and cultural rights ... require[s] a change in the core rules and assumptions that pervade the IP system” (Okediji, 2018, p. 37).
- <sup>127</sup> “Copyright represents one possible answer” (Story, Darch, & Halbert, 2006, p. 53).
- <sup>128</sup> I.e., the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights of (1966).
- <sup>129</sup> Hence, see Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1952), art. 1; American Convention on Human Rights (1969), art. 21; African [Banjul] Charter on Human and Peoples' Rights (1981), art. 14.
- <sup>130</sup> Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1(1).
- <sup>131</sup> See note 11.

## ORCID

Klaus D. Beiter  <http://orcid.org/0000-0002-0638-3052>

## REFERENCES

- Abdel-Latif, A. (2010). The emergence of the A2K movement: Reminiscences and reflections of a developing-country delegate. In G. Krikorian & A. Kapczynski (Eds.), *Access to knowledge in the age of intellectual property* (pp. 99–125). Brooklyn, NY: Zone Books.
- Abdel-Latif, A. (2015). The right to development: What implications for the multilateral intellectual property framework? In C. Geiger (Ed.), *Research handbook on human rights and intellectual property* (pp. 605–626). Cheltenham: Edward Elgar. <https://doi.org/10.4337/9781783472420>

- African [Banjul] Charter on Human and Peoples' Rights, 1981, June 27, 1520 U.N.T.S. 217, 21 I.L.M. 58 (entered into force 1986, October 21).
- Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994, April 15, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (entered into force 1995, January 1) [cited as TRIPS].
- Alston, P., & Quinn, G. (1987). The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*, 9, 156–229.
- Altbach, P. G. (1996). The subtle inequalities of copyright. *The Acquisitions Librarian*, 8(15), 17–26. [https://doi.org/10.1300/J101v08n15\\_03](https://doi.org/10.1300/J101v08n15_03)
- American Convention on Human Rights, 1969, November 22, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force 1978, July 18).
- Armstrong, C., De Beer, J., Kawooya, D., Prabhala, A., & Schonwetter, T. (2010). Summary and conclusions. In C. Armstrong, J. de Beer, D. Kawooya, A. Prabhala & T. Schonwetter (Eds.), *Access to knowledge in Africa: The role of copyright* (pp. 317–353). Claremont: UCT Press.
- Ashby Donald v. France, Appl. No. 36769/08, Eur. Ct. H.R. (2013, January 10).
- Askerud, P. (1997). *A guide to sustainable book provision*. Paris: UNESCO.
- Aufderheide, P., & Jaszi, P. (2018). *Reclaiming fair use: How to put balance back in copyright* (2nd ed.). Chicago, IL and London: University of Chicago University Press. <https://doi.org/10.7208/chicago/9780226374222j.001.0001>
- Bannerman, S. (2016). *International copyright and access to knowledge*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781139149686>
- Basalamah, S. (2000). Compulsory licensing for translation: An instrument of development? *IDEA, The Journal of Law and Technology*, 40, 503–547.
- Beiter, K. D. (2006). *The protection of the right to education by international law: Including a systematic analysis of article 13 of the International Covenant on Economic, Social and Cultural Rights*. Leiden and Boston: Martinus Nijhoff.
- Beiter, K. D. (2016). Establishing conformity between TRIPS and human rights: Hierarchy in international law, human rights obligations of the WTO and extraterritorial state obligations under the International Covenant on Economic, Social and Cultural Rights. In H. Ullrich, R. M. Hilty, M. Lamping & J. Drexel (Eds.), *TRIPS plus 20: From trade rules to market principles* (pp. 445–505). Berlin and Heidelberg: Springer. [https://doi.org/10.1007/978-3-662-48107-3\\_14](https://doi.org/10.1007/978-3-662-48107-3_14)
- Beiter, K. D. (2017). Is the age of human rights really over? The right to education in Africa: Domesticization, human rights-based development, and extraterritorial state obligations. *Georgetown Journal of International Law*, 49, 9–88.
- Beiter, K. D. (in press). Not the African copyright pirate is perverse, but the situation in which (s)he lives: Textbooks for education, extraterritorial human rights obligations, and constitutionalization “from below” in IP law. *Buffalo Human Rights Law Review*, 26.
- Bender, P., Dutcher, N., Klaus, D., Shore, J., & Tesar, C. (2005, June). *In their own language: Education for all*. Education Notes. Washington, DC: World Bank. Retrieved from <http://documents.worldbank.org/curated/en/374241468763515925/pdf/389060Language00of1Instruct01PUBLIC1.pdf>
- Berne Convention for the Protection of Literary and Artistic Works, 1886, September 9, revised at Paris 1971, July 24, 1161 U.N.T.S. 3 (entered into force 1972, December 15), and amended 1979, September 28 [cited as Berne Convention].
- Brysk, A. (2009). *Global good samaritans: Human rights as foreign policy*. Oxford and New York, NY: Oxford University Press.
- CESCR—see U.N. Committee on Economic, Social and Cultural Rights.
- Chon, M. (2007). Intellectual property “from below”: Copyright and capability for education. *U.C. Davis Law Review*, 40, 803–854.
- Commission on Intellectual Property Rights. (2003). *Integrating intellectual property rights and development policy* (3rd ed.). Report of the U.K. Commission on Intellectual Property Rights. London: Commission on Intellectual Property Rights.
- ComRC—see U.N. Committee on the Rights of the Child.
- Consumers International. (2006). *Copyright and access to knowledge: Policy recommendations on flexibilities in copyright laws*. Kuala Lumpur: Consumers International, Asia Pacific Office.
- Convention on the Rights of the Child, 1989, November 20, 1577 U.N.T.S. 3 (entered into force 1990, September 2).
- Coomans, F., & Kamminga, M. T., (Eds.), (2004). *Extraterritorial application of human rights treaties*. Antwerp and Oxford: Intersentia.
- Coomans, F., & Künnemann, R. (Eds.). (2012). *Cases and concepts on extraterritorial obligations in the area of economic, social and cultural rights*. Cambridge, Antwerp, and Portland: Intersentia.
- Coombe, R. J. (1998). *The cultural life of intellectual properties: Authorship, appropriation, and the law*. Durham and London: Duke University Press.
- Crews, K. D. (2017, November 2). *Study on copyright limitations and exceptions for libraries and archives: Updated and revised (2017 edition)* (WIPO, Standing Committee on Copyright and Related Rights, SCCR/35/6). Retrieved from <https://www.wipo.int/policy/en/sccr>

- De Schutter, O. (2011, December 19). *Report of the Special Rapporteur on the Right to Food: Addendum: Guiding principles on human rights impact assessments of trade and investment agreements* (U.N. Doc. A/HRC/19/59/Add.5). Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/174/71/PDF/G1117471.pdf>
- De Schutter, O., Eide, A., Khalfan, A., Orellana, M. A., Salomon, M. E., & Seiderman, I. D. (2012). Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34, 1084–1169.
- Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law. (2008).—see Geiger, C., Griffiths, J., Hilty, R. M., & many others. (2008). Declaration on a balanced interpretation of the three-step test in copyright law. *International Review of Intellectual Property and Competition Law*, 39, 707–713.
- Development Assistance Committee (DAC). (2016, March). *History of the 0.7% ODA target* (original text: (2002). DAC *Journal*, 3(4), III-9–III-11). Retrieved from <https://www.oecd.org/dac/stats/ODA-history-of-the-0-7-target.pdf>
- Dinwoodie, G. B., & Dreyfuss, R. C. (2015). An international *acquis*: Integrating regimes and restoring balance. In D. J. Gervais (Ed.), *International intellectual property: A handbook of contemporary research* (pp. 121–164). Cheltenham: Edward Elgar. <https://doi.org/10.4337/9781782544807>
- Drahos, P. (1996). *A philosophy of intellectual property*. Aldershot: Dartmouth.
- Drahos, P. (2002). Developing countries and international intellectual property standard-setting. *Journal of World Intellectual Property*, 5, 765–789. <https://doi.org/10.1111/j.1747-1796.2002.tb00181.x>
- Dutfield, G., & Suthersanen, U. (2008). *Global intellectual property law*. Cheltenham: Edward Elgar.
- ETO Consortium. (2019). Retrieved from <https://www.etoconsortium.org> (accessed June 11).
- European Social Charter (Revised), 1996, May 3, 2151 U.N.T.S. 277 (entered into force 1999, July 1).
- Fometeu, J. (2009, October 26). *Study on limitations and exceptions for copyright and related rights for teaching in Africa* (WIPO, Standing Committee on Copyright and Related Rights, SCCR/19/5). Retrieved from <https://www.wipo.int/policy/en/scrr>
- Forman, L., & MacNaughton, G. (2015). Moving theory into practice: Human rights impact assessment of intellectual property rights in trade agreements. *Journal of Human Rights Practice*, 7, 109–138. <https://doi.org/10.1093/jhuman/huv001>
- Foster, S. E. (2015). The conflict between the human right to education and copyright. In P. L. C. Torremans (Ed.), *Intellectual property law and human rights* (3rd ed., pp. 333–364). AH Alphen aan den Rijn: Kluwer Law International.
- Fredriksen, B., Brar, S., & Trucano, M. (2015). *Getting textbooks to every child in Sub-Saharan Africa: Strategies for addressing the high cost and low availability problem*. Washington, DC: World Bank. <https://doi.org/10.1596/978-1-4648-0540-0>
- Geiger, C. (2009). Implementing an international instrument for interpreting copyright limitations and exceptions. *International Review of Intellectual Property and Competition Law*, 6, 627–642.
- Geiger, C. (2015). Implementing intellectual property provisions in human rights instruments: Towards a new social contract for the protection of intangibles. In C. Geiger (Ed.), *Research handbook on human rights and intellectual property* (pp. 661–689). Cheltenham: Edward Elgar. <https://doi.org/10.4337/9781783472420>
- Geiger, C. (2017). Copyright as an access right: Securing cultural participation through the protection of creators' interests. In Giblin, R. & Weatherall, K. *What if we could reimagine copyright?* (pp. 73–109). Acton ACT: ANU Press.
- Geiger, C., Gervais, D., & Senftleben, M. (2014). The three-step test revisited: How to use the test's flexibility in national copyright law. *American University International Law Review*, 29, 581–626.
- Geiger, C., Griffiths, J., Hilty, R. M., & many others. (2008). Declaration on a balanced interpretation of the three-step test in copyright law. *International Review of Intellectual Property and Competition Law*, 39, 707–713. [cited as Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law].
- Gervais, D. J. (2016). Is there a “middle way” in international intellectual property? *International Review of Intellectual Property and Competition Law*, 47, 135–137. <https://doi.org/10.1007/s40319-016-0458-9>
- Gervais, D. J. (2017). *(Re)structuring copyright: A comprehensive path to international copyright reform*. Cheltenham: Edward Elgar. <https://doi.org/10.4337/9781785369506>
- Gibney, M., & Skogly, S. (Eds.). (2010). *Universal human rights and extraterritorial obligations*. Philadelphia, PA: University of Pennsylvania Press.
- Ginsburg, J. C. (2002). How copyright got a bad name for itself. *Columbia Journal of Law & the Arts*, 26, 61–73.
- Gondek, M. (2009). *The reach of human rights in a globalising world: Extraterritorial application of human rights treaties*. Cambridge, Antwerp, and Portland: Intersentia.
- Grosse Ruse-Khan, H. (2011). The international law relation between TRIPS and subsequent TRIPS-plus free trade agreements: Towards safeguarding TRIPS flexibilities? *Journal of Intellectual Property Law*, 18, 325–365.
- Grosse Ruse-Khan, H. (2016). *The protection of intellectual property in international law*. Oxford: Oxford University Press.
- Hague Recommendations Regarding the Education Rights of National Minorities. (1996).—see OSCE, Office of the High Commissioner on National Minorities. (1996). *The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note*. The Hague: Foundation on Inter-Ethnic Relations.

- Helfer, L. R., & Austin, G. W. (2011). *Human rights and intellectual property: Mapping the global interface*. Cambridge: Cambridge University Press.
- Heyneman, S. P., Farrell, J. P., & Sepulveda-Stuardo, M. A. (1981). Textbooks and achievement in developing countries: What we know. *Journal of Curriculum Studies*, 13, 227–246. <https://doi.org/10.1080/0022027810130306>
- Hugenholz, P. B., & Okediji, R. L. (2008, March 6). *Conceiving an international instrument on limitations and exceptions to copyright: Final report*. Retrieved from [https://www.ivir.nl/publicaties/download/limitations\\_exceptions\\_copyright.pdf](https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf)
- ICESCR—see International Covenant on Economic, Social and Cultural Rights.
- International Commission on Financing Global Education Opportunity (2016). *The learning generation: Investing in education for a changing world*. Retrieved from [https://report.educationcommission.org/wp-content/uploads/2016/09/Learning\\_Generation\\_Full\\_Report.pdf](https://report.educationcommission.org/wp-content/uploads/2016/09/Learning_Generation_Full_Report.pdf)
- International Covenant on Civil and Political Rights, 1966, December 16, 999 U.N.T.S. 171 (entered into force 1976, March 23).
- International Covenant on Economic, Social and Cultural Rights, 1966, December 16, 993 U.N.T.S. 3 (entered into force 1976, January 3) [cited as ICESCR].
- International Law Commission. (1977). Report of the International Law Commission to the General Assembly on the work of its twenty-ninth session. 32 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/32/10 (1977). Reprinted in: (1977). *Yearbook of the International Law Commission*, 2(2), U.N. Doc. A/CN.4/SER.A/1977/Add.I (Part 2) [cited as International Law Commission Yearbook].
- Isiko Štrba, S. (2012). *International copyright law and access to education in developing countries: Exploring multilateral legal and quasi-legal solutions*. Leiden and Boston: Martinus Nijhoff.
- Karimova, T. (2016). *Human rights and development in international law*. London and New York, NY: Routledge.
- Kawooya, D., Kakungulu, R., & Akubu, J. (2010). Uganda. In C. Armstrong, J. de Beer, D. Kawooya, A. Prabhala & T. Schonwetter (Eds.), *Access to knowledge in Africa: The role of copyright* (pp. 281–316). Claremont: UCT Press.
- Kur, A., & Grosse Ruse-Khan, H. (2008). Enough is enough: The notion of binding ceilings in international intellectual property protection. Max Planck Institute for Innovation & Competition Research Paper Series No. 09-01. Retrieved from <https://doi.org/10.2139/ssrn.1326429>
- Kur, A., & Levin, M. (Eds.). (2011). *Intellectual property rights in a fair world trade system: Proposals for reform of TRIPS*. Cheltenham: Edward Elgar.
- Langford, M., Vandenhole, W., Scheinin, M., & Van Genugten, W. (Eds.). (2013). *Global justice, state duties: The extraterritorial scope of economic, social and cultural rights in international law*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781139002974>
- Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. (2011). Retrieved from <https://www.etoconsortium.org> [also cited as Maastricht Principles].
- Mahler, D. G., Montes, J., & Newhouse, D. (2019, March). Internet access in Sub-Saharan Africa. *Poverty & Equity Notes*, No. 13, 1–4. Washington, DC: World Bank. Retrieved from <http://documents.worldbank.org/curated/en/518261552658319590/pdf/Internet-Access-in-Sub-Saharan-Africa.pdf>
- May, C. (2007). *The World Intellectual Property Organization: Resurgence and the Development Agenda*. London and New York, NY: Routledge.
- Ncube, C. B. (2017a). Using human rights to move beyond reformism to radicalism: A2K for schools, libraries and archives. In M. Callahan & J. Rogers (Eds.), *Critical guide to intellectual property* (pp. 117–143). London: Zed Books.
- Ncube, C. B. (2017b). Calibrating copyright for creators and consumers: Promoting distributive justice and ubuntu. In R. Giblin & K. Weatherall (Eds.), *What if we could reimagine copyright?* (pp. 253–280). Acton ACT: ANU Press.
- Neij and Sunde Kolmisoppi v. Sweden. (dec.), Appl. No. 40397/12, Eur. Ct. H.R. (2013, February 19).
- Nkosi, B. (2014, October 3). Students hurt by pricey textbooks. *Mail & Guardian*. Retrieved from <https://mg.co.za/article/2014-10-03-students-hurt-by-pricey-textbooks>
- Okediji, R. (2000). Toward an international fair use doctrine. *Columbia Journal of Transnational Law*, 39, 75–175.
- Okediji, R. L. (2006, March). *The international copyright system: Limitations, exceptions and public interest considerations for developing countries* (UNCTAD-ICTSD, Issue Paper No. 15). Retrieved from [https://unctad.org/en/Docs/iteipc200610\\_en.pdf](https://unctad.org/en/Docs/iteipc200610_en.pdf)
- Okediji, R. L. (2007). Securing intellectual property objectives: New approaches to human rights considerations. In M. E. Salomon, A. Tostensen & W. Vandenhole (Eds.), *Casting the net wider: Human rights, development and new duty-bearers*. Cambridge and Antwerp: Intersentia.
- Okediji, R. L. (2017). Reframing international copyright limitations and exceptions as development policy. In R. L. Okediji (Ed.), *Copyright law in an age of limitations and exceptions* (pp. 429–495). Cambridge: Cambridge University Press. <https://doi.org/10.1017/9781316450901.016>
- Okediji, R. L. (2018). Does intellectual property need human rights? *N.Y.U. Journal of International Law and Politics*, 51, 1–67.

- Onuora-Oguno, A. C. (2019). *Development and the right to education in Africa*. Cham: Palgrave Macmillan. <https://doi.org/10.1007/978-3-319-90335-4>
- OSCE, Office of the High Commissioner on National Minorities. (1996). *The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note*. The Hague: Foundation on Inter-Ethnic Relations [cited as Hague Recommendations Regarding the Education Rights of National Minorities].
- Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 1952, March 20, 213 U.N.T.S. 262 (entered into force 1954, May 18).
- Ramcharan, R. (2013). *International intellectual property law and human security*. The Hague: T.M.C. Asser Press. <https://doi.org/10.1007/978-90-6704-900-9>
- Read, T. (2015). *Where have all the textbooks gone? Toward sustainable provision of teaching and learning materials in Sub-Saharan Africa*. Washington, DC: World Bank. Retrieved from <http://documents.worldbank.org/curated/en/883821468179671004/pdf/97932-PUB-Box391498B-PUBLIC.pdf>
- Ricketson, S., & Ginsburg, J. (2006). *International copyright and neighbouring rights: The Berne Convention and beyond* (2nd ed.). Oxford: Oxford University Press.
- Ruggie, J. (2011, March 21). *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "protect, respect and remedy" framework* (U.N. Doc. A/HRC/17/31). Retrieved from [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf)
- Salomon, M. E. (2007). *Global responsibility for human rights: World poverty and the development of international law*. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199284429.001.0001>
- Salomon, M. E., Tostensen, A., & Vandenhoe, W. (Eds.). (2007). *Casting the net wider: Human rights, development and new duty-bearers*. Cambridge and Antwerp: Intersentia.
- Samuelson, P. (2009). Unbundling fair uses. *Fordham Law Review*, 77, 2537–2621.
- Senftleben, M. R. F. (2004). *Copyright, limitations and the three-step test: An analysis of the three-step test in international and EC copyright law*. Den Haag: Kluwer Law International.
- Sengupta, A. (2002). On the theory and practice of the right to development. *Human Rights Quarterly*, 24, 837–889.
- Shaheed, F. (2014, December 24). *Report of the Special Rapporteur in the Field of Cultural Rights: Copyright policy and the right to science and culture* (U.N. Doc. A/HRC/28/57). Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/249/51/PDF/G1424951.pdf>
- Shaver, L. (2014). Copyright and inequality. *Washington University Law Review*, 92, 117–168.
- Silva, A. J. Cerda. (2013). Beyond the unrealistic solution for development provided by the appendix of the Berne Convention on copyright. *Journal of the Copyright Society of the U.S.A.*, 60, 581–633.
- Skogly, S. I. (2006). *Beyond national borders: States' human rights obligations in international cooperation*. Antwerp and Oxford: Intersentia.
- Sprigman, C. J. (2018). Copyright and creative incentives: What do(n't) we know? In R. C. Dreyfuss & E. S.-K. Ng (Eds.), *Framing intellectual property law in the 21st century: Integrating incentives, trade, development, culture, and human rights* (pp. 32–61). Cambridge: Cambridge University Press. <https://doi.org/10.1017/9781316471647.003>
- Ssenyonjo, M. (2009). *Economic, social and cultural rights in international law*. Oxford and Portland, OR: Hart.
- Staudinger, M. (2015). A textbook version of the Doha Declaration: Editing the TRIPS Agreement to establish worldwide education and global competition. *IDEA: The Intellectual Property Law Review*, 55, 319–359.
- Story, A. (2002). Don't ignore copyright, the "sleeping giant" on the TRIPS and international educational agenda. In P. Drahos & R. Mayne (Eds.), *Global intellectual property rights: Knowledge, access and development*. Houndmills, Basingstoke, Hampshire and New York, NY: Palgrave Macmillan.
- Story, A. (2003). Burn Berne: Why the leading international copyright convention must be repealed. *Houston Law Review*, 40, 763–801.
- Story, A., Darch, C., & Halbert, D. (Eds.). (2006, May). *The copy/South dossier: Issues in the economics, politics, and ideology of copyright in the global South*. The Copy/South Research Group. May. Retrieved from <https://www.gutenberg.org/files/22746/22746-p/22746-p.pdf>
- Suthersanen, U. (2005). *Education, IPRs and fundamental freedoms: The right to knowledge*. UNCTAD/ICTSD/BA Regional Arab Dialogue, Intellectual property rights (IPRs), innovation and sustainable development, June 26–28, Alexandria, Egypt. On file with the author.
- Treaty on Access to Knowledge (proposed). (2005, May 10). Retrieved from <https://www.keionline.org/book/proposalfortreatyofaccesstoknowledgemay102005draft>
- TRIPS—see Agreement on Trade-Related Aspects of Intellectual Property Rights.
- U.N. Committee on Economic, Social and Cultural Rights. (1990, December 14). General Comment No. 3: The nature of states parties' obligations (art. 2(1) of the ICESCR) (U.N. Doc. E/1991/23) [cited as CESCR General Comment No. 3].



- U.N. Committee on Economic, Social and Cultural Rights. (1999, May 10). General Comment No. 11: Plans of action for primary education (art. 14 of the ICESCR) (U.N. Doc. E/C.12/1999/4) [cited as CESCR General Comment No. 11].
- U.N. Committee on Economic, Social and Cultural Rights. (1999, December 8). General Comment No. 13: The right to education (art. 13 of the ICESCR) (U.N. Doc. E/C.12/1999/10) [cited as CESCR General Comment No. 13].
- U.N. Committee on Economic, Social and Cultural Rights. (2006, January 12). General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15(1)(c) of the ICESCR) (U.N. Doc. E/C.12/GC/17) [cited as CESCR General Comment No. 17].
- U.N. Committee on Economic, Social and Cultural Rights. (2008, January 15). Concluding Observations on the initial report of the former Yugoslav Republic of Macedonia (U.N. Doc. E/C.12/MKD/CO/1) [cited as CESCR Concluding Observations Macedonia].
- U.N. Committee on Economic, Social and Cultural Rights. (2010, November 26). Concluding Observations on the second and third periodic reports of Switzerland (U.N. Doc. E/C.12/CHE/CO/2-3) [cited as CESCR Concluding Observations Switzerland].
- U.N. Committee on Economic, Social and Cultural Rights. (2012, December 13). Concluding Observations on the initial to third reports of the United Republic of Tanzania (U.N. Doc. E/C.12/TZA/CO/1-3) [cited as CESCR Concluding Observations Tanzania].
- U.N. Committee on Economic, Social and Cultural Rights. (2015, March 25). Concluding Observations on the combined second and third periodic reports of Tajikistan (U.N. Doc. E/C.12/TJK/CO/2-3) [cited as CESCR Concluding Observations Tajikistan].
- U.N. Committee on the Rights of the Child. (2001, April 17). General Comment No. 1, The aims of education (art. 29(1) of the Convention on the Rights of the Child), U.N. Doc. CRC/GC/2001/1 [cited as ComRC General Comment No. 1].
- UNESCO. (2003). UNESCO Guidelines on Language and Education. In *Education in a multilingual world*. Paris: UNESCO. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000129728> [cited as UNESCO Guidelines on Language and Education].
- UNESCO. (2016). Global education monitoring report 2016, *Education for people and planet: Creating sustainable futures for all*. Retrieved from [https://unesdoc.unesco.org/ark:/48223/pf0000245752\\_eng](https://unesdoc.unesco.org/ark:/48223/pf0000245752_eng) [cited as UNESCO Global education monitoring report].
- U.N. High Commissioner for Human Rights. (2004, June 9). *Mainstreaming the right to development into international trade law and policy at the World Trade Organization*. Report of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (U.N. Doc. E/CN.4/Sub.2/2004/17). Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/145/22/PDF/G0414522.pdf>
- United States—Section 110(5) of the U.S. Copyright Act, Panel Report, WTO Doc. WT/DS160/R (adopted 2000, June 15).
- U.S.-Morocco Free Trade Agreement, U.S.-Morocco, 2004, June 15, 44 I.L.M. 544 (2005) (entered into force 2006, January 1) [cited as U.S.-Morocco Free Trade Agreement].
- Vandenhoe, W. (Ed.). (2015). *Challenging territoriality in human rights law: Building blocks for a plural and diverse duty-bearer regime*. London and New York, NY: Routledge.
- Vienna Convention on the Law of Treaties, 1969, May 23, 1155 U.N.T.S 331 (entered into force 1980, January 27) [cited as Vienna Convention].
- Walter, S. L., & Benson, C. (2012). Language policy and medium of instruction in formal education. In B. Spolsky (Ed.), *The Cambridge handbook of language policy* (pp. 278–300). Cambridge: Cambridge University Press.
- WIPO. (2007). The 45 Adopted Recommendations under the WIPO Development Agenda. Retrieved from <https://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf> [cited as WIPO Development Agenda Recommendations].
- World Bank. (2008). *Textbooks and school library provision in secondary education in Sub-Saharan Africa* (World Bank Working Paper No. 126). Washington, DC: World Bank. <https://doi.org/10.1596/978-0-8213-7344-6>
- Yu, P. K. (2009). The objectives and principles of the Trips Agreement. *Houston Law Review*, 46, 979–1046.
- Yu, P. K. (2012). Intellectual property and human rights in the nonmultilateral era. *Florida Law Review*, 64, 1045–1100.
- Ziegler, J. (2005, January 24). *Report of the Special Rapporteur on the Right to Food: The right to food* (U.N. Doc. E/CN.4/2005/47). Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/104/24/PDF/G0510424.pdf>

## AUTHOR BIOGRAPHY



**Klaus D. Beiter**, B.Iur. LL.B. (UNISA, Pretoria), Dr. iur. (LMU Munich), is an Associate Professor at the Faculty of Law of North-West University, Potchefstroom, South Africa, and Affiliated Research Fellow at the Max Planck Institute for Innovation and Competition, Munich, Germany. He teaches Socio-Economic Rights, Intellectual Property Law, and International Social Justice at North-West University.

**How to cite this article:** Beiter KD. Extraterritorial human rights obligations to “civilize” intellectual property law: Access to textbooks in Africa, copyright, and the right to education. *J World Intellect Prop.* 2020;23:232–266. <https://doi.org/10.1111/jwip.12150>