

# Access to knowledge for consumers

Reports of  
Campaigns  
and Research  
2008-2010





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Reports of Campaigns and Research 2008–2010



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CONSUMERS INTERNATIONAL  
KUALA LUMPUR 2010

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Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, we are building a powerful international consumer movement to help protect and empower consumers everywhere. For more information, visit [www.consumersinternational.org](http://www.consumersinternational.org).

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Lot 5-1 Wisma WIM,

7 Jalan Abang Haji Openg,

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Tel: (603) 7726 1599

Fax: (603) 7726 8599

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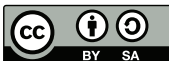
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# Introduction

From Argentina to Zambia, Consumers International's members are united in the cause of furthering access to knowledge for consumers. The global access to knowledge (or A2K) movement aims to create more equitable public access to the products of human culture and learning. Over the last two years, with the support of the Ford Foundation and the Open Society Institute (OSI), Consumers International (CI) and its members have been engaged in a programme of research and advocacy with exactly this purpose.

Amongst our other activities since the establishment of the A2K programme in 2008, we have:

- Released two editions of our *IP Watchlist*, covering 16 countries in 2009<sup>1</sup> and 34 in 2010,<sup>2</sup> which highlight to what extent those countries' laws and enforcement practices support consumers' interests in access to knowledge;
- Produced a short film to highlight the need for reform of intellectual property laws and enforcement practices to meet consumers' needs;<sup>3</sup> and
- Published a handbook titled *Access to Knowledge: A Guide for Everyone*, to provide a concise and non-specialist introduction to A2K issues for the consumer movement and like-minded non-governmental organisations (NGOs).

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<sup>1</sup> <http://A2Knetwork.org/sites/default/files/ip-watchlist09.pdf>

<sup>2</sup> <http://A2Knetwork.org/sites/default/files/IPWatchList-2010-ENG.pdf>

<sup>3</sup> <http://A2Knetwork.org/film>

None of these activities, successful as they were, will be the subject of this book. Instead, the book reports on four of the other initiatives on which CI and its members have collaborated over the last two years: a worldwide survey of consumers on barriers to A2K; national research on copyright flexibilities; advocacy and campaigning activities targeting developing countries; and a global meeting on A2K.

The remainder of this book is divided into four parts, each of which is devoted to one of the above initiatives. Before proceeding, a little more detail of each of them will be given.

## **Access barrier survey**

The biggest barriers that consumers face in accessing copyright works are those created by copyright law. Even so, consumers around the world will choose original copyright works over pirated copies, provided that they are available at an affordable price.

These are amongst the findings from a global survey of consumers conducted by CI in 13 languages and covering 15,000 consumers across 24 countries. The survey was designed to determine what obstacles consumers faced in gaining access to educational and cultural materials and software.

CI found that consumers, even in developing countries, would be more inclined to buy original rather than pirated copies of copyright works, if these provided high quality at a low enough cost. For those who could not afford to buy, borrowing offered an alternative – but particularly in developing countries, access to libraries is limited and the works they carry are few.

Whilst the means to copy and use copyright works were accessible to most consumers, others reported problems with digital locks and with limitations on the ability to access works at their time and place of choice.

Part of the solution to the access barriers that consumers face is the wider use of open content, such as Open Educational Resources (OER) and free and open source software (FOSS). Our survey found that most consumers are aware of these alternatives, and ready to give them a try.

But the rest of the solution to the access gap lies in the hands of governments and the private sector, who need to address consumers' needs for lower cost original materials to buy, borrow and access online.



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## Country research

From the big picture of our access barrier survey, we next zoom in to look at two countries in detail, based on their recent amendment of their copyright law. Whereas the amendment of a country's copyright law is nothing unusual, this is usually to extend the exclusive rights of copyright owners, for example by facilitating their use of digital locks that interfere with consumers' exercise of their fair use and fair dealing rights. Australia and Israel, on the other hand, recently adopted new copyright flexibilities to benefit consumers.

Very often when the introduction of new flexibilities is proposed, industry lobbyists will cry foul and exclaim that these will decimate the publishing, software or entertainment industries as the case may be. CI was curious to find whether their dire predictions had come true for two countries in which such new flexibilities had been adopted.

### Australian study

Our study in Australia, conducted with the University of New South Wales Cyberspace Law and Policy Centre, and our member CHOICE, dealt with the effect of new exceptions to facilitate time-shifting, space-shifting and format-shifting of copyrighted works. It found that there had been no basis to the fears of industry that the proposed exceptions posed a "potential dramatic threat" to the interests of copyright holders.<sup>4</sup>

Indeed, if anything, there was evidence to suggest that the amendments may have increased compliance with the law – not only by legalising the common and harmless consumer practices in question, but by improving some consumers' respect for the fairness of copyright law in general. This in turn may have dissuaded those consumers from infringing copyright in other respects, such as downloading music or TV shows without permission.<sup>5</sup>

The research also confirmed the finding of our global access barrier survey, that consumers were not wanton in their consumption of unlicensed copyright material. Whilst many consumers do share music or video files now and again when it is not possible or convenient for them to buy, only a small minority believe it to be morally acceptable to download as much as they please. Most are in fact concerned not to deprive artists of their income.<sup>6</sup>

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<sup>4</sup> See section 3.2.4.

<sup>5</sup> See section 3.5.6.

<sup>6</sup> See section 3.5.3.

The study's author concludes with a message that we hope other countries considering such amendments will heed:

It appears the risk of action to bring laws into compliance with certain low impact consumer behaviour are unlikely to generate the worst effects feared by creator advocates, and have considerable potential for improvements.<sup>7</sup>

### **Israeli study**

In Israel, our research, supported by the Israel Consumer Council and conducted by a team of scholars led by Dr Nimrod Kozlovski, dealt with the new “fair use” right in Israel’s Copyright Act – against which industry railed last year, arguing that it “risks creating gaps in protection.”<sup>8</sup>

Whilst the study acknowledges that fair use jurisprudence in Israel has been spotty – due in part to the mismatching of US common law principles with British-derived legislation – it finds that the general trend of the law has been to adapt fair use principles to the practices of consumers, taking account of their cultural needs,<sup>9</sup> and the heavy reliance on content re-use by Israel’s biggest employers and industries.<sup>10</sup>

Rather than reacting to such reuse of copyright content in “knee-jerk” fashion as US-based rights-holders are wont to do, investors in Israel take it in their stride, even when the use may be legally grey. The authors conclude that:

More than any other factor, what should be learned is from the Israeli praxis, and not theory, whereby copyright infringement in business is considered as a business risk, and where artists and creators wish to share and allow others to create.<sup>11</sup>

Once again, this country level study also supports the finding from our global access barrier survey that consumers are not inveterate pirates, but are in fact willing to pay for an easy and simple means to consume content.<sup>12</sup> An appropriate fair use right, that does not treat consumers

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<sup>7</sup> See section 3.7.2.

<sup>8</sup> International Intellectual Property Alliance. *2009 Special 301 Report on Copyright Protection and Enforcement*, p.208, available at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf>.

<sup>9</sup> See section 4.5.

<sup>10</sup> 4.2.2

<sup>11</sup> See section 4.5.

<sup>12</sup> 4.1.2

as criminals for fulfilling basic educational and cultural needs, is a key measure in establishing such a mutually beneficial copyright ecosystem for creators and consumers alike.

Having said this, Israel's fair use right is found to fall short in some respects. The authors of our study recommend that it should be supplemented with a set of permitted uses, to serve as a non-conclusive guide to the extent of fair use under Israeli law.<sup>13</sup>

## Advocacy and campaigning

The third part of this book comprises a series of short reports from six of our members who carried out advocacy or campaigning activities at a national level. Small seed grants to these members, totalling USD\$40,000, were awarded in early 2010 for a range of activities that supported the A2K programme's objectives.

The six members whose reports are included, and their activities that CI chose to support, are as follows:

- **CAI India** – To sensitise librarians, information managers and educators on barriers to access and open access to knowledge resources.
- **CAO Nigeria** – To carry out a national campaign for the amendment of the Copyright Act to make it more permissive.
- **IDEC Brazil** – To advocate for consumer rights in the new copyright law in Brazil.
- **NCF South Africa** – To campaign using a social media platform and email about the need for copyright reform, with representation via an online petition.
- **RACE Cameroon** – To campaign on book prices including research, lobbying and public awareness components.
- **ZACA Zambia** – To reduce the retail prices of educational books in Zambia by removal of 20% import duty.

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<sup>13</sup> See section 4.2.3.

## Papers from the Global Meeting on A2K

As part of CI's global consumer network on A2K, CI organised a number of successful meetings during 2009 and 2010. These included:

- Meetings of our members and like-minded NGOs, held for the Asia-Pacific,<sup>14</sup> Latin American<sup>15</sup> and African<sup>16</sup> regions between February and April 2009. These meetings facilitated networking and institutional capacity-building, and enabled us to collaboratively develop a two-year strategic plan on A2K for the global consumer movement.
- A CI-sponsored workshop on “Copyright Limitations and Exceptions for Education and Research Environments” was held in Nairobi in May 2009, for the purpose of gathering consumer input into the review of Kenya's Copyright Act.<sup>17</sup>
- An event titled “The Next Wave of ASEAN Consumer Protection in Telecommunications” was co-organised by CI in July 2009. One of the important outputs from this event was the *Chiang Rai Declaration on Consumer Protection in Telecommunications*, which advocates a people-centered approach to consumer protection in telecommunications.<sup>18</sup>
- CI co-organised a workshop on the “Global State of Copyright and Access to Knowledge” at the fourth meeting of the Internet Governance Forum held in Sharm el Sheikh, Egypt. Speakers at the event included Lea Shaver of Yale University's Information Society Project, Dr Perihan Abou Zeid from Pharos University, Alexandria, Egypt, Tobias Schonwetter from the University of Cape Town, South Africa, and Pranesh Prakash from the Centre for Internet and Society, Bangalore.<sup>19</sup>
- CI held a “Business Roundtable on the Consumer Interest in Intellectual Property Rights” in Paris in October 2009.<sup>20</sup> The event provided the opportunity for key business and civil society leaders to

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<sup>14</sup> <http://A2Knetwork.org/report-cis-asia-pacific-regional-meeting-a2k>

<sup>15</sup> <http://A2Knetwork.org/report-cis-latin-american-regional-meeting-a2k>

<sup>16</sup> <http://A2Knetwork.org/report-cis-african-regional-meeting-a2k>

<sup>17</sup> <http://A2Knetwork.org/workshop-copyright-limitations-and-exceptions-education-and-research-environments-nairobi>

<sup>18</sup> <http://A2Knetwork.org/chiang-rai-declaration>

<sup>19</sup> <http://A2Knetwork.org/access-knowledge-internet-governance-forum>

<sup>20</sup> <http://A2Knetwork.org/business-roundtable>

discuss and debate the role that consumers' interests play in their decision-making on intellectual property issues.

- CI's 2010 Global Meeting on Access to Knowledge was held in Kuala Lumpur over two days in April 2010, bringing together consumer groups and experts from around the world to discuss and collaborate on issues of access to knowledge (A2K) and communications rights.<sup>21</sup>

From the last of these meetings, we present a selection of papers which make up the fourth and final part of this book. The first (and the only contribution to this volume written in French!) comes from Najiba El Amrani El Idrissi and Mohamed Abdou Ammor from CI member ATLAS-SAÏS of Morocco, writing on the role of stakeholders in the education system in promoting A2K.

Next, Eddan Katz of the Electronic Frontier Foundation contributes *Mapping A2K Advocacy*, which is an excellent and concise primer on the entire A2K movement. Although written in 2007, it has not seen print until now.

Mariana Harjevschi, Moldova country coordinator for eIFL IP,<sup>22</sup> writes next on *Libraries and Access to Knowledge – Partners with Consumers*, which includes a directory of librarians that CI members will find very useful. Last but not least, Guilherme Varella of CI member IDEC (who has also contributed a report to part 3 of this book) provides a useful overview of pending changes to the copyright law of Brazil.

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<sup>21</sup> <http://A2Knetwork.org/ci-global-meeting-a2k>

<sup>22</sup> <http://plip.eifl.net/eifl-ip>



## **Part I**

# **Global consumer survey on A2K access barriers**





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# First phase: planning and interviews

*Dr Jeremy Malcolm*

## **Abstract**

A global survey of consumers, targeting 25 countries, was conducted by Consumers International through its members over 2009 and 2010, to investigate the barriers that impeded them from effectively accessing and using copyright materials. The survey was designed to be implemented in two phases; the first of which would involve face-to-face interviews with consumers in the target countries to reveal the nature of the barriers they faced in general terms, and the second a larger-scale questionnaire that would focus in on the identified barriers and quantify their scale.

In the end, the first phase interviews were conducted with 156 respondents in 20 countries worldwide. A wide range of political, economic, social and technological access barriers were revealed. This paper presents those barriers both in raw form, and grouped into clusters that cut across the different classes of copyright work about which respondents were questioned.

The most interesting preliminary results included the finding that the quality of copyright works was in some cases even more important to consumers than their cost, that African consumers were more concerned about respecting copyright than consumers in other regions, and that consumers lacked awareness of the availability and characteristics of free and open source software.

During 2009 and 2010, Consumers International conducted a 25-country survey on barriers that consumers face in accessing and using copyright materials.

The purpose of this access barrier survey was to gather evidence of consumers' actual experience in trying to access and use materials in three areas covered by copyright: educational materials, software, and films and music. The survey encompassed not only the legal constraints of copyright law, but also various other barriers to access.

This information was sought for two main purposes:

- To illustrate the extent to which unbalanced copyright laws inhibit consumers from accessing and using educational materials, software, films and music.
- To inform CI's advocacy activities by uncovering exactly which barriers to access (including barriers other than copyright) should be targeted in future campaigns.

It was hoped that the research would enable CI to answer questions like:

- What are the biggest difficulties for consumers overall in accessing and using copyright materials?
- Are political, economic, social or technological barriers predominant?
- How does this vary by country, region or demographics?

### **1.1 Previous research**

In a literature review that preceded the survey research, it was found that there was only limited existing research on access barriers faced by consumers in accessing copyright material. Some of the most useful such research included:

- Surveys of the state of copyright protection and enforcement practices worldwide.<sup>1</sup>

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<sup>1</sup> Consumers International. *Copyright and Access to Knowledge*. Consumers International, Kuala Lumpur, 2006.

- Surveys of consumers' attitudes to unlicensed copies of copyright material, either in the form of counterfeit products<sup>2</sup> or online file sharing.<sup>3</sup>
- Surveys of consumers' attitudes to Digital Rights Management (DRM) of digital music<sup>4</sup> and video.<sup>5</sup>
- Surveys of the availability of Internet access and the extent of Internet usage worldwide.<sup>6</sup>
- Surveys on the availability and affordability of educational materials.<sup>7</sup>

The present research was to go further than these in two respects. First, it would be broader in scope, in that it would encompass access to and use of educational materials, software, films and music. Second, it would be more open-ended, not focussing upon any particular barrier to access (such as DRM) but rather leaving consumers to nominate the barriers that they find most onerous in practice.

## 1.2 Classification of access barriers

There are many factors that can operate as barriers to access of copyright materials. In strategic planning, a standard method of categorisation of

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<sup>2</sup> de Matos, Celso Augusto, Ituassu, Cristiana Trindade and Rossi, Carlos Alberto Vargas. "Consumer attitudes toward counterfeits: a review and extension". *Journal of Consumer Marketing* 24(1), 36-47, 2007.

<sup>3</sup> Madden, Mary and Lenhart, Amanda. *Music Downloading, File Sharing and Copyright*. Pew Internet & American Life Project, July 2003, <http://www.pewinternet.org/Reports/2003/Music-Downloading-Filesharing-and-Copyright.aspx>

<sup>4</sup> Dufft, Nicole, Stiehler, Andreas, Vogeley, Danny and Wichmann, Thorsten. *Digital Music Usage and DRM: Results From a European Consumer Survey*. INDICARE, 2005, [http://www.indicare.org/tiki-download\\_file.php?fileId=110](http://www.indicare.org/tiki-download_file.php?fileId=110)

<sup>5</sup> Dufft, Nicole, Stiehler, Andreas, Bonn, Philipp and Wichmann, Thorsten. *Digital Video Usage and DRM: Results From a European Consumer Survey*. INDICARE, 2006, [http://www.indicare.org/tiki-download\\_file.php?fileId=170](http://www.indicare.org/tiki-download_file.php?fileId=170)

<sup>6</sup> International Telecommunications Union. *ICT Statistics Database*. ITU, 2007, <http://www.itu.int/ITU-D/icteye/Indicators/Indicators.aspx>

<sup>7</sup> Rens, Andrew, Prabhala, Achal and Kawooya, Dick. *Intellectual Property, Education and Access to Knowledge in Southern Africa*. Trade Law Centre for Southern Africa, 2006, [http://www.iprsonline.org/unctadictsd/docs/06\\_05\\_31\\_tralac\\_amended-pdf.pdf](http://www.iprsonline.org/unctadictsd/docs/06_05_31_tralac_amended-pdf.pdf)

macro-environmental factors is a PEST analysis, which groups them into Political, Economic, Social and Technological forces.<sup>8</sup> This classification was employed in the design of the present survey, on the basis that political factors are taken to include law, social factors to include education, and economic factors to include availability. Consider, then, this simplified example:

<b>Political</b>	<b>Economic</b>
Supports A2K: <ul style="list-style-type: none"><li>• Copyright exceptions for personal copying</li></ul> Inhibits A2K: <ul style="list-style-type: none"><li>• Copyright terms in excess of TRIPS minima</li></ul>	Supports A2K: <ul style="list-style-type: none"><li>• Falling cost of computing power and Internet access</li></ul> Inhibits A2K: <ul style="list-style-type: none"><li>• The digital divide</li></ul>
<b>Social</b>	<b>Technological</b>
Supports A2K: <ul style="list-style-type: none"><li>• Strong culture of peer production</li></ul> Inhibits A2K: <ul style="list-style-type: none"><li>• Use of words like “piracy” and “theft” to describe knowledge sharing</li></ul>	Supports A2K: <ul style="list-style-type: none"><li>• Peer-to-peer file sharing</li></ul> Inhibits A2K: <ul style="list-style-type: none"><li>• DRM and Technological Protection Mechanisms (TPM)</li></ul>

### 1.3 Scope

All factors that impact upon a consumer’s ability to access or use educational materials, software, or films and music were to be within the scope of the survey. Outside the scope of the survey were the following:

- Access to other copyright works such as books (except for education), visual art, photographs or live performances.

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<sup>8</sup> Courtney, Roger. *Strategic Management for Voluntary Nonprofit Organizations*. Routledge, London, 2002, 171-179.

- Access to goods that are not protected by copyright, such as food and pharmaceuticals.
- Access barriers only experienced by users in a business or governmental capacity.

The geographical scope of the survey was broad, covering 25 countries from all regions. The foundation of this list of countries was developed by including all those cited on the Priority Watch List of the USTR Special 301 Report for 2006, 2007 and 2008. This list was fine-tuned based on the availability of a willing CI member in each country, as well as for regional balance, and to include a selection of developed countries that were seen as having strong intellectual property protection.

By design, there was a large degree of overlap between the countries selected for participation in the access barrier survey and those from which reports were sought for contribution to CI's IP Watchlist, although they were not identical. Thus, all of the countries that participated in the access barrier survey also contributed to the 2010 IP Watchlist, with the addition of France.

In the end, due to members' resource limitations, a large majority but not all of the 25 selected countries successfully participated in each phase of the survey. There were 20 valid sets of results received in the first phase, and 24 in the second phase.

## **1.4 Methodology**

Due to the breadth of the survey as well as the range of countries targeted, in relation to the constraints of available resources, the most efficient methodology for a large scale survey was to conduct it in writing rather than face-to-face interview.

On the other hand a purely objective quantitative study would be poorly suited to the aims of this survey, which were to investigate consumers' subjective experiences of attempting to access and use copyright material. Mere speculation as to what these difficulties may be would not provide a firm foundation for the design of a quantitative survey.

To resolve this dilemma, the following methodology was proposed:

- First, a relatively small number of face-to-face interviews of consumers would be conducted by CI members amongst the participating member countries, with the objective of determining in broad terms what political, economic, social and technological

barriers to access consumers are likely to face and how they would feel about them.

- Second, recordings or transcripts of these interviews (where necessary translated into English) would be used to isolate a range of opinions about the various access barriers faced by consumers.
- Third, these opinions would be used to develop a larger-scale quantitative survey of consumers. It was determined that a suitable statistical method for this purpose was the use of a Likert scale, which is specifically designed to measure subjective states of mind such as opinions.

For example, the following might have been a range of opinions expressed during the face-to-face interviews:

- Political:
  - I avoid downloading or sharing copyrighted material using the Internet because I know it is illegal.
  - If a CD or film has been discontinued by the publisher, I should be allowed to obtain an unofficial copy.
- Economic:
  - I would be more likely to buy textbooks if they were not so expensive.
  - I would be happy to pay a reasonable price to watch new release movies on my computer if that option was commercially available.
- Social:
  - I will only buy a textbook that is written in my native language.
  - I have to use Microsoft software because that's what all my friends and colleagues use.
- Technological:
  - I never buy DVDs from other regions when I travel because I can't play them on my DVD player at home.

- Peer-to-peer file sharing software is too complicated for me to use.

These statements would be grouped into clusters of those that exemplified the same access barrier (for example, cost, DRM, vendor lock-in, strength of enforcement) and one question formulated from each cluster for inclusion in the final quantitative survey, in a form that would be both simple and general enough for most consumers to answer.

## 1.5 Preparation of the first phase interviews

The first phase survey form was quite comprehensive, consisting of 12 multi-part interview questions, which were designed to lay the groundwork for the second phase of the survey which would quantify the extent and scale of the access barriers that were identified in the first phase. These questions were:

### Educational materials

1. Have you ever needed to access or use educational materials such as textbooks? [*If no, skip to question 4*]
2. Describe any difficulties or concerns you may have experienced in gaining access to educational materials in any of the following circumstances:
  - a) buying them;
  - b) borrowing them;
  - c) accessing them on the Internet; and
  - d) any other circumstances.
3. When you have had access to the educational materials you needed, describe any difficulties or concerns you may have experienced with them, including difficulties in:
  - a) reading, listening to or viewing them;
  - b) copying from them; and
  - c) sharing them.

### **Software**

4. Have you ever needed to access or use computer software outside of your workplace? *[If no, skip to question 9]*
5. Describe any difficulties or concerns you may have experienced in gaining access to computer software outside of your workplace in any of the following circumstances:
  - a) buying it;
  - b) borrowing it;
  - c) downloading it from the Internet; and
  - d) any other circumstances.
6. When you have had access to the computer software you needed outside of your workplace, describe any difficulties or concerns you may have experienced with it, including difficulties in:
  - a) using it;
  - b) copying it;
  - c) modifying it; and
  - d) sharing it.
7. Do you know what is meant by terms “free software” or “open source software”? *[If no, skip to question 9]*
8. What has influenced your decision to use, or not to use, free or open source software?

### **Films and music**

9. Do you ever watch films or listen to music, other than at a public venue such as a cinema or concert? *[If no, end the interview]*
10. Describe any difficulties or concerns you may have experienced in gaining access to films or music (other than at public venues) in any of the following circumstances:
  - a) buying them;
  - b) borrowing them;
  - c) accessing them via television or radio;



- d) accessing them on the Internet; and
  - e) any other circumstances.
11. When you have had access to films or music, describe any difficulties or concerns you may have experienced with them, including difficulties in:
- a) watching or listening to them;
  - b) copying from them; and
  - c) sharing them.
12. How, if at all, do the terms under which films or music are licensed (normally described in a copyright notice) influence how you use them?

Although the basic questions to be covered were set out in the survey form that was given to participating members, other relevant issues could also be discussed during the interview, and indeed interviewers were encouraged to think of follow-up questions.

This first phase survey was administered to 156 respondents across 20 countries worldwide, in most cases via face-to-face interviews with consumers. The countries that participated included both developed (Japan and South Korea) and developing (eg. Indonesia and Zambia) countries. Within each country, members were instructed to ensure that a reasonable gender, age and socio-economic balance of respondents was maintained, including a number of respondents with disabilities.

Volunteers could consent to have their responses audio or video recorded; but in most cases notes of their responses were taken during the interview, and later translated into English where necessary.

## 1.6 Analysing the interview data

The table overleaf summarises the interview data and contains several columns which require explanation:

- Class of work – this is the broadest category into which the questions were grouped, dealing with the barriers that face consumers in attempting to access *educational materials*, *software*, and *films and music*.



Figure 1.1: First phase interviews by CIN Kenya, June 2009

- Activity – for each class of material, the survey endeavoured to uncover the barriers that faced consumers in trying to *access* it, and once they had access to such material to make *use* of it. This column describes the type of access (for example, buying, borrowing or accessing online), or the type of use (for example, reading/watching, copying, modifying or sharing) about which the respondent was questioned. In the case of Brazil, consumers were not asked directly about the specified types of access and use, but these were instead used as prompts for an open-ended interview. In this case, the appropriate answers are inferred from the interview notes.
- Summary of access barrier – this captures the access barrier that the consumer described in their answer. It is important to note that these are not multiple choice options; all responses in this column came directly from the consumers interviewed. Similar answers were combined under a single heading, which involved a degree of subjective assessment, however where any significant difference

of meaning existed separate headings were retained (eg. “Lack of training” and “Lack of support”).

- Incidence – this column shows the number of respondents from each region who encountered the problem listed, being amongst 30 respondents from the Latin American (LA) region, 84 from the Asia-Pacific and Middle East (AP) and 42 from Africa (A), which are the three regions of the members who participated in the first phase. Not all respondents answered all questions – for example, fewer of the African respondents answered questions on computer software, because many of them had not had any occasion to use a computer. Other questions were skipped because respondents had not encountered any relevant barriers in accessing or using the specified class of material. Conversely, where one person recorded being impacted by several barriers to the access or use of copyright material, these are reported separately.
- P E S T – this column indicates whether the access barrier described can be most accurately classed as a Political, Economic, Social or Technological factor. In some cases, the classification was ambiguous (for example, one answer given was that “the license can cause problems when copying”), in which case an interpretation was made (in that case, that a technical limitation was being described). Such classification is a subjective exercise and is therefore not definitive, but was undertaken to confirm that an adequate cross-section of all types of access barrier had been covered.

#### **A selection of quotes from the first phase interviews . . .**

- “Piracy culture sustains low costs”  
– Bangladesh respondent
- “If the CD is used for a right purpose then copying the CD is not wrong”  
– Indian respondent
- “I ignore the licence openly. All do this in Lebanon.”  
– Lebanese respondent
- “You have the same copyright notice on counterfeit materials. So, why would you refrain from copying?”  
– Cameroon respondent

Class of work	Activity	Summary of access barrier	Incidence		PEST	
			LA	AP A		
Educational	Buying	Too expensive	14	49	31	E
		Unavailable and/or sold out	5	36	18	E
		Too many editions or curriculum changes	2	7	1	S
		Slow delivery	1	4	2	S
		Not available at local stores	0	5	1	E
		Second hand stock is unavailable or outdated	3	2	1	S
		Lack of assistance in finding books	1	2	0	S
		Not enough pre-purchase information	1	1	0	T
		Problems with payment logistics	0	0	2	E
		Concern over possible illegal origin	1	0	0	S
		Books unavailable in library	5	21	21	E
		Time limits or other restrictions on withdrawals	0	12	4	S
		Lack of libraries or librarians	1	7	8	S
		Inconvenience of having to borrow	1	5	4	S
		Peers do not want to share	1	4	2	S
		Books hard to find	1	4	0	S
		Library books are outdated	0	1	3	E
Cannot write in books	0	3	0	S		
Membership fees too expensive	0	0	2	E		
Too slow	0	1	0	S		
Need to coordinate access amongst peers	1	0	0	S		
Content unavailable online	6	18	6	T		
Too expensive	2	8	7	E		

Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
		No Internet access	0	5	9	E
		Too slow	0	8	5	T
		Problems with payment logistics	0	6	4	E
		Requires registration or subscription	0	6	4	E
		Lack of training	1	4	3	S
		Lack of assistance in finding books	1	4	0	S
		Compatibility problems	0	0	4	T
		Poor quality	2	2	0	T
		Lack of privacy	0	2	0	S
		Cyber cafés are not blind accessible	0	0	1	T
		Risk of viruses	0	0	1	T
		Difficulty typing	0	1	0	T
		No local content	0	0	1	S
		Cannot just buy excerpts required	0	1	0	E
		Technical problems	0	1	0	T
		Difficulty in licensing works for local reprinting	0	1	0	P
		Poor quality or condition of books	5	17	17	T
		Not available in local language	7	15	5	S
		Font size too small or page too crowded	2	10	2	T
		Difficulty understanding content	1	6	4	S
		Lack of infrastructure (electricity or equipment)	0	0	8	E
		Restricted access to Internet materials	2	2	4	T
		Culturally inappropriate content	0	1	6	S
	Other access					
	Reading					

Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
		Not accessible to the vision impaired	0	3	1	T
		Mobility/accessibility of online material	0	4	0	T
		Borrowed copies contain others' notes	0	3	0	S
		Outdated content	0	1	1	S
		Don't like reading electronic copies	0	2	0	S
		Uninteresting presentation	0	2	0	S
		Poor translation	1	0	0	S
		Misdescription of content	0	1	0	S
		Too expensive	3	12	14	E
	Copying	Legally constrained from copying	1	13	12	P
		Library or copy shop does not allow copying	2	10	2	P
		Poor quality of photocopies	2	8	3	T
		Not possible to copy from electronic sources	2	8	3	T
		Lack of infrastructure (electricity or equipment)	0	2	7	T
		Lack of technical knowledge	0	1	3	S
		Difficult to copy bound volumes	0	2	0	T
		Afraid of damaging the book	0	1	0	T
		Too much to copy	0	1	0	S
		Fear of loss of originals left for copying	0	0	1	S
		No clean originals to copy from	0	1	0	E
		Risk of loss or damage	9	29	22	S
	Sharing	Inconvenience of having to share	1	3	4	S
		Legally constrained from sharing	0	2	4	P

Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
Software	Buying	Lack of infrastructure (electricity or equipment)	0	1	2	T
		Compatibility problems	0	1	1	T
		Too expensive	8	34	22	E
		Limited variety available	0	8	6	E
		Problems with payment logistics	0	2	1	E
		Becomes outdated quickly, requiring updates	0	1	1	E
		Not available in local language	2	0	0	S
		Risk of unknowingly buying pirated software	2	0	0	P
		Constrained from installing on several PCs	0	2	0	P
		Insufficient information before purchase	0	1	0	S
		Licence too complicated	0	1	0	E
		Taken advantage of by vendors	1	0	0	S
		No copy available to borrow	0	9	7	S
		Not permitted by the software licence	2	3	1	P
Accessing online	Borrowing	Risk of viruses or corruption	0	3	2	T
		Copy-protection mechanisms	0	1	3	T
		Peers do not want to share	0	1	2	S
		Feels uncomfortable to borrow	1	1	0	S
		Too slow	2	21	12	T
		Too expensive	1	6	9	E
		Risk of viruses or corruption	1	9	3	T
		Not permitted by the software licence	0	4	1	P
		Downloads blocked	0	2	2	T

Class of work	Activity	Summary of access barrier	Incidence			PEST
			LA	AP	A	
		Lack of technical knowledge	2	1	1	S
		Not available	0	2	1	T
		Problems with payment logistics	0	2	1	E
		Untrusted source	1	1	0	T
		Requires registration or subscription	0	1	0	E
		Too many terms and conditions to read	0	1	0	P
		Not available in local language	0	0	1	S
	Other access	Cannot install software onto a rented computer	2	1	0	T
		No public Internet terminals	0	1	0	E
	Using	Compatibility problems	1	11	9	T
		Not available in local language	4	5	7	S
		Poor quality or usability of software	2	9	3	T
		Lack of training	4	5	5	S
		Expiration of trial software	0	10	3	T
		Lack of support	2	6	2	S
		Technical problems	1	5	2	T
		Interference from anti-piracy measures	2	2	0	T
		Lack of necessary features	0	2	1	T
		Not accessible to the blind	0	1	1	T
		Poor quality of media	0	1	1	T
		Concern over privacy	0	1	0	S
		Difficulty cancelling licence renewal	0	1	0	E
		Too slow to install	0	1	0	T



Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
Copying		Copy-protection mechanisms	3	10	2	T
		Not permitted by the software licence	1	6	5	P
		Lack of technical knowledge	2	6	3	S
		Technical problems	0	2	4	T
		Too slow	0	2	1	T
		Expiration of trial software	0	0	3	T
		Risk of viruses	0	2	1	T
		Original media not available	0	0	1	T
		Lack of technical knowledge	4	4	10	S
		No source code	0	2	10	T
Modifying		Not permitted by the software licence	0	0	2	P
		Risk of corruption	0	1	0	T
		Encryption	0	1	0	T
		Not permitted by the software licence	0	6	7	P
		Copy-protection mechanisms	1	3	1	T
		Lack of technical knowledge	0	0	4	S
		Risk of loss or damage	0	3	1	S
		Risk of viruses	0	4	0	T
		Original media not available	0	0	2	T
		Compatibility problems	0	1	0	T
Using FOSS		Not compatible to share files with Windows	5	0	2	S
		Lack of training	1	1	3	S
		Risk of viruses or spyware	0	5	0	S

Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
		Not user friendly	0	5	0	S
		Limited features	0	2	2	T
		Windows is better known/more accepted	2	0	1	S
		Not available in local language	0	1	1	S
		Lack of support	0	2	0	S
		Untrusted source	0	1	1	S
		Do use – more affordable	0	15	6	E
		Do use – to support community, anti-monopoly	2	0	0	S
		Do use – easy to use	0	1	1	S
		Do use – better security	1	0	0	S
		Do use – easy to obtain	0	0	1	S
		Too expensive	9	43	18	E
		Limited variety available	2	13	14	E
		Too long before movies released	0	5	0	E
		Problems with payment logistics	0	1	3	E
		Not enough pre-purchase information	1	1	0	S
		Hard to tell pirated from original	0	0	1	T
		Cannot buy track-by-track	0	1	0	E
		Limited variety available	1	17	10	S
		Prefer to keep longer	0	8	2	S
		Too expensive	3	2	3	P
		Peers do not want to share	1	2	5	S
		Poor quality	0	5	2	T
Films and music	Buying					
	Borrowing					

Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
		Legally constrained from borrowing	0	1	2	P
		Afraid of losing or damaging	2	0	1	T
		No video or music libraries	0	0	2	E
	Broadcast access	Limited variety available	2	12	14	T
		Service interruptions or advertising	2	8	8	T
		Pay TV too expensive	5	7	4	E
		Bad signal quality	4	6	2	T
		Cannot access on demand	2	3	1	T
		Culturally inappropriate content	0	2	2	S
		Interference from family members	0	4	0	S
		Too long before movies released	1	3	0	E
		Censorship	0	1	1	P
		Lack of infrastructure (electricity or equipment)	0	1	1	E
		No subtitles	0	1	0	T
		Technical problems	0	1	0	T
	Accessing online	Too slow	6	25	13	T
		Too expensive	0	4	9	E
		Limited variety available	0	8	4	T
		Lack of Internet access	2	4	5	E
		Risk of viruses	1	5	1	T
		Corrupt or incomplete download	1	3	2	T
		Technical problems	1	3	1	T
		Legally constrained from accessing	0	2	2	E

Class of work	Activity	Summary of access barrier	Incidence			PEST
			LA	AP	A	
		Lack of technical knowledge	1	2	1	S
		Requires registration or subscription	0	2	0	E
		Problems with payment logistics	0	1	1	E
		Copy-protection mechanisms	0	0	1	T
		Language inaccessibility	0	0	1	S
		Compatibility problems	0	1	0	T
		Regional limitations	1	0	0	T
		Lack of infrastructure (electricity or equipment)	0	0	1	E
		Poor quality	0	0	0	T
	Other access	Compatibility problems	14	49	19	T
	Watch/listening	Not available in local language	1	9	5	T
		Censorship	3	5	6	S
		Lack of infrastructure (electricity or equipment)	0	10	2	P
		Not accessible to the vision or hearing impaired	0	1	8	E
		Wrong labelling or missing content	0	4	1	T
		Poor translation	0	4	0	S
		Damage to equipment from poor quality copies	2	2	0	S
		Feels guilty to use pirated content	0	0	3	T
		Interruptions	0	2	0	P
		Lack of infrastructure (electricity or equipment)	0	1	0	S
	Copying	Legally constrained from copying	4	12	6	E
		Too expensive	0	8	6	P
			0	2	10	E

Class of work	Activity	Summary of access barrier	Incidence			P E S T
			LA	AP	A	
		Copy-protection mechanisms	2	5	3	T
		Poor quality	1	2	3	T
		Too slow	0	2	1	S
		Lack of technical knowledge	1	0	2	S
		Prefer not to copy a pirate version	1	0	0	S
		Technical problems	0	1	0	T
		Risk of loss or damage	1	13	12	S
		Legally constrained from sharing	0	5	10	P
	Sharing	Lack of infrastructure (electricity or equipment)	0	1	4	E
		Fear originals will be copied	0	0	2	S
		Copy-protection mechanisms	0	0	1	T
		Poor quality	0	0	1	T
		Compatibility problems	0	1	0	T
		Licence is ignored privately (or unspecified)	11	23	20	
	Effect of licence	Licence is always observed	1	11	6	
		Licence is usually observed	0	12	4	
		Licence is ignored if price is unaffordable	3	10	0	
		Licence is ignored openly	0	5	4	
		Licence is sometimes observed	1	6	1	
		Unaware of licence	1	3	1	
		Licence is ignored for non-commercial use	0	5	0	
		Licence is ignored for foreign rights holders	3	1	0	
		Licence is ignored if goods are unavailable	1	0	0	

## 1.7 Highlights of the interview results

A rough idea of the scale of the access barriers faced by consumers, and their geographical incidence, can be gleaned from the table overleaf. Little weight should be given to the numbers reported, as this first phase of the survey was just intended as an evidence gathering exercise to inform the preparation of a larger-scale questionnaire, not to produce a statistical account of the scale of the problems. It was the function of the second phase of the consumer survey to assess the scale of the access barriers that we unveiled in the first phase.

Notwithstanding this limitation, some patterns have emerged from the 156 responses received, suggesting areas that would merit further study. Three of these are as follows:

1. On average it seems that African consumers are much more likely than consumers in Asia or Latin America to regard copyright infringement as a legal and moral issue. This finding seems to carry across each of the African countries covered, and each of the classes of material about which respondents were surveyed. This may reflect the success of WIPO's Africa Bureau, which ostensibly exists to assist local IP ministries and to support the development potential of IP, but which has been criticised for instilling Western values of IP protection without regard to the principles of the WIPO Development Agenda.
2. Most consumers in each region privately ignore copyright licence terms. Of the remainder who don't ignore the licence altogether, many will still disregard it where the cost of purchasing licensed copies is unaffordable. However, in the case of cultural media (films and music), consumers are actually less concerned with the cost of obtaining access (because this is mitigated by the wide availability of pirated copies), as with the unsatisfactory quality of the copies they obtain. A corollary is that more consumers might be more likely to buy legitimate copies of goods if they were priced more reasonably.
3. Consumers have limited understanding of free and open source software (FOSS). Even many of the respondents who indicated that they understood what this phrase meant, went on to say that they didn't use FOSS because the software would expire after a set time, that it was "demo software" with limited features, that it required payment to unlock additional features, or that it was beridden with

spyware or viruses. In fact, none of these preconceptions are correct. This suggests the need for education of consumers on the unique features of FOSS and (though not covered in the phase one survey) other forms of free licensing such as Creative Commons.

## 1.8 Categorising the access barriers

As well as being grouped into *political, economic, social* and *technological* factors, many of the access barriers identified are related and can be clustered together. This may be because the same access barrier was identified in respect of more than one class of material (for example cost was identified as a barrier to accessing educational material, software, and films and music), or in respect of more than one type of access or use (for example legal constraints were identified as a barrier to copying, borrowing and sharing), or simply because the barriers exemplify the same underlying problem in two different contexts (for example, “Too many editions or curriculum changes”, of educational materials, was grouped with “Becomes outdated quickly, requiring updates” of software).

Political	Economic
Legally constrained from accessing, copying, borrowing or sharing (17)	Material is too expensive to access (11)
Feeling of guilt about infringement of copyright (2)	Unavailable, limited stock or hard to find (15)
Fear of inadvertently committing or facilitating an infringement (4)	Cannot buy parts of larger works (2)
Intermediaries prevent copying	Difficulty in dealing with licensors (2)
Material is filtered, blocked or censored (3)	Places to buy, borrow or download material do not exist (3)
Licence too verbose or complicated to follow (2)	Material is outdated when available (5)
	Problems with payment logistics (6)
	Poor quality or condition of materials (7)
	Culturally appropriate material not available (3)

<b>Social</b>	<b>Technological</b>
Risk of borrowed or lent materials being lost or damaged (6)	Mechanisms or design limitations that prevent access, copying or modification (14)
Cannot use borrowed material or equipment as one's own (3)	Usage difficulties due to physical design of materials (2)
Inconvenience of having to borrow or share (6)	Compatibility problems (8)
Inconvenience of using online or digital materials (2)	Inability to access on demand, or delivery too slow (2)
Lack of support, assistance, education or training (15)	Inability to access in certain regions
Use or access of materials involves loss of privacy (5)	Materials are damaged in transmission, delivery or download (2)
Local language version unavailable or inadequate (10)	Too slow to download, copy or install (8)
Pre-purchase information unavailable or inaccurate (6)	Lack of equipment, network or power infrastructure (10)
Material is not user friendly, familiar or engaging (4)	Risk of viruses, corruption, spyware or damage to equipment (9)
Too many editions, updates or curriculum changes (2)	Technical problems with access or use (6)
Do not trust the source of the material (2)	Not accessible to the disabled (5)
Peers do not want to share (3)	Lack of necessary features (2)
Interference or interruptions to use (3)	

Here therefore the access barriers are grouped together into the four types of factor that they illustrate, and into clusters of the same or similar access barrier, with the number in parentheses indicating the number of reported barriers that have been clustered together (not the number of individual respondents nominating the barrier).

## 1.9 Conclusion

The first phase of the access barrier survey was useful in its own right, as well as being a vital input into the development of the second phase of



the survey which will be described in the next chapter.

It was found during the first phase that African consumers appear to be the most respectful of copyright, despite the gaping knowledge gap that confronts that continent. This finding was to be confirmed by the results of the second phase of the research. A similar anomaly had been found in the preparation of CI's 2010 IP Watchlist, in that countries such as Kenya and Zambia had strict, colonial-era copyright laws that seemed quite inappropriate to the stage of economic development of those countries.

Another finding was that overall, consumers pay little attention to the licensing terms of the copyright works that they use. Many will copy works whether or not the licence permits them to do so, and this is especially so where they cannot afford to do otherwise. On the other hand, consumers also indicated that the quality of the copyright works that they use is an important criterion for them – even more so than their cost. This suggested that consumers would buy original copyright works in preference to pirated copies if they had the means to do so. As will be seen, this finding too was borne out by the results of the second phase of the research.

The third highlight of the first phase was the finding that consumers are quite confused about the characteristics of FOSS and other open content, with many not availing themselves of such content because of these doubts. This finding was to prompt the inclusion of a set of questions about their perceptions of FOSS and open content in the second phase of the survey. It will also inform CI's future advocacy activities as we continue to work to advance the state of access to knowledge around the world.



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# Second phase: global questionnaire

*Dr Karuthan Chinna and Dr Jeremy Malcolm*

## Abstract

A global survey administered to about 15,000 consumers in 24 countries revealed that copyright law creates hurdles for consumers seeking to access copyright works. The biggest hurdles confronted consumers seeking to purchase such works. Consumers were concerned that the works they purchased should be of low cost, and high quality. The availability of original licensed products that met these criteria strongly influenced consumers to buy, across all of the countries surveyed. Conversely, consumers in most countries were inclined to avoid pirated alternatives, both for moral and legal reasons.

For those who could not afford to buy copyright works, borrowing offered an alternative means of access to works – but here too, consumers faced barriers. The biggest barriers they faced were their lack of access to libraries, and even when access was available, the limited availability of the materials that they wanted. These barriers were highest amongst the developing countries surveyed.

In comparison, the means to copy and use copyright works were accessible to most consumers, albeit that some reported problems with digital locks and with limitations on the ability to access works at their time and place of choice. For a majority of consumers, we found that open content, such as free and open source software (FOSS) and Open Educational Resources (OER), offered an acceptable alternative to proprietary copyright works, susceptible

of wide dissemination within countries of all levels of economic development.

### 2.1 Survey development

The first phase of the survey had provided CI with an overview of the access barriers that face consumers around the world, thus enabling us to develop a more concise and focussed questionnaire for the second phase. One of ways in which the questioning became more focussed was that we decided not to maintain separate lines of questions about the three classes of material: educational materials, software, and films and music.

This was done because the first phase had uncovered few important differences between the ways in which consumers access and use each class of material. Instead, consumers would be asked about “copyright works” in general, with the preamble to the survey defining this term to include each of the three classes of material noted above.

More differences had been found during the first phase between the various means by which copyright works could be accessed and used – namely, buying, borrowing/lending, accessing online, using (for example, reading or watching), and copying the works. Therefore in the pilot version of the second phase questionnaire, five sections of questions were asked, covering each of these methods of access or use.

A sixth section included in the pilot version of the second phase survey covered free and open source software (FOSS) and other freely licensed material, which the first phase survey had revealed was very poorly understood. The final section aimed to determine why this was so.

There were four questions in each of the six sections described above, save for the section covering the use of copyright works which contained five questions, for a total of 25 questions in all.

The pilot questionnaire was administered on a small scale in Malaysia by FOMCA, the Federation of Malaysian Consumer Associations. There were 46 respondents to the pilot, including respondents from both peninsula and east Malaysia, in urban and rural areas, both sexes, and a range of ages.

## 2.2 Refinement of the pilot survey

On return of the results, a reliability analysis report was conducted by our consultant statistician, Dr Karuthan Chinna. This revealed some statistical weaknesses in certain of the survey sections and questions. In most cases, the weakness could be corrected by removing the weakest question from each section, thereby reducing the number of questions per section from four to three.

However, there were two sections that were not so easily fixed. These were the section on purchasing copyright works, and the section on accessing them online. In each of these sections, the questions that dealt with the use of pirated works did not gel with the other questions in the section. (To be more technical, the inter-item correlation between the questions was very low, with a Cronbach's alpha value of 0.455 for the first section, and 0.447 for the second.)

This problem was corrected by reorganising the component questions of these sections, dividing them into one new section on purchasing copyright works, and one on using pirating copies. Thus, in the end the first five sections became:

- Purchasing
- Borrowing
- Copying
- Using
- Pirating

The final section on FOSS and other free content remained unchanged, save that like the other sections it was reduced to three questions, for a total of 18.

A smaller scale second pilot was conducted on the revised survey which yielded more satisfactory results, except in the case of the section on pirating copyright works. Originally the third question had read, "If a pirated version was not available, I would buy the original." However the inter-item correlation of this question was very low (Cronbach's alpha 0.385).

A replacement question, "The original is easily available," was included in the final version of the questionnaire. Unfortunately time did not allow for us to pilot the survey a third time with this replacement question. In the event, the results for this question as administered were

not satisfactory either, and it was subsequently omitted from analysis. With the question removed, the inter-item correlation of the section was good.

### 2.3 Final form of the questionnaire

As noted above, there were six sections in the questionnaire, with three questions per section, except in the section on piracy which in the end only had two valid questions. Therefore there were seventeen items for analysis in total. For each question, respondents were asked to circle their responses on a Likert Scale of 1 to 5, where:

1: Strongly disagree 2: Disagree 3: Somewhat agree 4: Agree 5: Strongly agree

Here are the final questions in English (the titles of each section and the note that follows it are for reference only, and were not administered to respondents):

#### **Section A: Purchasing original copyright works**

I consider purchasing an original version of copyright materials rather than a pirated copy when:

- a1: The price of original version is affordable
- a2: The quality of the original version is better than the copy
- a3: An original version of the title I want is readily available

*Note: High scores in the three items indicate **inclination to buy original** if conditions are met.*

#### **Section B: Borrowing copyright works**

I encounter problems with borrowing copyright works due to:

- b1: Lack of institutions, such as libraries, from which to borrow
- b2: Unavailability of the materials I need at the institutions
- b3: Unwillingness of peers to share<sup>1</sup>

*Note: High scores in the three items indicate major **problems in borrowing** copyright works.*

#### **Section C: Copying copyright works**

I encounter problems when trying to copy copyright works because:

- c1: They are designed in a way that prevents copying
- c2: I have no access to the equipment needed for copying

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<sup>1</sup> By omission, this question was not administered in Israel.

c3: Making a copy is too expensive

*Note: High scores in the three items indicate major **problems in copying** copyright works.*

#### **Section D: Using copyright works**

I encounter problems when trying to make use of copyright works because:

d1: They are not in a language familiar to me

d2: They are not compatible with the equipment I have access to<sup>2</sup>

d3: I cannot access them at the time and place of my choice

*Note: High scores in the three items indicate major **problems in using** copyright works.*

#### **Section E: Pirating copyright works**

I am less inclined to buy or download a pirated copy of copyright material when:

e1: I fear being prosecuted for using a pirated copy

e2: I believe that acquiring a pirated copy is morally wrong

*Note: High scores in the two items indicate **less inclination** towards using pirated copyright works.*

#### **Section F: Awareness of FOSS and open content**

I do not make use of copyright works that are free to use copy or share, such as open source software because:

f1: I am not aware of their existence

f2: I do not think they are as good as works that are sold

f3: I do not think they are as easy to use as works that are sold

*Note: High scores in the three items indicate **lack of awareness** of FOSS and open content.*

## **2.4 Administration of the questionnaire**

Participating CI members from 25 countries were selected to administer the questionnaire. They were requested to distribute 600 questionnaires in paper form, by whatever means they could: for example, distribution by hand at shopping centres and other public places and events, distribution by direct mail, or by completion over the telephone. Completed forms were returned to CI for tabulation and analysis.

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<sup>2</sup> By omission, this question was not administered in Israel.

Where possible, members were asked to ensure that a geographical, age and gender balance was maintained, and for this purpose an optional set of questions requesting the respondent's name, age, location and sex was also included in the survey. A majority of respondents voluntarily completed these questions, and no major demographic imbalances were observed in the final results across all countries.

In the end, results from only 23 countries were analysed together, omitting Australia and Spain. Due to organisational changes affecting our Australian participant that interfered with administration of the survey, almost no results were received from Australia and it was therefore excluded from analysis. As for Spain, a very good number of responses was received – 2,957 – however due to the software employed by the Spanish member (aggregating results obtained by telephone), individual responses could not be isolated. Whilst this meant that its results could not be analysed together with those from other countries, the Spanish results will be separately dealt with in section 2.5.2.

The questionnaire was translated into 13 languages: Bahasa Indonesia, Bahasa Malaysia, Bengali, Chinese, French, Hebrew, Japanese, Korean, Portuguese, Russian (although in the end our Russian member decided not to participate), Spanish, and two Indian languages. Ten of these translations, plus English, were made available online.

### **2.4.1 Online administration**

A deliberate decision was made not to administer a predominantly online questionnaire, because this would skew the responses towards a somewhat younger, richer, more technologically literate demographic – particularly in developing countries. This would tend to defeat the purpose of the questionnaire, as these respondents would be less likely than the general population to have experienced the same set of A2K access barriers.

Having said that, a parallel online questionnaire was established at <http://A2Knetwork.org/survey>, and members were asked to direct respondents to that site if they wished to complete the questionnaire online. In the end, some countries were unable to distribute any paper forms, and relied wholly on the online questionnaire. These were France, the United States, Australia and Israel. (Israel's questionnaire was actually self-hosted on another site, resulting in the accidental omission of two questions, as noted above.)

Since all four of these are developed countries with a high penetration of Internet usage, it was thought that the degree of bias experi-



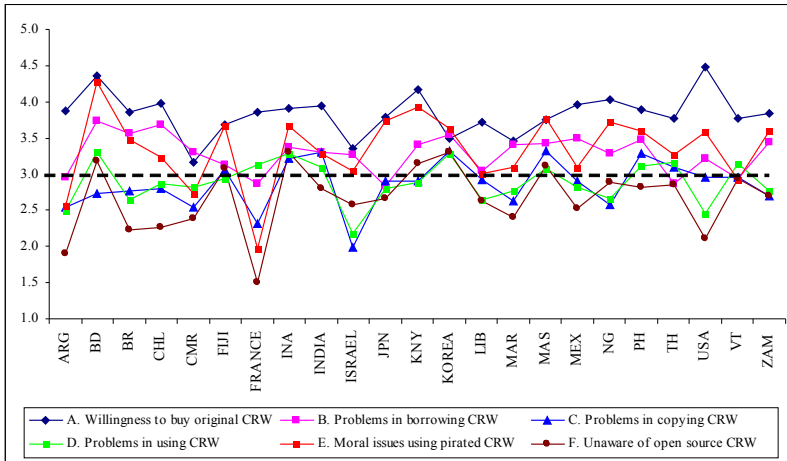


Figure 2.1: Graph for all the six sections

enced from relying wholly on an online questionnaire would be minimal. Nonetheless, particularly in France, the responses eventually received by this method alone do reveal some likely demographic bias. This is not significant enough to detract from the validity of the results across all countries.

## 2.4.2 Questionnaire responses

As shown in the table below, 12,049 valid responses (excluding those from Spain) were received. Among these, 1,223 valid responses (10% of the total) were completed online. For 153 of the online responses the country of origin either could not be easily determined or was outside the list of 25 target countries. Since this was a relatively small number, it was decided not to include these in analysis.

## 2.5 Results

The stand-out finding from this survey is that most consumers prefer to acquire copyright materials legally, rather than using pirated copies, provided that these are available to them at a fair price. They make this choice partly for pragmatic reasons – that they wish to obtain copies of

Table 2.1: Number of cases by country

Country code	Country name	Frequency	Percent
ARG	Argentina	507	4.2
BD	Bangladesh	585	4.9
BR	Brazil	1,437	11.9
CHL	Chile	73	.6
CMR	Cameroon	489	4.1
FIJI	Fiji	629	5.2
FRANCE	France	146	1.2
INA	Indonesia	1,024	8.5
INDIA	India	482	4.0
ISRAEL	Israel	306	2.5
JPN	Japan	713	5.9
KNY	Kenya	516	4.3
KOREA	South Korea	700	5.8
LIB	Lebanon	144	1.2
MAR	Morocco	524	4.3
MAS	Malaysia	719	6.0
MEX	Mexico	460	3.8
NG	Nigeria	600	5.0
PH	Philippines	509	4.2
TH	Thailand	469	3.9
USA	United States of America	40	.3
VT	Vietnam	541	4.5
ZAM	Zambia	436	3.6
Total		12,049	100.0

the highest quality – and partly because they consider it wrong to use pirated works, and don't wish to fall foul of the law.

It is the unavailability of high quality originals at fair prices that forces many consumers, particularly in the developing world, to fall back on the black market for access to the content for their educational and cultural development. This problem is particularly acute given that rights-holders do not adequately adjust the cost of original works to account for the purchasing power of consumers in developing countries.<sup>3</sup>

Yet, despite their poor treatment at the hands of rights-holders, the

<sup>3</sup> Consumers International. *Copyright and Access to Knowledge*. Consumers International, Kuala Lumpur, 2006, pp.41-43.

second phase survey confirmed the results of the first phase, in revealing that many of the developing countries that we surveyed – amongst them the long-suffering consumers of Bangladesh, Kenya and Malaysia – were the most staunch in their belief that pirating content was wrong.

This finding contrasts starkly with the stereotype promoted by the content industries, of consumers who use unlicensed copyright material being lawless and amoral “pirates.”

Other interesting findings from this research can also be made. From each of the six sections of the survey the overall results may be summarised as follows:

- A: Generally, consumers in all countries **prefer to buy original works** if conditions are met. The most important conditions are **affordability** and **quality**.
- B: Except in four countries, consumers cite **problems in borrowing** copyright works: mainly **limited access to works in libraries**. However, the **barriers to borrowing are lower than those to purchasing**.
- C: In about a third of the countries surveyed, consumers cited **problems in copying** copyright works. The biggest barriers to those who were affected were **access to copying equipment** and **digital locks**.
- D: In fewer than half the countries surveyed, consumers cited **problems in using** copyright works. The biggest problem for these users was an **inability to time and space shift**.
- E: Except in four countries, consumers cited **less inclination** towards using pirated copyright works – about equally for moral reasons and for fear of being prosecuted.
- F: In about three-quarters of the countries surveyed, consumers generally cited **awareness** towards FOSS and open content, but some were ambivalent towards its quality and ease of use.

To a large extent, the results of the survey transcend country and region. The differences between individual developed countries (such as France and South Korea) or individual developing countries (such as Cameroon and Kenya) eclipse those between developed countries and developing countries as a bloc.

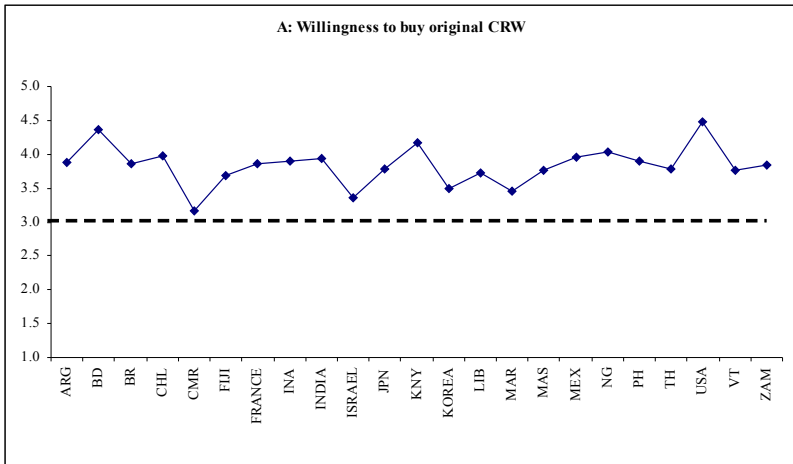
Nevertheless we can have confidence that the survey responses are correct, because they are consistent with what we know about each of the countries from other sources. For example, it makes sense that the

lowest awareness of open source software amongst developed countries is in South Korea, because until this year that country's government mandated the use of Microsoft software for e-commerce applications such as Internet banking.<sup>4</sup> It also seems correct that all of the countries that reported the availability of materials in their local language to be a barrier to access, were from countries that did not speak one of the five major UN languages.

There are however also a few surprises revealed by the survey, which will be discussed below section by section.

### 2.5.1 Graphs by section

Figure 2.2: Section A: Willingness to buy original copyright works

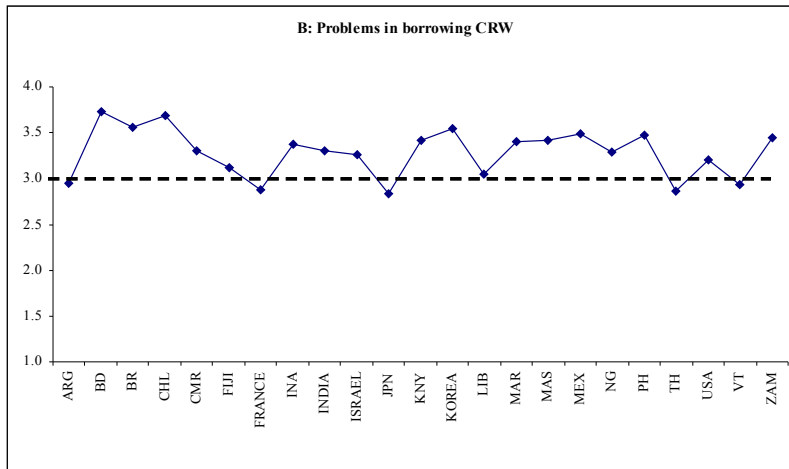


The first section is the only one on which all countries were agreed. Consumers in all countries were more likely to buy original copyright works than to have recourse to pirated copies, provided that conditions are met. In most countries, the affordability and the quality of the original copy were of about equal importance. But interestingly there were more countries (twelve) for which quality was a more important criterion than the number of countries (eight) for which cost was more decisive.

<sup>4</sup> AFP, "S.Korea ends Microsoft's online shopping monopoly" (2010), available from [http://news.yahoo.com/s/afp/20100701/tc\\_afp/skoreaitinternetbankingmicrosoft\\_20100701053219](http://news.yahoo.com/s/afp/20100701/tc_afp/skoreaitinternetbankingmicrosoft_20100701053219).

The lesson from this section is clear: consumers will pay for the better quality of original products if they can. Therefore, if content industries wish to combat piracy, the best way in which to do so is to make sure that consumers are not forced into settling for lesser quality copies because the originals are priced beyond their means.

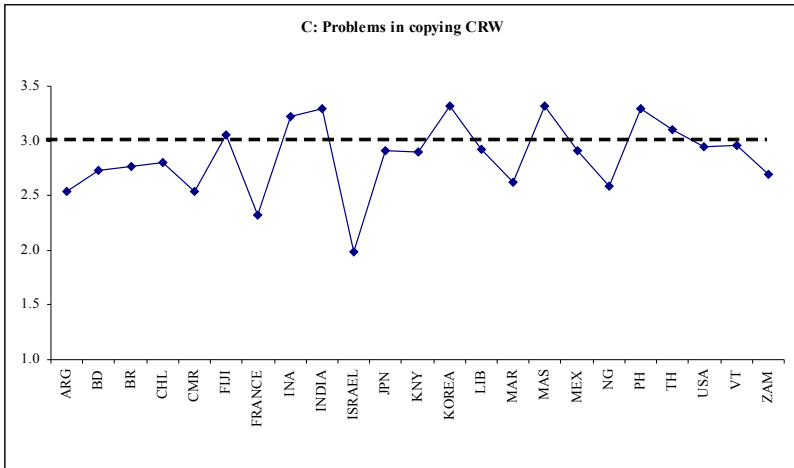
Figure 2.3: Section B: Problems in borrowing copyright works



Except in France, Japan, Thailand and Vietnam, consumers encountered some problems in borrowing copyright works. This mostly affected their attempts to borrow from lending institutions such as libraries, rather than from friends. Amongst the worst affected were developing countries such as Bangladesh, Brazil, Chile, Kenya, Mexico, Phillipines and Zambia (but also, interestingly, South Korea). These are countries in which the resources of lending institutions are the most strained.

Based on this finding, we recommend that the governments and educational institutions of the affected countries look closely at whether they are devoting sufficient resources to their library sector. Libraries can be an important mechanism for improving access to knowledge, particularly in countries where the purchase of copyright works is beyond the means of ordinary consumers.

Figure 2.4: Section C: Problems in copying copyright works

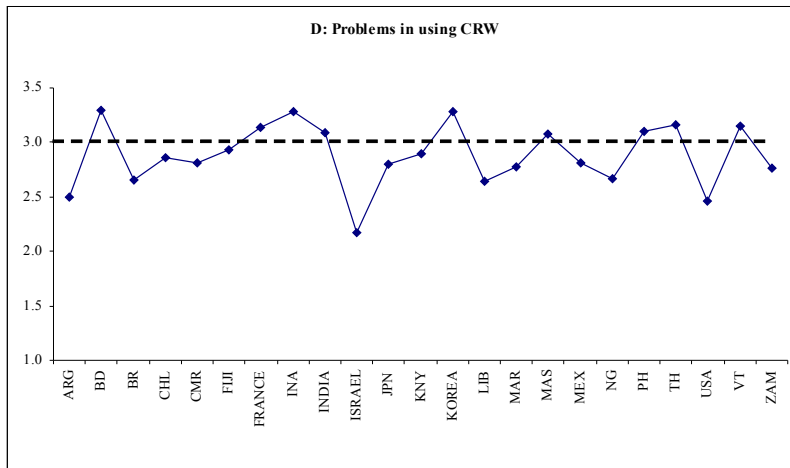


Far fewer consumers reported significant difficulties in making copies from copyright works. Moreover, those who reported not having difficulty tended to answer more strongly than those who did face problems. The seven countries in which some difficulty was reported by the average consumer were Fiji, Indonesia, India, South Korea, Malaysia, the Philippines and Thailand.

Amongst these countries, a majority reported running into trouble with digital locks, or perhaps other design features of copyright works that limited the user's ability to copy. Access to equipment for copying was also a limiting factor – but the cost of making copies was generally not.

What we draw from this section of the survey is that the barriers to copying material are generally quite low. Therefore, the dissemination of works that can be freely and legally copied could be an excellent strategy for increasing access to knowledge, even for developing countries. The policy implications of this finding are that governments would do well to promote the greater use and development of open content such as FOSS and Creative Commons-licensed Open Educational Resources (OER) by their citizens.

Figure 2.5: Section D: Problems in using copyright works



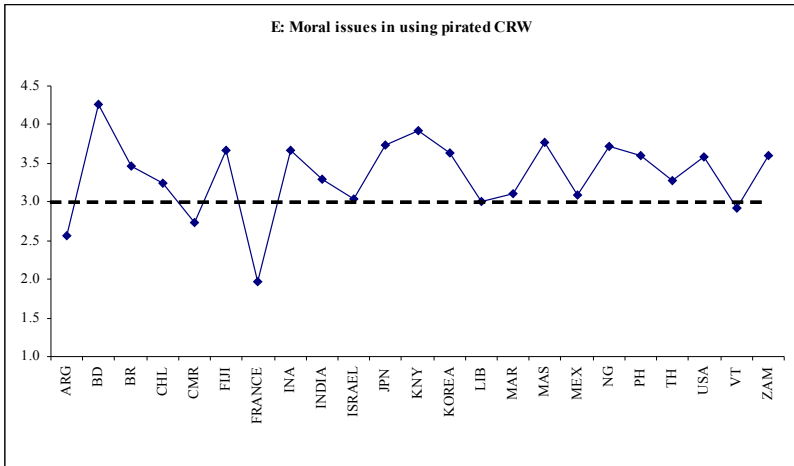
The next section on the use of copyright works returned similar results to the preceding section. In nine countries – Bangladesh, France, Indonesia, India, South Korea, Malaysia, Philippines, Thailand and Vietnam – users reported problems in using copyright works, but a greater number did not report significant problems, and were more vehement about this than those who did.

In those countries where difficulties were experienced, easily the most serious problem encountered was the inability to access copyright materials in the time and place of the user's choice. This difficulty can be countered by technologies for time-shifting, space-shifting and format-shifting, and for copyright laws that support the use of these technologies.

The policy lesson from this section is that consumers' legal use of copyright works can be fostered by helping them to access those works at times, places and on devices of their choosing. Some countries support such flexibility in their copyright law – but others do not.<sup>5</sup>

<sup>5</sup> Consumers International. *2009 IP Watch List*, 2009, p.2.

Figure 2.6: Section E: Dislike using pirated copyright works



Supporting the result of the first section of the survey is the result of this fifth section, which clearly shows that, only excepting Argentina, Cameroon, France and Vietnam, consumers worldwide dislike using pirated copyright works, both because they believe it to be morally wrong, and because they fear of being prosecuted for doing so.

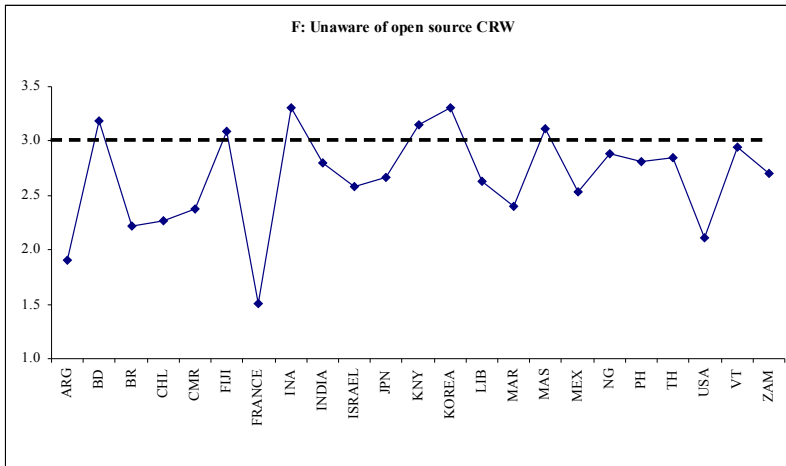
There were two countries, Lebanon and Israel, in which the fear of prosecution did not deter consumers from using pirated copies, but their moral attitude towards piracy did deter them. This is explicable by the fact that in both Lebanon and Israel, copyright enforcement is quite limited. But even in these countries, consumers were conscious of the moral dimension of the use of pirated works.

This result once again demonstrates that while reliance on pirated products may be widespread in many developing countries, consumers would prefer to avoid such products altogether if legal alternatives were available and affordable.

Another interesting result from this section is the dramatic disagreement from French consumers with the contention that the use of pirated goods is morally wrong. This may represent a backlash against the heavy-handed HADOPI law adopted by the French Parliament in 2009, which requires Internet Service Providers to disconnect users from the Internet, for up to a year, if they are found to have participated in unauthorised online file sharing.



Figure 2.7: Section F: Awareness of FOSS and open content



One of the preliminary findings from the first phase of the consumer survey was that consumers had little awareness of the availability or characteristics of open content works such as free and open source software (FOSS) and Creative Commons licensing. However this was not fully borne out by the second phase of the survey. There were only five countries (Kenya, Fiji, Indonesia, South Korea and Israel) in which consumers claimed not to be aware of the availability of open content.

There was a similar list of countries (excluding Israel, but adding Bangladesh and Malaysia) that shied away from using open content because of concerns about its quality and usability (additionally, Thailand, Vietnam and Zambia were concerned just about its usability). On the other hand the balance of the countries surveyed were receptive to the use of open content.

This is good news for policy-makers in those countries, who can take comfort in the fact that the promotion of FOSS and open content as a mechanism for increasing access to knowledge in their country is likely to be warmly received. In the five countries which lack awareness of open alternatives, there is a good opportunity for those governments to institute an awareness-raising campaign.

Table 2.2: Questionnaire results from Spain

	<b>a1</b>	<b>a2</b>	<b>a3</b>	<b>b1</b>	<b>b2</b>	<b>b3</b>
Strongly disagree	501	297	463	214	179	866
Disagree	243	270	435	312	237	565
Neutral	241	601	829	579	547	832
Agree	478	681	537	657	730	354
Strongly agree	1494	1108	693	1195	1264	340
	<b>c1</b>	<b>c2</b>	<b>c3</b>	<b>d1</b>	<b>d2</b>	<b>d3</b>
Strongly disagree	775	1065	1600	1228	1194	744
Disagree	487	454	551	572	591	425
Neutral	642	545	458	634	627	674
Agree	470	362	168	257	290	460
Strongly agree	583	531	180	266	255	654
	<b>e1</b>	<b>e2</b>	<b>f1</b>	<b>f2</b>	<b>f3</b>	
Strongly disagree	934	1357	1479	1471	1359	
Disagree	510	495	327	470	467	
Neutral	608	516	376	547	607	
Agree	383	260	305	265	280	
Strongly agree	522	329	470	204	244	

### 2.5.2 Results from Spain

As noted above, the results received from Spain could not be analysed together with the results from the other countries for technical reasons. A table of those results is therefore presented separately below.

The results seen here are broadly consistent with the overall findings, with some interesting differences. Specifically:

- A: Spanish consumers **prefer to buy original works** if conditions are met. The most important condition is **affordability**.
- B: Spanish consumers cite **problems in borrowing** copyright works: mainly **limited access to works in libraries**. Even so, the **barriers to borrowing are lower than those to purchasing**.
- C: Spanish consumers cite **fewer problems in copying** copyright works than those from some other countries, but a significant number report **digital locks** as the biggest barrier.

- D: Consumers from Spain cite **fewer problems in using** copyright works than those from some other countries, but a significant number report **inability to time and space shift** as the biggest barrier.
- E: Spanish consumers **do not avoid using pirated copyright works** because of the belief that it is morally wrong or that they will be prosecuted for doing so.
- F: Spanish consumers are both aware of FOSS and open content, and are **more confident** than users from some other countries about its quality and ease of use.

Once again, many of these results – including the differences between other countries – are explained by what we know from other sources of the unique legal and cultural environment of Spain.

For example, downloading files from peer-to-peer file sharing networks is legal in that country, pursuant to the personal use exception in Spanish law.<sup>6</sup> Copyright owners are recompensed for this personal use by a compulsory levy that is paid on copying equipment and media, such as blank CD and DVDs, and home computers. Legal too are Web sites which link to (but do not host) copyright resources for download.<sup>7</sup> Naturally, in such a legal environment, consumers will not view non-profit file sharing as a moral issue.

Spain is also a country in which open source software has been aggressively promoted by government at a sub-national level; for example, the deployment of FOSS throughout the region of Extremadura has become a well-known FOSS success story.<sup>8</sup> More information is available in the very detailed Spanish country report to our 2010 IP Watchlist, which is available at <http://a2knetwork.org/reports/spain>.

## 2.6 Conclusions

Consumers International went into this research project with an open mind, asking questions that went beyond copyright law, to determine whether in fact other barriers were more important than copyright in constraining consumers' access to knowledge. Thus, we asked:

- Whether quality or availability were bigger barriers for consumers to the purchase of copyright materials than cost.

<sup>6</sup> Revised Law on Intellectual Property (Royal Legislative Decree 1/1996), Article 25.

<sup>7</sup> See <http://exgae.net/la-red-p2p-es-legal>.

<sup>8</sup> See <http://freeknowledge.eu/projects/casestudies/Extremadura>.

- Whether social factors were more important than the constraints upon libraries in allowing consumers to borrow.
- Whether the resources required for making copies, rather than barriers erected by copyright owners, were the bigger barrier.
- Whether language or infrastructure barriers, rather than limitations on time- and space-shifting, would most inhibit the use of copyright works.

The stark and somewhat unexpected result was that *without exception, the answer was “no.”* In other words, the barriers most closely linked to copyright law were always the most significant barriers to the purchase, borrowing, copying and use of copyright works.

We also asked about pirated copyright works, and open content such as FOSS. We were again surprised to find that despite the popular stereotype that those who infringe copyright do so without concern for the law or the rights of content creators, in fact most consumers do view content piracy as a moral issue, and would prefer to avoid recourse to pirated works. Conversely, they are receptive to the use of open content.

The implications of these findings for policy makers and industry leaders are straightforward. Consumers are willing to buy high quality original copyright works if they are affordable. They should be given the opportunity to do so, rather than being forced by their economic circumstances into accepting inferior pirated substitutes.

Governments should also support non-proprietary alternatives, to which even the most underprivileged can have access – namely, the resources of libraries, and open content that can be copied, shared and modified freely.

By these means, the barriers that face consumers in accessing and using copyright works can be reduced over time, and access to knowledge for all can flourish.

### **Statistical annex**

A spreadsheet containing all the individual responses (except from Spain) is available on request from CI, as are country-by-country graphs. For Spain, CI can supply aggregated results and results grouped by age and sex.

Table 2.3: Median scores by items by country

Country	a1	a2	a3	b1	b2	b3	c1	c2	c3	d1	d2	d3	e1	e2	f1	f2	f3
ARG	4	4	4	3	3	2	3	2	2	2	2	2	2	3	2	2	2
BD	5	5	4	4	4	3	3	3	2	2	3	5	4	5	3	3	4
BR	4	5	4	4	4	3	4	3	2	3	2	3	4	4	2	2	2
CHL	5	4	3	4	4	3	4	3	2	2	2	3	3	3	2	2	2
CMR	4	3	2	4	4	4	2	2	2	2	3	3	2	3	2	2	2
FIJI	4	4	4	3	3	3	3	3	2	2	3	3	4	4	3	3	3
FRANCE	5	4	4	3	4	2	4	2	1	2	3	5	1	2	1	1	1
INA	4	4	4	4	4	3	4	3	3	3	3	4	4	4	3	4	3
INDIA	4	4	4	4	4	3	4	3	3	3	3	3	3	4	2	3	3
ISRAEL	3	4	4	4	3	-	1	1	2	2	-	2	2	4	5	1	1
JPN	4	4	4	3	4	2	3	3	2	3	3	3	4	4	2	3	3
KNY	5	5	4	4	4	3	3	3	3	2	3	3	4	4	3	3	3
KOREA	3	4	3	4	4	3	4	3	3	3	3	3	4	4	4	3	3
LIB	4	4	3	3	3	3	3	3	2	2	3	3	3	3	2	3	2
MAR	4	4	3	4	4	2	3	3	1	2	2	3	3	3	2	2	2
MAS	4	4	4	4	4	3	4	3	3	3	3	3	4	4	3	3	3
MEX	5	4	4	4	4	3	4	3	2	3	3	3	3	3	2	2	2
NG	5	5	4	4	4	3	2	3	2	2	2	4	4	4	2	3	3
PH	4	4	4	4	4	3	4	3	3	3	3	3	4	4	3	3	3
TH	4	4	3	3	3	2	4	3	3	3	3	3	3	3	3	3	3
USA	5	5	5	3	4	2	4	3	2	2	2	3	4	4	1	2	2
VT	4	4	4	3	3	3	3	3	3	3	3	3	3	3	3	3	3
ZAM	4	4	4	4	4	3	3	3	2	2	3	4	4	4	2	3	2
Total	4	4	4	4	4	3	3	3	2	3	3	3	4	4	2	3	3

Table 2.4: Mean scores by items by country

Country	a1	a2	a3	b1	b2	b3	c1	c2	c3	d1	d2	d3	e1	e2	f1	f2	f3
ARG	4.1	3.9	3.6	3.2	3.2	2.4	3.0	2.6	2.0	2.5	2.4	2.6	2.5	2.6	1.9	1.9	1.9
BD	4.5	4.5	4.1	3.9	4.1	3.2	2.9	2.9	2.3	2.5	3.0	4.4	4.1	4.5	2.8	3.3	3.5
BR	3.8	4.1	3.6	3.8	3.7	3.2	3.3	2.9	2.1	2.7	2.5	2.7	3.4	3.5	2.0	2.3	2.3
CHL	4.5	3.9	3.5	4.0	4.1	2.9	3.3	3.0	2.0	2.7	2.6	3.2	3.4	3.1	2.2	2.1	2.4
CMR	4.1	2.9	2.5	3.3	3.4	3.2	2.6	2.5	2.5	2.6	2.8	3.1	2.7	2.8	1.6	2.7	2.8
FIJI	3.6	4.0	3.4	3.1	3.3	2.9	3.2	3.3	2.7	2.6	3.0	3.2	3.6	3.7	3.1	3.1	3.1
FRANCE	4.1	3.8	3.7	2.8	3.9	1.9	3.3	2.1	1.6	2.1	3.2	4.1	1.8	2.2	1.4	1.7	1.4
INA	3.8	4.2	3.7	3.8	3.4	2.9	3.5	3.2	2.8	3.1	3.3	3.4	3.6	3.7	3.2	3.4	3.3
INDIA	4.1	4.0	3.7	3.3	3.5	3.0	3.6	3.2	3.0	2.8	3.2	3.3	3.1	3.4	2.6	2.8	2.9
ISRAEL	3.1	3.2	3.8	3.7	2.9	-	1.7	2.0	2.3	2.0	-	2.3	2.2	3.9	4.4	1.5	1.8
JPN	3.7	4.0	3.6	3.1	3.4	1.9	3.3	2.8	2.7	2.7	2.8	2.9	3.6	3.9	2.6	2.8	2.6
KNY	4.2	4.3	3.9	3.4	3.5	3.2	2.8	3.0	2.9	2.4	2.8	3.4	3.9	4.0	3.0	3.1	3.1
KOREA	3.3	3.7	3.4	3.9	3.7	3.1	3.5	3.3	3.2	3.3	3.2	3.3	3.6	3.6	3.3	3.3	3.3
LIB	3.6	4.0	3.5	3.0	3.0	3.2	2.9	3.2	2.7	2.4	2.6	2.9	2.8	3.2	2.3	2.9	2.7
MAR	3.7	3.6	3.0	4.0	3.6	2.7	3.3	2.8	1.8	2.6	2.6	3.1	3.2	3.0	2.2	2.6	2.4
MAS	3.6	4.0	3.7	3.6	3.6	3.1	3.4	3.3	3.2	3.0	3.1	3.1	3.7	3.9	2.7	3.4	3.3
MEX	4.1	4.0	3.7	3.6	3.6	3.3	3.5	3.1	2.2	2.7	2.8	3.0	3.1	3.1	2.4	2.5	2.6
NG	4.1	4.2	3.9	3.3	3.8	2.7	2.4	2.9	2.5	2.0	2.5	3.5	3.5	4.0	2.7	3.0	3.0
PH	3.9	4.1	3.7	3.6	3.7	3.1	3.5	3.3	3.0	2.8	3.1	3.3	3.5	3.7	2.6	2.9	2.9
TH	3.9	3.9	3.5	3.1	3.0	2.4	3.6	2.9	2.8	3.2	3.0	3.2	3.2	3.4	2.8	3.1	2.7
USA	4.7	4.3	4.5	3.3	3.8	2.6	3.4	2.9	2.6	2.1	2.4	2.9	3.5	3.7	2.0	2.1	2.3
VT	3.8	3.9	3.6	3.1	3.0	2.8	3.0	2.9	2.9	3.0	3.2	3.3	2.9	2.9	2.9	3.1	2.9
ZAM	4.0	4.0	3.5	3.5	3.8	3.0	2.9	2.8	2.4	2.1	2.8	3.4	3.4	3.8	2.4	3.0	2.7
Total	3.9	4.0	3.6	3.5	3.5	2.9	3.2	3.0	2.6	2.7	2.9	3.2	3.4	3.5	2.6	2.8	2.8

Table 2.5: Mean by Sections by country

Country	A. Willing to buy original	B. Problems in borrowing	C. Problems in copying	D. Problems in using	E. Dislike using pirated	F. Unaware of FOSS, etc
ARG	3.9	3.0	2.5	2.5	2.6	1.9
BD	4.4	3.7	2.7	3.3	4.3	3.2
BR	3.9	3.6	2.8	2.7	3.5	2.2
CHL	4.0	3.7	2.8	2.9	3.2	2.3
CMR	3.2	3.3	2.5	2.8	2.7	2.4
FIJI	3.7	3.1	3.1	2.9	3.7	3.1
FRANCE	3.9	2.9	2.3	3.1	2.0	1.5
INA	3.9	3.4	3.2	3.3	3.7	3.3
INDIA	3.9	3.3	3.3	3.1	3.3	2.8
ISRAEL	3.3	3.3	2.0	2.2	3.0	2.6
JPN	3.8	2.8	2.9	2.8	3.7	2.7
KNY	4.2	3.4	2.9	2.9	3.9	3.2
KOREA	3.5	3.5	3.3	3.3	3.6	3.3
LIB	3.7	3.0	2.9	2.6	3.0	2.6
MAR	3.5	3.4	2.6	2.8	3.1	2.4
MAS	3.8	3.4	3.3	3.1	3.8	3.1
MEX	4.0	3.5	2.9	2.8	3.1	2.5
NG	4.0	3.3	2.6	2.7	3.7	2.9
PH	3.9	3.5	3.3	3.1	3.6	2.8
TH	3.8	2.9	3.1	3.2	3.3	2.9
USA	4.5	3.2	3.0	2.5	3.6	2.1
VT	3.8	2.9	3.0	3.1	2.9	2.9
ZAM	3.8	3.4	2.7	2.8	3.6	2.7
Total	3.8	3.3	2.9	2.9	3.4	2.8

Table 2.6: Section results by country

Country	A. Willing to buy original	B. Problems in borrowing	C. Problems in copying	D. Problems in using	E. Dislike using pirated	F. Unaware of FOSS, etc
ARG	Yes	Yes	No	No	No	No
BD	Yes	Yes	No	Yes	Yes	Yes
BR	Yes	Yes	No	No	Yes	No
CHL	Yes	Yes	No	No	Yes	No
CMR	Yes	Yes	No	No	No	No
FIJI	Yes	Yes	Yes	No	Yes	Yes
FRANCE	Yes	No	No	Yes	No	No
INA	Yes	Yes	Yes	Yes	Yes	Yes
INDIA	Yes	Yes	Yes	Yes	Yes	No
ISRAEL	Yes	Yes	No	No	Yes	No
JPN	Yes	No	No	No	Yes	No
KNY	Yes	Yes	No	No	Yes	Yes
KOREA	Yes	Yes	Yes	Yes	Yes	Yes
LIB	Yes	Yes	No	No	Yes	No
MAR	Yes	Yes	No	No	Yes	No
MAS	Yes	Yes	Yes	Yes	Yes	Yes
MEX	Yes	Yes	No	No	Yes	No
NG	Yes	Yes	No	No	Yes	No
PH	Yes	Yes	Yes	Yes	Yes	No
TH	Yes	No	Yes	Yes	Yes	No
USA	Yes	Yes	Yes	No	Yes	No
VT	Yes	No	Yes	Yes	No	No
ZAM	Yes	Yes	No	No	Yes	No
Total	Yes	Yes	No	No	No	No

Mean  $\geq 3$  coded as Yes and mean  $< 3$  coded as No



## **Part II**

# **National research on copyright flexibilities**



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# Shifting sands? The moderate impact of Australia's 2006 copyright exceptions

*David Vaile, Cyberspace Law and Policy Centre\**

## Abstract

The 2006 “time-shifting” and “format-shifting” amendments to Australia’s Copyright Act 1968 introduced new exceptions for personal use of various copyright items, belatedly legalising popular uses of digital devices like music players and personal video recorders which had previously resulted in mass infringements of the prohibition on unauthorised reproduction. This report explores sources of evidence (including a substantial online consumer survey, interviews with experts, and surveys of literature and data sources) about their effects, if any, on consumer and industry attitudes and behaviour, and implications for local and international policy-makers. There appears to have been very limited if any direct impact (as was generally expected for changes merely legalising existing practises), with many consumers not aware of the relevant

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\* UNSW Law Faculty, Sydney, Australia. This research was generously supported by Consumers International and CHOICE, formerly Australian Consumers Association, and gratefully acknowledges assistance from Jeremy Malcolm, Catherine Bond, Gordon Renouf, the online survey provider AusPoll, interns and staff of Cyberspace Law and Policy Centre including Sophia Christou, Amanda Belz, Mina Aresh, Stephen Matulewicz, Stephanie Cuevas, Nijat Kassoumov and Stephen Matulewicz, and the 1500 consumers and tens of experts who responded to our invitation to participate in survey and interviews. It grew out of the Unlocking IP ARC Linkage project led by Professor Graham Greenleaf.

legal position either before or after the amendments. There was some evidence supporting the view that they encouraged a greater respect for copyright law generally, and more legal and less illegal behaviour; and not supporting fears about an imagined “floodgate” effect encouraging consumers to think that they could now commit other online infringements with impunity.

## **3.1 Introduction**

### **3.1.1 Consumers International – the Access to Knowledge (A2K) project**

Consumers International (CI) is funded by a grant from the Ford Foundation to develop a Global Consumer Dialogue and Public Education Network on Access to Knowledge (A2K) issues. The goal of this grant is to lend greater support to consumer organisations’ voices worldwide, in trade negotiations and other fora, where consumer interests rarely receive due attention when developing and expanding intellectual property (IP) regimes.

The Global Consumer Dialogue aims to identify problems consumers face in accessing and using copyright protected materials, highlighting access barriers that require further investigation while responding to the legitimate needs and expectations of artists and content creators. The objective of the A2K project is to serve as a catalyst for policy change, encouraging governments and international organisations to develop more balanced IP regimes. This balance will take into account the public interest as well as the interests of rights holders, businesses and other stakeholders.

To this end, CI’s strategies include conducting targeted, impartial, evidence-based research on IP and A2K issues at the national level, in a number of jurisdictions. The Cyberspace Law and Policy Centre and CHOICE (formerly known as the Australian Consumers Association) have partnered with CI to conduct this Australian-focused project *Copyright Limitations and Exceptions in Australia: Effects of the 2006 time-shifting and format-shifting amendments on consumers and copyright industries*.

### **3.1.2 “Copyright Limitations and Exceptions in Australia”: Outline of this project**

Taking as its broad concern the effects of new limitations and exceptions to copyright law at a national level, this project focuses on the 2006

amendments to the *Copyright Act* 1968, the main statute implementing copyright law in Australia.<sup>2</sup>

The introduction of specific provisions (creating new exceptions to behaviour infringing copyright) to allow for “time-shifting”<sup>3</sup> and “format-shifting”<sup>4</sup> of sound and video content in certain circumstances is the starting point for this research. It explores survey evidence and expert observations about the impact, if any, of these changes on consumer attitudes and awareness, and also reported respect or lack thereof for the most relevant provisions of copyright law (these changes introduced in 2006, and the prohibition of unauthorised file sharing and copying).

The broad purpose of this research is to investigate whether there is evidence of any negative or positive economic impacts which can be reasonably directly ascribed to these changes, affecting the interests of copyright industries and rights holders. Further, the project was interested to identify evidence, if it exists, which may help to determine whether any such losses, if they exist, outweighed the presumed welfare benefits that accrue to consumers from the changes.

The project investigated consumer experiences of the amendments, including knowledge of and responses to the changes, and whether consumers’ attitudes towards both copyright industries and copyright law generally have been affected by the changes. The project also sought informed observations about industry attitudes to the 2006 amendments, the experiences of copyright industries in the wake of the amendments, and whether these experiences have influenced industry attitudes towards further potential copyright reforms that might benefit consumers.

One goal of this project, in line with CI’s A2K project, is to draw upon the findings of this research in recommending whether copyright limitations such as the 2006 amendments can be used as a model for adoption in other jurisdictions either with an expectation that all stakeholders will

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<sup>2</sup> *Copyright Amendment Act 2006* (Cth) No. 158 (hereafter “the amending Act”), amending *Copyright Act 1968* (Cth) (hereafter “the Copyright Act”) [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/). See below in Appendix 3.9.3 for the text of the amendments.

<sup>3</sup> See for example s111 *Copyright Act 1968* (Cth), “Recording broadcasts for replaying at a more convenient time,” introduced by Part 1 of Schedule 6, “Exceptions to infringement of copyright” to the *Copyright Amendment Act 2006* (Cth), [http://www.austlii.edu.au/au/legis/cth/num\\_act/caa2006213/sch6.html](http://www.austlii.edu.au/au/legis/cth/num_act/caa2006213/sch6.html).

<sup>4</sup> See the changes introduced by Part 2 of Schedule 6 of the amending Act, s43C “Reproducing works in books, newspapers and periodical publications in different form for private use”; 47J “Reproducing photograph in different format for private use”; s109A “Copying sound recordings for private and domestic use” and s110AA “Copying cinematograph film in different format for private use.” For our purposes ss. 43C and 47J are of lesser interest.

benefit, or if there are risks, that these are in the scheme of things reasonable and not excessive.

#### 3.1.3 Scope

This Report presents findings and conclusions drawn from survey research undertaken for the project, as well as expert observations and our preliminary recommendations based upon these findings (sections 3.6 and 3.7).

A number of components fed into the preparation of this report:

- An online survey of 1,500 consumers conducted by CHOICE's pollster, with survey questions, coding and further analysis from Cyberspace Law and Policy Centre. (Sections 3.4 and 3.5)
- Interviews with experts from industry, institutional and consumer stakeholder groups. (Section 3.6)
- A review of publicly-available copyright industry data and reports, from Australia and elsewhere, for comparative purposes; and a survey of scholarly commentary with respect to the 2006 amendments, as well as relevant policy and law reform documents. (Section 3.8 References)

Commentary around the time of the 2006 amendments, including the Australian Government's 2005 *Issues Paper*<sup>5</sup> and submissions made by various interested groups, provides a useful starting point for concerns and issues that could be expected to arise since the amendments came into force. That discussion offered a perspective grounded in academic, legal and commercial policy issues when these changes were yet to be integrated into the day-to-day lives of consumers as newly "lawful" activities.

However, after this burst of energetic discussion, interest in the effects these changes might have upon consumers' attitudes and behaviour fell away significantly. This is despite continuing anxiety on the part of copyright industries, legal commentators and government over consumer interaction with copyright material, particularly consumer attitudes towards unauthorised uses of copyright material and appropriate public education about what is and what is not lawful use.

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<sup>5</sup> Attorney-General's Department, *Issues Paper - Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (Canberra, Australia, May 2005).

Section 3.3 sets out a series of hypotheses which the survey might support or undermine, in conjunction with other sources of data. Sections 3.4 and 3.5 offer an analysis of results from the online consumer survey carried out for this project.

The online survey described in Section 3.4 was conducted in November 2009 by CHOICE and their pollster AusPoll (who provided the core quantitative results), with the Cyberspace Law and Policy Centre providing formulating questions and structuring the survey, and analysing the qualitative results in questions 4 and 8 and the outcome overall.

The respondents were Australian residents. The survey had 1,500 respondents overall, segmented and weighted to be nationally representative of Australia's population by gender, age band and location.

(There is of course a source of bias intrinsic to an online survey, even where such demographics match the general population, as we believe they do here, namely that those who do not have online access are not polled. As such, this sample can only be taken as a guide to the online segment of the population. However, given that considerable focus was on online behaviours of respondents, the impact of this source of bias may be somewhat lessened, in that the views of those without online access would have been largely inapplicable for many of the questions.)

This survey sought to determine the level of consumer awareness of the 2006 amendments, bearing in mind the significant amount of discussion provoked by the changes within legal and copyright industry circles.

Further, the survey also sought to provide a picture of the relative impact that the amendments may subsequently have had on consumer attitudes towards their uses of copyright material, and the balance between consumers' and copyright owners' interests in the Australian copyright system more generally.

In light of the earlier debates and concerns and the relative silence on these matters in the years following commencement of the amending Act, this survey aimed to explore any evidence of actual effects upon consumer attitudes and behaviour.

This may be of interest where concerns echoing those previously debated in Australia are raised in other jurisdictions that may be considering similar exceptions in domestic copyright systems.

A broad range of literature was surveyed, including scholarly commentary, government reviews, industry reports and statistics. These are noted in Section 3.8 References.

Most legal commentary appeared around time of amendments, often in response to government reviews. There has been little commentary or discussion on these exceptions since then. There is more coverage in

industry reports and economic statistics, although these are ultimately not very helpful in addressing the hypotheses.

## 3.2 Background

### 3.2.1 Copyright developments in Australia

#### US Free Trade Agreement 2004

The *Australia-US Free Trade Agreement* of 2004,<sup>6</sup> which mostly came into force in 2005, introduced a range of IP related measures; many of its 900 or so pages dealt with intellectual property (IP), including the large Chapters 16 and 17. Extensive legislative changes were required to implement it.<sup>7</sup> Although promoted as “harmonising” Australian IP law with that of the US, these changes were largely seen as supportive of rights-holder interests, particularly the movie and music industries, and particularly on the US side (though the Motion Picture Association of America or MPAA, trading internationally as the “Motion Picture Association,” in effect participated on the Australian negotiating side as part of a broad copyright alliance). Penalties increased for many forms of unauthorised use and circumvention of technological protection measures, including that under the earlier *Copyright Amendment (Digital Agenda) Act 2000* (Cth)<sup>8</sup> that was approved in the case of *Sony v Stevens*.<sup>9</sup>

However, conspicuous by its absence was a reciprocal change implementing the US balancing concept of “Fair Use,” which while principles-based and hence potentially simple but vague in application, arguably accorded better with popular notions of fairness. So it was to some extent seen as one-sided. Pressure built for some change, especially as both the iPod and the TiVo, key US entertainment technological advances, were effectively illegal in Australia. And the then-current law also arguably retained the technical prohibition on home private copying of broadcasts, despite the apparent ubiquity of this practice.

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<sup>6</sup> *Australia-US Free Trade Agreement*, (Washington, 18 May 2004) [2005] ATS 1, entry into force: 1 January 2005, <http://www.austlii.edu.au/au/other/dfat/treaties/2005/1.html>

<sup>7</sup> See the *US Free Trade Agreement Implementation Act 2004* (Cth), <http://www.austlii.edu.au/au/legis/cth/numact/uftaia2004363/>, and *Copyright Legislation Amendment Act 2004* (Cth), [http://www.austlii.edu.au/au/legis/cth/num\\_act/claa2004325/](http://www.austlii.edu.au/au/legis/cth/num_act/claa2004325/)

<sup>8</sup> [http://www.austlii.edu.au/au/legis/cth/consol\\_act/caaa2000294/](http://www.austlii.edu.au/au/legis/cth/consol_act/caaa2000294/)

<sup>9</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850 (6 October 2005), <http://www.austlii.edu.au/au/cases/cth/HCA/2005/58.html>



## International aspects

Bilateral and Multilateral agreements have increasingly been used strategically to pursue approaches that may not be successful for an interest group in one venue or the other alone. Arguably the A-US FTA was used in this way, attempting to set in place changes in the position of users and owners of copyright works that could not have been implemented in multilateral agreements so quickly, if at all. For this reason it is worth noting the broader context.

## 2006 Amendments

By 2006 the pressure for further changes to the copyright law resulted in the *Copyright Amendment Act 2006* (Cth), which among other matters introduced some changes to the exceptions and limitations in the Copyright Act so as to legalise time- and format-shifting as narrowly defined and specific exceptions. They are the subjects of this report. See Appendix 3.9.3 for the text of these changes.

There was limited consideration of a US-style Fair Use model after some agitation, but this was rejected. Australian copyright law remains a morass of particular exemptions and defences for narrow purposes or situations, while the main law is clear that, as an Attorney General's Department officer said to this author, "users don't have rights, they have exceptions and defences to breaches of the overarching provisions favouring owners."

The two changes have been implemented in this complex environment.

### 3.2.2 Time-shifting and format-shifting debates

The literature and commentary discussing time-shifting and format-shifting exceptions in Australia<sup>10</sup> suggests that this debate occupied legal writers and policy commentators largely during the time immediately preceding and during the introduction of the 2006 amendments. Since then, discussion on the provisions appears to have cooled significantly. Neither we nor our interviewees have come across a significant body of discussion of the topic since the changes.

The material also illustrates how the issues and arguments raised by law reform and policy documents, academic commentators, and commercial stakeholders shaped the parameters of the debate surrounding

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<sup>10</sup> See Section 3.8 References, below, for some of the material investigated.

the amendments; the voices of consumers or consumer advocates were relatively little raised or heard, in part due to the lack of a critical mass of staff in the sector who are in a position to be able to engage at the level necessary to participate effectively, and in part because policy makers show limited interest in facilitating such input counter-balancing the well resourced contributions of industry and institutional stakeholders.

#### **3.2.3 Interviews**

As well as the online survey of consumers, we conducted about 20 intensive telephone interviews with some of the people who had participated in the earlier debates, both to invite their recollection of expectations and concerns at the time, and their reaction to the survey. The questions and the list of participants are in the Appendices 3.9.4 and 3.9.5 below in this report.

#### **3.2.4 Copyright industries' and commentators' concerns and expectations**

The Australian Copyright Council submissions raised some typical industry concerns about the potential harm this sort of amendment might do to the interests of copyright owners and artists.<sup>11</sup> Time shifting is seen as having potential for interference with future market for TV shows or with the ability to collect accurate ratings data.

19. A major concern is the potential for these proposals to interfere with the emerging and rapidly growing market for legitimate digital downloads of music and television programs. The Government is proposing to introduce these amendments at the very time that technological developments have enabled consumer desire for “format-shift” and “time-shift” copies to be met by the marketplace.

20. The gap in the market which the proposed amendments are apparently intended to address – the absence of a market for a “time-shift” copy or a “format shift” copy – is rapidly being filled by download services such as ninemsn

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<sup>11</sup> Australian Copyright Council, “Submission [to Senate Legal and Constitutional Affairs Committee] on Submission on Exposure Draft: *Copyright Amendment Bill 2006: Exceptions and other Digital Agenda review measures*” (October 2006), <http://www.copyright.org.au/x0605.pdf>

and BigPond. For example, ninemsn is currently offering recent episodes of McLeod's Daughters for \$1.95, and television programs are available for download from BigPond from \$1.95. Technology is already available which allows people to view digital downloads on a television screen. Allowing these copies to be made without payment will interfere with existing and future download markets.<sup>12</sup>

Format shifting was sometimes seen as a potential dramatic threat to the CD music sales industry, although the business model for this industry has been under a cloud for some time.

While the specific matter of the time and format-shifting exceptions also appears to have become somewhat less of a concern for Australian copyright industries, the more general issue of consumer attitudes, and more importantly, behaviour, with respect to downloading (whether legally or illegally), format shifting, and other ways of accessing and consuming copyright material, has continued to be of significant interest to this category of stakeholders.

The continuing emphasis by copyright industries upon consumer attitudes and behaviour, particularly in advocating changes to copyright law to attempt to alter these attitudes or behaviours, needs to be examined in light of the concerns raised at the time of the amendments by industry representatives and organisations.

## Concerns

Specifically, it is instructive to consider the degree to which some of the concerns raised by some Australian copyright industries have or have not been borne out with the operation of these amendments.

Evidence of impact, if there were any, might be expected to be found in some copyright industries' market and revenue data reports, as well as annual reports and research studies conducted for industry bodies, both in Australia and in other comparable jurisdictions. This data is largely perceived to be consistent with no substantial direct impact from the core changes we are discussing (or data not adequate to answer this question).

Our interviews undermined the perception that there were widespread fears that the time- and format-shifting changes themselves would have a serious adverse impact. It appears that relatively few

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<sup>12</sup> Australian Copyright Council, "Response to government proposals for new exceptions in media release 'Major copyright reforms strike balance,'" (May 2006), <http://www.copyright.org.au/x0601.pdf>

expert commentators expected serious adverse effects directly from the changes. Most were not surprised that there appears now to be little or no evidence of direct impact from the Schedule 6 part 1 and 2 changes.

If anything, the fear at the time was an indirect one, that there would be but one chance to have instituted a “blank media royalty levy” as part of the law reform package. This was seen to be a remunerated extension of exceptions. In reality, the negotiations did not result in such a levy.<sup>13</sup> This was seen as a significant potential loss by many of those associated with industry organisations or collecting societies.

#### **Consumers and technology**

A major theme in the preliminary comments was that “consumer behaviour is driven by technological possibilities,” “law should reflect consumer behaviour but in a way which protects artists rights.”<sup>14</sup> Another way of looking at this is that what the law says is not a high priority for many people, not because they seek to break the law, but because the “affordances” of the technology (what you can obviously do) are so compelling, and the expectation is that if it is legal to buy a device it should be legal to use it.

#### **Complexity: Part of the problem?**

One feature of the changes is their textual complexity. See the Appendix 3.9.3. Some commentators thought this was part of the problem of compliance. Examples cited included “you can make a copy for your mum who lives in but not your girlfriend who lives next door,” direct copies without format changes may still be illegal (ie technological format dependent), and “what does at a more convenient time really mean, if anything?”

However, one lobbyist did not think that the law needed to be able to be understood by ordinary people.<sup>15</sup> So many of the influences on copyright law are now related to compliance with say obligations in Free Trade Agreements or international agreements like Berne and WIPO that it is not realistic for non-specialists to be able to understand the language or appreciate what behaviour is compliant or not, in detail. If this were to be the case, it does not suggest a very consumer friendly compliance

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<sup>13</sup> Commentators [10], [11].

<sup>14</sup> [11].

<sup>15</sup> [10].

regime. Indeed, some other commentators<sup>16</sup> suggested that some of the low level of compliance may be contributed to by the difficulty in understanding exactly what is or is not prohibited or permitted, working from first principles and common sense. The differences in expression of the four relevant amendments were a case in point, with specific inclusions and exclusions in each.

### **Confusion about personal use**

One university copyright officer was concerned that it would be hard to educate users of technology that what was OK for personal use was not OK for professional (ie teaching) use.

### **Removal of irritant**

Many commentators felt there was unlikely to be any direct impact, but that the removal of the prohibition on time shifting TV, and transferring music onto an iPod, would eliminate an absurdity (“an obvious problem”) or irritant, and thus reduce the sources of complaint for consumers and their advocates.<sup>17</sup> Indeed, one felt that it made the difference between being able to rationally explain and justify the Act and not.<sup>18</sup> But this may also “make the debate more difficult, and revert to being a matter for specialists.”<sup>19</sup>

## **3.3 Hypotheses**

A main aim of this report is to consider a range of hypothetical impacts from the changes, and to look for evidence that these have either occurred or not occurred.

We considered some of the potential concerns of vendors/copyright owners and distributors. We were looking for evidence of whether the time- and format-shifting changes would have an impact on the following factors, and considered scenarios where they have no impact, a negative impact from the owner perspective (which may or may not coincide with consumers’ interests), or a positive one. Negative outcomes for creators, vendors or rights holder would of course be significant for assessing these changes or similar initiatives.

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<sup>16</sup> [11].

<sup>17</sup> [12].

<sup>18</sup> [17].

<sup>19</sup> [12].

As we consider the sets of survey results later, it would be useful to compare the results with whatever evidence you might expect to see which would support each of these alternative hypotheses if they had in fact occurred.

(For convenience, we also summarise the outcomes. Discussion is set out under each question in the survey, and in general matters raised by experts.)

#### **3.3.1 Consumer awareness of general copyright laws and obligations?**

This deals with the degree to which consumers appreciate the general law about copyright, and speculates that by ending the controversy about the iPod, this attention may have some impact.

- 1. No impact: As a result of the changes, consumers are no more or less aware of the relevant operation and obligations imposed by copyright law.**
- 2. Negative impact: Consumers become less well informed, or more misinformed, about the nature of copyright law details as a result of the changes.**
- 3. Positive impact: The changes result in consumers having a better understanding of the copyright regime, and the specifics around time- and format-shifting, and other forms of unauthorised behaviour.**

*Outcome:* It appears to be a combination of 1 (no impact, the predominant effect) and limited evidence for some quite minor positive impact. A very large proportion was not aware of the changes.

Expert commentators believed that consumer awareness of copyright law generally was weak, and had limited impact on consumer behaviour compared with other influences such as what the new technology allows, or peer group assumptions about acceptable behaviour.

#### **3.3.2 Consumer awareness of legal behaviour?**

By drawing attention to one form of now legal behaviour, it may be that the amendments prompted people to look more carefully at legal and illegal activities.

1. **No impact: Consumers' level of awareness of what activities are currently legal is unaffected by the changes.**
2. **Negative impact: Consumers are less well informed or aware about what is legal after the changes.**
3. **Positive impact: Consumers are better informed about what is legal (including time- and format-shifting) as a result of the changes.**

*Outcome:* As with hypothesis 3.1 above, it appears to be a combination of 1 (no impact, the predominant effect) and limited evidence for some minor positive impact.

There is also some continued confusion about whether, for instance, format-shifting from CD to iPod is legal (with a significant number wrongly thinking it is not legal), perhaps as a result of overlapping ideas from general industry campaigns about piracy.

### **3.3.3 Consumer awareness of illegal behaviour?**

This deals with the degree to which respondents are aware of the relevant provisions of the Copyright Act 1968 (Cth), which make certain actions, including downloading, copying and “file sharing” without authorisation, illegal.

1. **No impact: Consumers' understanding of what is illegal is not affected by the changes.**
2. **Negative impact: As a result of the changes, consumers are less informed about what is illegal, and for instance wrongly think that unauthorised downloading is legal, or that format shifting from a CD is illegal.**
3. **Positive impact: Consumers are more informed about what is illegal after the changes.**

*Outcome:* As with hypothesis 3.2 above, this is a combination of 1 (no impact, the predominant effect) and limited evidence for some minor positive impact. There remains significant apparent confusion about whether small amounts of unauthorised downloading or copying is legal.

There is disagreement among different expert commentators as to the explanation, with some (including some of the musicians) thinking this is self-serving feigned ignorance, while others seeing some impact of wrong

assumptions about the existence of some sort of general “fair use” right absorbed from popular culture or online discussions on US sites.

#### **3.3.4 Consumer attitudes and intentions about legal behaviour?**

This deals with respect for the scope of activities which are legal, and/or intention of doing them: for instance, time- and format-shifting are properly legal, copyright law in general has the balance right, and intention to do those newly legal things and other legal things, like buy rather than copy songs.

1. **No impact: As a result of the changes, consumers attitude and intention about doing what is legal is unaffected.**
2. **Negative impact: Consumers have less respect for the scope of things which are legal and/or less intention of doing them (example) after the changes.**
3. **Positive impact: The changes result in consumers having more respect for the scope of things which are legal and/or more intention of doing them (example).**

*Outcome:* As with the hypotheses above, this is a combination of 1 (no impact, the predominant effect) and limited evidence for 3, some minor positive impact. Some commentators observed that our questions did not enable distinctions between no impact because of (a) ignorance (“don’t know”), (b) lack of respect (“don’t care”), or (c) the more likely explanation: the changes authorise what they were doing anyway “so why would we change”?

The evidence of slight positive impact would be encouraging for policy makers, as it may indicate that consumers are exercising their entitlements more effectively, but this was a relatively minor component of the result.

#### **3.3.5 Consumer attitudes and intentions about illegal behaviour?**

This deals with respect for the scope of things which are illegal, and/or intention of doing them: for instance, unauthorised file sharing of music or movies is properly legal, copyright law in general has the balance right, and intention to do those still illegal things (like perma-



nently archive files, or copy without format shifting) and other things like copy/download rather than buy songs.

1. **No impact: Their attitude and intention about doing what is illegal is unaffected.**
2. **Negative impact: They have less respect for the scope of things that are illegal and/or less intention of doing them (example). This was the supposed “floodgates,” “give them an inch and they’ll take a mile,” “thin end of the wedge” argument, and one of the potentially serious side effects which might warrant reconsideration of such amendments were it to come to pass.**
3. **Positive impact: They have more respect for the scope of things which are illegal and/or more intention of doing them (example).**

*Outcome:* Consistent again with the pattern above, this is a combination of 1 (no impact, the predominant effect) and limited evidence for 3, some minor positive impact.

Some commentators observed again that our questions did not enable distinctions between no impact because of (a) ignorance (“don’t know”), (b) lack of respect (“don’t care”), or (c) the more likely explanation: the changes authorise what they were doing anyway “so why would we change?”

The evidence of slight positive impact would be very encouraging for policy makers and rights owners, as it does not bear out the concerns expressed by some that consumers would through ignorance or self-interest come to the conclusion that the new laws weakened obligations to avoid infringement or piracy and thus “anything goes.” It tends to support the view that the changes have had a minor though not insignificant discouraging effect on illegal behaviour.

### 3.3.6 Consumer behaviour and market results at macro level

This looks for observable changes in market and commercial results from consumer actions attributable to the changes in the law.

1. **No impact: On purchasing behaviour or sales results etc. is identifiable and attributable to the changes.**
2. **Negative impact: Consumers in this scenario would buy less, so sales of music and movies and related items would fall, and/or profits or margins may also fall.**

**3. Positive impact: Buy more, sales of music and movies and related items would fall, profit fall.**

*Outcome:* The results were inconclusive, but the most consistent explanation is 1, no impact. The consensus among experts we spoke to was that there was no data available that could, or did, show any significant change in consumer behaviour attributable to the changes.

In part this was because the data available was not fine grained or focussed enough to enable this analysis, in part because what data there was available showed limited differences between trends in Australia and elsewhere (as you would expect if the Australian changes in the law created market impacts), but the most consistent observation was that all the other big changes in the international and local markets for say music or video entertainment content were much more influential and dramatic than any effects that would be expected from the time- and format-shifting changes.

Changes in technology, rejigging business models, the extent of legal and illegal downloads and the focus of industry investment were among these much larger influences. They were considered to have swamped and masked any impact of the Australian law changes, being orders of magnitude more likely to explain observed trends.

#### **3.3.7 Vendor behaviour and market results at macro level**

- 1. No impact directly attributable to this change is detectable: Any changes are unrelated to the specific change in the law in Australia.**
- 2. Negative impact directly attributable to this change: This hypothetical option sees creators or vendors produce or invest less, development efforts or innovation falls, confidence and willingness to be active in the market falls, efficiency and prices improve.**
- 3. Positive impact directly attributable to this change: As a result of the changes, creators or vendors produce/invest more, development effort or innovation grows, confidence and willingness to be active in the market increases.**

*Outcome :* The results were inconclusive, but the most consistent explanation is 1, no impact. The consensus among experts we spoke to was

that there was no data available which could, or did, show any significant change in industry behaviour attributable to the changes.

As with the impact on consumers from other influences, it was generally believed that the explanation for changes to products, investment, marketing or channels for music or video content was more likely to be external factors than the 2006 Copyright Act changes. There did not seem to be any industry understanding or view that the law changes, or any consumer behaviour around them, warranted or had prompted substantial responses. This is consistent with their assumption that by in effect formalising what was already occurring, there would be little consumer impact.

### **3.4 Survey of consumer views**

The reason for undertaking this survey has been discussed above. In part it will be filling gaps in research and noting the relative silence on the issues raised at the time of the amendments.

Attention to consumer perspectives has been somewhat neglected so far, especially in light of the amendments that purported to be directed to consumer interaction with copyright material and fitting the law to consumer expectations about what should be “normal” uses.

In this light, we will review the importance of tracking whether consumers even aware of the changes made to take account of their views, whether such consumer attitudes have shifted in any way (ie do consumers now expect that even broader “uses” are acceptable?), what impact amendments had on consumer attitudes towards copyright law and their own interests generally.

#### **3.4.1 Questions**

The questions and the responses will be described as they are encountered below.

#### **3.4.2 Method**

See the section above for formulation of hypotheses. The questions have been framed around these concerns.

The *Copyright Amendment Act 2006* (“The Act”) sparked considerable debate up to its passage. However, this appears to have largely subsided, and little was known about whether speculation at the time by both industry commentators and academia – about the anticipated effect the

amendments on consumer attitudes towards and perceptions of copyright law – were confirmed. The amendments were largely directed at dealing with consumer interaction with copyrighted material, and expectations about what *uses* should be legal.<sup>20</sup>

Whether the amendments expanded consumer expectations about their entitlements to use copyrighted material, or whether consumer attitudes towards copyright law were changed as a result of the amendments was unclear.

To remedy this a survey was conducted. A total of 1,500 observations were gathered. The questions were aimed at discerning the consumer public's general perceptions of copyright law in the context of the 2006 amendments, whether these amendments had any impact on the efficacy of copyright law generally, and if so, if it was negative or positive from the perspective of articulated industry and consumer interests.

There were eight questions, six with fixed response options (“multiple choice”) and two (Q4 and Q8) with free-form questions which asked the respondent why they chose their selected option from the previous fixed response question.

The free-form responses showed most respondents seeking to explain their answers and reasons in a similar fashion; there were few outlying responses which expressed novel views<sup>21</sup> (less than 1%). These free-form responses were therefore also coded into a number of rough categories to give quantitative measures of opinion. This also aided in addressing unforeseen limitations in some survey questions (see below).

### 3.5 Survey results

The survey results for the eight questions are set out below under two groups, first dealing with behaviour and then expectations.

#### Part 1 (Consumer Behaviour)

The first question was directed at determining a general propensity to time-shift, format-shift and download material from the Internet, while the second question targeted knowledge of the legality of these three activities.

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<sup>20</sup> See Second Reading speech and Hansard.

<sup>21</sup> Respondent 93307: “What I do is my responsibility and honestly I don't care”; Respondent 96602: “no-one listens to copyright law anyway”

The results showed that 82%, 54% and 51% of participants respectively had engaged in these activities; post-2006, only the latter activity (downloading) is now illegal. The survey further shows that the likelihood that one has downloaded music or video from the Internet decreases with age; and thus younger respondents are more likely to have engaged in this activity (48% and 47% of those aged 18-24 and 25-34 compared with 39% and 40% of those aged 55-64, and 65 and above).

The second question reveals that 83%, 74% and 45% of respondents believed that the aforementioned activities are legal (however, the latter may be closer to 42% as approximately 3% of the sample misconstrued the question). Of those who had downloaded music and movies from the Internet 30% believed that the activity was legal (again, this may be closer to 27%) while 21% recognised its illegality but asserted they had done the same.

Overall the propensity of individuals to engage in copyright infringing activity remains significant. This is coupled with statistics which suggest that public education about what constitutes copyright infringing activity is inadequate. Many respondents (approximately 30%) who were not familiar with copyright law offered a reason why downloading copyrighted material is acceptable; whatever merit these arguments have, such activity remains illegal. This part of the survey does show a need for more effective public education and also provides some information about how such education may be targeted towards certain groups of the population.

### **3.5.1 Question 1: “Have you ever done any of the following activities?”**

This asked about past actual behaviour in three activities:

- Downloaded music or video material (like movies/TV Shows) from the Internet
- Copied music from a CD that you own to a digital media player
- Recorded a TV show at home to watch at a later time

Over 80% acknowledged time-shifting a TV show, while only 54% recalled copying music from CD to digital device with a change of format (which is legal). Only just over 50% said they have downloaded items from the Internet.

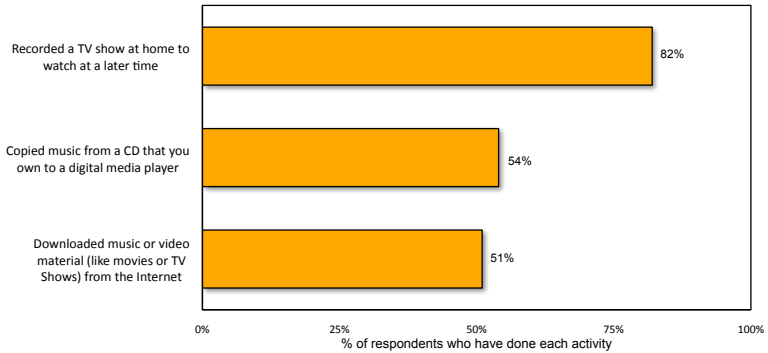


Figure 3.1: Question 1. Have you done these?

Younger respondents were more likely to have copied music from a CD player to a digital media player. For example, 83% of 18-24 year olds and 73% of 25-34 year olds have done this compared to only 31% of those aged 55-64 and 27% of those aged over 65.

Younger respondents were also more likely to have downloaded music or video material. For example, 77% of 18-24 year olds and 68% of 25-34 year olds have done this compared to only 32% of those aged 55-64 and 28% of those aged over 65.

Majority have recorded TV – is this because VCRs are cheaper/more readily available/more widespread that suitably fast connections and high data allowances in many homes?

Half downloaded from online and half copied from own CDs – again, is this just indicative of lesser availability in general population of both fast broadband connections/higher data allowances (being more expensive), and access to technology such as MP3 players/iPods and computers capable of these things?

Do the questions regarding burning music and downloading content merely show that only 50% actually have any interest in accessing this type of content (music/TV shows/movies), whereas more people in the general population mainly just watch TV? (Particularly as these figures appear to be more heavily weighted in terms of the youth of respondents – do young people generally just consume far more cultural content, and purchase more net-enabled computers/MP3 players/CDs etc?)

NB – the third question only asks whether the person has “downloaded from the Internet” – it *doesn't* specify if this downloading was au-

thorised or unauthorised – ie, possible that people who have used iTunes, etc would have also answered “yes” to this – so potentially merely shows that only 50% of respondents even have capacity/inclination to download content (from whatever source, and onto “new” devices like MP3s), whereas far more people are still using “older” technology such as VCRs.

### 3.5.2 Question 2: “Do you think the following activities are legal or illegal in Australia?”

We asked about three activities, music format shifting from CD and TV time-shifting, which were illegal but became legal after the changes, and downloading music you don’t own, which remains illegal. What was surprising was that 45% wrongly thought file sharing was legal, and about a 20% wrongly thought format- and time-shifting were still illegal.

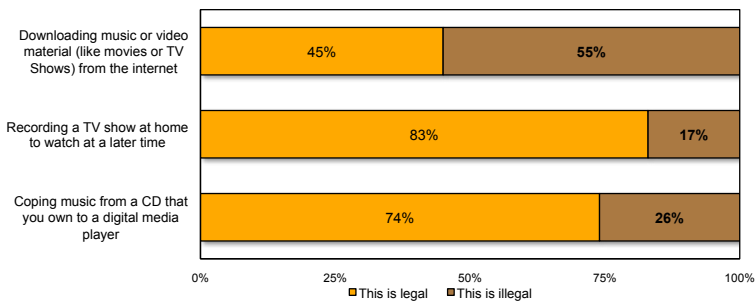


Figure 3.2: Question 2. Legal or illegal?

Younger respondents were more likely to believe it is legal to copy music from a CD player to a digital media player. For example, 82% of 18-24 year olds and 86% of 25-34 year olds believe this is legal, compared to 63% of those aged 55-64 and 67% of those aged over 65.

Younger respondents were also somewhat more likely to believe it is legal to download music or video material. For example, 48% of 18-24 year olds and 47% of 25-34 year olds believe this is legal compared to 39% of those aged 55-64 and 40% of those aged over 65.

Between 25-50% are misinformed about what is legal or illegal, 25-30% think the things legalised in 2007 changes remain illegal, while half think unauthorised downloading is legal.

There appears to show a need for more effective education; or perhaps that complexity is hard to understand and remember, inviting speculation that it may be better to have simpler laws.

**Commentators** criticised the shorthand expression “music you own,” pointing out that (a) you don’t “own” the music on a CD you buy, and (b) various dealings with music you don’t own may be either authorised in a particular business model or permitted by an exception; and hence the question is ambiguous.<sup>22</sup>

The awareness figure downloading without permission in a 2007 ARIA survey was 77%, somewhat higher than this survey.<sup>23</sup>

#### **3.5.3 Question 3: “What is your attitude to downloading unauthorised copyrighted material like movies and music from the Internet?”**

This question asks the recipient’s attitude to downloading unauthorised copyrighted material like movies and music from the Internet? How much of this is OK: None, a little or a lot?

While only a small number (12%, one in eight) thought it acceptable to download as much as you want, a third (34%) thought it is acceptable to download a little. Just over 50% thought no unauthorised downloading was acceptable.

Men were more likely than women to believe it is OK to download as much material as you want (17% compared to 7%).

Half think it is OK to download unauthorised material. Half do it. Half also think it is legal: a case for more education?

Do the respondents understand *what* authorised or unauthorised copyright material is – ie, is there the possibility that, when they think of “authorised copyrighted material,” some participants might be expecting to see a © symbol, or that the material has to be “registered” or not come from the US – or any of the other common misconceptions about what makes something “copyright.” The explanations in the survey only refer to how “copyright material” is protected under law in Australia – it doesn’t point out that pretty much all content (especially available online) is most likely to be “copyright material” - and the issue of particular types of permissions (for particular *types of uses*) being necessary only appears towards the end of the survey.

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<sup>22</sup> [15] mentioned freebies, and different legal options for access.

<sup>23</sup> [15].



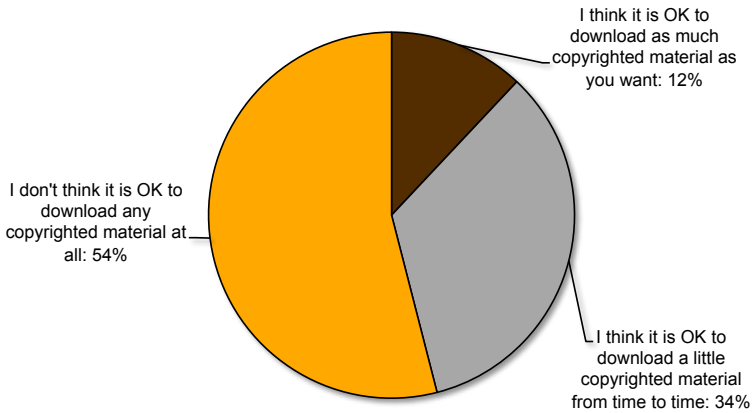


Figure 3.3: Question 3. Attitude to unauthorised downloading?

The third and fourth questions gave respondents the opportunity to voice their attitudes concerning the download of copyrighted material as well as to provide reasons for the same. Only 12% respondents that it was OK to download as much copyrighted material as they wanted (17% of who were male and 12% female); while 34% of people believed it was OK to do so from time to time.

When asked why respondents had answered the third question as they did, the responses fell broadly into three categories: those who recognised the illegality or immorality of downloading copyrighted material, those who provided a justification for why they did download copyrighted material and those who could not provide a reason for downloading copyrighted material.

The former category comprised 49.7% of the total sample; 23.8% of the responses recognised its illegality as the sole reason for not downloading copyrighted material.<sup>24</sup> Others in the subsection, a total of 25.9%, pointed to the immorality of depriving artists of their income (many mentioning royalties in particular).<sup>25</sup>

Of the second category (comprising 29.9% of the sample), five broad

<sup>24</sup> Respondent 14897: "If it's illegal, it's illegal"; Respondent 12609: "because it is stealing from someone else"

<sup>25</sup> Respondent 99067: "It cheats the artist of income"; Respondent 98652: "The artists do not receive their due royalties"

reasons emerged for those who thought it was OK to download copyrighted material from time to time or whenever they wanted:

1. 9.2% had an economic rationale for this. Some based this on the fact that by infringing copyright no-one is harmed in any substantive manner or that it was a “*victimless crime*” and they would not have bought the product anyway.<sup>26</sup> Others fell into this category because they asserted that copyrighted material is too expensive<sup>27</sup> or that by paying for Internet one has already expended a sufficient amount to warrant downloading copyrighted material.<sup>28</sup>
2. Similar in nature to this category are those respondents who based their response on personal use, comprising 7.7% of the sample. These respondents similarly asserted that if one does not make a profit from the downloading then no-one is harmed.<sup>29</sup>
3. A small portion of the sample (2.8%) asserted that the only purpose of downloading copyrighted material was to sample works. Thus, allowing someone to sample the work increases the chance that they would actually purchase it, and so downloading copyrighted material benefits both artists and publishers.<sup>30</sup> Though many asserted that the laws favour artists and publishers too much, the rationale seems to be centred on the idea that, if such downloading was legalised it would benefit consumers, artists and publishers.
4. The last substantive justification, comprising 8.2%, was based on the fact that copyrighted material is readily accessible and that this justifies illegal downloading. Some of these respondents pointed out that some copyrighted material is rare and unavailable in Aus-

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<sup>26</sup> Respondent 396: “People who download and watch are not depriving artists of any rightful income – those who download and do not sell for a profit never intend in the first instance to purchase the material”

<sup>27</sup> Respondent 439: “Entertainment is for everyone, not just those who can afford...”

<sup>28</sup> Respondent 5809: “[We] pay enough for Internet access, we should get some value from it”

<sup>29</sup> Respondent 9690: “As long as it is for personal use and not for further distribution for profit...”

<sup>30</sup> Respondent 93712: “Although it is illegal to download copyrighted material, sometimes it is nice to get a few samples of the material before dishing out money for trash”.

Respondent 1665: “I do not buy a book or magazine without flicking through it, or purchase a new car without taking it for a test drive. But the movie/music industry expects me to pay for a product before I can determine if I like it.

tralia and therefore downloading is the only way to obtain it.<sup>31</sup> Others simply targeted the fact that it was “there.”<sup>32</sup>

5. Another small portion of the sample (2%) justified downloading copyright material by arguing that “everyone else does it.”<sup>33</sup>

**Commentators** were in two minds about these results, especially the industry experts. One strand of thinking was that consumers were “fooling themselves” and really did know that downloading was illegal, hence there was an element of bad faith about the 45% legal answers.

However, equally clear were views that the question was a little ambiguous, the law complex and most people unaware of the details, so the answer could be a fair and honest explanation.

Although legal theory notions of *de minimis* and “fair use” in the US mould were raised to explain the thinking, more commentators thought in particular that many people did believe, without any technical legal awareness, that it was fair to download a little bit on the basis of morality and perceived limited harm, or of risk assumptions that there was no enforcement.<sup>34</sup>

### 3.5.4 Question 4: “Why?” [do you hold your attitude to downloading unauthorised material]

This question refers back to the answer to the earlier question 3, and asks why that earlier answer was given. Table 3.1 sets out the bare figures, not divided according to answer.

The two largest reasons for any answer were that “it’s stealing” and then it “undermines artists’ rights to income”; together these were half of all responses. This should be some solace for the copyright owning and investing community, for it shows quite a popular motivation was resonant with industry messages seeking to encourage respect for the property aspects of information products.

However in this overall form the data does not support understanding why the views expressed in answer to Q3 were justified by particular reasons. For that we need a different formulation which attributes these reasons to different answers in Q3.

<sup>31</sup> Respondent 34934: “If you are looking for something special that is hard to find elsewhere...”

<sup>32</sup> Respondent 33715: “Because it’s available and easily accessible”

<sup>33</sup> Respondent 95886: “Same old story – everyone else is doing it”

<sup>34</sup> [14], [19].

	<b>Answer</b>	<b>Number</b>	<b>%</b>
4-1	<i>"It's stealing"</i>	357	23.8
4-2	<i>Undermines Artists rights to income</i>	388	25.9
4-3	Not done for profit, not otherwise buy	137	9.1
4-4	Sampling	42	2.8
4-5	Contempt for the industry	34	2.3
4-6	Easy, convenient, or rare items	123	8.2
4-7	Everyone does it	30	2.0
4-8	No reason, doesn't hurt	113	7.5
4-9	Personal Use	117	7.8
4-10	Misc	10	.6
		<b>1,500</b>	<b>100.0</b>

Table 3.1: Why [do you hold the attitude you gave in Q3 to downloading unauthorised copyrighted material, like movies and music, from the Internet]?

These second level tables were created for this purpose out of the raw data.

### Responses

Despite the fact that in Q3 only 55% of respondents thought that downloading material from the Internet was legal, the Q4 responses reveal that the percentage that acknowledge some ethical issues of doing so is larger. This, in part, reflects that some misinterpreted the question as the downloading of "authorised" copyrighted material.

Of these respondents the three main groups were those who compared this type of downloading to stealing, those who recognised it as illegal and those who asserted that it undermined the artists/creators' rights to income or royalties.

Characteristic responses recognising illegality/immorality:

- *"Because it is stealing from someone else."*
- *"If it's illegal it's illegal."*
- *"The law is there to be obeyed."*
- *"People that have copyright have invested their own money and do not receive anything from illegal downloads."*

	<b>Answer (grouped by Q3: how much is OK?)</b>	<b>Number</b>	<b>%</b>
	None	836	55.7
4-1	<i>"It's stealing"</i>	346	23.1
4-2	<i>Undermines Artists rights to income</i>	380	25.3
4-3	Not done for profit, not otherwise buy	6	0.4
4-4	Sampling	1	0.1
4-6	Easy, convenient or rare	7	0.5
4-8	No reason, doesn't hurt	44	2.9
4-9	Personal Use	18	1.2
4-10	Misc	34	2.3
	A little	495	33.0
4-1	<i>"It's stealing"</i>	10	0.7
4-2	Undermines Artists right to income	6	0.4
4-3	<i>Not done for profit, not otherwise buy</i>	88	5.9
4-4	Sampling	39	2.6
4-5	Contempt for the industry	19	1.3
4-6	<i>Easy, convenient or rare</i>	83	5.5
4-7	Everyone does it	24	1.6
4-8	No reason, doesn't hurt	51	3.4
4-9	Personal Use	74	4.9
4-10	Misc	101	6.7
	As much as you want	169	11.3
4-1	<i>"It's stealing"</i>	1	0.1
4-2	Undermines Artists right to income	2	0.1
4-3	<i>Not done for profit, not otherwise buy</i>	43	2.9
4-4	Sampling	2	0.1
4-5	Contempt for the industry	15	1.0
4-6	<i>Easy, convenient or rare</i>	33	2.2
4-7	Everyone does it	6	0.4
4-8	No reason, doesn't hurt	18	1.2
4-9	Personal Use	25	1.7
4-10	Misc	24	1.6
		<b>1,500</b>	<b>100.0</b>

Table 3.2: Why do you hold your attitude you gave in Q3 to downloading unauthorised copyrighted material like movies and music from the Internet? (the most common two are shown in italics)

- *“The owner of the material is entitled to be paid for their artistic endeavours.”*

The remainder of the respondents, most of whom either believed it was OK to download copyrighted material from time to time or as much as one would want, provided a wide range of justifications.

A number provided justifications based on economic rationality. These included the assertion that downloading copyrighted material *“doesn’t hurt anyone”* or that it is a *“victimless crime.”* Others fell into this category as they asserted that since they *“[were] never going to purchase it anyway, it’s not taking profit from anyone”* which could be interpreted as a justification based on the Harm Principle. A number of others simply asserted that the cost of purchasing legit material was *“too expensive”*. There were also those who asserted that payment for Internet services (being *“excessive”* [4008]) in Australia constituted a sufficient rationale to download copyrighted material.

Characteristic responses based on economic rationality:

- *“If I was never going to purchase it anyway, it’s not taking profit from anyone.”*
- *“People who download and watch are not depriving artists of any rightful income – those who download and do not sell for a profit never intend in the first instance to purchase the material.”*
- *“Content providers have failed to supply their product appropriately as society demands, and as such are now accusing us of ‘stealing’ the content as a means of making up for their shortcomings in content delivery. While it may be illegal, it’s a pretty victimless crime. Music and movie industries are making record profits despite it. Frankly, they deserve the lesson in humility.”*
- *“Entertainment is for everyone and not just for those who can afford to go to a venue such as a picture theatre.”*
- *“Pay enough for Internet access, should get some value from it.”*

Akin to these were responses based on *“personal use.”* Some justified this on the basis that they were not making any profit from it while others relied on a general assertion.

Characteristic responses based on personal use:

- *“I think it’s ok if it’s purely for your own use.”*

- *“If it is for personal use and not for distributing to make a profit.”*
- *“If you are only using it for personal use and not selling it or making money from copying it isn’t a problem.”*

Others justified downloading copyrighted material as a means to sample works. Many of those who relied on this justification asserted that without the opportunity to sample they would not otherwise buy copyrighted material, some comparing it to the ability to sample a book by reading it before purchase. Others thought that this also provided justification for downloading only one song from an album where one does not like the others and thus would not pay for everything.

Characteristic responses based on sampling:

- *“Although it is illegal to download copyrighted material, sometimes it is nice to get a few samples of the material before dishing out your money for trash.”*
- *“I use the download to see if I really like the movie or music. If yes I purchase a legal copy, if no I destroy the download.”*
- *“People maybe like only one song and don’t want to buy the CD.”*
- *“I do not buy a book or magazine without flicking through it first, or purchase a new car (sic) without taking it for a test drive. But the movie/music industry expects me to pay for a product before I can determine if I like it. . .”*

A number of those who believed it was OK to download as much copyright material as they wanted expressed some contempt for either the revenue-earning capacity of the industry or towards the artists responsible for the works. Of these a number expressed discontent at being “ripped off” or asserted that artists were paid “too much”. Other niche responses included that copyright law was too overarching.

Characteristic responses evidencing a degree of contempt:

- *“The mark-ups and profits made by the recording artists and actors is outrageous. How can it be justified that an actor makes a fee from one movie which would eclipse the GDP of many small nations.”*
- *“Copyright laws are getting too stringent and ridiculous, even the smallest, least original thing is being copyrighted these days.”*
- *“The people responsible take all your money without giving back – I’m just taking back.”*

- *“Because when I see what happens, when people like Britney Spears get paid what they do and act like they do. This means to me the entertainment industry can kiss my arse!!!!!!!”*

Another category was those who regarded the accessibility of copyright material as a reason to download works. These responses can be split into two categories – those who regarded the fact that it was “available” as sufficient justification and those who targeted the fact that certain copyrighted materials are not available in Australia.

Characteristic responses targeting availability:

- *“Because it’s available and easily accessible.”*
- *“If you are looking for something special that is hard to find elsewhere but not to download anything and everything.”*
- *“The items that I have downloaded in the past are television shows that are not available within Australia either for viewing on free-to-air network television or for purchase (have not been distributed on DVD).”*

A final category were those who did not provide any justification but rather found support from the fact that “everyone else does it”:

- *“Same old story – everyone else is doing it !!”*
- *“Why not, everyone else is doing it?”*
- *“I don’t know anyone who doesn’t download music... It seems to be the norm.”*

#### **Part 2: Consumer Attitudes towards the Act**

Questions 5 and 6 together targeted public knowledge of the 2006 amendments, and whether or not knowledge of the amendments increased, decreased, or did not affect the propensity of individuals to engage in copyright infringing activities. Question 5 revealed that the vast majority of respondents were unaware of the 2006 amendments (74%).

By and large the parts of question 6 concerning time- and format-shifting revealed what was considered to be a known fact at the time of the changes: the enactment of the *Copyright Amendment Act 2006* had legalised what the majority of the public was already doing. However, 23% and 24% of respondents asserted that the amendments made them more



likely to time-shift (to watch at a more convenient time) and format-shift, while 6% and 8% said it would make them less likely to do so.

On the other hand, 32% and 30% of respondents asserted that awareness of the change in the law made them less likely to download unauthorised TV shows and music respectively, while only 6% and 7% said that they would be more likely to do so. Once again the survey revealed an age-dimension to the results. Knowledge of the amendments were more likely to affect the behaviour of older respondents to make it closely aligned with the law – 37% and 42% in the 55-64 and 65+ age groups for TV shows and 40 and 42% of the same age groups for music, as compared with 19% and approximately 22% of those aged 18-34 for the same activities.

The latter half of the survey demonstrates once again a failure of public education as to the state of copyright law. Yet it generally shows positive results for public reaction to the changes, with only a small portion of the respondents disagreeing in substance with the general state of copyright law and the direction of the amendments. The results could potentially reveal that knowledge of the amendments is may in some cases have some influence to divert individuals from unlawful activity to lawful activity; knowing that time and format-shifting are legal, people may be more inclined to use these methods to view TV and listen to music that they might otherwise have downloaded illegally.

Still, there are large numbers whose attitudes are not affected so the real impact may be harder to assess.

### **3.5.5 Question 5: “Were you aware of this change in the law in 2007?”**

Australian copyright law generally prevents you from downloading or sharing copyrighted material. However, in 2007 some parts of the law were changed. These changes made it legal to: 1) copy music from a CD you own to your digital media player; and 2) record a TV show at home to watch at a later time. Were you aware of this change in the law in 2007?

Most people are not aware of the 2007 changes. Was there failure of public education about the changes? Or was it as some commentators suggested, because there was in fact no reason for an ordinary person to do anything, the law was just catching up with what they were doing anyway – so no need for any change or attention?

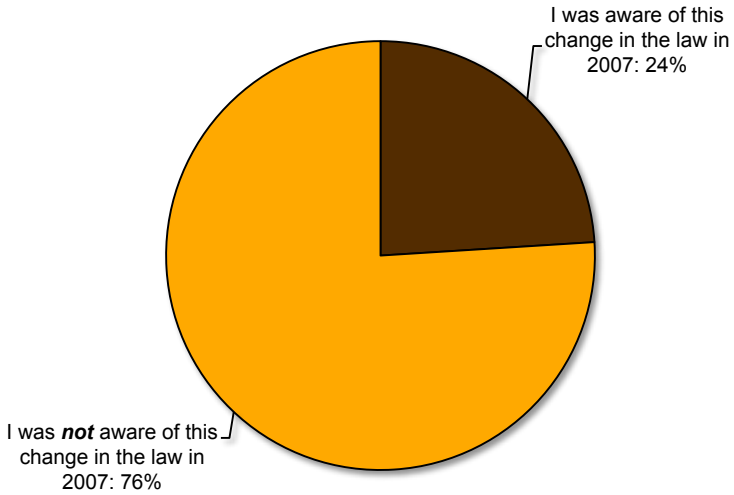


Figure 3.4: Question 5. Aware of the changes?

### 3.5.6 Question 6: “Does being aware of this change in the law affect your likelihood to do any of the following?”

This question includes some preliminary background, and then asks whether knowing this makes any difference.

As discussed above, changes to the law in 2007 made it legal to:

1. Copy music from a CD you own to your digital media player.
  - a) Record a TV show at home to watch at a later time.

Does being aware of this change in the law affect your likelihood to do any of the following?

Older respondents were more likely to believe that knowledge of the laws made them less likely to download an authorised TV show. For example, 37% of 55-64 year olds and 42% of those aged over 65 believed this knowledge made them less likely to do this. This compares to 19% of those aged 18-24 and 19% of those aged 25-34.

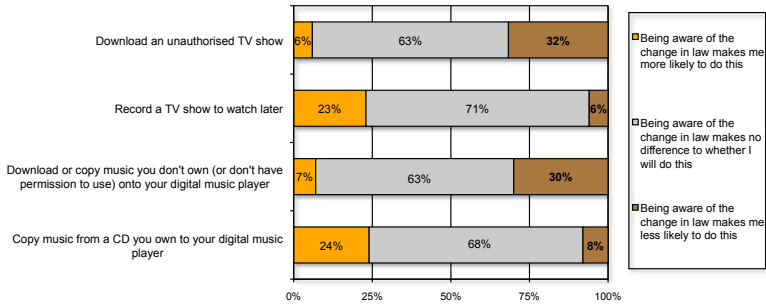


Figure 3.5: Question 6. Awareness affect likely behaviour?

Older respondents were also more likely to believe that knowledge of the laws made them less likely to download or copy music that they don't own. For example, 40% of 55-64 year olds and 42% of those aged over 65 believed this knowledge made them less likely to do this. This compares to 21% of those aged 18-24 and 23% of those aged 25-34.

When made aware, most say no change, but a significant proportion say they are more likely to do the legal acts and less the illegal acts (eg some limited but significant evidence that the change has increased respect for law).

**Commentators** largely agreed with this interpretation.<sup>35</sup> “Consumers want to do the right thing”.<sup>36</sup> This was also seen to be disproving the assumptions around the “floodgates” concerns: most commentators agreed it was consistent with the idea that the changes had increased respect for the law and appreciation of what is properly legal and what is piracy, rather than that consumers now see copyright material as fair game by whatever means.<sup>37</sup>

“The more informed people are the better they behave”.<sup>38</sup>

Commentators generally also thought the question was well framed and the answers likely to be a reasonable reflection of the surveyed sample, unlike some of the other questions whose implications were queried.

This then is one of the most significant outcomes of the survey. Fears about floodgates or a free for all do appear to be unfounded, and some

<sup>35</sup> [2], [3], [4], [11], [14], [15].

<sup>36</sup> [19].

<sup>37</sup> [9] “once we know what the rules are we are willing to comply.”

<sup>38</sup> [14].

small but real positive impact is likely to be felt in a direction welcomed by most commentators interviewed.<sup>39</sup>

#### **3.5.7 Question 7: “Do you think this law is fair or unfair to consumers as well as artists and their publishers?” [respondents say “fair”]**

The final two questions ask respondents whether or not they thought copyright law (specifically in response to the provisions regarding time- and format-shifting, press/educational use and the length of copyright) was in favour of consumers, or artists and publishers, or whether there was a fair balance between the interests of the two groups, and why.

Question 7 again includes some preliminary background, and then asks for a judgement.

Australian copyright law prevents people from copying or sharing creative material (including written work, music, film and software), without the author or owner's permission, for around 70 years from first publication or the author's death. However, it is legal to use this material for educational purposes and press reporting without charge. It is also legal to copy music to different formats and record a TV show to watch at a later time as described above. Do you think this law is fair or unfair to consumers as well as artists and their publishers?

At face value, 81% thought that the balance between consumers, artists and publishers was fair – once again revealing an age dimension with 73% of those aged 18-24 falling in this category compared with 80-83% in the higher age brackets (25-64) and 88% of 65-84 year olds. This may reflect both the increasing propensity of younger aged people to purchase copyrighted material and their lower income levels. 14% of respondents thought that copyright law favoured artists and publishers too much – within these results there was also a gender dimension; 20% of men falling into this category while only 8% of women. A small portion of respondents (5%) thought that the laws favoured consumers too much.

A large group of respondents (25.1%) justified their answer with an assertion that the laws were self-evidently fair or reasonable;<sup>40</sup> while

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<sup>39</sup> [13].

<sup>40</sup> Respondent 98966: “It's a compromise”

Respondent 99049: “I think it is fair to both parties”

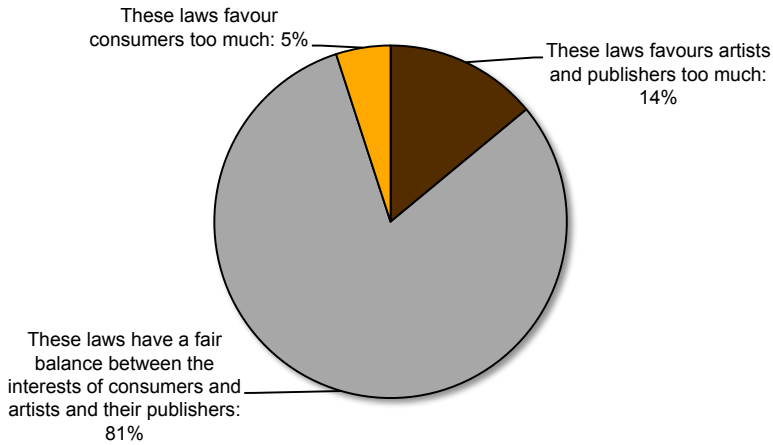


Figure 3.6: Question 7. Law fair to consumers and artists?

14.5% of the sample asserted that the amendment adequately protected or served the rights of both consumers and artists/publishers.<sup>41</sup>

A further 9.3% of this group believed that either time and/or format shifting were the chief reasons that copyright law was fair since it did not substantively affect the rights of the authors and creators<sup>42</sup> while others (1.3%) targeted time shifting specifically as it allowed for both the convenience of consumers but also publicity for producers through increased exposure and higher ratings.<sup>43</sup> 5.6% of the sample targeted the educational and press exemptions as striking the balance in copyright law, mainly as a matter of necessity,<sup>44</sup> while a few had problems with press use but agreed with use for educational purposes.<sup>45</sup>

<sup>41</sup> Respondent 76107: "It protects artists whilst recognising the public's interests"

Respondent 78810: "[it allows] access of works to the public, as well as protecting the intellectual property and income of the artist"

<sup>42</sup> Respondent 93168: "I don't think it makes any difference to the suppliers of a TV show if one records it to watch at a more convenient time"

Respondent 90447: "If you own it you should be able to use it the way you want"

<sup>43</sup> Respondent 4157: "Artists and performers are getting free publicity"

Respondent 6902: "[time shifting] still makes ratings happen. The owners will still get paid to copy films and music... bit of give and take works well."

<sup>44</sup> Respondent 3729: "There needs to be room for compromise in regards to education and news so that we are educated and informed"

<sup>45</sup> Respondent 15808: "I can support educational use but I don't see why the press should be allowed to use it"

Of the small portion of the sample who thought that the laws favoured consumers; 3.9% targeted either the now lesser potential for artists to benefit from income,<sup>46</sup> or deficiencies in the copyright law that could be exploited.<sup>47</sup>

Those who thought that copyright law favoured artists and publishers too much did so because of a belief that artists are excessively protected either because of the length of copyright (3.9%)<sup>48</sup> or because artists already earned enough anyway (2.7%).<sup>49</sup> 1.9% of this sub-sample believed that consumer suffered from rights-restrictions which made copyright law unfair.<sup>50</sup>

Most respondents now seem to think the balance is reasonable.

**Commentators** were a little surprised by this result. Some noted the quite low levels of knowledge and interest in the details of copyright law, and suggested this assessment may not be very well informed. Others were comforted by the relatively positive attitude revealed.<sup>51</sup>

Many raised doubts about the framing of the question<sup>52</sup> and thus the validity of the responses (in one case drawing a parallel with a court ordered survey<sup>53</sup> that was discounted for some its flaws): the potential for the introductory incomplete summary to omit key issues<sup>54</sup> but influence views, the order of the options with the 'balanced' in the middle, favouring that answer, and the detailed phrasing of the summary were all criticised.

On balance it seems likely that these factors do reduce the weight that should be given to the figures in this question, although many commentators thought that even with these concerns there was some support for the view that this sample group were generally well disposed to the bal-

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<sup>46</sup> Respondent 1386: "The artists lose royalties doing it this way"

Respondent 1419: "Stealing money from artists"

<sup>47</sup> Respondent 9136: "Pirating is rife due to these loopholes in the copyright law"

Respondent 79414: "It is very hard to catch people doing the wrong thing"

<sup>48</sup> Respondent 227: "Why does a dead person need protection"

<sup>49</sup> Respondent 69590: "Artists and publishers are overpaid immoral hams whose drug fuelled excess lifestyles are out of touch with reality"

<sup>50</sup> Respondent 92068: "It still makes it illegal to download"

Respondent 99709: "CDs are very expensive comparatively"

<sup>51</sup> Eg [11] "better than expected – fabulous!"; also [19]. [2] was surprised even 14% said it favoured artists too much. [14] had assumed there was more anti-copyright industry sentiment.

<sup>52</sup> Eg [12] "the question is difficult to ask. You can't draw much from this."

<sup>53</sup> [11] referred to *AVCS v Foxtel & Ors* [2006] ACopyT 2, <http://www.austlii.edu.au/au/cases/cth/ACopyT/2006/2.html>

<sup>54</sup> Eg., [3] noted the omission of libraries from those permitted to take advantage of these new entitlements.

	<b>Answer</b>	<b>Number</b>	<b>%</b>
8-1	Creator's Rights	58	3.9
8-2	Length of time	58	3.9
8-3	Ownership – artists/publishers already get enough	40	2.7
8-4	Time shifting	20	1.3
8-5	Time/Format shifting	139	9.3
8-6	Educational Purposes	84	5.6
8-7	<i>Fair and reasonable</i>	376	25.1
8-8	<i>Unsure/personal/no reason given</i>	395	26.3
8-9	Miscellaneous	83	5.5
8-10	Sufficiently protects creators and/or consumer rights	218	14.5
8-11	Consumers need more rights	29	1.9
		<b>1,500</b>	<b>100.0</b>

Table 3.3: Why do you hold the attitude you gave in Q7 to whether the law is fair or unfair to consumers as well as artists? (The most common two are shown in italics)

ance of copyright law. The concerns focused on the potential impact of influences in the questions given the likely unreliable level of awareness of relevant issues.

### 3.5.8 Question 8: Why [do you hold the attitude you gave in Q7]?

**Consumer Responses:** The final free form question gave the respondents the opportunity to comment on first, whether they think copyright law in the wake of the amendments favours artists or consumers or whether it struck the balance between the rights of both, and then asked why. Many respondents took this opportunity to target a certain aspect of the law (the question itself outlined the length of copyright protection, free use for educational and press reporting purposes and time- and format-shifting) and comment on why that particular part of the law shifted or maintained the balance in a particular way. Yet the vast majority of respondents asserted that the law was fair and reasonable with-

	<b>Answer (grouped by Q7: who copyright favours)</b>	<b>Number</b>	<b>%</b>
	Fair balance	1,217	81.1
8-1	Need to protect creator's rights	15	1.0
8-2	Excessive duration	16	1.1
8-3	Artists/publishers already get enough	5	0.3
8-4	Publicity is valuable in itself	17	1.1
8-5	Time-/format-shifting required	128	8.5
8-6	Educational users cannot afford it	81	5.4
8-7	<i>Fair and reasonable</i>	371	24.7
8-8	<i>Unsure/no clear reason</i>	316	21.1
8-9	Miscellaneous	50	3.3
8-10	Sufficiently protects creators and/or consumer rights	215	14.3
8-11	Consumers need more rights	3	0.2
	Favours Artists	206	13.7
8-2	<i>Excessive duration</i>	41	2.7
8-3	Artists/publishers already get enough	35	2.3
8-4	Publicity is valuable in itself	3	0.2
8-5	Time-/format-shifting required	10	0.7
8-6	Educational users cannot afford it	2	0.1
8-7	Fair and reasonable	1	0.1
8-8	<i>Unsure/no clear reason</i>	59	3.9
8-9	Miscellaneous	27	1.8
8-10	Sufficiently protects creators and/or consumer rights	2	0.1
8-11	Consumers need more rights	26	1.7
	Favours Consumers	77	5.1
8-1	<i>Need to protect creator's rights</i>	43	2.9
8-2	Excessive duration	1	0.1
8-5	Time-/format-shifting required	1	0.1
8-6	Educational users cannot afford it	1	0.1
8-7	Fair and reasonable	4	0.3
8-8	<i>Unsure/no clear reason</i>	20	1.3
8-9	Miscellaneous	6	0.4
8-10	Sufficiently protects creators and/or consumer rights	1	0.1
		<b>1,500</b>	<b>100.0</b>

Table 3.4: Why do you hold the attitude you gave in Q7 to whether the law is fair or unfair to consumers as well as artists? (The most common two are shown in italics)



out any particular justification. Another similar group of respondents thought that the laws strike the balance correctly by adequately protecting the rights of both consumers and creators (*“it protects the artists whilst recognising the public’s interests [76107], allowing access of works to the public, as well as protecting the intellectual property and income of the artist” [78810]*).

A small group of respondents asserted that copyright laws are still well in favour of consumers – one asserting that the artists *“lose royalties this way”* and another that *“pirating is rife due to these loopholes in the copyright law.”* Others in this category expressed concern for creator’s rights in general; saying that although the laws were fairly balanced, the profit-making capacity of some of these activities (presumably time-shifting) should be cautioned against or policed.

On the flip side others argued that consumers still suffered because of a lack of rights in the market. Some of these included the fact that consumers still have to pay too much to obtain copyrighted material (96738, 99709) or that what is now considered illegal downloading should not be (*“what’s the use of the Internet then” [93656]* and *“it still makes it illegal to download [92068]*) or even that Internet prices are so high that they justify illegal downloading (*“Internet prices are high – much higher than other countries. So I think we need to get something for our money”*).

Two other groups made more specific remarks against restrictive rights against consumers; one of these groups targeted the fact that 70 years after the death of the author was far too long for copyright to subsist (*“why does a dead person need protection” (227)*, a number of others suggested time frames [15802, 27290]. Another group alleged that copyright law was unfair because artists already earn enough anyway (*“they earn too much anyway” [47547]* *“because they could afford to sell at a reasonable price instead of profiteering [52943]* *“artists and publishers are overpaid immoral hams who drug fuelled excess lifestyles are out of touch with reality” [69590]*).

Certain individuals also (mainly referring to time-shifting) thought that the amendments and current state of the law is fair because it leads to increased publicity and exposure for artists (*“artists and performers are getting free publicity [4157]*, *“the consumers may not otherwise purchase the material and therefore the exposure for the artists etc. Would not exist [99646]*) and even higher ratings for programmes ([6902]).

A reasonable group of the sample thought that time- and format-shifting was self-evidently fair either because it did not substantively effect the rights of the authors and creators (*“I don’t think it makes any difference to the suppliers of a TV show if one records it to watch at a more*

*convenient time*" [93168]) and also because of a belief that purchase entitled them to use material as they pleased (*"If I have bought... I should be able to put my... songs on my MP3"* [48653], *"if you one (own) it you should be able to use it the way you want"*) or because free-to-air is by nature free (*"free to air, it's free"* [85903]).

Others targeted the fact that it was free for educational purpose as the chief reason for which the laws were fair, however a small sample of these respondents disagreed with the use for press reporting warranting the same exemption.

**Commentator observations:** The numbers in this table were not thought to say very much, since so many of them effectively were in categories of "don't know" or "it's fair because it's fair."

This was perceived by many commentators to be a reflection of a relative lack of awareness and analysis of the underlying copyright law and its balance or lack thereof amongst the general (online) population, confirmed by the very high proportion (75%) of those in Q5 who were not aware of the changes until told.

However, while overall of limited value, the comments were felt to be of some value in explaining the thinking on particular responses.

## 3.6 Commentary from experts and stakeholders

This section sets out some of the general predictions, concerns and observations from a range of commentators noted in Appendix 3.9.5. Comments on the specific questions are included above in the relevant section.

### 3.6.1 Predictions and concerns, perceived outcomes

A common prediction was in fact that there would be no external change as a result of the changes to the law.<sup>55</sup> The changes were seen to be aimed at "decriminalising" or "legitimising" certain ordinary use, existing consumer behaviour.<sup>56</sup> It was seen as the law "catching up,"<sup>57</sup> although the technologically specific provisions are seen as likely to diminish over time.<sup>58</sup>

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<sup>55</sup> [2], [3], [4], [18], [19].

<sup>56</sup> [4], [13], [18]. See also the *Explanatory Memorandum* for the Amendment bill for s109A.

<sup>57</sup> [13] noted the law is slow in Australia to catch up with technology, previously seen with the Betamax case.

<sup>58</sup> [10].

Indeed, one complaint was that the amendments, although touted as “opening the way for new technology,”<sup>59</sup> in fact represented the legalisation of the last generation of digital technology, not the next.<sup>60</sup>

Another strand of thinking lamented that the changes did not go far enough, and noted the effect of “Technological Protection Measures” (extended under the umbrella of the US Free Trade Agreement) and contract to restrict or negate some the benefits of the amendments.<sup>61</sup>

There was some hope that the changes would “appease or take the heat out of the debate,” or reduce advocate concerns.<sup>62</sup> This generally was not seen to have occurred,<sup>63</sup> although some pro-consumer advocates suggested that copyright had returned to the marginal specialist interest category, after briefly taking a more prominent place in public affairs.<sup>64</sup>

Some thought the changes would make the law harder to explain,<sup>65</sup> due to the complexity, while others thought the opposite, because “the law is no longer an ass” in banning popular activities perceived to be harmless.<sup>66</sup> In practice both effects were seen to have occurred to some extent.

In practise there was very little perceived change in consumer behaviour that could be traced to the amendments.<sup>67</sup> Some observers suggested there might be some impact in reducing unit price of certain items, but did not consider they had any subsequent evidence to tie any of the continuing price pressures directly to the amendments. Others suggested that the primary driver was technology itself, and what it permitted or prohibited, not the details of the amendment.

There was seen to be some confusion, and the complexity drew adverse comment.<sup>68</sup> Some even thought it was so bad as to be a nonsense, almost impossible to comply with.<sup>69</sup> It was seen also as a missed opportunity to simplify the law in this area.<sup>70</sup>

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<sup>59</sup> [18].

<sup>60</sup> [3].

<sup>61</sup> [9], [17], [18]. Several noted that you are not permitted to bypass a TPM if it prevents you from taking advantage of one of the new exceptions.

<sup>62</sup> [12], [13].

<sup>63</sup> [13]

<sup>64</sup> [12].

<sup>65</sup> [14], [17].

<sup>66</sup> [12], [14].

<sup>67</sup> See above: most of those predicting no effect felt vindicated.

<sup>68</sup> [15], [18].

<sup>69</sup> [11].

<sup>70</sup> [14].

One aspect some industry figures regretted was the perceived passing of the moment when a royalty scheme for blank media could have been introduced, and thus the industry were worse off.<sup>71</sup> However, the continuing rapid per unit sales revenue from digital music and content, in particular for the iPod were seen to be a counter influence potentially tending to swamp this fading hope. “Cheap and convenient still works” for iTunes sales, an echo of the convenience justifications in question 4.<sup>72</sup>

Many observers noted the great departure from “technological neutrality” in the changes and their very detailed conditions of application.<sup>73</sup> This suggested to some that the benefit would recede as technology changed yet again.

There was some concern that institutions would be adversely effected, both because the changes were largely for “personal” use, excluding libraries etc. for doing the acts on behalf of their clients, and also because the restrictions for staff meant that they would have to learn different rules for home and work copying.<sup>74</sup>

The main concern for a small number of industry experts, though in practice not voiced actively by many (and rejected by others),<sup>75</sup> was that there would be a “floodgates” problem, once the copyright rules were relaxed then consumers would assume anything was fair game. Also expressed in the saying “give them an inch, they take a mile,” this was in fact ultimately not seen as having been realised: both in terms of anecdotal consumer views reported by many experts, and the consumer answers to survey question 6, the conclusion appears to be that this has not happened.<sup>76</sup>

#### **3.6.2 Figures don't reveal identifiable impacts**

In light of the relative lack of public discussion since the amendments, one of the few forms of potential information regarding consumer behaviour (before our survey) might have been from industry statistics and data. Although this is “indirect” (ie, not directed towards assessing impact of the provisions or the time-/format-shifting activities themselves), it may give some idea of patterns of consumer activity regarding copyright material.

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<sup>71</sup> [10], [11].

<sup>72</sup> [6], [9].

<sup>73</sup> [3], [17], [18].

<sup>74</sup> [3], [11], [19].

<sup>75</sup> [4], [14].

<sup>76</sup> [10], and see comments around question 6.

Publicly available statistics and data for Australian industries – music, film, video and the like – do however give little indication of any direct correlation between the amendments and macro business results. This was a major theme of our investigations. One commentator also noted that the US Government Accountability Office had reported no reliable data,<sup>77</sup> in relation to attempting to disaggregate the impact of P2P services; one had to make assumptions and industry assumptions were often wrong.<sup>78</sup>

For instance the ARIA data in Schedule 2.9.6 for 2005 – 2009 show dramatic falls in certain physical media sales in 2005 and 2006, with some declining further 2007 to 2009 while others stabilise. At the same time, digital sales figures start from a low base and increase regularly in the range of 30-40% per year. RIAA figures and those from various movie sources tell a similar though equally patchy story. It seems clear that dramatic forces are at work on the business models of both music and movie industries.

The consistent view of many commentators was that the data did not and would not reflect any direct impact of the time- and format-shifting amendments.<sup>79</sup> The larger forces were considered likely to swamp any effect, and no-one was expecting any significant change in any case. No commentator pointed to data to contradict this, and most thought that there was no such data.<sup>80</sup> Industry efforts at data collection were presumed to focus on piracy, the “main game”.<sup>81</sup> One observer noted a New York Times story suggesting that even here that downloads did not markedly affect sales of CDs, which were under challenge by other online models, though some industry figures did not go this far.<sup>82</sup>

### 3.6.3 Developments in other jurisdictions

Publicly available statistical data for industries – music, film, video etc – do not support an obvious causal link with the two amendments here, or with the overseas equivalents.

More work needs to be done on comparisons with Australian data. Reasons for similarities and differences may emerge which take into account the 2006 amendments.

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<sup>77</sup> [18].

<sup>78</sup> [10], [3].

<sup>79</sup> Eg, [4].

<sup>80</sup> See for instance views expressed by commentators [2], [3], [9], [11], [14], [15], [19].

<sup>81</sup> [14]: “no one is worried” about format shifting having a direct impact on sales.

<sup>82</sup> [3].

#### USA

The first jurisdiction to introduce time-shifting exceptions to copyright law was the United States through the common law doctrine of “fair use” later codified in the Copyright Act of 1976 and interpreted to include time-shifting within its scope in *Sony Corp. of America v Universal City Studios Inc.* And later in *RIAA v Diamond Multimedia* the scope of the doctrine was also extended to format-shifting.

Both the United Kingdom and New Zealand slowly after have moved in the same direction as the US. In 1988 and 2008 respectively, each country introduced their own time-shifting exceptions through legislation.<sup>83</sup> However the UK is yet to introduce an exception for format-shifting; though it was recommended in the Gowers Review of Intellectual Property.<sup>84</sup> New Zealand on the other hand introduced both time- and format-shifting simultaneously “as part of a wider reform process to ensure that our intellectual property legislation is up to date, relevant and takes account of international developments”.<sup>85</sup>

#### New Zealand

The New Zealand Government’s position paper proposed a narrow exception that would permit the owner of a legitimate copy of a sound recording to make one copy of that sound recording (and the music it contains) in each format for his or her personal use. It notes that remunerated statutory licences operating in other countries (such as in Europe and Canada) generally have broader private or personal copying rights than its proposed exception. It is understood that a levy scheme was not pursued because of the assessment of administrative costs of establishing such a system, as well as the cost to consumers who are purchasing blank media for the purpose other than copying copyright material. The New Zealand proposal would not allow copying of borrowed or hired sound recordings.

#### ***Copyright (New Technologies and Performers’ Rights) Amendment Act***

The First Reading speech indicates:

The permitted acts or exceptions to the exclusive rights of copyright owners contained in the Act provide an impor-

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<sup>83</sup> In the UK this is found in the *Copyright, Designs and Patents Act 1988* s70(1) while in New Zealand it is found in the *Copyright (New Technologies) Amendment Act 2008* s84

<sup>84</sup> Under Recommendation 8

<sup>85</sup> *Copyright (New Technologies) Amendment Bill 2006* First Reading

tant balance between protection of copyright, and access for users. The bill clarifies and amends the exceptions to copyright owners' exclusive rights, particularly in relation to fair dealing, library archival and educational use, and time shifting. It also introduces new exceptions for format shifting of sound recordings for private and domestic use, and for de-compilation and error correction of software.

Today the popularity of MP3 players, iPods, and other portable digital music players means that people want to transfer music, which they have legitimately bought, on to these devices to take advantage of the new technology or to enjoy music in different places. Yet, despite the fact that this activity is common practice, it is an infringement under the Copyright Act – a fact that most music lovers do not know. This makes otherwise law-abiding New Zealanders into unintentional lawbreakers. The bill amends this situation to reflect both fairness and reality. The exception does not legitimise clearly damaging behaviour like copying CDs for friends or selling them, or authorising online file sharing of music.

## **3.7 Conclusions and recommendations**

The implications of the survey and related investigations into other data sources and expert opinion is summarised below, and recommendations drawn from that commentary and our analysis follows.

### **3.7.1 Conclusions**

Based on the observations regarding the effects upon consumers and industries, and the attitudes to consumer-oriented copyright limitations and exceptions, it appears that the following observations can be made:

- A large number of people are not well informed about the changes, or the law before them. Misconceptions about what is legal and what is illegal abound. Education projects should be considered.
- Complexity in the legislation is not helpful; simplicity would be preferred. (Though some industry advocates say the law does not need to be, or cannot be made to be, understood or be understandable for ordinary people.)

- The changes have most likely made little impact on most or all consumers. In general the negative scenarios considered in Section 3.3 have not been observed in any significant degree.
- Where consumers are aware of the changes, a majority generally say there has been little impact on their attitudes or behaviour. There are a small but potentially significant number who have had both their respect for copyright law and their intention to use legal options improved.
- There is acceptance among a majority of consumers that there is a reasonable balance in the currently achieved model (although they generally appear poorly informed and uninterested in the detailed operation of the legislative scheme). This positive attitude appears to be somewhat improved by the changes. Industry and creator advocates tend to share this view, while consumer and institutional advocates are conscious of many shortcomings and difficulties in the entitlements of users, and tend to feel the balance is less fair.
- Some people aware of the previous situation (iPods and PVRs often illegal) had a low respect for copyright law and its balance, and the changes appear to have improved their opinion.
- There is no significant indication that the changes have encouraged greater levels of unauthorised Internet transactions.
- There is minor evidence that the changes have had a slight discouraging effect on unauthorised Internet transactions.

#### **3.7.2 Recommendations**

Recommendations for the adoption of similar legislative flexibility about time-, format- and space-shifting elsewhere in light of the Australian experience can be made on the basis of this survey.

- On the basis of the interim analysis and work to date there is little reason for concern about ill effects for consumers or the industries affected, and some indication of benefits for many stakeholders. It appears the risk of action to bring laws into compliance with certain low impact consumer behaviour are unlikely to generate the worst effects feared by creator advocates, and have considerable potential for improvements.



- The law in this area should be simplified. The complexity may be responsible for poor awareness and poor compliance. Industry advocates have a range of views about consumers just having to learn about it, and the virtues of complex finely targeted permissions preserving other controls over related non-permitted uses, but the easier it is the more likely it will happen. Many commentators interpreted the survey and other material as showing that there is widespread ignorance of what is permitted and not under the new format-shifting rules.
- Compliance should be made as easy as possible.<sup>86</sup> Industry needs to develop ever more flexible and accessible means to purchase compliant content in ways that are at least as convenient, ubiquitous and straightforward as non-compliant sources, if not better. After early delays there is some improvement in Australia, but anything that slows for instance the availability of material on platforms like the iTunes Music Store is an obstacle to apparent consumer willingness to do the right thing if it is convenient and simple.
- There is scope for education about the right way to behave, but it cannot necessarily make up for overly complex legal schemes.
- Future consultations on policy in this area should make more vigorous attempts to encourage stakeholders to look for common ground; the polarisation of the discussion with entrenched positions on either side may have contributed to sub-optimal legislative outcomes.<sup>87</sup> Some industry groups may need to consider that there appears to be a somewhat wider than assumed willingness of consumers to comply with well understood straightforward regimes, protecting artists rights while not overly complicating use. The fight against piracy, working at extremes, may have distracted attention from the more reasonable mainstream consumer behaviours, which need to be accommodated to some extent.
- While many think that a remunerated exception is no longer possible, it remains attractive to some in industry seeking a simple solution to the conflict between widespread copying and artists' rev-

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<sup>86</sup> Interviewee [19]

<sup>87</sup> Interviewee [11]

enue. Whether this is a desirable issue to reopen is unclear. It might be in the form of a new statutory licence.

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### **Canada**

Canadian Recording Industry Association (CRIA)

Sales (physical; digital from 2008), comparative month year-to-year, 2005-2008.

### **New Zealand**

Recording Industry Association of New Zealand (RIANZ)

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### **US**

Recording Industry Association of America (RIAA), 2007/2008 Comparative Shipment and Retail value – Digital and Physical products

Motion Picture Association of America (MPAA), 2008 Theatrical Market statistics.

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[including comparative/global piracy data re: US film products].

IIPA, "Copyright Industries in the US Economy: 2003-2007 Report" (International Intellectual Property Alliance, 2009)

[Statistics and data on growth and employment, foreign sales and exports of copyright industries as a whole; BUT includes scientific/manufacturing/etc industries as well as creative and secondary industries.]

#### **UK**

2009 Entertainment Retailers Association Yearbook <http://www.eraltd.org/attachments/Resources/yearbook.pdf>

[Statistics covering music, video and game software spending/retail values, with breakdown for music and(home) movie formats, including CD, digital, DVD, VHS, BluRay etc.]

#### **International**

International Federation of the Phonographic Industry (IFPI),

2006, 2007 and 2008 Recorded Music sales and comparative sales: physical and digital; covering US, Europe, Asia, Latin America, Global.

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- OECD
- WIPO
- WTO

## 3.9 Appendices

### 3.9.1 Samples of Responses – Q3 and Q4: attitude to downloading

#	Summary category	Examples
1	“It’s stealing” Illegal, Immoral or wrong	<p>If it is unauthorised then that makes it not OK [record no. 33]</p> <p>It’s just wrong. [9]</p> <p>Illegal. [38]</p> <p>Pirating deprives the owner/creator of the copy-right material, their rights to royalties from sales etc, while others using the material unlawfully, could profit from that. [36]</p> <p>The law is there to be obeyed. [636]</p> <p>I think it is stealing. [229]</p> <p>Because the people that own the rights to the movie/music are unable to collect royalties (their income) from the sale of the movie/music. I only watch TV shows on the net that I have missed on the TV station website. They are not downloaded for future watching, just streamed to watch live. [397]</p>
2	Undermines Artists rights to income	<p>The creators don’t get paid for their product. [9]</p> <p>Someone is losing out. [19]</p> <p>Artists don’t get royalties. [174]</p> <p>It’s other people’s work. [505]</p>

<p><b>3</b></p>	<p>Economic OK if it isn't for profit/ wouldn't otherwise buy</p>	<p>People who download and watch are not depriving artists of any rightful income – those who download and do not sell for a profit never intend in the first instance to purchase the material. [12] You are not doing this so you can sell it later. It's for your own personal use. [52] Because sometimes that is the only way some people can afford music or movies, like people on a pension who just afford to have a computer etc, can't afford to buy CDs or DVDs and therefore wouldn't be buying them even if they couldn't get them off the net, I object to those people that download to make money from it by making multiple copies and selling them off or people that can afford to buy them downloading them. [345] Why pay full price? [541]</p>
<p><b>4</b></p>	<p>Sampling Try before you buy/wouldn't buy unless you can sample</p>	<p>Because if I don't then I never get to sample the product and am less likely to purchase the CD or DVD. [11] It assists in making a decision about making a purchase. I do not buy a book or magazine without flicking through it first, or purchase a new car without taking it for a test drive. But the movie/music industry expects me to pay for a product before I can determine if I like it... [79]</p>

5	Contempt for the industry	<p>Copyright laws were introduced to protect the rights of a creator to the material they created. These days, copyright is just big business. Most (c) holders don't care about the material, they just care about the \$. [24]</p> <p>The prices that are charged for the purchase of new or old movies, DVD music, or games on DVDs are basically robbery for the makers. The materials to make the discs are anywhere from a tenth to ten times less than what they are to produce. Being charged anywhere beyond a twenty dollar price range and the profit margins of the companies making these discs is wrong. Yes, they need to make a profit but how much of a profit against how much of sheer greed to rip off the consumer? [309]</p> <p>The owners of the material make obscene amounts of money. I haven't heard any stories about the author of the material going bankrupt because of pirating. [496]</p> <p>I think big corporations charge too much for CDs and DVDs... At the same time I firmly believe that smaller record labels etc should be supported as much as possible. [1378]</p> <p>They rip us off so time for a bit of payback. [1267]</p> <p>Artists get a glorified wage anyways and squander it on 17 cars... So I think its fair that us middle class people get a break... If they are a one hit wonder then I feel its ok to only download that song and not have to pay \$20 for the album... If the artist/ actor/actress is good... Then I buy their movie/album, I think that's fair. [1424]</p>
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<p><b>6</b></p>	<p>Accessible Ease of ac- cess/convenience and rarity</p>	<p>Because sometimes we do not have time to see it at the time they put it on television. [147] Because the people that own the rights to the movie/music are unable to collect royalties (their income) from the sale of the movie/music. I only watch TV shows on the net that I have missed on the TV station website. They are not downloaded for future watching, just streamed to watch live. [397] If you miss some shows, that are shown free to air anyway. [459] Only download music that are rare or hard to find. [61]</p>
<p><b>7</b></p>	<p>Everyone does it</p>	<p>Everyone does it – it would be to hard to stop. [13] I don't know, everyone does it, it's everywhere and it's free... everyone should be able to share! [198] Everyone does. [313] Because everyone does it and nothing has really been done about it. [515] Everyone does it. [536] All do it. [669]</p>
<p><b>8</b></p>	<p>No particular reason given or reason makes little sense or adds nothing</p>	<p>I download it legally from the new Foxtel site. [44] Have no reason. [192] A little doesn't hurt. [362] For obvious reasons. [370] Don't know. [499] Just do. [572] We are downloading Indian language movies. [1319] If people didn't download movies, we wouldn't have to sit and watch a 2min spiel every time we hire a DVD on why you shouldn't download pirate stuff (man, it gets really annoying after a while). [6]</p>



### 3.9.2 Sample responses – Q8: Why do you hold the attitude in Q7 about whether law is fair or unfair to consumers as well as artists?

#	Description	Examples: (Code: (response to q7) response to q8 [number])
1	Creators' Rights  Protect creators' rights to income	(3) Performers must have their income protected. [38] (2) Because that person paid for their item to be copyrighted so it is theirs. [50] (2) Artists have the right to financial returns for their work. [131] (2) There needs to be some laws in place to safeguard the copyright of artists and their publishers or there would be mayhem in the publishing sector, and it would severely affect the income of these sectors. [167] (1) The artists lose royalties doing it this way. [64] (2) As long as you do not make a profit from this it should be ok. [141] (2) I think these laws are fair as long as they are not for commercial gain. [194]
2	Sufficiently protects creators' and/or consumers' rights	
3	Consumers need more rights	
4	Length of time  Duration too long (70 years, dead people etc.)	(2) I think it is a reasonable system, but would like to see the 70 years reduced to say 20 years unless some sort of renewing process is undertaken. [90] (1) 70 years is a loooooong time. [125] (1) Because as stated in the blurb above we cannot use it for 70 years from inception or death of writer but media can and educational user can as well. [148] (1) Why does a dead person need protection? [227]

<p>5</p>	<p>Ownership – artists already get enough</p>	<p>(2) Well known artists and publishers in my opinion do very well from sales etc. [1395]                  (1) The publishers have had a good time for too long overcharging consumers and exploiting artists for their own lazy gain! It's like I demanded to be paid again for work I did last week that I'd already been paid for, how ridiculous is that? [1156]                  (1) Some people just want more money and don't care about fans. [1217]</p>
<p>6</p>	<p>Publicity is valuable to creators</p>	<p>(2) The more “exposure” an artist gets the more “sales” this should translate into. So the old adage “any publicity is good publicity” may be appropriate under these changes to the law. [30]                  (2) I might add some music to a video I make to put on YouTube. I am showing someone how to do something with their horse. If I edit in a comment showing the name of the singer/band, that would be free advertising for that singer/band. As long as I give proper credit to the artist, that should be enough. After all, the music is not the main focus of my video. The horsemanship is. The music is to make the video happier and I have acknowledged the artist. [644]</p>

5	Time-/format-shifting “more convenient time” and format shifting is required	<p>(2) Not sure about the music part, but for the TV shows, some of the shows are shown at inconvenient times and being able to copy and then watch later is fair. [100]</p> <p>(2) Consumers shouldn't have to pay more than once to store a song in different media formats, nor should they be restricted in watching the shows they want to watch when they want to watch them. On the flip side, artists and publishers still get their royalties for the initial download/purchase of the music or viewing/recording of the show. [249]</p> <p>(2) I believe for students all should be free if you own a product you should be able to make a back up or save it to another format to watch or listen to later. [290]</p>
6	Educational Purposes	<p>(2) Schools and educational institutions would be unable to afford to use much copyright material if they had to pay full price. This would be detrimental to both students and teachers and also the copyright owner as students would in many cases remain ignorant of their work. Recording a TV show to watch later makes no difference to copyright if it is just for personal use to watch once. [121]</p> <p>(2) I believe for students all should be free if you own a product you should be able to make a back up or save it to another format to watch or listen to later. [290]</p> <p>(2) I use educational material and it needs to be free. [137]</p> <p>(2) I am a teacher who uses materials from TV and the Internet for my students. Without this facility it would dramatically retard the way I could deliver content to my students. [162]</p>

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7	Fair and reasonable	<p>(2) Equal. [1]</p> <p>(2) It is good. [7]</p> <p>(2) We should all benefit in some way without too much cost. [14]</p> <p>(2) The answer says it. [17]</p> <p>(2) It sounds reasonable. [21]</p> <p>(2) Have to have some mix. [45]</p> <p>(2) The high costs of recordings, concerts, books etc warrants downloading to offset some consumers costs. [73]</p> <p>(2) 70 years is long enough. [272]</p>
8	Unsure/no reason given/reason makes no sense	<p>(3) Too many loop holes! [43]</p> <p>(2) No reason, I have no opinion. [59]</p> <p>(2) It is fair people should be able to view material. [12]</p> <p>(2) Again if you can't sample the work then I am less likely to buy it. It's like a car dealer to saying buy a car without ever seeing it. [11]</p> <p>(2) There has to be a bit of flexibility on the part of both artists and consumers. Some CD's are way over priced so it is no wonder that they are downloaded through the net. [169]</p> <p>(2) Don't know. [182/184]</p> <p>(1) The cost is high comparatively to afford... [1226]</p>

### 3.9.3 The relevant exceptions in Copyright Amendment Act 2006 (Cth)

#### “Time-shifting”: section 111 (broadcasts – cinematograph films and sound recordings)

- Section 111 applies as an exception to copyright infringement where a person makes a recording of a cinematograph film or sound “solely for private and domestic use” for the purpose of watching or listening to the recording “at a time more convenient than the time when the broadcast is made.” However, creating a library of such recordings becomes infringing at some time after the undefined point where it is no longer retained merely for this transient purpose.<sup>88</sup>
- The Section broadens the scope of the copyright infringement exception for recording broadcasts for personal use. It is a repeal and substitute of the previous s 111, which was limited in scope and practical benefit because it applied to the broadcast only and not to any work, film or sound recording included within the broadcast. New s 111 aims to clarify that making a recording of a broadcast in certain circumstances does not infringe copyright in the broadcast, or any work or other subject matter included in the broadcast.
- According to the Explanatory Memoranda:

new s 111 reflects the intention that copyright law should ensure appropriate exceptions are provided to allow common domestic practices that do not unreasonably affect the copyright’s owner’s interests, such as video taping or recording television and radio programs in the home to watch or listen to at a later time.

The relevant text of the Amending Act is set out below:

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<sup>88</sup> [17] suggests that the intended result, deprecation of library building, has come about due not to the law but to the change in recording technology from tape and DVD, whose recordings are slow to make and permanent, to PVR and TiVo-style devices, whose hard disks fill up unless periodically purged but are also quick and convenient enough to use for time shifting.

## Schedule 6—Exceptions to infringement of copyright

### Part 1—Recording broadcasts for replaying at more convenient time

#### *Copyright Act 1968*

...

#### 1 Section 111

Repeal the section, substitute:

#### **111 Recording broadcasts for replaying at more convenient time**

- (1) This section applies if a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.

Note: Subsection 10(1) defines **broadcast** as a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*

#### *Making the film or recording does not infringe copyright*

- (2) The making of the film or recording does not infringe copyright in the broadcast or in any work or other subject-matter included in the broadcast.

Note: Even though the making of the film or recording does not infringe that copyright, that copyright may be infringed if a copy of the film or recording is made.

#### *Dealing with embodiment of film or recording*

- (3) Subsection (2) is taken never to have applied if an article or thing embodying the film or recording is:
- (a) sold; or
  - (b) let for hire; or
  - (c) by way of trade offered or exposed for sale or hire; or
  - (d) distributed for the purpose of trade or otherwise; or
  - (e) used for causing the film or recording to be seen or heard in public; or
  - (f) used for broadcasting the film or recording.

Note: If the article or thing embodying the film or recording is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the article or thing but also by the dealing with the article or thing.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the article or thing by the lender to a member of the lender's family or household for the member's private and domestic use.

**2. Subsection 248A(1) (after paragraph (a) of the definition of *exempt recording*)**

Insert:

or (aaa) an indirect cinematograph film or sound recording of a performance, being a film or recording that:

- (i) is made from a communication that is a broadcast of the performance; and
- (ii) is made in domestic premises; and
- (iii) is made solely for private and domestic use by watching or listening to the performance at a time more convenient than the time when the broadcast is made;

**“Format-shifting”**

Part of Schedule 6 of the Amending Act created sections 43C (literary works), 47J (photographic works), 109A (sound recordings), and 110AA (cinematograph films) which introduce limited new technology-specific exceptions to the general prohibition against unauthorised copying and related dealings, generally turning on the involvement of a “format” conversion stage in the copying. The type of “format” involved appears to vary and is in some cases uncertain (for instance, encoding format cf. physical media format cf. digital file format, etc.). One key feature is that digital to digital format-shifting is permissible for music (eg AIFF on CD to MP3 on iPod), while it is not for “film” – only analogue video tape to “electronic” (a strangely ambiguous term, since analogue is electronic too, and one which has been assumed to mean digital).

Rather than a single general “format-shifting” exception, as some have assumed now exists as a result of this attempt to legalise certain entrenched consumer behaviours, the specific application of each new provision varies by technology and other circumstances, and creates a complex array of conditions and limitations on each. Within the context of each use the conditions make a certain sense, but this fine tuning comes at the expense of simplicity, comprehensibility, and consistency.

In turn this increases the burden and risk on those trying to advise ordinary users of their “rights” and obligations, and may create a new range of relatively trivial technical infringements which many go unenforced.

The text of the amendments are set out below. Rather than summarise their effects here, it is useful for the reader to attempt to understand the specific conditions applicable to each new entitlement individually and together, as well as to compare similarities and differences with those offered for the other technologies.

## **Part 2—Reproducing copyright material in different format for private use**

### ***Copyright Act 1968***

#### **6 After section 43B**

Insert:

#### **43C Reproducing works in books, newspapers and periodical publications in different form for private use**

- (1) This section applies if:
- (a) the owner of a book, newspaper or periodical publication makes from it a reproduction (the *main copy*) of a work contained in the book, newspaper or periodical publication; and
  - (b) the main copy is made for his or her private and domestic use instead of the work as contained in the book, newspaper or periodical publication; and
  - (c) the main copy embodies the work in a form different from the form in which the work is embodied in the book, newspaper or periodical publication; and
  - (d) the book, newspaper or periodical publication itself is not an infringing copy of either the work or a published edition of the work; and
  - (e) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the work in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the work incidentally made as a necessary part of the technical process of making the main copy.



- (2) The making of the main copy is not an infringement of copyright in the work or a published edition of the work.

*Dealing with main copy may make it an infringing copy*

- (3) Subsection (2) is taken never to have applied if the main copy is:

- (a) sold; or
- (b) let for hire; or
- (c) by way of trade offered or exposed for sale or hire; or
- (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

*Reproducing work from main copy may infringe copyright*

- (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of another reproduction of the work from the main copy.

*Disposal of book etc. may make the main copy an infringing copy*

- (6) Subsection (2) is taken never to have applied if the owner of the book, newspaper or periodical publication disposes of it (in the form from which the main copy was made) to another person.

*Status of temporary reproduction*

- (7) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary reproduction of the work as a necessary part of the technical process of making the main copy, then:

- (a) if the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy—the making of the temporary reproduction does not infringe copyright in the work or a published edition of the work; or
- (b) if the temporary reproduction is not destroyed at that time—the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the work and the published edition of the work from which the main copy was made.

**7 After Division 4A of Part III**

Insert:

**Division 4B—Acts not constituting infringements of copyright in artistic works**

**47J Reproducing photograph in different format for private use**

- (1) This section applies if:
  - (a) the owner of a photograph (the *original photograph*) makes a reproduction (the *main copy*) of it for his or her private and domestic use instead of the original photograph; and
  - (b) the original photograph itself is not an infringing copy of a work or published edition of a work; and
  - (c) either:
    - (i) the original photograph is in hardcopy form and the main copy is in electronic form; or
    - (ii) the original photograph is in electronic form and the main copy is in hardcopy form; and
  - (d) at the time the owner makes the main copy, he or she has not made, and is not making, another reproduction of the original photograph that embodies the original photograph in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the original photograph incidentally made as a necessary part of the technical process of making the main copy.
- (2) The making of the main copy is not an infringement of copyright:
  - (a) in the original photograph; or
  - (b) in a work, or published edition of a work, included in the original photograph.

*Dealing with main copy may make it an infringing copy*

- (3) Subsection (2) is taken never to have applied if the main copy is:
  - (a) sold; or
  - (b) let for hire; or
  - (c) by way of trade offered or exposed for sale or hire; or
  - (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

*Reproducing main copy may infringe copyright*

- (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of a reproduction of the main copy.

*Disposal of original may make the main copy an infringing copy*

- (6) Subsection (2) is taken never to have applied if the owner of the original photograph disposes of it to another person.

*Status of temporary reproduction*

- (7) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary reproduction of the original photograph as a necessary part of the technical process of making the main copy, then:

- (a) if the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy—the making of the temporary reproduction does not infringe copyright in the original photograph or a work, or published edition of a work, included in the original photograph; or
- (b) if the temporary reproduction is not destroyed at that time—the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the original photograph or a work, or published edition of a work, included in the original photograph.

## 8 After section 109

Insert:

### 109A Copying sound recordings for private and domestic use

- (1) This section applies if:
- (a) the owner of a copy (the *earlier copy*) of a sound recording makes another copy (the *later copy*) of the sound recording using the earlier copy; and
- (b) the sole purpose of making the later copy is the owner's private and domestic use of the later copy with a device that:

- (i) is a device that can be used to cause sound recordings to be heard; and
  - (ii) he or she owns; and
  - (c) the earlier copy was not made by downloading over the Internet a digital recording of a radio broadcast or similar program; and
  - (d) the earlier copy is not an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording.
- (2) The making of the later copy does not infringe copyright in the sound recording, or in a literary, dramatic or musical work or other subject-matter included in the sound recording.
- (3) Subsection (2) is taken never to have applied if the earlier copy or the later copy is:
- (a) sold; or
  - (b) let for hire; or
  - (c) by way of trade offered or exposed for sale or hire; or
  - (d) distributed for the purpose of trade or otherwise; or
  - (e) used for causing the sound recording to be heard in public; or
  - (f) used for broadcasting the sound recording.

Note: If the earlier or later copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the later copy but also by a dealing with the later copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the earlier copy or the later copy by the lender to a member of the lender's family or household for the member's private and domestic use.

## 9 After section 110

Insert:

### **110AA Copying cinematograph film in different format for private use**

- (i) This section applies if:
  - (a) the owner of videotape embodying a cinematograph film in analog form makes a copy (the *main copy*) of the film in electronic form for his or her private and domestic use instead of the videotape; and

- (b) the videotape itself is not an infringing copy of the film or of a broadcast, sound recording, work or published edition of a work; and
- (c) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the film in an electronic form substantially identical to the electronic form in which the film is embodied in the main copy.

For this purpose, disregard a temporary copy of the film incidentally made as a necessary part of the technical process of making the main copy.

- (ii) The making of the main copy is not an infringement of copyright in the cinematograph film or in a work or other subject-matter included in the film.

*Dealing with main copy may make it an infringing copy*

- (iii) Subsection (2) is taken never to have applied if the main copy is:

- (a) sold; or
- (b) let for hire; or
- (c) by way of trade offered or exposed for sale or hire; or
- (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (iv) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

*Disposal of videotape may make the main copy an infringing copy*

- (v) Subsection (2) is taken never to have applied if the owner of the videotape disposes of it to another person.

*Status of temporary copy*

- (vi) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary copy of the film as a necessary part of the technical process of making the main copy, then:

- (a) if the temporary copy is destroyed at the first practicable time during or after the making of the main copy—the making of the temporary copy does not infringe copyright in the film or in any work or other subject-matter included in the film; or

- (b) if the temporary copy is not destroyed at that time—the making of the temporary copy is taken always to have infringed copyright (if any) subsisting in the film and in any work or other subject-matter included in the film.

**9AA Review of new sections 47J and 110AA**

- (1) The Minister must cause to be carried out by the end of 31 March 2008 a review of the operation of sections 47J and 110AA of the *Copyright Act 1968*.

Note: Those sections are inserted in that Act by this Part.

- (2) The Minister must cause a copy of the report of the review to be laid before each House of the Parliament within 15 sitting days of that House after the report is completed.

### 3.9.4 Questions raised in expert interviews

The following issues were the basis of the interviews with the experts, stakeholders, commentators and academics whose views were sought.

- How do you want to be attributed: anonymous, personal opinion, or view of the organisation?
1. Do you know about the 2006 Copyright changes we are focusing on – format-shifting and time-shifting?  
[Only those answering Yes were interviewed in full. Most were involved either in making submissions on behalf of their constituents or organisations, or providing advice to those preparing such submissions, or assessing the relevance of the proposed changes.]
  2. Did you have any predictions about what would happen, whether from business/creator, consumer, or commentator perspectives, after the changes? Who (which group) did you think it would most affect, if any?
  3. In particular, did you have any concerns about their possible impact?
  4. What do you think has actually happened, from business/creator end or consumer end?
  5. See the summary of our survey, the eight questions, answers, extracts from qualitative explanations by respondents. Are you surprised by any of the results? Anything out of kilter with your expectations?
    - level of practices, awareness and beliefs
    - reasons for beliefs
    - likely impact on behaviour
    - attitudes to copyright balance
  6. We have not been able to locate any data series which shows any impact in eg sales volumes, turnover etc. attributable to the format- and time-shifting changes. (Maybe there was no effect distinguishable from other factors, maybe there is no data specific enough to detect such a change, maybe we have missed something.) Are you aware of any such data which indicates any identifiable effect from the changes?

7. What if any impact do you see in the future? Any concerns?
8. Any comments about our online survey? Methods, flaws etc.  
[The limitations or implications of some of the questions were remarked upon by some of the interviewees. No critical flaws were identified, subject to caution about the viability of extrapolating the results to precise proportions of the wider population. Quantitative answers to question 8 were generally considered of little assistance, although they were broadly consistent with expectations and earlier answers.]

#### **3.9.5 Interviewees**

The following experts and stakeholders agreed to be interviewed in relation to their observations and opinions about both the legal changes and the content of the survey. Unless otherwise indicated, their views were personal opinions not attributed to their organisations. Some preferred to remain anonymous. Numbers in square brackets, like this [12], in the text refer to observations made by a particular interviewee.

##### **Not attributed by name**

- [1.] Anti-piracy body executive
- [2.] Musician, music industry body director
- [3.] Institutional librarian and industry body
- [4.] Creators' and producers' legal adviser (partner)
- [5.] Video industry body executive
- [6.] Music industry body executive
- [7.] Visual arts industry body counsel

##### **Personal views only**

- [8.] Bill Cullen, artist manager (One Louder Entertainment)
- [9.] Colin Jacob, consumer advocate (Electronic Frontiers Australia)
- [10.] Ian McDonald, adviser (formerly of Copyright Council, advocate for creator collecting societies and peak organisations)



- [11.] James Dickinson, Screenrights, film industry body executive
- [12.] Kimberlee Weatherall, law lecturer
- [13.] Lindy Morrison, musician (member of Music Council)
- [14.] Louise Buckingham, industry body (formerly Copyright Council, now PhD candidate)
- [15.] Richard Letts, music industry body executive (Music Council of Australia)
- [16.] Sabine Heindl, anti-piracy body executive (Music Industry Piracy Investigations)
- [17.] Stephen Young, University copyright officer (Melbourne University)

**Organisation attribution**

- [18.] Matt Dawes, Australian Digital Alliance, spokesperson, consumer and education institution advocate
- [19.] Robyn Ayres, ArtsLaw Centre of Australia (principal)

### 3.9.6 Sales figures for Australian music 2005-2009

Table 3.7: Australian wholesale music sales for the years 2005 to 2009.  
Source: ARIA.

VALUE \$000's	2005	2006	2007	2008	2009
<b>PHYSICAL</b>					
<b>CD Singles</b>	20,353	12,002	6,712	3,570	1,314
<b>Vinyl Albums</b>	346	256	199	392	1,050
<b>Cassette Albums</b>	421	181	54	8	12
<b>CD Albums</b>	444,729	421,941	362,061	323,800	320,900
<b>Music Video/DVD</b>	53,699	49,192	53,030	43,576	43,160
<b>Other</b>	719	343	192	102	432
<b>TOTAL</b>	<b>520,267</b>	<b>483,915</b>	<b>422,248</b>	<b>371,448</b>	<b>366,868</b>
<b>DIGITAL</b>					
<b>Digital Track</b>	2,471	11,560	18,695	27,087	38,534
<b>Digital Album</b>	940	4,149	6,778	13,150	21,846
<b>Mobile Ringtones</b>	3,729	10,280	9,976	8,249	6,306
<b>Digital Other</b>	767	1,868	4,515	5,704	12,558
<b>TOTAL</b>	<b>7,907</b>	<b>27,857</b>	<b>39,964</b>	<b>54,190</b>	<b>79,558</b>
<b>TOTAL</b>	<b>528,174</b>	<b>511,772</b>	<b>462,212</b>	<b>425,638</b>	<b>446,112</b>

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# Fair Use in Israel

*Dr Nimrod Kozlovski, Jonathan Klinger, Uria Yarkoni and Nati Davidi*

## 4.1 Introduction

Around March 2009, Ofir Kutiel decided to upload a video to YouTube, the world's most popular video sharing site. The video he created was based on short bits from dozens of other YouTube music clips, all by independent artists, including drums, guitar riffs, vocals and video. Kutiel, also known in Israel as Kutiman, created "Thru You: Mother of all Funk Chords",<sup>1</sup> a mash-up between many other works that reached more than a million views on YouTube.

Kutiman did not ask for permission from the artists, he just did what he thought felt right at the time.<sup>2</sup> "I thought it would be more fun if they find out for themselves," Kutiman said, explaining that after they found out, they were flattered by his use of their copyrighted work.

Above all else, Kutiman's approach represents the Israeli scope of fair use: Kutiman created something, but unlike what we think of an artist, Kutiman created what he created by using others' work, and only by others' work. His understanding that the whole is what's important, and that as long as no commercial gain is made, and everything is between friends, then it's OK to act, represents the Israeli approach towards fair use.

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<sup>1</sup> <http://www.youtube.com/watch?v=tprMEs-zfQA>

<sup>2</sup> Steve Mollman, "The YouTube DJ Cutting Up Copyright", CNN, 02.04.2009, <http://edition.cnn.com/2009/TECH/04/01/youtube.kutiman/index.html>

Kutiman's innovation is just one example of how things evolve in Israel and how innovation is fostered there; we set to inspect how copyright is perceived in Israel, in order to find out whether Israel has a special approach towards fair use.

In this first-of-its-kind research, we began by reviewing all the published Israeli cases which deal with fair use, the exemption allowing use of work covered by copyrights for purposes such as research, review, journalists reporting and other change similar purposes, in search of common threads in the courts' rulings.

We found limited but understandable common ground in the Israeli Fair Use doctrine, which is based primarily on moral rights and the effect on market value than on any other factor. Yet, we found that the doctrine provides very little legal certainty for the relevant stakeholders.

We then analysed the effect of the new Copyright Act of 2007, which was meant to codify the common-law fair use. We found that the process of "codification" practically established a new doctrine of fair use, which is yet to be interpreted.

We further aimed to analyse how the general public understands fair use, by a set of questionnaires sent to content creators, entrepreneurs and content consumers. The questionnaires provided us with a preliminary hint: content creators and content consumers in Israel have little to no understanding of fair use, and perceive copyright laws in a different manner than what the black letter law is. We found that the content creators are also willing to share their content with others, and want to build upon others' works.

Following the detailed questionnaires, we went and interviewed market participants and influential stakeholders in-depth, including executives in the venture capital industry, entrepreneurs, musicians, visual artists and photographers. We found that most content creators and key players in the market wish for a change in copyright laws, seeking it to be more permissive, and understand that the current state of copyright laws is unbearable, prohibiting them from most common uses, which they conceive as desirable.

In conclusion, we find the law in Israel, while evolving to meet the new digital creativity landscape, still lacks the balance which will reflect the social understanding of what should constitute a fair use and how copyright can foster creativity and innovation. But the law does not stand in isolation; the Israeli *praxis* evolved differently and allowed consumers fair uses even when the law was not on their side.

### 4.1.1 The Team

**Dr Nimrod Kozlovski, Adv.** Nimrod Kozlovski is a researcher, lecturer and consultant in the fields of Internet and information law and information security. He received his doctor degree in law (JSD) from Yale Law School and conducted his Post-Doc research in computer science as an associate in the computer science department at Yale University.

Dr Kozlovski consults to start-ups, high-tech companies and governmental bodies and serves in the advisory board of several technological companies. He is the author of the book *The Computer and the Legal Process* (Israeli Bar Association Press, 2000), co-editor of the book *Cybercrime* (NYU Press, 2007, ed: Jack Balkin et al) and author of numerous articles on the Internet and privacy law, computer crimes, computer search and seizure and electronic evidence. He was an Adjunct Professor for Cyber-Crime at New York Law School and is currently a lecturer in cyberlaw and e-commerce at Tel Aviv University. After receiving his LL.B and LL.M degrees with honors from Tel Aviv University, he clerked for Hon. Gavriel Kling, Tel Aviv District Court, and later for Hon. Dr Michael Cheshin of the Israeli Supreme Court. He is a fellow of the Yale Information Society Project since 2002.

**Jonathan J Klinger, Adv.** Jonathan J Klinger, Advocate, LL.B, LL.M, BA, practices cyberlaw, privacy and intellectual property in Israel and consults to Israeli hi-tech companies and start-ups. Jonathan is also the chief legal counsel of Hamakor, Israel's open source association and Eshnav, people for wise Internet use. Jonathan teaches Computer Game Development Law and researches privacy, p2p applications and intellectual property.

**Uria Yarkoni, Adv.** Uria Yarkoni, Advocate, is a practising litigator in the field of Intellectual Property. Uria has a BSc in Computer Science and a LLB, both from Tel Aviv University. Uria lives in the Israeli cultural centre, Tel Aviv, for over 20 years, and has intimate knowledge of the city's musical agenda, as well as musical experience of his own.

**Nati Davidi, Adv.** Netanel (Nati) Davidi, Advocate, gained his LL.B, LL.M (Law and Technology) from Haifa University. He also graduated from the Hacking Defined Course at the Technion Israeli Institute of Technology. Nati consults to Israeli high-tech companies and start-ups and in particular in the fields of Information Security, Computer Forensics, and Internet Media Monetisation. Nati is deeply involved in Creative

Commons operation in Israel and was the leader of the Israeli branch of Creative Commons in 2006-2009. For almost ten years he has been composing and producing music as his main hobby.

#### 4.1.2 Key Conclusions

The Fair Use Doctrine as evolved by the Israel courts suggests the following notions:

- **The Moral Right Foundation** – Court perceive attribution as the basis of fair use; without attribution there would be no fair use.
- **Commercialisation and Fairness** – Commercial use was generally perceived as less fair than non-commercial, but there is no clear judicial guidance or articulated rationale to base this foundation.
- **Public Perception of Fairness in Copyright** – The general public understands, erroneously, that a non-commercial use, which attributes the work to its original author, is fair *per se*.
- **Medium Neutrality** – The medium in which the copyrighted work was used does not affect the “fairness” of the use.
- **Party Neutrality** – Parties seeking fair use defence varied, and were often distributors and creators of content.
- **Israeli-Grounded Defence** – While fair use was imported from the common law, the courts who ruled in fair use cases hardly relied on foreign court decisions, and followed alternatively two Israeli Supreme Court cases with conflicting notions of fair use. The two cases in the Supreme Court had almost no foreign cases cited in them.
- **Linking Fair Use and Innocent Infringer Doctrine** – The courts erred (in doctrinal implementation) in creating a linkage between the fair-use defence and innocent infringer doctrine.
- **The Social Norm of Fair Use** – The general public is willing to pay for an easy and simple means to consume content, but also considers downloading content from the Internet as less wrong than purchasing pirated content in physical medium.

## 4.2 Copyright In Israel: Introduction

Israel's copyright regime was based originally on King George's Laws. Until the enactment of the 2007 Copyright Act, the position was that "[t]he existing Copyright Law in Israel originated in the 1911 British Copyright Law. It was applied to the British Mandate in 1924 and has been amended twice since"<sup>3</sup>. As Israel was under British Mandate until 1948, and in a similar manner to all other statutes in Israel, copyright law was supposed to be interpreted under the same common law guidelines, relying on common law precedents. However, Israel's Legal Basis Statute from 1980 refers also to other sources of law as it states that "had the court observed a legal question that remains unanswered and has not found an answer within legislation, legal precedents or by analogy, it will rule according to the principles of liberty, justice, equity and peace of the Israeli heritage."

Copyright was first enacted in the 1709 Statute of Anne of England, and was "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned"<sup>4</sup>. From that point in time, copyright underwent many changes, including being applied to musical works, and being extended from the original period of 14 years. Copyright was a means to balance between the author's right in his works and the general public's right to use that work. The ancient Irish Cathnach defines it as follows: "To every cow belongs her calf, therefore to every book belongs its copy".<sup>5</sup>

As a balance between the author's right and the rights of the general public, several exemptions were added to copyright law, such as the period in which copyright applies, whereafter the work would reside in the public domain, and other exceptions, which were added in common law, such as fair use.

The British legislation, enacted in Israel at 1919, excluded "any fair treatment in a work for self-study, research, review or journalistic excerpt."<sup>6</sup> Such exemption presented a short list of causes which would have allowed using copyrighted works for a closed list of purposes. The

<sup>3</sup> Debbie L. Rabina, "Copyright protection in Israel: a reality of being 'pushed into the corner'". Information Research, Vol. 6 No. 4, July 2001, <http://informationr.net/ir/6-4/paper110.html>

<sup>4</sup> [http://en.wikipedia.org/wiki/History\\_of\\_copyright\\_law](http://en.wikipedia.org/wiki/History_of_copyright_law)

<sup>5</sup> Cited in Wikipedia, *supra*, retrieved 18.04.2010

<sup>6</sup> Israeli Copyright Order, 1911, [http://he.wikisource.org/wiki/%D7%97%D7%95%D7%A7\\_%D7%96%D7%9B%D7%95%D7%AA\\_%D7%99%D7%95%D7%A6%D7%A8%D7%99%D7%9D,\\_1911](http://he.wikisource.org/wiki/%D7%97%D7%95%D7%A7_%D7%96%D7%9B%D7%95%D7%AA_%D7%99%D7%95%D7%A6%D7%A8%D7%99%D7%9D,_1911)

fair treatment doctrine was mostly based on UK legislation and UK interpretation.

While this was the general rule, copyright law was often interpreted, in the Israel scholarly society, by relying on US sources as precedents, and not on British cases. Yet, applying US common law principles to British legislation results in a hybrid theory of copyright that had a vast effect on fair use doctrine. Fair dealing was entered as an exemption to the British law in the Copyright, Designs and Patents Act of 1988; however, fair dealing was considered narrowly and applies only to a conclusive list of cases, where the fairness is a narrow funnel which excluded fair use in causes not specified under law,<sup>7</sup> Israeli case law interpreted the fair dealing clause in the eyes of the broader US definition.

In 2007, Israel recodified its Copyright Act, and established a new found definition of fair use in a rather broad and vague wording, which gave protection to many uses, from self-copying and circumventing DRM to reproducing materials for academic use. We found that even before the 2007 Act, Israel's fair use doctrine had allowed the establishment of an information society which had many advantages; much of the following have to do with Israel's competition law and understanding of the free markets, with acknowledgement of consumer rights, but the unique status of Israel's fair use has allowed the implementation of solutions in media, technology, academics and other fields of activity which had encouraged innovation.

Up to 2007, Israel's definition of fair use was rather wide in the codified law, and case law had broadened it in judicial decisions. Whilst Israel's statute, as it stands today, is quite similar to the United States', the interpretation made by the Israeli courts of the Act allowed freedoms and activities for media and other publications. The Israeli courts defined fair use laying on two axes, a financial property like axis and the moral rights axis, which is set as a pre-condition for fair use. When the court reviewed fair use, it inspected the moral right in a broader light than the financial right, and declared fair use when the use was with credit.

We inspected the case law before and after the 2007 legislation. The following section presents an overview of case law prior to 2007,

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<sup>7</sup> "Thus the Court must judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work, in the manner that The Sun did, for the purpose of reporting the relevant current events, in this case the published untruthful statements of Mr Al Fayed", *Hyde Park Residence Ltd v Yelland & Ors* [2000] EWCA Civ 37 (10 February 2000), <http://www.bailii.org/ew/cases/EWCA/Civ/2000/37.html>



analysing the decisions and reviewing what was considered fair and what wasn't under the previous legal regime.

#### 4.2.1 Case law prior to 2007

Until 1993, when *Geva* was decided, there was little or no mentioning of fair use doctrine in Israeli court cases. The first district court ruling was the Hallinger case.<sup>8</sup> Hallinger was a radio engineer who published an advertisement stating "If you want to release your man, call 03-385082." The defendant, a reporter from Galey Zahal, Israel's military radio station, called and played the first part of the recording from Hallinger's answering machine on air. The message was an advertisement. The plaintiff filed a suit claiming copyright infringement by broadcasting the answering machine's message, and the court rejected copyright infringement, mostly based on the fact that the work was too short to be entitled to copyright protection, as it did not constitute a "work." However, the court stated that had Hallinger established his right for copyright protection, the use made by Esteron would not be fair as it is not a "journalistic excerpt" but rather playing the work in full. When inspecting fair use, the court did not consider any of the other material considerations present in fair use doctrine, like the social value of the use or the effect on the market value of the work, but interpreted fair use as a *carte blanche*. This approach, which does not investigate deep into the fair use elements, seems to be the dominant judicial approach even after *Geva* was decided by the Supreme Court and should have directed the lower courts differently in their method of forming a decision in fair use claims.

#### Geva

The first decision by the Supreme Court was in the case of David (Dudu) Geva.<sup>9</sup> Geva, a well-known Israeli illustrator, used Donald Duck's figure in an 18-page story which was published in a larger work, *The Duck Book*, which criticised the Israeli society; the use of Donald Duck was a parody and mocked it. The Disney Company sought permanent injunction against Geva to prohibit him from using Donald Duck's image.

The Case, decided in 1993, was the first Israeli case to deal with copyrighted works as a part of a larger culture, invoking a claim by Geva that Donald Duck was conveyed into the public domain as a cultural icon.

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<sup>8</sup> CA 178/79 *Hallinger v. Esteron*, DD 1980(2) 45

<sup>9</sup> PCA 2687/92 *David Geva v. The Disney Co.*, CR 57 (1), p. 251, available at [http://www.nevo.co.il/Psika\\_word/elyon/padi-ng-1-251-l.doc](http://www.nevo.co.il/Psika_word/elyon/padi-ng-1-251-l.doc)

The Supreme Court quoted the District Court's decision and Geva's statement in that regard:

The respondent [*in the original case, Geva*] [claims] that DD became "public domain," but it seems that it mixed two definitions that are included in the phrase. DD is indeed "public domain" in the manner of international recognition. Any child knows him. But he is not "public domain" in the sense of its property right. That belongs to its author, for the period granted by the law and does not belong to any artist who wishes to take it and make use of it. The appellant [*Geva*] acknowledges the extensive meaning of his claim, and specifically states that it does not claim that copyrights on DD were lost. In his statements he wishes to elaborate: "We did not say, under this claim, as mistakenly understood by the district court, that Donald Duck's image is public domain in a sense that anyone who wishes may take it, but that *apart from the protected image of Donald Duck, the proprietary drawing with a commercially protected value, ... Donald Duck is a word or signal in a cultural language which is able to be used as such.* Therefore, the use is allowed if, and only if, it does not deprive the original work more than the graphical icon and conditioned that the use is made while providing a communicational message, where the use does not claim to be the source, but *au contraire*, claims itself to be a cultural use as a quote, signal, word.

While the cultural aspects of Donald Duck were indeed considered in the case, the court relied mostly on the newly enacted Basic Law of Human Dignity and Liberty<sup>10</sup> which constitutionalised the right for property and considered whether the "fair treatment" exemption, then residing in clause 2(1) to the Act,<sup>11</sup> covered Geva's use of Donald Duck. Geva claimed that his use should be considered as criticism of Disney's work, and the court asserted that fair use is not sufficient:

from the phrasing of clause 2(1)(I) it seems, that for the exemption lying in it to come to force we require two terms: the first is that the use should be for a purpose of self

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<sup>10</sup> Basic Law: Human Dignity and Liberty, LB No. 1454, 10th March, 1994, English version available at <http://www.knesset.gov.il/laws/speciaL/eng/basic3eng.htm>

<sup>11</sup> *Ibid.*

learning, research, criticism, review or journalistic reporting; while the second is that the treatment of the protected material under this use will be fair. The language of the clause states that these are cumulative; and to be emphasised: *fair treatment by itself does not promise protection. This is a crucial but insufficient condition. The use must fall into one of the said purposes in the clause, and the list is closed and exclusive.*<sup>12</sup>

The court adopted the four considerations presented in 17 USC 107: (i) the purpose or character of the use; (ii) the nature of the copyrighted work; (iii) the substantiality of the work; and (iv) the effect on market value, in analysing whether the use was fair, and explained, that “if the duck story has artistic-satiric value and if it doesn’t, the use of DD is indeed fully commercial; therefore the consideration of the purpose of the use and its nature encourages the classification of non-fair use.”

Although it may seem not aligned to *Geva*, the court in a later case acknowledged that commercial use may be fair.<sup>13</sup> The court did not address the issue of whether fair use is considered for a closed list of social purposes (not to be confused with the purposes of the work) or whether it has a broader meaning.<sup>14</sup> However, until the enactment of the 2007 Copyright Act, the statutory list of purposes was closed and narrow, and under the four US considerations, as stated above, relied on the commercial use more than any other factor.

The Israeli courts dealt with “fair treatment” only in limited number of cases prior to the new Act.<sup>15</sup> Unlike the US case law, which seems rather consistent,<sup>16</sup> Israeli cases varied in their application of the doctrine. At times, the court ruled that full copying of a copyrighted work to a Web forum for an educational institution constitutes fair use,<sup>17</sup> at

<sup>12</sup> When *Geva* was decided, the fair treatment clause did not contain the words “such as,” which the new clause does contain, and therefore, the court asserted that satire, unlike parody, does not constitute fair treatment.

<sup>13</sup> CA 2790/93 *Eisenman v. Kimron*, CD 48(1) 251, [http://www.nevo.co.il/Psika\\_word/elyon/9302790.doc](http://www.nevo.co.il/Psika_word/elyon/9302790.doc)

<sup>14</sup> Clauses 45-48 to *Geva*.

<sup>15</sup> A full list was compiled by the students in the Law & Technology Fair Use Clinic, available at <http://spreadsheets.google.com/pub?key=pah0DrMQnlcw1drUpAztiOw&output=html>

<sup>16</sup> Samuelson, Pamela, *Unbundling Fair Uses*. Fordham Law Review, Forthcoming; UC Berkeley Public Law Research Paper No. 1323834. Available at SSRN: <http://ssrn.com/abstract=1323834>

<sup>17</sup> C (Tel-Aviv) 64046/04 “*Al Hashulchan*” *Gastronomical Center v. Ort Israel* (Unpublished, 10.05.2007),

others the court ruled that even though the work was used for academic research, failing to provide credit to the original author prevents the use from being fair.<sup>18</sup> It may be said, that cases were dealt in court under a vague and unclear legal regime and without proper guidance from the Supreme Court.

The lack of clear criteria regarding what is fair led to a *de facto* legal regime in which works could have been copied in full,<sup>19</sup> or even made available to the public as long as they were made available by an educational institution.<sup>20</sup> All that done, with no clear guidance from the court. But prior to understanding how the courts understood fair use, we have to realize the legal status of fair use doctrine – whether it was a defence, an exemption or a right under the legal jurisprudence.

### **Fair use as an indoctrinated defence**

Until 2007, fair use was used as a defence in most cases where the court favoured the defendant, but there was no other open doctrine for the court to exempt him from liability. Even without relation to the *legal* doctrine of fairness, it was ruled in some cases that merely applying credit was the threshold for fairness when providing journalistic excerpts, as in *Zoom Communications*<sup>21</sup> where fair use was granted for displaying historical photographs, whereas the same claim was rejected in *Arad*<sup>22</sup> (and also *Noff*<sup>23</sup>) due to lack of credit. While not being considered one of the terms in the Copyright Act for fair use, attribution or credit constituted a material element when rejecting fair use claims of defence. In cases such as *Kaplansky*,<sup>24</sup> the court rejected fair use because although all the key

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available at <http://info1.court.gov.il/Prod03/ManamHTML4.nsf/10785E68B4E982CB422572DA003BE3C7/>

<sup>18</sup> C (Tel-Aviv) 46017/01 *Kaplanski v. Hartoch* (unpublished, 28.07.2004), available at <http://www.nevo.co.il/Psikaword/shalom/s01046017-295.doc>

<sup>19</sup> C (Jer) 8397/98 *Biton v. Sultan*

<sup>20</sup> C 1192/96 *NMC v. Holon*

<sup>21</sup> CA 3038/02 *Zoom Communications v. Educational TV*,

[http://info1.court.gov.il/Prod03/ManamHTML4.nsf/978E9606E5EB7B2D422572D3005D3230/\\$FILE/BDAE8F8CA95BB258422572CC002B5806.html?OpenElement](http://info1.court.gov.il/Prod03/ManamHTML4.nsf/978E9606E5EB7B2D422572D3005D3230/$FILE/BDAE8F8CA95BB258422572CC002B5806.html?OpenElement)

<sup>22</sup> C 69995/04 (Maj. TA) *Arad v. Miscal*, [http://www.nevo.co.il/Psika\\_word/shalom/s04069995-216.doc](http://www.nevo.co.il/Psika_word/shalom/s04069995-216.doc)

<sup>23</sup> C (Tel-Aviv) 1706/04 *Akiva Noff v. Israel Broadcast Agency*, [http://www.nevo.co.il/Psika\\_word/mechozi/m04001706-369.doc](http://www.nevo.co.il/Psika_word/mechozi/m04001706-369.doc)

<sup>24</sup> CA (Tel-Aviv) 46017/01 *Kaplansky v. Hartoch*, [http://www.nevo.co.il/Psika\\_word/shalom/s01046017-295.doc](http://www.nevo.co.il/Psika_word/shalom/s01046017-295.doc)

elements of fair use were retained, a journalistic excerpt was published without attributing credit properly but only in a minimal manner.<sup>25</sup>

The courts also ruled that any use that violates the author's right to first publish the work or that distorts the original author's intent in the work may be infringing. In two different decisions, both *Kimron, Belbo*<sup>26</sup> and in *Keren*<sup>27</sup> fair use was not granted when the right of first publication was taken from the original author. In another case, *Peled*<sup>28</sup>, the court determined that a use was not fair as it falsified the original intent of the author.

Courts also put an emphasis on the market value, where uses which effect the market value or merchantability of a work were found to be non-fair. In a few cases, Israeli courts acknowledged that *the damage to the work's market value is the core reason to reject or accept fair use claims*. In *Malkus*,<sup>29</sup> the court rejected fair use merely because "the more people will download songs from the Internet, the smaller the paying audience will be." In *Malkus*, a singer uploaded her album to the Web and allowed her fans to download her music for free. Her agent, Arnon Gold, sought for copyright infringement and won. Malkus's claim for fair use was rejected by the court, ruling that though promoting her songs may be a good cause, it cannot be fair to the plaintiffs, who make their money from the selling of the defendant's albums. The market value was also one of the considerations in *Keren* and in *Orgad*.<sup>30</sup>

### What purposes were acknowledged as fair?

**In commercial use** The courts generally did not address the purpose of the use in determining what is considered fair and what isn't. However, the courts acknowledged that commercial purposes do not mean, *per se*, that there is no fair use. In most cases the court rejected fair use defenses

<sup>25</sup> We can see that a similar case, but where credit was properly attributed, was granted a fair use defense. C 5293/05 (*Jer*) *Sasser v. Vesti*, [http://www.nevo.co.il/Psika\\_word/shalom/s05005293-306.doc](http://www.nevo.co.il/Psika_word/shalom/s05005293-306.doc)

<sup>26</sup> C 1143/83 *Belbo film productions v. Monitin Journalism*, DD 1987(2), 391, [http://www.nevo.co.il/Psika\\_word/shalom/S-NF-2-391-L.doc](http://www.nevo.co.il/Psika_word/shalom/S-NF-2-391-L.doc)

<sup>27</sup> C 1808/03 *Keren v. Yedioth Aharonot*. [http://www.nevo.co.il/Psika\\_word/shalom/s03001808-433.doc](http://www.nevo.co.il/Psika_word/shalom/s03001808-433.doc)

<sup>28</sup> C (Tel-Aviv) 22228/95 *Micha Peled v. IBA*, [http://www.nevo.co.il/Psika\\_word/shalom/s95022228-hk.doc](http://www.nevo.co.il/Psika_word/shalom/s95022228-hk.doc)

<sup>29</sup> C (Tel Aviv) 28435/04 *Arnon Gold Productions v. Layla Malkus*, [http://www.nevo.co.il/Psika\\_word/shalom/s04028435-270.doc](http://www.nevo.co.il/Psika_word/shalom/s04028435-270.doc)

<sup>30</sup> C (Tel Aviv) 19964/05 *Orgad v. Teva Hadvarim*, [http://www.nevo.co.il/Psika\\_word/shalom/s05019964-400.doc](http://www.nevo.co.il/Psika_word/shalom/s05019964-400.doc)

when the purpose was found to be commercial (*Kaplansky, Roy Export*,<sup>31</sup> *Orgad, Menusi*,<sup>32</sup> *Azgad*,<sup>33</sup> *Shimon*,<sup>34</sup> *Yaacov*,<sup>35</sup> *Malkus* and *Geva*). However commercial may be fair (as found in the vague *Ort*, where the court did not address the issue). In general, it was ruled in *Geva* that the more commercial a work is, the less inclined the court would be to accept a fair use defence. The sole case where a distinct commercial use was accepted as fair was in *Biton*.<sup>36</sup>

*Biton* was a case in which a publisher of a local newspaper sought compensation from another local paper that republished its opinion column in an advertisement presented as a part of an election campaign. The court stated that the commercial use is inherent, but a publicist's interests are that as many people as possible would read his opinions. The lower courts ruled in *Raviv* "when the use becomes a competition to the protected work and harms its potential market, it will not be fair use, and it does not matter that the purpose of the use is one of the purposes that the copyright act wanted to encourage."<sup>37</sup>

**In journalistic use** Generally speaking, however, when the purpose of the use was journalistic, the courts were more inclined into ruling for fair use than ruling against it (For: *Zoom, Zoom77, Biton*; Against: *Kaplansky, Arad, Menusi, Hallinger, Dorfman*,<sup>38</sup> *Keren, Noff, Belbo, and Sasser*). However, how does this affect the journalistic purpose of fair use? When inspecting all the cases which were ruled against fair use, one can see that apart from *Dorfman, Sasser* and *Belbo*, all the cases which rejected fair use defences were cases where the credit to the original author was missing, and had the proper credit been given, the courts would have been inclined to rule in favour of fair use. In *Sasser* fair use was rejected

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<sup>31</sup> CA 8393/96 *Hapaais Lottery v. The Roy Export Establishment Co.* [http://www.nevo.co.il/Psika\\_word/elyon/9608393.doc](http://www.nevo.co.il/Psika_word/elyon/9608393.doc)

<sup>32</sup> C (Petach Tikva) 2230/95 *Yedidya (Didi) Menusi v. Joseph Marco*, [http://www.nevo.co.il/Psika\\_word/shalom/S-NoPub-ZN-3-314-L.doc](http://www.nevo.co.il/Psika_word/shalom/S-NoPub-ZN-3-314-L.doc)

<sup>33</sup> CA (Tel-Aviv) 72672/04 *Azgad v. Schpiegelman*, [http://www.nevo.co.il/Psika\\_word/shalom/s04072672.doc](http://www.nevo.co.il/Psika_word/shalom/s04072672.doc)

<sup>34</sup> C (Tel-Aviv) 22917/03 *Shimon v. Naharot Rafting*, [http://www.nevo.co.il/Psika\\_word/shalom/s0322917.doc](http://www.nevo.co.il/Psika_word/shalom/s0322917.doc)

<sup>35</sup> CA 8117/03 *Eitan Inbar v. Assaf Yaacov*, [http://www.nevo.co.il/Psika\\_word/elyon/03081170-c14-e.doc](http://www.nevo.co.il/Psika_word/elyon/03081170-c14-e.doc)

<sup>36</sup> C 8937/98 *Biton v. Soultan*, [http://www.nevo.co.il/Psika\\_word/shalom/s98008397-3.doc](http://www.nevo.co.il/Psika_word/shalom/s98008397-3.doc)

<sup>37</sup> C 33122/00 *Raviv v. State*, [http://www.netlaw.co.il/it\\_itemid\\_608\\_desc\\_ftext\\_htm](http://www.netlaw.co.il/it_itemid_608_desc_ftext_htm)

<sup>38</sup> C (Tel Aviv) 75851/04 *Dorfman v. Ynet*, [http://www.nevo.co.il/Psika\\_word/shalom/s04075851-371.doc](http://www.nevo.co.il/Psika_word/shalom/s04075851-371.doc)

as there was an exact (full) copy of a book's chapter in a newspaper, with no distinct journalistic contribution.

Moreover, in *Hirschfeld*<sup>39</sup> the court inspected whether the use was fair and found that applying credit made the use fair. Therefore, one can understand that a journalistic purpose, with the proper credit attached, may be considered as fair use.

**In educational use** When adjudicating cases in which educational use was claimed to be a fair use, the courts were inconsistent in applying the doctrine and in their approach to educational use (For: *Peri*,<sup>40</sup> *Mekhula*,<sup>41</sup> *Ort, Tuaf*; Against: *Yaacov*). *Yaacov*, which was decided by the Supreme Court, dealt with a law professor who sought damages from a former student who typed his class notes and published a book based on the professor's lectures. The Supreme Court ruled that the use is not fair, as the nature and purpose of the use was commercial. In another case, *Mekhula*, the court was rather inclined to rule that there was no copyright infringement in works where the nature of the work was instruction in a community center, because of a dispute of the actual ownership and title of the work.

**In criticism** In cases that related to criticism the court mostly accepted the social value of criticism (For: *Zoom77, Biton, Tuaf*; Against: *Geva*) and generally ruled that when the work is required in order to criticise it, the use of it, even in full, may be fair. Analysing the court's rejection of the fair use defence in *Geva* is based mostly on the fact that *Geva* used Disney's protected works to criticise something other than Disney's work (parody, and not satire). In general, the Israeli courts acknowledged that use of a protected work in order to criticise it may be fair.

**In review** In cases that relate to review, the courts tended to accept the journalistic review of a work as fair (For: *Zoom77, Hirschfeld, Bass*,<sup>42</sup>

<sup>39</sup> C (Petach Tikva) 3098/07 *Hirschfeld v. Yom LeYom*. [http://www.nevo.co.il/Psika\\_word/shalom/SH-07-3098-a.doc](http://www.nevo.co.il/Psika_word/shalom/SH-07-3098-a.doc)

<sup>40</sup> C 59647/06 *Dr. Arnon Peri v. Lahav*, [http://www.nevo.co.il/Psika\\_word/shalom/s06059647.doc](http://www.nevo.co.il/Psika_word/shalom/s06059647.doc)

<sup>41</sup> C (Jerusalem) 8303/06 *Mekhula v. Hanan Cohen*, <http://www.nevo.co.il/Psikaword/mechozi/m06008303-158.doc>. *Mekhula* was accepted in part and rejected in part. While fair use was not properly discussed in the ruling, the nature and purpose of the rejected claims was fair use and for self-study.

<sup>42</sup> C 24595/97 *Ruth Bass v. Keter Publishing*, [http://www.nevo.co.il/Psika\\_word/shalom/s9724595.doc](http://www.nevo.co.il/Psika_word/shalom/s9724595.doc)

Against: *Zoom, Kaplansky, Noff, Belbo, Peled*). While three cases were ruled against journalistic review, one must take into consideration that in *Belbo*, when rejecting fair use, the court acknowledged the author's right for first publication and that both in *Noff, Zoom* and *Kaplansky* no credit was asserted to the original author. As noted before, the Israeli courts tend to regard lack of credit automatically as unfair, and this was the ground for the ruling and not the purpose of the use.

### **Did different media receive different treatment when applying fair use doctrine?**

An important thing to mention is that most cases which were ruled for fair use related to written media (*Zoom77, Biton, and Bass*) either in textual form or images. There was no reference in court decisions to any musical or artistic use, either as homage, mash-ups or remixes. The sole case in which fair use was raised as a defence when publishing untreated musical recordings was *Malkus*. However we can see that the court attaches no importance to the fact that the use of the original work was in the medium of video (*Zoom, Roy Export Noff, Peled*), newspaper reporting (*Zoom77, Biton, Menuisi, Arad, Sasser, Belbo, Orgad*), books and academic research (*Kimron, Kaplansky, Geva, Yacov, Peri*), radio (*Hallinger*) or Internet (*Malkus, Dorfman, Ort*). The fairness of the use was not treated differently in different mediums.

While the courts accorded equal treatment under fair use for different mediums, in cases not relating to fair use, the Internet was regarded as a "world wild Web" and allowed extreme measures against alleged violations of copyright. In one case, the District Court of Haifa allowed the blocking of DNS records of a Website,<sup>43</sup> and other cases, such as *Malkus*, regarded the Internet as a place where torts and other malicious actions are taken on a daily basis, and therefore require moderation,<sup>44</sup> or in some cases incur liability on Website operators,<sup>45</sup> even by the Supreme Court.

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<sup>43</sup> OCR 3485/08 C 167/07 *NMC Music v. Eli Amar*, <http://www.law.co.il/computer-law/eliamar.pdf>

<sup>44</sup> C 32986/03 *Buschmitz v. Refuah*, [http://www.nevo.co.il/Psika\\_word/shalom/s03032986-360.doc](http://www.nevo.co.il/Psika_word/shalom/s03032986-360.doc)

<sup>45</sup> RCA 1700/10 *Dubitzky v. Shapira*, <http://elyon1.court.gov.il/files/10/000/017/t04/10017000.t04.pdf>



**Did the courts acknowledge fair use as an exemption, a defence or a balance of interests?**

In the *Geva* decision, the court acknowledged the importance of fair treatment, and stated that “the purpose of the use has actual meaning in regards to the existence of copyrights, or in fact, to the question of infringement (and sometimes to the exemption to it)”<sup>46</sup>, and explained that copyright is a delicate balance between two conflicting interests<sup>47</sup>:

it is, in fact, a collision between basic values: the freedom of expression against the author’s right to his work. The collision in the related issue realises in part the tension in the base of copyright laws, as well as the base of other intellectual property laws: between protecting the free flow of information, on freedom of speech, and the free markets on the other hand, and between protecting the property of the author in his work.

When explaining why fair use was codified, the court asserted that<sup>48</sup>

several uses in several circumstances were exempted from the protection of copyright for reasons of public policy. However, the use of these is allowed solely in the framework of the law’s exemptions. The legislator was aware for the need to balance between the purposes of the copyright laws and other public interest, by providing legitimacy to certain uses, and added a clause in the Act.

In *Hirschfeld*, the court acknowledged the social value of fair use and explained that “in such publication there is room to promote social values like freedom of information and freedom of expression and then apply the exemption of criticism mentioned in clause 2(1).”

In cases where fair use was accepted, the court acknowledged that fair use is a defence, for example, in *Zoom*, the court stated that in order to apply for the fair use defence, the defendant should first show that his use was fair and that proper credit was granted. In general, when inspecting *Hallinger*, as the first court case that acknowledged fair use in general, you can understand that fair use was initiated as a defence mechanism. However, in *Geva*, where fair use was rejected, the court acknowledged

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<sup>46</sup> *Geva*, clause 16

<sup>47</sup> *Ibid*, clause 25

<sup>48</sup> *Ibid*, clause 28

fair use was an exemption to copyright, and not a defence, as in cases where the use may be fair, there will be no copyright infringement<sup>49</sup>.

### **Where does the burden of proof of fair use lie?**

The courts in Israel ruled that fair use is a defence, which the burden of proof lies on the defendant, such as in *Zoom* (and *Shimon*), but in certain cases, began by discussing fair use (*Arad*, *Biton*) before even checking if copyright applied in the case. In these cases, the understanding of fair use as a defence is what allowed the court to balance between free speech and copyright. In most cases, where fair use was rules, other defences applied as well: in *Biton* the court applied the innocent infringer doctrine, in *Bass* the court found the granting of an actual license, in *Hallinger* (where the use was ruled as unfair) the work was found not to be entitled to copyright. In another case, *Peri*,<sup>50</sup> the burden of proving who owns the copyright was put on the plaintiff, but once the defendant showed a license, the burden was reversed, and the court used fair use reasoning to reject the copyright claim.

### **The legal linkage between an innocent infringer and fair use**

The courts found significant connections, in some cases, between the fair use defence and the innocent infringer defence stated in clause 8. Clause 8 to the old Copyright Act determined that it would not be an infringement of copyright had the defendant not known about the infringement. In *Biton*, for example, the court ruled that the defendant's understanding that he was not infringing copyright, entitles him to a defence under clause 8, as there is a requirement for *mens rea* in performing copyright infringement. Moreover, in both *Zoom*<sup>77</sup> and *Arad*, the court acknowledged that the defendant's understanding that he was not infringing of any copyright, even if he were, entitles him to pay reduced damages.

It is more than reasonable to conclude that even if certain uses were not fair, then damages ruled in cases where the use was marginally close to fair use, were materially lower than damages in other cases. The courts used their discretion in damages in cases where the use was marginal, and allowed fair use to operate as a defence against damages.

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<sup>49</sup> In the later, Premier League decision, fair use was acknowledged as a right, and not a defence.

<sup>50</sup> C (Tel Aviv) 59647/06 *Dr. Arnon Peri v. Lahav*. [http://www.nevo.co.il/Psika\\_word/shalom/s06059647.doc](http://www.nevo.co.il/Psika_word/shalom/s06059647.doc)

A good example of this misunderstanding of fair use may be seen at *Ort*<sup>51</sup> in which magistrate judge Avigail Cohen found Ort, a school which operated an online forum, not liable for content taken from an online recipe Website. When finding ground for fair use, the judge ruled, after analysing the Israeli case law regarding service provider liability, that Ort was entitled to the fair use defence for the following reasons:

Ort in this case was innocent in all relation to the said infringement and I believe Mrs. Mattas [Ort's forum manager] that she was not aware to the existence of the said "infringement" until she received notice from Al Hashulchan [the plaintiff]. I reckon, in these circumstances, that this does not mean Ort and/or the forum manager Mrs. Mattas knew about the copyright infringement and most certainly they did not encourage or participate in a substantial manner the infringement by the forum participant named "Cherry". *It should be noted that the full credit to Mrs Goren and Al Hashulchan was written by this Cherry, so it is reasonable to accept the claim, where publishing this article in the forum by Ort in good faith, and that the use was fair.*

### **The necessity of use of the original work in making fair use**

Courts acknowledged that if the use of a work, either in part or in whole, is required in order to exercise one of the fair use purposes, it should be considered as fair. The court's decision in *Zoom77* shows how to understand this common law fair use and how it may be applied. The *Zoom77* case<sup>52</sup> involved a lawsuit by Zoom77, an Israeli photo agency against Haaretz, an Israeli newspaper. Haaretz published in two different cases, in his media criticism section, two images photographed by Zoom77's photographers.

The first photograph in question was a photograph of an Olympic swimmer blessed by a rabbi attached to an article in one newspaper, where the plaintiff claimed that it was robbed the exclusivity of the item by the competitor and criticising the "exclusivity" of such items; the other cause of action was an article criticising an item in another newspaper putting an image of Parliament member Ahmad Tibi with a misleading

<sup>51</sup> C 64045/04 *Al Hashulchan v. Ort*, <http://info1.court.gov.il/Prod03/ManamHTML4.nsf/10785E68B4E982CB422572DA003BE3C7/>

<sup>52</sup> C (Jerusalem) 8107/01 *Zoom 77 Ltd. V. Haaretz Publishing Ltd.* (unpublished), available at <http://www.nevo.co.il/Psikaword/shalom/s018107.doc>

title, suggesting that Tibi is supporting Saddam Hussein, when actually he was demonstrating against the bombing of Iraqi children.

Both cases were in the form of media criticism, and related to the use of the photograph, adjudicated together. However the Magistrate's Court of Jerusalem ruled differently in the two cases, explaining that one is criticism on the actual photograph and the other is not. The court's test – whether the journalistic report could survive without the photo – seems questionable, as the court itself describes both items eloquently without the use of these photos.

In another case, *Tuaf*,<sup>53</sup> the court explained that quoting lyrics of poems written by the plaintiff is required in order to criticise them and when “the name of the author was mentioned and it was specifically stated as a quote” there was no violation of the moral rights, and the criticism applied to the poems was fair.

To conclude, where there is need for actual use of the copyrighted work in order to criticise, review or report about it, the use would be considered fairer.

### **Who were the parties who sought the fair use defence?**

In general, fair use defendants were either involved in media and publication (*Arad, Sasser, Orgad, Zoom, Zoom77, Memusi, Biton, Hallinger, Dorfman, Keren, Noff, Belbo, Raviv*), research and study (*Kaplansky, Bass, Yaacov, Peri, Mekhula, Maoz*<sup>54</sup>, *Kimron*), or advertising (*Roy Export, Azgad, Shimon, Malkus, Geva*).<sup>55</sup> A material part of the cases involving fair use were cases in which a media company was involved, showing the importance of using others' work in daily activities (as shown also separately in the interviews we conducted).

However, the common criteria in all of the cases are the use of others' work as a part of the daily activity. In turn, the engagement in a daily activity of content creation, which regularly requires building upon others' work, exposes oneself to legal action for the use of these works.

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<sup>53</sup> C (Haifa) 12390-03 *Tuaf v. Teicher*, [http://www.nevo.co.il/Psika\\_word/shalom/SH-03-12390-173.doc](http://www.nevo.co.il/Psika_word/shalom/SH-03-12390-173.doc)

<sup>54</sup> C (Katzrin) 562/02 *Maoz v. Israeli Archeological Society*, [http://www.nevo.co.il/Psika\\_word/shalom/s02000562-370.doc](http://www.nevo.co.il/Psika_word/shalom/s02000562-370.doc)

<sup>55</sup> While Azgad is not properly described as advertising, it was content created by Azgad that was used to promote his business. Azgad's suit was regarding copyright in legal briefs and complaints.

### What was the language and reasoning courts used to allow fair use?

The reasoning the courts used to allow fair use were vague and incoherent with US or UK court authority. For example, in *Kaplansky*, the court asked:

it may be that the news-article applies to the definition of “research” or “review” or even “journalistic excerpt”, as the purposes stated in the said clause, but it is still to be ruled whether including those sections from the article in the news-article were made in a fair manner? There is no dispute that *the defendant did not make any commercial use when including those pieces in the news-article*, material criteria when deciding whether the use was fair. In fact, the real question which was raised in court was whether proper credit was granted to the plaintiff? Meaning: whether a reasonable reader could tell or know, that all the data published in the news-article that were taken from the article were actually taken from the article the plaintiff composed?

In *Orgad* the court ruled that “the more a use carries a commercial nature, the more the tendency to define it as unfair”. In *Sasser*, the court ruled that no fair use would be granted where there is no additional value in the work:

in reviewing or providing journalistic excerpt, as the publisher sees right to copy portions from a work without sufficing to report its content, in order to enjoy the protection of “fair dealing” it has to be spiced with evaluation and assessment of the things from different perspectives. The legislative purpose in providing protection for “fair use” came to express the need to defend the copier when the copy was made for a purpose which does not fall from the purpose of protecting the author.

However, the court in *Biton* ruled quite differently:

the things were published as they were, without any amendments, in a manner that their origin and author were mentioned. ...according to the writing around the article ...the purpose of the publication was criticism. Political-social-public criticism. This criticism which clause 2(1)(i) to

the law speaks of has to be interpreted in a broad manner, it is to be allowed breadth even to parodic or satiric criticism.

### **How much did the courts rely on foreign court decisions?**

As the origins of Israeli Copyright law are from UK and most academic work that relates to copyright is based on US jurisprudence, one could expect the courts to be relying heavily on comparative law. However, when examining the courts' decisions, we found that analysing fair use, only one court's decision used UK case law to define what fair use is (*Peled*) and three decisions used US case law (*Geva, Dorfman* and *Roy Export*). The other cases which cited UK Case law (*Geva, Yaacov, Azgad* and *Roy Export*) used the UK cases to assert copyright; the same was applied when citing US cases (*Hallinger, Belbo, Orgad, Yaacov, Azgad* and *Kimron*). However, and more surprising, a material portion of the cases regarding fair use in Israel did not even cite one foreign reference and seem to be an independent Israeli jurisprudence of fair use (*Menusi, Bass, Zoom77, Biton, Kaplansky, Keren, Maoz, Malkus, Noff, Sasser, Arad, Peri, Raviv, Ort*).

We find that the reliance of lower courts solely on two cases where the matter in question was an extreme case, and not following foreign decisions, to have impaired the lower courts in Israel and prevented them from ruling in coherence with either US or UK law, and moreover created a blur of uncertainty where fair use was not defined. We believe that the court decisions in regards to fair use should have had more reliance on foreign court decisions and applied more reasoning from them.

### **What was the courts' philosophy behind fair use?**

The Israeli courts seldom acknowledge the philosophy beyond fair use or discuss the balance between the social values, free speech and copyright. In *Roy Export*, we can find that the court ruled that:

the exemption in clause 2(1)(I) to the act has much importance, and there is reason to interpret it not in a restrictive manner. When we come to protect the original work we should acknowledge that over-protection may impede cultural and social progress, which relies on the past's accomplishments. From the nature of things, any progress or development which utilises society is created from the creative achievements of persons who pave the way by laying brick by brick.

The court later ruled that the fairness of the use is more important than the other factors. The same balance was brought by the courts in *Kimron*, where the court ruled that fair use is “a conflict between interests, which sometimes stand one in front of the other – a person’s right to defend the fruits of his work against society’s right to add and prosper on the fertile land of the past – between which we must balance.” Otherwise, lower courts fail to display a positive philosophy, but only act according to the (somewhat laconic) Supreme Court ruling.

### **Was the Supreme Court a shepherd in asserting fair use?**

The sole court decision that dealt with fair use in a lengthy and deep manner, *Geva*, did so without adding an *obiter dictum* to its opinion explaining what fair use is, but only discussed the current legal matter in question. When discussing the purposes of fair use (Clauses 31-42) there was no discussion regarding other uses than criticism, and the decision mentioned only criticism in the way presented in *Geva*, a parody of Donald Duck, without taking a comparative analysis. As to the other considerations, the court gave an opinion with an *obiter dictum* regarding the purpose of the use (clauses 45-48), but not to the character (clause 49, dealing solely with criticism), the substantially (clauses 50-53) and the effect on market value (clause 57). We believe that the lack of proper guidance by the Supreme Court is one of the reasons for the current state of uncertainty.

This means, that when coming to interpret the statute, and especially when not relying on foreign court decisions, the lower courts had no leading opinion to rely on, which may be the cause why many rulings made wrong interpretations of the statute or that the decisions lacked legal discussion of what fair use is.

### **How did the fair use doctrine crystallise in the lower courts?**

It seems that apart from two cases (*Geva* and *Zoom77*), the Israeli courts have declined to accept the four considerations provided by the US Copyright statute, and created a hybrid between fair treatment and fair use. While imported to the Israeli jurisprudence in *Geva*, the four considerations in the basis of fair use were not mentioned or discussed in most court decisions. Lower courts relied on a statement made in *Roy Export* in order to rule for or against fair use, where the court ruled that “I reckon that the first test – the fairness of the use, in which case the defendant’s activity is inspected, is the material test. Against it, it seems that the sec-

ond test, the purposes of the use, is minor.” Where courts followed this reasoning, which was decided only a few months after *Geva*, it meant that *Geva* was, technically annulled by the courts.

The difference between *Geva* and *Roy Export* was the difference between a marginal case and a case where fair use was just raised as a general statement. *Geva* had a material discussion of the nature of fair use, with inspection of the four considerations and discussion of the material rights and freedoms. *Roy Export* was a brief and inconclusive discussion of fair use, where the sole acknowledgement was that commercial use would tend to be less fair.

We found that most court cases did not follow either *Geva* or *Roy Export*, respectively, but selected which of the decisions to follow. In choosing which decision to follow, the courts actually chose the result of the case. We found that *Yaacov* and *Kaplansky* cite *Roy Export* in order to state that commercial use of copyrighted works may not be considered fair, which is broader than what was ruled in *Roy Export*. *Zoom* and *Keren* cite *Roy Export* before asserting that no fair use was made; where *Zoom* explains that the lack of credit is the reason and *Keren* depends on the market value, and *Azgad*, *Orgad* cite *Roy Export* solely to assert copyright.

On the other hand, the cases that cite *Geva* gave broader protection to fair use: *Bass*, *Zoom77*, *Biton*, *Orgad*, *Kaplansky* and *Sasser* cite *Geva* in order to examine whether fair use would be accepted, and most of them rule for fair use (*Kaplansky* and *Sasser* rule against fair use claim due to the credit issue). *Dorfman* follows *Geva* and *Bass*, ruled by the lower courts, to examine whether fair use would be established and declines fair use. *Keren* and *Azgad* cite *Geva* in order to explain that the damage to the work's market value is the reason why fair use shall not be established and *Yaacov* cites *Geva* as supplementary to *Roy Export*.

We find the existence of two leading decisions problematic, and believe that until the Supreme Court would balance between these two decisions, fair use would still remain uncertain.

### **Did fair use become an omnibus exemption from civil liability?**

When observing some court decisions it may seem that fair use was not used as an omnibus exception. The courts refrained from accepting fair use defence as a general rule, and inspected the matter on a case-by-case basis. In other cases, even when the four considerations stated in 17 USC 107 were established, the courts used the *Roy Export* ruling in order to rule out fair use, as they created the linkage between attribution, commercial use and fairness. In some cases, such as *Zoom*, *Kimron*, *Maoz*



and *Kaplansky*, the courts did not even address the issue of fair use when credit was not asserted. However, in *Biton*, fair use was granted without any inspection of the four considerations.

### Case law prior to 2007, a brief conclusion

Prior to the 2007 legislation, there was no certainty and no coherency between cases where fair use was adjudicated. The courts had no reliance on foreign decisions and no legal philosophy rules fair use jurisprudence. Most courts did not, even, grasp fair use or analyse it under the proper legal terms. Apart from cases like *Zoom77*, in which Judge Agmon-Gonen discussed the four elements and considerations of fair use, most courts rejected the fair use defence briefly and without discussion after finding that no credit was attributed (even though attribution was not essential after the 2007 legislation).<sup>56</sup> Therefore, when the Israeli Parliament set out to codify the fair use doctrine, it set out on a journey that had little or no legal subject matter. What was made during this process, as detailed herein, was an erroneous understanding of fair use.

#### 4.2.2 2007 Legislation

In 2007, Israel enacted a new Copyright Act,<sup>57</sup> after almost 60 years in which the Copyright Act was based on the British Mandate's acts from 1911<sup>58</sup> and 1924<sup>59</sup> which were put into force when Great Britain gained a mandate over the territories of Palestine-Israel. The new Act, which was in parliamentary discussion since 2003, was meant to be a codification of a compromise between creators and users.<sup>60</sup> The new Act represented a difficult compromise that on one hand included annulment of statutory

<sup>56</sup> See, CA (Tel Aviv) 23976/07 *Shooky Kook v. Omer Shamay Hacohen* where the courts ruled that attribution does not have to be made in every case, and that in some cases, where it is adequate and acceptable, credit may not be provided.

<sup>57</sup> Copyright Act (2007), Published LB 5768 No. 2119, 25.11.2007, p.38. English translation available courtesy of Prof. Birnack at <http://www.tau.ac.il/law/members/birnack/IsraeliCopyrightAct2007.pdf>

<sup>58</sup> Copyright Act (1911), Published at LOI 3 (70) 2633, available at [http://he.wikisource.org/wiki/%D7%97%D7%95%D7%A7\\_%D7%96%D7%9B%D7%95%D7%AA\\_%D7%99%D7%95%D7%A6%D7%A8%D7%99%D7%9D,\\_1911](http://he.wikisource.org/wiki/%D7%97%D7%95%D7%A7_%D7%96%D7%9B%D7%95%D7%AA_%D7%99%D7%95%D7%A6%D7%A8%D7%99%D7%9D,_1911)

<sup>59</sup> Copyright Order (1924), Published at LOI 1 (70) 364, available at [http://he.wikisource.org/wiki/%D7%A4%D7%A7%D7%95%D7%93%D7%AA\\_%D7%96%D7%9B%D7%95%D7%AA\\_%D7%99%D7%95%D7%A6%D7%A8%D7%99%D7%9D](http://he.wikisource.org/wiki/%D7%A4%D7%A7%D7%95%D7%93%D7%AA_%D7%96%D7%9B%D7%95%D7%AA_%D7%99%D7%95%D7%A6%D7%A8%D7%99%D7%9D)

<sup>60</sup> <http://blog.shemesh.biz/?p=428>

damages<sup>61</sup> *de facto*,<sup>62</sup> and on the other balanced between user rights and copyright holders' rights. The new Act, which already received academic attention,<sup>63</sup> is yet to be adjudicated by the Supreme Court and very few rulings have been reached by the Magistrate's and District Courts.

### **Fair Use under Israeli Law**

Though the new Act mostly meant to codify court rulings and added the necessary amendments to use copyrights in the digital age, it changed the previous "fair dealing"<sup>64</sup> clause into a "fair use" clause.<sup>65</sup> Clause 19 of the new Act states as follows:

- (a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
- (b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, *inter alia*, all of the following:
  - (1) The purpose and character of the use;
  - (2) The character of the work used;
  - (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
  - (4) The impact of the use on the value of the work and its potential market.
- (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.<sup>66</sup>

In comparison, 17 USC 107,<sup>67</sup> the US Federal Copyright Code, describes fair use in a similar manner, with minor differences that involve the balance between user's rights and copyright:

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<sup>61</sup> <http://www.ynet.co.il/articles/0,7340,L-3455352,00.html>

<sup>62</sup> <http://2jk.org/praxis/?p=1047>

<sup>63</sup> See also <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1458405>

<sup>64</sup> Or "fair treatment", under a different translation.

<sup>65</sup> <http://www.tglaw.co.il/fullnewse.asp?cat=6>

<sup>66</sup> Birnhack's translation

<sup>67</sup> <http://www.copyright.gov/title17/92chap1.html>

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The similarity between the statutes is not coincidental; the Israeli legislator formally adopted the US model of fair use,<sup>68</sup> but tried to create more certainty by setting specific categories which would amount to fair use, via secondary legislation, rather than only define the general criteria. While the scholar Netanel claims that the Israeli legislator adopted not only fair use in its US version, but also the case law and legal standard, we find a material difference between the two.

First and foremost, in spite of similarity, sub-clause (c) of the Israeli Act allows the Minister of Justice to determine, *prima facie*, that there are cases which constitute as fair use,<sup>69</sup> and this is meant to be a significant avenue for admitting fair use categories into the Israeli law.

<sup>68</sup> Netanel, Neil W., *Israeli Fair Use from an American Perspective* (January 14, 2009). *Creating Rights: Readings in Copyright Law*, Michael Birnhack, Guy Pessach, eds., Nevo Press, 2009; UCLA School of Law Research Paper No. 09-03. Available at SSRN: <http://ssrn.com/abstract=1327906>

<sup>69</sup> Similar to the approach presented at Carroll, Michael W., *Fixing Fair Use*. *North Carolina Law Review*, Vol. 85, 2007; Villanova Law/Public Policy Research Paper No. 2006-21. Available at SSRN: <http://ssrn.com/abstract=945194>, where Carroll offers to operate a fair use authority, pre-ruling on specific cases.

Moreover, the US list of purposes is broader than the Israeli one, allowing “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” against “private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution”; therefore, uses such as copying multiple copies for a classroom may still be open for interpretation of the courts.

As a matter of legal argumentation, the US law defines fair use as “not an infringement of copyright”, while the Israeli Act defines it solely as “permitted”, which might be open to interpretation, but still allow reasoning of whether it is an affirmative defence or exemption.

While both Acts perform similar tests containing four considerations,<sup>70</sup> the commercial factor is only mentioned once in the Israeli Act and twice in the US Act and does not seem to carry the same weight in the balance; clause 19(b)(1), unlike 17 USC 107(1) does not contain similar phrasing to “including whether such use is of a commercial nature or is for non-profit educational purposes.” The only consideration with commercial effects in the clause is “[t]he impact of the use on the value of the work and its potential market.” This, may, in some cases, generate a dissonance where a US and Israeli Case containing the same facts would be decided differently solely on the basis of the commercial nature. In light of the *Roy Export* decision, which ruled that commercial uses tend to be less fair, it is still a matter in question whether the new legislation reduced the commercial character of a use from being less fair.

Up to this day, the minister of justice has yet to issue a list of cases where uses are considered fair and to apply certainty to fair use. While the causes for the minister’s refusal to provide a list may be unknown, the new arena allows the minister to accept broader uses, and reduce litigation costs.

This legislation was a result of two years of discussion in the parliament and the public struggle between authors, creators and copyright organisations. The Parliament’s committee set to discuss the copyright act was the Economics committee, which discussed fair use in one session, on 2 January 2007. Prior to this session, the book publishers association and the producer’s guild,<sup>71</sup> and the software companies,<sup>72</sup> tried to define circumvention of DRM as non-fair. These parties joined the discussion

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<sup>70</sup> <http://fairuse.stanford.edu/CopyrightandFairUseOverview/chapter9/9-b.html>

<sup>71</sup> Knesset’s Economics Committee, 17.07.2006, <http://www.knesset.gov.il/protocols/data/html/kalkala/2006-07-17-01.html>

<sup>72</sup> Knesset Economics Committee, 27.12.2006, <http://www.knesset.gov.il/protocols/data/html/kalkala/2006-12-27-01.html>

in hope to change or somewhat narrow fair use, with hope of a new and thorough debate.

However, the discussion on 2 January, while quite intense,<sup>73</sup> left the software companies out of the game, and raised an argument between the publisher associations and the universities; where the publishers protested about the universities' use of materials when providing students reading material. Moshe Kachlon, the committee's chair, made a statement after the discussion and stated that "it would not be reasonable that students would have to pay for dozens of books just because the law won't allow them to take portions of them for study."<sup>74</sup>

But the tension inside the committee itself, if analysed, was between organisations, guilds and creators. Avihu Medina, which represented the songwriters association explained that unlike popular music, the only mean for poets to collect royalties would be from them being taught in universities. At the same time, the book publishers association and music publishers claimed against the fair use definition, stating that it was too broad for educational uses. In the end, the parliamentary committee had no discussion regarding fair use in other forms than education, and accepted the phrasing of fair use in the best possible way it saw to increase literacy, education and Israeli research.

However, memos sent in support of fair use came from the software companies, such as SAP and the broadcast channels, like Keshet. Their claims and wishes were not addressed.

Both the software companies and the broadcast channels were in favour of a broader fair use definition due to their role as defendants in fair use cases (as broadcast channels) and as reverse-engineering defendants in copyright cases. It is clear that the biggest employers and industries in Israel rely heavily on fair use, even in a broader sense than any other state.<sup>75</sup>

When balancing between the rights, parliament member Yoel Hasson explained that "while we try to protect the authors and their work, we have to stop here. When things like these start to cost money they just evaporate from the educational system. When you will begin complicat-

<sup>73</sup> Knesset Economics Committee, 02.01.2007, <http://www.knesset.gov.il/protocols/data/html/kalkala/2007-01-02.html>

<sup>74</sup> Knesset Economics Committee, Press Release, 02.01.2007, <http://www.knesset.gov.il/spokesman/heb/Result.asp?HodID=6985>

<sup>75</sup> Michael Factor, "Israel to be downgraded in the US Special 301 Watchlist," The IP Factor, 02.02.2010, <http://blog.ipfactor.co.il/2010/02/02/israel-to-be-downgraded-in-the-us-special-301-watch-list/>

ing a school with payments, rules and laws, it will drop from the agenda and no one will study it.”

When presenting the bill to the Parliament to vote<sup>76</sup>, Moshe Kachlon explained that the broad interpretation of fair use was the committee’s intent: “when forming the changes from the original bill, the committee acknowledged that a broad phrasing may create uncertainty where a user may not know *a priori* if a use he makes in a creation would be legitimate, and from the other hand we allowed flexibility in developing this arrangement and adapting it to changing circumstances.”

While the purpose of the Act was to add certainty and to decrease litigation, while allowing technological developments to occur, the result of the Copyright Act was not as they expected. The wording of the fair use clause, as detailed, herein, was less than conclusive and less appealing than expected.

### **Fair Use as a political impediment**

During the 2010 term, Parliament Member Meir Sheerit submitted a bill<sup>77</sup> introduced by Wikipedia Israel,<sup>78</sup> proposing that non-commercial use of government pictures shall be free of charge, as long as the use is with credit, and does not manipulate or alter the photos in any way. In an interview,<sup>79</sup> Sheerit stated that one of the reasons for the governmental opposition to the bill was the fear from use of the photos by organisations which are hostile to Israel or wish to promote the opposing narrative.

The bill was prepared following a study by Creative Commons Israel and Wikimedia,<sup>80</sup> which dealt with Crown Copyrights. The understanding and discussions were whether to apply fair use principles to these uses or to exempt them individually. The tension between personal uses and political uses was balanced by the Israeli ministry of justice, which drafted the bill for MK Sheerit, and exempted non-commercial use only.

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<sup>76</sup> Knesset Protocol, 19.11.2007, <http://www.knesset.gov.il/tql/knesset/Knesset17/html/20071119@06302307@011.html>

<sup>77</sup> Copyright Bill (Amendment – Authorized use of photos taken by public authorities), 2010

<sup>78</sup> Jonathan Liss, “Wikipedia Bill arrives to the Ministerial Committee,” Haaretz, 09.05.2010, <http://www.haaretz.co.il/captain/spages/1167961.html>

<sup>79</sup> Jonathan Liss, “Parliament Member Sheerit, why did the government object to the wikipedia bill”?, Haaretz, 10.05.2010, <http://www.haaretz.co.il/captain/spages/1168084.html>

<sup>80</sup> [http://wikimedia.org.il/%D7%96%D7%9B%D7%95%D7%99%D7%95%D7%AA\\_%D7%94%D7%9B%D7%AA%D7%A8](http://wikimedia.org.il/%D7%96%D7%9B%D7%95%D7%99%D7%95%D7%AA_%D7%94%D7%9B%D7%AA%D7%A8)

Interestingly enough, the definition of what is commercial and what is not has yet to be discussed.

It is interesting to note that both the language of the bill and the language opposing the bill use copyright as censorship or impediments on free speech. The rationale behind the bill, at least as stated by MK Sheetrit, was to allow the dissemination of Israeli *Hasbara* (propaganda) and use of the Israeli imagery for free by bloggers, Wikipedia and other organisations who wish to use them in order to enrich their works. However, at least as stated by MK Sheetrit, the governmental opposition was based on the fear of use by hostile organisations. Both parties held an opinion that government works are a part of the discourse and that copyright may be used to prohibit others' speech or to allow them to undertake one's narrative. These rationales underplay the economical aspects of copyright, and deal with fair use in a different manner, which is the ability to silence political speech.

### Premier League case

After the 2007 legislation, there was little or no copyright litigation and no adjudication of fair use. Up to the present point in time, relying on fair use as a positive defence under the new Act seemed risky and insecure, as no legal certainty was asserted under fair use. Apart from two cases, in which fair use was raised by the defendant but not argued in court and therefore rejected with no cause,<sup>81</sup> and a case where a magistrate court decided that when distributing copies of a chapter in a book by an educational institute may not be considered as fair use,<sup>82</sup> *Premier League* was the sole case where fair use was discussed in detail and argued in front of the court.

*Premier League* was, primarily a motion to reveal the identity of an anonymous Website operator who offered links to video streams which broadcast the UK Premier League's soccer games free of charge.

The Premier League's claim was that since an anonymous person was infringing on their copyright, the court must order his Internet Service Provider to reveal his identity. While the Israeli statutes have no fixed procedure on the revealing of anonymous users, the cases brought to court

<sup>81</sup> CA (Tel Aviv) 16187/07 *Irene Israeli v. Yedioth Aharonot*, <http://www.nevo.co.il/Psikaword/shalom/SH-07-16187-720.doc>, CA (Tel Aviv) 58032/07 *Tess Schefflan v. Yedioth Internet*, <http://www.nevo.co.il/Psikaword/shalom/SH-07-58032-525.doc>

<sup>82</sup> The court ruled distinction has to be made between a situation where the user is the teacher and the student, as the teacher may violate the author's rights, SC (Tel Aviv) 1194-03-09 *Averbuch v. Lavon*, [http://www.nevo.co.il/Psika\\_word/shalom/SH-S-09-03-1194-658.doc](http://www.nevo.co.il/Psika_word/shalom/SH-S-09-03-1194-658.doc)

relied heavily on the Draft Electronic Commerce Bill,<sup>83</sup> a bill drafted from 2005<sup>84</sup> (discussed at the Parliament Committee of Science and Technology), which contained clause 13(b) (formerly 15) stating that:

had the court been pleased that there is real danger that the contents of information uploaded to a telecommunication network or the distribution on said network, constitutes as a tort against a person or infringe his intellectual property right, it is permitted, by the request of said person, to order the internet service provider that provided access or hosting services, to disclose to that person details it may hold to identify the distributor of the data.

Israeli courts relied heavily on that clause when considering the requests to reveal anonymous posters,<sup>85</sup> where some of these claims were brought also against the Website hosting the data, as Israeli law does not exempt service providers from liability like clause 230 of the CDA.<sup>86</sup>

In a preliminary decision, granted on August 2008,<sup>87</sup> judge Agmon-Gonen requested that the State Attorney join as the case raises substantial questions. In the preliminary decision, Agmon-Gonen stated that in her opinion, broadcasting rights in games are not a part of copyright; Agmon-Gonen stated that “the question is: do we as a society wish that the legal regime of copyright at all, and the new added rights in the new Act, granting a wide monopoly to owners of rights, would apply to the broadcasting of sporting games, and if so, in what breadth?” Agmon-Gonen ruled that there is no broadcast right, stating that:

from a preliminary reading of the new Act, I reckon that due to the new balance the legislator created, *we cannot determine that there are copyrights in the photos of a live sport*

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<sup>83</sup> <http://www.justice.gov.il/NR/rdonlyres/4CCDE0BD-283C-4A21-8426-EFA5161C6E0B/9492/356.pdf>

<sup>84</sup> <http://www.justice.gov.il/NR/rdonlyres/D6BB4DAB-02D3-4F23-AA40-A86B8BD0A9A8/0/misharelectroney.pdf>

<sup>85</sup> DR (Tel Aviv) 541/07 *Jacob Sabo v. Yedioth Internet* (unpublished), 11.11.2007, available at <http://info1.court.gov.il/Prod03/ManamHTML4.nsf/72A9D6605EFACB4042257390003BFAB9/>, RCA (Haifa) *Rami Mor v. Yedioth Internet* (unpublished) 22.04.2007, available at <http://halemo.net/edoar/0090/morvsynet3.htm>, OCR 3854/07 *Walla! Communications v. The Municipality of Ariel* (unpublished) 16.01.2007, available at <http://www.netlaw.co.il/files/doc/ver20070116wallavariel.pdf>

<sup>86</sup> <http://en.wikipedia.org/wiki/Title47oftheUnitedStatesCode>, <http://www.law.cornell.edu/uscode/47/230.html>.

<sup>87</sup> OCR (Tel Aviv) 11646/08 *Premier League v. John Doe*, (unpublished), 16.07.2008, available at <http://www.nevo.co.il/Psikaword/mechozi/m08011646-241.doc>



*event.* As a matter of fact, what interests the viewers is the game itself, and there is no importance to the “original work”; meaning, the angles of photography and replays. The fact is that the audience watches the game in any broadcast and at any angle.

After the State Attorney joined the case, and as neither party claimed that there are no broadcast rights in sporting events, Judge Agmon-Gonen decided to refrain from determining this in her final opinion, yet decided not to disclose the John Doe’s details to the Premier League. When denying the motion, Judge Agmon-Gonen first described the recent academic approaches towards copyright, citing Lessig’s *Free Culture*<sup>88</sup> and the Israeli Scholars Yuval Dror<sup>89</sup> and Niva Elkin-Koren<sup>90</sup>, *Agmon-Gonen builds the case to present a new approach in Copyright when she asserts Fair Use as a Right, not as a protection.* “As I stated, user rights sometimes confront copyrights. Therefore, acknowledging the right to participate in the cultural life, and enjoying progress, as *a constitutional right* to be fulfilled under fair use, will bring an adequate balance between copyright and user rights. The fact that this is a right, and not just a defence, has practical meaning. For example, I believe that you can address the court to request declaratory relief that a specific use is authorised.”

Later, Judge Agmon-Gonen balances between the Premier League’s copyright and the general public’s rights, and checks whether streaming of sporting games constitutes as fair use. She explains that:

The new Act broadened fair use and left the court with consideration to inspect whether the cases brought to him constitute as fair use. When interpreting the clause and balancing between copyrights and user rights, you should take in consideration the fact that almost everyone in every day life shall be affected by this balance, and keep those persons from being hurt by a narrow interpretation of the user right, and in the centre, the right for fair use. You should take precautions not to turn a whole nation to infringers ... as the right for fair use relates to the public, which is not copyright-literate, you must ensure that what the court asserts will suit the digital-internet reality.

<sup>88</sup> Lessig, Lawrence. *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004)

<sup>89</sup> Dror, Yuval, *The Politics of Technology* (2005)

<sup>90</sup> Elkin-Koren, Niva. *User Rights*, (Hebrew) (2007). *Authoring Rights: Reading the Israeli Copyright Act*, Nevo Publishers, 2009, p. 327

*Some uses, which are determined as legitimate by most of the users, should be determined fair use; however, this does not mean that infringing activity performed by many knowingly as infringing, but only to what is considered legitimate.*

With this reasoning, Judge Agmon-Gonen jumped over the “such as” requirement in clause 19, and inspected the four considerations without relating to the purpose of the use, which has to be a protected social mean, finally explaining that as there is almost no effect on the market value, and that sports is a national recreation which should remain in the public’s domain, streaming of sporting games constitutes fair use.

### **Cultural aspect of Fair Use**

Judge Agmon-Gonen’s decision focuses on the everyday event of soccer and the importance to the general public in viewing sporting events. Judge Agmon-Gonen claims (by relying on the US case law of *Arriba*<sup>91</sup> and *Perfect 10*<sup>92</sup>) that first and foremost, by enabling more people access to more information, the general benefit to society grows, and there is almost no effect on market value because of two characteristics: the first is that people who watch streaming video over the defendant’s Website receive poor quality which does not substitute the real quality of a live feed, and therefore do not have a real effect on market value, as people who can afford to watch do so over satellite or cable television, but the other is that:

sport culture has a great social contribution, and you should enable many to watch national and global sporting games ... it may be that the digital age in a capitalist world mandates us to return to a court decisions which are two hundred years old, and allow access to sporting events to those less capable by the Internet. Watching soccer games, in sporting events, is socially important. Therefore, there is an importance that watching these games will be allowed to whoever wishes to, even if he cannot afford subscription to cable or satellite TV, or go out to have fun in a place that broadcasts the games.

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<sup>91</sup> *Kelly v. Arriba Soft Corporation* (280 F.3d 934 (CA9 2002) withdrawn, refiled at 336 F.3d 811 (CA9 2003))

<sup>92</sup> *Perfect 10 v. Google, Inc., et al.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006)

Judge Agmon-Gonen's approach represents a different understanding of the cultural rights granted in *Geva*. Agmon-Gonen allows the public to recapture the culture left behind in his mind, in contrast to the court's reasoning in *Geva* that Donald Duck was a part of his memories, childhood and values he grew up with but still prohibited from use. Agmon-Gonen's ruling might have opened a hatch for the public to reuse the resources that were taken away from him by copyright giants and recapture fair use.

Noda<sup>93</sup> explains the cultural aspects of fair use, saying that some times fan-based works or derivative works enhance the market value and are considered fair both by the authors and the users:

After more than two decades of fansub activity in the United States, however, a Japanese company has yet to pursue an infringement lawsuit against a fansub group in either United States or Japanese courts. The lack of enforcement is not due to ignorance of fansub activities on the part of Japanese anime and manga industries ... For the Japanese licensor, fansubs provide a free means of increasing their exposure to United States fans and distributors alike, in exchange for the remote possibility that fansubs themselves might scare away potential distributors.

### **Does Premier League mean a change in copyrights in Israel?**

While it may be tempting to analyse the Premier League as a focal point in Israeli copyright law, it seems that it does not represent the common opinion in Israeli court, and is still pending appeal. Premier League was an extreme case which was quite different from the regular copyright claims and initiated a public, open discussion on the right to fair use, access to knowledge and classifying content. Judge Agmon-Gonen opened the discussion on the fairness of the use that was claimed as an infringement. However, while not being the king's road in court decisions relating to copyright, the Premier League decision initiated a discussion of rights in the mainstream media about copyrights and fair use, from legal scholars such as Michael Birnhack<sup>94</sup> to more colourful reviews of the decision

<sup>93</sup> Noda, Nathaniel T., *When Holding on Means Letting Go: Why Fair Use should Extend to Fan-Based Activities*. Univ. of Denver Sports & Entertainment Law Journal, Vol. 5, p. 64, 2008. Available at SSRN: <http://ssrn.com/abstract=1376223>

<sup>94</sup> Michael Birnhack, "The balance returned: copyrights were not meant to protect corporations," 03.09.2009, Calcalist, <http://www.calcalist.co.il/articles/0,7340,L-3359946,00.html>

in the sport journals,<sup>95</sup> and received quite a lot of attention for a legal decision.

### **Interpreting fair use from now on**

Currently, fair use has yet to be discussed in Israeli Courts following the new Act, as with the limited litigation so far, it is yet too early to tell whether a new age for fair use has started. Following *Premier League*, which is currently on appeal, we believe that many cases may claim fair use as an affirmative defence.<sup>96</sup> However, the inherent incentive to settle copyright cases, rather than bear the costs of litigation, may limit judicial decisions which can enlighten our investigation into fair use principles.

With regards to statutory damages in Israel and their relation to fair use, Clause 56 to the Israeli Copyright Act replaced the previous statutory damage of 10,000 ILS minimum and 20,000 maximum to a broader 100,000 ILS maximum; while considerations similar to those considered when applying fair use, such as the scope of the use, the profit and effect on market value, as well as other considerations caused under-litigation of copyright cases where potential defences occur. Moreover, recent developments show that in some cases the courts ruled as low as 3,000 ILS (around USD\$800) per infringement in commercial use cases.<sup>97</sup>

### **4.2.3 Our conclusions**

The courts have applied fair use as a balancing factor between free speech, education and property, and in the end result mostly denied fair use claims. We found that the courts deformed the fair use doctrine; they did not apply it in an orderly procedure as implemented by the Supreme Court. The courts refrained from applying the considerations from UK and US precedent, and inconsistently applied procedures and burdens of proof. In some cases where fair use was not used to protect legitimate

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<sup>95</sup> Eitan Beckerman, "Following the district court of Tel Aviv's decision, you can watch the UK Premier League games for free on the Internet," Ha'aretz, 25.09.09, <http://www.haaretz.co.il/hasite/spages/1116748.html>

<sup>96</sup> For example, currently in discussion are a few cases which are still in the preliminary stage that may have *fair use as a right* claims, including C (Jerusalem) 5792/09 *Gabay v. State*, where Gabay is seeking damages for the State's use of his copyrighted PowerPoint presentation, and the state (and other plaintiffs) are claiming, amongst other defences, for fair use is research and study; and C 27120/08 *Citynet v. Man*, where Citynet claims that Man's use of photos from its Website is infringing and Man claims for his right for fair use as a part of his defence in a libel suit.

<sup>97</sup> CA (Tel Aviv) 18254/07 *Keren Ephraim v. Yail Printing*, <http://www.lawpubshop.co.il/?CategoryID=266&ArticleID=2098>

uses, courts used fair use doctrine to reject its use as a defence and find a way to apply liability.

We found that most courts denied fair use as a defence, and used the concept rather as a balancing factor between free speech, education and property. We found that in some cases courts had a less-than-perfect understanding of the law and applied fair use without relating to the definition of it as set by the Supreme Court in *Geva* or *Roy Export*. We also found that the courts tended to confuse fair use with other factors and considerations, causing a mix-up of onus, burden of proof and applications of defence claims, which caused the uncertainty in fair use.

Israeli courts did not form a mandating doctrine of fair use, and contrary to the statement that the 2007 legislation as stated herein was a codification of the case law, reality shows that fair use was vague and amorphous, and therefore the 2007 legislation came to create new norms. Up to 2007, the doctrine was incoherent and non-persistent, and applied by the courts without boundaries or restrictions. The Israeli legislator tried to adapt the US model and therefore did not just codify the law but imported a new doctrine with heavy use. Therefore, we can understand the opposition to fair use because it was incorporated as an enabling body of law.

Moreover, no best practices were created that ease the application of the law and create legal certainty; while the courts had the option to set best practices, such as determining that thumbnail photos were fair use or that showing up to 15 seconds from a movie may be fair, they refrained from doing so.

The lack of such best practices creates legal uncertainty which creates more burdens on the legal system, and as we will show later on in our research, the lack of certainty (as we believe) creates legal costs and can lead to wrong decisions.

However, we can say that while the *Premier League* was an extreme and unconventional ruling, it at least started a discussion around legal rights, by allowing the insertion of the consumer rights narrative into the legal language and dissecting fair use as a critical element in the process. The acknowledgement of consumer rights and the cultural rights presented in *Premier League* allow us a better understanding of the law as a reflection of society.

We reckon that establishing best practice guidelines by the ministry of justice, or by a voluntary association, adherence to which would render the use as automatically fair, may be a good start, but may also narrow the current wide application of fair use and mean that in some cases what is considered fair use may be litigated or negotiated for a license,

which may also harm innovation<sup>98</sup> and cause persons wishing to engage in fair use to license their uses for payment. Such licensing, for example, may mean that copyrights shall be replaced with a series of contractual obligations, setting further restrictions than the law meant in copyright solely due to negotiations between the parties where the licensing party is stronger than the licensee. In cases where fair use may be utilised, it is preferred to reject licensing and create such certainty under litigation or legislation.

Therefore, to promote certainly a set of permitted uses is required, which will serve as a non-conclusive list, as set in clause 19(2) to the Copyright Act, and stakeholders should call the minister of justice to issue one soon.

### 4.3 Israeli Innovation Industry, a case for fair use

Israel's innovation industry, start-ups and the high technology sector account for more than 40% of Israel's exports.<sup>99</sup> Israel's innovation and hi-tech enchanted people such as Dan Senor, who wrote the book *Start Up Nation*,<sup>100</sup> and provided food for thought for others. We researched whether the Israeli atmosphere and legislation encourages innovation, and whether fair use is one of these encouraging factors. A recent study made in the US found that around one sixth of US GDP is a result of fair use,<sup>101</sup> however this study includes some industries that are not innovation intensive, such as the photocopying industry. In contrast, and contradicting popular belief, the intellectual property industries have contributed far less than that the fair use industry, around 5%, at least in the United States.<sup>102</sup>

While we cannot similarly measure the size of Israel's fair use economy, and have much critique as to the means of the US survey, it is important to understand the breadth of fair use in the economy. Israel's economy does not centre around content creation, but does develop technology that utilises content. Israel's technology sector focuses on safe har-

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<sup>98</sup> For example, C (Jerusalem) 6306/04 *Schoken v. The Israeli Labour Party*, [http://www.nevo.co.il/Psika\\_word/mechozi/m04006306-415.doc](http://www.nevo.co.il/Psika_word/mechozi/m04006306-415.doc)

<sup>99</sup> Ora Koren, "The Leap in Israeli Export from independence until today", *The Marker*, 20.04.2010, <http://www.themarker.com/tmc/article.jhtml?ElementId=oc20100420567543>

<sup>100</sup> <http://www.amazon.com/dp/044654146X>

<sup>101</sup> [http://www.wired.com/images\\_blogs/threatlevel/2010/04/fairuseeconomy.pdf](http://www.wired.com/images_blogs/threatlevel/2010/04/fairuseeconomy.pdf)

<sup>102</sup> <http://www.riaa.com/ispnoticefaq.php>

bours<sup>103</sup> of the Copyright Act in many cases and exercises discretion in protecting its intellectual property with copyright litigation.

Therefore, we set ourselves on a journey to seek what was unique and distinct in Israel's copyright.

### 4.3.1 Israel's Competition Law and Incentives for Creativity

Israel has broad protection for consumer rights, allowing consumers protection and certainty to engage in business with others. For example, the Israeli Contracts Act<sup>104</sup> was interpreted as allowing the weaker side, which did not draft the contract, a permissive interpretation.<sup>105</sup> Israeli consumer rights reach further into limiting property rights in cases like returning products after sale<sup>106</sup> as a default rule, and requiring notices to be posted for consumers. Consumers may also cancel contracts for services such as cable, telephone, gas or other services provided against a monthly bill with mere notice or telephone call.<sup>107</sup> Therefore, Israel has a history of balancing in favour of consumers even in spite of property rights.

We can see that in a series of cases, the Israeli courts favoured the free markets and competition over property rights, with the understanding that as innovation comes, there will be more welfare.

<sup>103</sup> For example, a particular Israeli technology which was intensively discussed is Boxee; Boxee is an Israeli start-up which creates a media centre that has social features such as sharing, and allows third parties to implement plug-ins to create content. One of these plug-ins allowed Boxee users to view the contents of Hulu, the US-based video site, inside the Boxee player. Viewing Hulu's content was only available to persons who were entitled to view Hulu (US residents) and Boxee did not interfere with Hulu's business model; however, Hulu did the best it could to block Boxee (Avner Ronen, "The Hulu Situation", Boxee Blog, 18.02.2009, <http://blog.boxee.tv/2009/02/18/the-hulu-situation/>, <http://mashable.com/2010/02/04/congress-why-did-hulu-block-boxee/>).

But not only does Boxee present a new method of content distribution, it bases its software on the open source XBMC (Avner Ronen, "What made us start boxee", *Boxee Blog*, 12.06.2008, <http://blog.boxee.tv/2008/06/12/what-made-us-start-boxee/>) Moreover, Boxee allows protocols such as BitTorrent to be installed and relies heavily on consumption of pirated content. However, the interaction with streaming services and legal content providers made Boxee a huge success. Boxee is just one example of the Israeli innovation, and how bringing together of content, software and persons could create an innovative atmosphere; but when we began our research, explaining how Israel created start-ups such as Boxee came to mind.

<sup>104</sup> The Contracts Act (General Part), 1973

<sup>105</sup> CA 300/97 *Hasson v. Shimshon Insurange*, CD 52(5), 746, CA 769/96 *Rubinstein v. Zamran*, CD 42(3), 581, and also C (Tel Aviv) 3364/07 *Talmor v. The Payis Institute*.

<sup>106</sup> The Consumer Protection Act, 1981, clause 4c

<sup>107</sup> The Consumer Protection Act, 1981, Amendment 23, clauses 13C & 13D.

Therefore, fair use is only one case where consumer rights are balanced against property and limit property under the Israel law in order to achieve free markets and free competition. Moreover, with regards to the rights for free competition, Israel has a unique labour court, which rules consistently in favour of employees, and has invalidated anti-competition clauses,<sup>108</sup> refused to acknowledge that accumulated knowledge was sufficient to allow non-competition<sup>109</sup> and ruled that there has to be more than just the employer's interest against competition in order to make any non-competition clause valid.<sup>110</sup>

Applying the same restrictions on property rights, the Israeli anti-trust court determined that the Israeli Federation for Discs and Audio-cassettes was a monopoly, and placed limitations on its operation and royalty collection practices.<sup>111</sup> The same limitations on the exercise on exclusive rights were placed in other cases, granting far reaching protection for generic pharmaceutical makers,<sup>112</sup> and even adding Israel to the black-list of intellectual property protection states.<sup>113</sup>

In regards to data-rights, the Supreme Court ruled in favor of broader protection for the use of others' data.<sup>114</sup> Broader protection for the use of others' data was also granted by the lower courts,<sup>115</sup> citing *Feist*<sup>116</sup> as the precedent but providing broader protection than it, even for use of copyrighted images in *Google*, or using web-crawlers to harvest information

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<sup>108</sup> Supreme court ruling in CA 6601/96 *AES v. Saar*, <http://www.nevo.co.il/Psikaword/elyon/9606601.doc>

<sup>109</sup> LB (Tel Aviv) 5110/08 *Magnet Website Development v. Oded Gendler*, <http://web1.nevo.co.il/Psikaword/avoda/aa08005110-43.doc>

<sup>110</sup> LB (Tel Aviv) 10407/08 *Orin Schpalter Financial Education v. Nir Boldour*, <http://web1.nevo.co.il/Psikaword/avoda/aa08010407-82.doc>

<sup>111</sup> AT (Jerusalem) 3574/00 *The Federation for Israeli and Mediterranean Music v. The Antitrust Authority*, <http://web1.nevo.co.il/Psikaword/mechozi/m00003574-1.doc>

<sup>112</sup> Kfir Luzzato, *Pharmaceutical Patents in Israel*, [http://www.luzzatto.com/articles/11.12.08\(7\).pdf](http://www.luzzatto.com/articles/11.12.08(7).pdf), Ethan Bronner, "Issues Stand Before Israel in Joining Elite Group," *New York Times*, 19.01.2010, <http://www.nytimes.com/2010/01/20/world/middleeast/20israel.html?partner=rss>

<sup>113</sup> Michael Factor, "Israel to be downgraded in the US Special 301 Watchlist," *The IP Factor*, 02.02.2010, <http://blog.ipfactor.co.il/2010/02/02/israel-to-be-downgraded-in-the-us-special-301-watch-list/>

<sup>114</sup> RCA 2615/05 *Maariv v. All You Need*, <http://elyon1.court.gov.il/Files/05/160/025/p10/05025160.p10.HTM>, RCA 8304/09 *Bezeq v. Yellow Pages*, <http://elyon2.court.gov.il/files/09/040/083/S03/09083040.S03.htm>

<sup>115</sup> C 1379/06 *Hoogle v. Eran Raviv.*, <http://www.ravia.co.il/media/computer-law/hoogle1.pdf>

<sup>116</sup> *Feist Publications, Inc. v. Rural Tel. Service*, 499 US 340, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US>



from the data owner in *Bezeq* and *Maariv*.<sup>117</sup>

As to retaining free competition, Israel allows parallel import of goods that sometimes infringe on a person's exclusive right,<sup>118</sup> providing more incentives to compete in the market.

Israel's flavour of competition law also includes many stipulations in the general licenses provided to cellular companies,<sup>119</sup> for example, clause 14 for the *Cellcom License* stipulates that it may not harm the free competition by preventing or creating different tariffs for different companies, that it has to allow its users to mobilise their own phone number (clause 35-36) and that it has to provide equal calling rates inside the cellular network and outside it.

But free competition is just one element in the Israeli innovation landscape. Amongst other things, we believe that copyright laws reflect on that element, and went to examine it in our questionnaires and interviews.

### 4.3.2 Fair use and copyright literacy in Israel

In order to better understand how the Israeli public understands fair use, we conducted an online survey of 306 participants. The participants were requested to answer regarding their approaches to copyright and use of copyrighted material. The survey was directed towards content users and creators, in a technologically savvy community and was posted in a few blogs and in social networks. The average age of the participants was 29.43 with a standard deviation of 8.5.

The main rationale for the survey was to compare the views of content creators towards copyright laws and copyright norms, and to compare what was perceived in the general public as fair use and what was considered wrong. When comparing the survey results to the actual law, we found that most content creators and users understand what copyright is, though they consider fair use in a different way than the law codified.

We presented the participants with 21 questions which present their approaches and understanding of copyright. The participants were requested to rank their answers on a scale between 1 and 5, where 1 means

<sup>117</sup> Though a lower court decision had some conclusions regarding trespass by web-crawlers as something that might be considered as tort if stated in the Terms of Service, see SC 6000/03 *Uri Even-Chen v. Nir Souissa*, <http://halemo.net/edoar/0024/20030915vertict.htm>

<sup>118</sup> RCA 11019/09 *Toy Empire v. Diamant Toys*, [http://web1.nevo.co.il/Psika\\_word/elyon/09101190-s03.doc](http://web1.nevo.co.il/Psika_word/elyon/09101190-s03.doc)

<sup>119</sup> See, for example, the license for Cellcom, one of Israel's cellular operators: <http://www.moc.gov.il/sipstorage/FILES/4/634.pdf>

“do not agree” and 5 means “totally agree.” We posted links to the survey in various Facebook groups, through our Twitter accounts and blogs, and asked friends who participate in the content industry to send the link to our online survey to their friends. We intentionally designed the survey to address a focused group of persons engaging in content creation and use, and towards copyright literate users, not the general public who has almost no interaction with creating works or using others’ works. We believe that by doing so, our results reflected the understanding of the law of those who play a role in the copyright discourse and frequently engage in creation.

The survey’s results were interesting, and more interesting when compared to the case law and court’s interpretation of *fair use*. While we found that the general public has a similar approach to copyright guidelines as the court and law does, we believe that Agmon-Gonen’s statement that “Some uses, which are determined as legitimate by most of the users, should be determined fair use” should be understood as the funnel to discuss fair use: what is perceived by the public as normative.

*De facto*, courts determined fair use for cases where one of the purposes did not apply (*Ort, Premier League* and even the US Court’s *Sony v. Universal*).

**There is a problem in the availability of copyrighted material to be used:** People mostly agreed (3.68, stdev: 1.34) with the claim that there are not enough institutions to borrow copyrighted material from in order to use their work, and a majority of the participants know how to find works to base their work upon, such as Creative Commons licensed work or other sources (4.37, stdev: 0.92). Moreover, there is no problem of availability to locate works (regardless of the legality of such availability) (2.86, stdev 1.42).

**We also found out that a majority of the participants know how to find free content on the web** (1.84 said they do not, stdev 1.14), and most people believe that free content is as good as content they pay for (1.51, stdev 0.92 said they believe that free content is not as good as paid content).

It is worthwhile to mention, that the scarcity in available copyrighted works is one of the reasons courts acknowledged or have adopted the innocent infringer defense as a part of fair use. In cases such as *Arad* and *Zoom77* where copyrighted works were presented, we found the scarcity element as a cause of fair use, where without these specific elements, there could have been no use and no reporting or criticism. In *Keren*, the court itself explained that fairness was a matter of scarcity: the plaintiff photographed a unique event, the collapse of a floor in a wedding, which

resulted in the death of many people and the injuries of others, and his images were the only ones taken. Keren sold the images to a newspaper, but when another newspaper posted the images he took before the event, the court stated that “the plaintiffs acknowledge that the disaster was in national proportion and as such the public has interest in covering it, but they detest the fact that the photos used in the paper and the news company were photos which preceded the event, personal images of the plaintiffs that had no relation to the collapse itself.”

**A small minority of the participants create works based on the works of others** (such as remixes or mash-ups) (1.92, stdev 1.29), but when they do create (even works not based on others’), they generally prefer that others will use it (3.86, stdev 1.23).

**Most people share content they create on the Internet or on file sharing networks** (3.07, stdev: 1.55), but only a few participants edit content on Wikipedia or share online content (2.39, stdev 1.45).

The anomaly between the actual sharing and the will to share may be caused due to the fact that most participants are users and not creators; in general, people answered that they prefer sharing to a greater extent (closer to 5) than actual uploading.

Some problems with current copyright agreements and practice (unlike the copyright laws) in Israel show this anomaly; in the *Malkus* case, for example, an artist wanted to share her content for free on the Internet but was sued by her producer who had rights in the recording. Moreover, courts have acknowledged that the right to share and the moral rights of the authors are the main pillars of fair use (*Kimron, Zoom, Arad, Maoz, Noff*) and provided content creators the legal assurance that when others base their works on them they will be credited.

**We found that most people believe that they are allowed to download works and use them if it is not for commercial gain** (3.18, stdev 1.35).

Though this approach may seem as inconsistent with copyright legislation, it is indeed a factor in the courts’ rulings; most courts ruled that non-commercial uses may be fairer than commercial ones, where ruling that commercial use was non-fair (*Roy Export* and *Azgard*, for example) where no reported case was ruled against a person who used a copyrighted work for his personal purposes. One reason for that is that most of the time, personal uses (both fair and unfair) occur in the confinements of the home (and therefore the exemptions in the US law for personal performance and non-commercial performances in 17 USC 110).

In a recent case,<sup>120</sup> Waves Audio sought action against a person who held and sold copies of their software; where the defendant claimed that he received a copy from a friend in the university and he copied it to an investigator who came to consult with the defendant in regards to setting up a home studio. Damages of 150,000 ILS were asserted for the infringement, which was commercial; in a similar case similar damages were asserted.<sup>121</sup> However, the less commercial the use was, the lower the damages that were ruled. In *Arad* and *Keren*, high damages were asserted because of the high (or available) market value of the infringement (copying of still images); but when a publicly available news article was copied, the damages were lower (*Menusi, Kimron, Kaplansky, Maoz*).

There are no reported cases of any action against a personal user; which may have caused the public to think that personal use is almost always permitted. The general public may have also understood Orgad's "the more a use carries a commercial nature, the more the tendency to define it as unfair" as a negative, causing the *de facto* understanding to be "the *less* a use carries a commercial nature, the more the tendency to define it as *fair*."

As to use and downloading of content without actual permission: we surveyed three questions in order to understand what causes participants to download content from the Web: we found that the three factors we examined were quite similar: the most significant factor was the availability of a work (3.79, stdev 1.24); meaning that where a legal alternative exists on an available basis, people will tend to prefer to purchase it. Next was the quality of the work (3.18, stdev 1.43) meaning that **people will prefer to purchase works if the paid medium has higher quality** (such as DVD versus pirated CAM downloads) and lastly the price of the work (3.08, stdev 1.34). We believe that additional research is needed in order to find the incentives and to have better understanding of the causes.

These conclusions have some implications when understanding how the general public perceives fair use: a user that views a work in a website, such as YouTube, and knows that it is publicly available there, he has no way of knowing whether such work was posted there in a legal manner or not;<sup>122</sup> the general public has no indication whether a use is unauthorised, and the lack of such notification may also come to explain the

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<sup>120</sup> C 1188/08 *Waves Audio v. Gertel Roy*, [http://www.law.co.il/media/computer-law/vibes\\_audio1.pdf](http://www.law.co.il/media/computer-law/vibes_audio1.pdf)

<sup>121</sup> OCR 4108/08 *Yusifon v. Destinator*, <http://www.nevo.co.il/Psikaword/mechozi/m08004104-191.doc>

<sup>122</sup> Interview with Gil Hirsh

innocent infringer defence.<sup>123</sup> These conclusions may be backed up also by two recent studies from the Netherlands<sup>124</sup> and Australia.<sup>125</sup>

Moreover, understanding what the public determines as fair or not is a matter which consists mostly of the procurement process; the more it is simple and available, the more the public perceives it as legal; where a work is publicly available, and is offered for free on the Internet in fair quality, the public will understand it as legal. In a similar manner, *Premier League* explained that when the content broadcasted by the defendant was not in the same quality as the legal alternative as viewing it on TV, it does not interfere with the market value of the original work and people who want to obtain the work in high quality will prefer to purchase it.

Lastly, as to copy protection and DRM, we found that most people have access to equipment that allows them copying copyrighted content (1.98 do not have, 1.3 stdev), and that preparing copies does not require a great deal of time and effort (2.29 said it does, 1.33 stdev). On the other hand participants mostly disagreed with the statement that they cannot choose the time and place to use copyrighted works they purchased (2.23, stdev 1.41).

It is worthwhile to mention that DRM was a material issue when the parliament discussed the Copyright Act.<sup>126</sup> The Israeli software industry had discussed the matter of DRM and objected to the original Bill's clauses, which allowed the circumvention of DRM for reverse-engineering specifically, but insisted in asserting a DMCA-like clause against circumventing DRM. However, and with material disregard for the issue of DRM, the parliament accepted a phrasing of clause 24 which allowed the copying of software for backup purposes or for maintenance of authorised copies. However, the representatives from the academy stated that they need the reverse-engineering exemption in order to better understand software and promote research activity, as well as technology. The Israeli Antitrust authority also explained that "the more users and the more supplementary products a technological product has, the

<sup>123</sup> Interview with Offir Gutelzon

<sup>124</sup> <http://www.ivir.nl/publications/vaneijk/Communications>

<sup>125</sup> The Australian study by Andrew Ramage finds similar conclusions in regards to downloading of MP3 files illegally from the Internet; where similar answers were given to whether it was done because it was without copy protection (43.2%), convenient (37.0%) or too expensive to purchase (36.5%).

Andrew Ramage, "Top Three Reasons We Choose Illegal Downloads," News.com.au, 07.05.2010, <http://www.news.com.au/technology/download-culture/why-do-australians-choose-illegal-downloads/story-fn58oolp-1225863649562>

<sup>126</sup> For example, the 141 protocol from 27.12.2006, <http://www.knesset.gov.il/protocols/data/html/kalkala/2006-12-27-01.html>

higher the value of this product becomes, even the consumer understands that.”

The reason that anti-DRM circumvention clauses were not legislated in Israel has a direct connection to the lack of available legal sources to purchase content online in Israel. Where at the time of the legislation (2006-2007) no Israeli online store was available apart from <http://www.songs.co.il/>, which sold a limited repertoire, and the cellular companies which sold ringtones and mobile content. Israeli acceptance of DRM was not likely, where the online market for content was barren until 2008. Therefore, it is more likely that prior to allowing legal clauses that infringe on consumer rights, the legislator would have wished that at least an attempt to enter the market would be made. One can say that Israel missed the DRM bandwagon for many reasons, and with the current decline in DRM's popularity is not going to legislate any DRM clause.

Two additional things that have to be noted: the first is the material difference between attitudes towards purchasing a pirated copy and downloading it from the Internet. When surveyed, most people stated that purchasing a pirated copy is morally wrong (3.87, stdev 1.33) whereas in response to the question of whether downloading pirated copy is wrong, a smaller minority agreed (2.75, stdev 1.27). And finally, we found that most of the participants are not afraid of being sought by the copyright holders when they download illegal copies (2.22, stdev 1.37).

Understanding that downloading pirated copies is different from purchasing them from a store is not something based on case law; in *Malkus*, the court rejected the fair use defence and ruled damages that are equal to other cases are<sup>127</sup> where distribution of content was made. Also, as noted earlier, the courts were indifferent as to the media where the use occurred in determining whether the use was fair or not. The sole decision which might have had any reference to the difference between purchasing a pirated copy and downloading it was *Premier League*, which was an anomaly under Israeli law.

Furthermore, we believe that most users do not fear litigation over copyright downloading due to two, separate and equally important factors. The first is the recent *Rami Mor* decision,<sup>128</sup> which reflects the public's view of unmasking anonymous Internet users and a general lenient

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<sup>127</sup> C (Jerusalem) *The Performer's Guild v. Eurotex Textile*, 120,000 ILS in damages. For example, was a case where public performance of a radio station in a factory occurred.

<sup>128</sup> RCA 4447/07 *Rami Mor v. Barak*. <http://elyon1.court.gov.il/files/07/470/044/p10/07044470.p10.htm>

approach towards file sharers<sup>129</sup> who are not distributors. The Mor decision stated that there is currently no legal process to unmask anonymous internet users in Israel for tortuous acts. The other factor, which is equally important, is that Israel is not a material content producer, and that most content downloaded is not original Israeli content. Some bloggers and popular users say that downloading Israeli music is morally wrong<sup>130</sup> and call not to download Israeli music.<sup>131</sup>

Moreover, most Israeli content is currently available free of charge. As of 2008, the major Israeli TV channels make most of their original content available on the Internet for free.<sup>132</sup> The Israeli Cable Company, "HOT" makes most of its shows available,<sup>133</sup> and so does the satellite company, "Yes".<sup>134</sup> So, where most of the Israeli original TV content is available freely, there is no difference between downloading it through P2P, viewing it on YouTube, or using the original legitimate means.

#### 4.4 Interviews with market participants

We interviewed, between April and May 2010, persons we believed may have additional insights on copyright and innovation; ranging from people active in the Israeli start up and venture capital community, musicians, photographers and journalists. We conducted a brief interview with each of them, attempting to understand how they grasp copyright law, do they believe copyright law protects them, and whether they use others' work when creating and allowing others to use their work.

We conducted these interviews in order to have a better understanding of our results in the review of case-law and questionnaires, and to see through the market makers' perspective: how does copyright allow or impede their means of operation and informs their daily activities. We conducted the interviews with 15 persons, over the phone or by personal meetings, and the length of the interviews varied. Some participants pre-

<sup>129</sup> For example, the *Eli Amar* case and *C (Haifa) NMC Music v. Avi Hirsch*, <http://www.nevo.co.il/Psikaword/mechozi/m05000915-584.doc>

<sup>130</sup> Gy Hajaj, "How not to be assholes", *Oneg Shabat*, 05.01.2007, <http://haoneg.com/buy-original>

<sup>131</sup> Moran Lifschitz, "The 11<sup>th</sup> Comandment: thou shall not burn", 14.04.2007, <http://archive.scoop.co.il/article.html?id=7147>

<sup>132</sup> Keshet is Available on <http://mako.co.il/>, Reshet on <http://reshet.ynet.co.il/> and Channel 10 publishes most of its TV shows on <http://nana10.co.il>

<sup>133</sup> <http://hot.ynet.co.il/home/0,7340,L-7250,00.html>

<sup>134</sup> <http://yes.walla.co.il/>

ferred to remain anonymous, and some requested not to be associated with what they presented us.

**How did the participants grasp intellectual property rights? Did the participants have a coherent understanding of the law?** Whilst participants generally had knowledge of how copyright laws work and what they are meant to protect, there were some misunderstandings as to where the border between copyright and patents is placed, and what copyright may not protect. However, most participants showed that there is a need to change copyright laws, by reforming them and allowing personal, non-commercial uses of others' copyrighted works (Gil Hirsch, Anonymous VC Participant, Bruno Grife, Ran Harnevo, Tomer Lichtash), by creating a central registrar of copyrights in similar manners to the US (Offir Gutelzon) or by allowing users to know what their rights are (Tomer Lichtash).

However, most Israeli entrepreneurs did not address the Israeli laws as something relevant to their daily operation. Ran Harnevo explained that "most of the Israeli endeavors are targets to the international markets"; Israeli start-ups build their business models on going global as the Israeli market for content is quite limited. Most participants did, in fact, build their business models on foreign markets and not the Israeli one.

**What was the participant's biggest concern in regards to copyright laws?** Participants showed concern that copyright laws are not enforced enough in Israel (Bruno Grife, Gil Lavi, Noa Redelman) and that smaller players in the media market are left contractually inferior in comparison to the big companies (Bruno Grife, Ran Harnevo, Gil Hirsch). However, participants from the hi-tech industry also noted that copyright law may inflict barriers on their creativity and ability to produce, as well as create legal costs on developing new ideas and start-ups (Lichtash, Hirsch and Shimshon). However, participants who were active in more than one creative field (Noa Redelman, Tomer Lichtash) had a problem balancing between their needs for copyright protection as an artist and as a part of the software industry.

Some participants believed that copyright laws are no longer relevant to them, even if they create content, as they enforce their rights by applying social norms, and not legal threats. Dor Garbash and Alizarin Weissberg stated that "when an advertising agency took our credit in a campaign they published, we revolted the internet against them" as their mean of enforcement. Noa Redelman stated:



The only defence [I] want as a creator is being attributed as the author of the work. The reason is due to my motives as a creator: what thrives me is my express[ion], the will for being known . . . it is sufficient that people know that I did this and no one else will take credit on it.

Tomer Lichtash, an interdisciplinary creator explained his view on the Copyright Act:

First of all, the Copyright Act is very restrictive, it protects a huge industry that means it cannot be all good. There is a material economical interest that guards and limits use, and no matter how I try to find a loophole, and not only in Israel, the interests will prevail. From Disney, which is the worst of all and through innocent things that people take something and draw Bambi in kindergarten when infringing the law. It just shows me how this law cannot be kept.

Offir Gutelzon from PicScout explained that in his understanding, copyright might entitle him to some protections, but they are useless:

I reckon that they [copyright laws] entitle me protection, but I guess I won't use it. I don't see the stage where protecting intellectual property is something I can rely on the law in order to get protection. It's a function of my focus. The law grants me protection, but doesn't allow me to disclose the work easily. If I see a company that does exactly what I do, I can't reverse-engineer their code to see if they copy from me.

Ran Harnevo from 5min.com said:

Israel has a problem, it has old laws, draconic laws, and if you are an entrepreneur and want to cooperate with the establishment it costs too much. I have, for example, some friends who own bars and it's too expensive for them to pay royalties nowadays in a new bar, it's unreasonable if you start something new.

Ben Enosh from PlyMedia explained:

Usually we want [to protect intellectual property] from our efforts: creating code is the motivation and the best way to protect it is not to disclose it but to provide services with the software. . . . we provide our software as a service, but in

other products we have patents where possible. We don't extremely believe in this issue, but we take steps due to consideration of portfolio investments.

Gil Hirsch from Face.com said:

What lacks today is the adaptation of the laws to digital distribution, because they don't allow it [digital distribution] and there's something about going digital that makes you lose control, up to a point where I want to launder all the copies between a person inside his own home.

One VC executive we interviewed and requested to remain anonymous, explained that "quite a few start-ups check their rights before starting, either to protect from copying or to see if they step on someone's toes, and it influences the business model occasionally," however, he stated that unlike patents, which may be a deal-breaker in terms of investing, copyright infringement is a mere impediment, and sometimes not considered a barrier. Gil Hirsch explained in detail:

It was customary that at least between commercial entities there would be violations in regards to content. Content lawsuits occur all the time and the question is on what grounds you should sue; you see that intellectual property litigation is entirely business oriented and the preliminary question is who has the money to be sued.

**Did the participants think that copyright protected them?** Most concerns from copying or infringement of copyright was against other creators with commercial intent and not from unauthorised copying by users or fans. Bruno Grife, from the band Terry Poison, for example, explained:

The reason is that I invest my time in intellectual property, and that's the only way to protect it. If my intellectual property is digital media or audio, it's different, but if I compose then someone could *steal* from me in the composition level, which is harder to prove since you have to prove that it's not derived or that it has similarity to the original.

Gil Hirsch, the entrepreneur of Face.com, explained:

The reasons [to protect my copyright] are commercial. But I protect it in the least possible way. Where I can release and protect myself, I prefer to do so. We write articles for the university to explain what we do, or we provide insights on what we do, so I don't perceive everything as a threat. If the engine was an API and someone would have copied it, then it would be *stealing* intellectual property per se. What did you steal? Hours of work, research, money. And here it would be clear, as everyone who *stole* it *stole* something that is really problematic which he has only one way to obtain.

However, the use of the word stealing in regards to copyright, though it lacks official standing, was widespread amongst participants. No major difference was spotted when interviewing musicians and people from the hi-tech industry.

A different approach was given in the interview with Dor Garbash and Alizarin Weissberg, two young publishers who operate an online magazine. The two expressed a need to be read by wider audience, and wanted as many people as possible to replicate their content. They said that the pre-rolled advertisements and credit are sufficient and that copyright is not a barrier, as they believe that it only disables their productive process.

I think that the dynamics in our society is the need for respect and the only way to get it is by granting monetary value to a work. I would be glad if dynamics that occur in the field of art would occur in the field of entertainment and media... such as more emphasis on whom the author is, individualism in creation.

In general, reference to copyright infringement as stealing was noted not only once, showing that participants favoured the narrative presented by the copyright holders.

**Do, in general, participants tend for stronger copyrights?** In general, most of the people who create content use others' content when creating (the exceptions were Gil Lavi and Bruno Grife, which avoid doing so) and therefore would have preferred broader copyright limitations, such as allowing to create on others' work for non-commercial uses. Tomer Lichtash, for example, explained that use of others' content in an *homage* is something that may be considered as a compliment, and not as a prohibited use. Noa Redelman and Bruno Grife explained that when they perform cover versions in live shows, they do so in order to pay tribute to

the original author, and Grife explained that sometimes he uses others' work in live shows to create new things. Participants more involved in technology used quite a lot of open source in their creation (Gil Hirsch, Ran Harnevo) and allowed others to use their works with copyrighted material (Ben Enosh). In general, stronger copyright laws may put impediments on some of the participants' business models or deter them from engaging in business.

Noa Redelman explained that stronger copyright won't assist her, as a growing artist:

Copyright laws reflect the hegemony in the field, and the Internet destabilises their certainty. As a creator, you are torn between the two camps; I say to myself that I'm in favour of stricter copyrights and punishment, but these laws serve the rich. Who makes money from [my] music? A small percent comes to the artists, the money flows to those who already have the money, and reality killed the means of enforcement.

**Do participants use or rely on the use of works of others?** The most important conclusion from conducting the interviews was that none of the participants understood how they create upon the works of others. For example, software developers had to be reminded that they build on open source applications when they create (Gil Hirsch, Ran Harnevo, Ben Enosh) and photographers had to be reminded that the objects in the photos may as well be entitled to copyright protection (Gil Lavi), musicians had to be reminded that they perform cover versions (Noa Redelman, Bruno Grife). In general, due to the invasion of copyright to the private area of the personal area and applying copyright principles on many of the daily uses people perform, most participants did not grasp how copyrightable was their personal space.

Yet once comprehended, several of the participants actually base their business models on others' creations (Lichtash) or by allowing others to use their services with regard to copyrighted material (Hirsch), and others store and process copyrighted content in order to provide the content owners more power over it (Guetelzon). Lichtash explained that in his view everything is a derivative work:

When you read a book, you're not absorbing, but once you read a book and write a note on it, you become an author: you can issue a companion to a book, but you still are

in fear in cases like the Harry Potter companion [that] was sued over.

Even participants from the venture capital industry had uses of copyrighted material in PowerPoint presentations, and used it in their blog posts when they did not find an adequate free alternative.

### **Do participants allow others to use their works without paying for it?**

Some participants base their business models on allowing others to use their platform without payment in general. For example, Ran Harnevo's 5min.com operates a video player allowing content publishers to publish online content, and generates revenues from advertisements shown. 5min.com has won several prizes, such as the Tech-Aviv award in 2009,<sup>135</sup> NY Top-Startup Competition in 2009,<sup>136</sup> and operates with the content publishers, where all the content is original. Another platform which allows using its intellectual property is Gil Hirsch's Face.com. Face recently opened an Application Programming Interface, allowing others to use Face.com to develop their own applications<sup>137</sup> without any charge. Face.com's business model is based on allowing others to use the platform in a non-commercial way, where commercial uses would be billed. Face.com also won the 2009 Techonomy competition.<sup>138</sup> In general, the favorable Israeli start-ups who received media attention, such as Boxee, Face.com and Katlura, all operate on an open platform which is their business model. The openness is at the forefront of Israeli innovation, and might have something to do with the fact that these start-ups succeed where others fail: they build their business models on permissions and not restrictions.

Bruno Grife from Terry Poison explained that he might provide others his pre-mixed tracks to apply remixes or edit them, and that he would be flattered if others would cover their music, but if it were for commercial purposes, he would like to receive some compensation.

### **Do participants tend to enforce their copyrights in a strong manner?**

Most of the participants did not tend to enforce their copyrights, especially for non-commercial uses. Some explained that some uses, even

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<sup>135</sup> <http://www.vccafe.com/2009/12/30/5min-wins-top-spot-in-techavivs-peer-awards/>

<sup>136</sup> <http://www.prnewswire.com/news-releases/5min-wins-ny-video-2009-top-startup-competition-79819272.html>

<sup>137</sup> <http://blog.face.com/2010/05/03/api/>

<sup>138</sup> <http://blog.face.com/2009/03/31/facecom-voted-best-of-show-techonomy/>

unauthorised, may be flattering (Grife, Redelman), and that they may request credit (Lichtash, Shimshon), but that in general, as long as the use does not interfere with the fair market value, enforcing it may be a costly activity (Harnevo) and they will avoid doing so unless specifically required. In general, enforcing copyright was regarded as a business consideration, and participants explained that legal action was a part of the corporate strategy in regards to copyright.

Bruno Grife, for example, mentioned that he wants his fans to upload their videos from shows to technological platforms like YouTube. However this is not the common approach that we see, especially due to cases like *Lenz v. Universal*<sup>139</sup> where a mother had to argue that her incidental use of 30 seconds from Prince's "Let's Go Crazy" was fair, which the court accepted. It seems that at least some artists, especially young or ones at the beginning of their career, are willing to share their music online for free<sup>140</sup> and acknowledge new business models. Other creators post at least some of their work on the web, either as a portfolio,<sup>141</sup> or by allowing others to download their content or use it.

#### **Do participants fear legal action when creating works based on others?**

Most participants acknowledged that legal action might be taken against them with regards to copyright and had obtained legal advice; however, their understanding of the legal procedure was as a business constraint which has to be taken care of and not as a limit on their creativity (Gil Hirsch, Ran Harnevo). Others had a reasonable understanding of the law, and grasped that as long as they do not pose any legal problems to others, they will not be sued (Redelman).

It seems that most participants understood copyright infringement solely as a business risk, such as other risks like poor marketing, time to market or other failures to perform, and not as a legal barrier.

For example, one executive in the Venture Capital industry, which preferred to remain anonymous, stated:

Because I live in Israel and consume services from overseas, I have a sensitivity, as a consumer, to access content that's public broadcasting. . . . [However] it was blocked in Israel by the publisher because I'm not from the United States. *As an American I may be a contributor to public television, but*

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<sup>139</sup> C 07-3783 *Stephanie Lenz v. Universal Music*, <http://www.eff.org/files/filenode/lenzvuniversal/OrderGrantingPSJ.pdf>

<sup>140</sup> <http://myspace.com/terrypoisonmusic>

<sup>141</sup> <http://gillavi.com/he/>

*I would not be able to consume it.* The same is to Rhapsody, where I pay them money, but unable to consume it. I'm actually not sure what is the legal mechanism, but the problem is with business.

The interviews with the participants allowed us broader understanding of what is considered fair and not fair by the content creators themselves. We found that the common definition of an author, who works and creates alone, is not as relevant as in the past; most of the content creators today base their works on others and consider themselves as users. While different groups may take different incentives from the copyright system, we found that some believe that the current incentives to create are not as strong as required, and that reform is needed.

We understand that the social norms in Israel differ from what the legislation provides, in that creators often do not mind that others use their works as long as credit is attributed. This gap between the law and the default rules creates a burden on creators and users, and prevents fair and wanted uses by users who cannot negotiate a specific license from the artists or creators they wish to build upon. In fact, we believe that one of the uncertainties in copyright is created because of the lack of sensible default rules, where we understand that most of our participants acknowledged non-commercial use as fair in their opinion.

We also found out that when creating, content creators do tend to consult with legal experts as to whether creating work based on others' would amount to infringement. However, the uncertainty of fair use drives them towards licensing the content instead of attempting to create fair use.

Here, again, we find that the vagueness of fair use creates an impediment for creators and authors, which limits their creativity and leaves them in uncertainty. In Israel, as in other jurisdictions, legal advisors and scholars could not define clearly fair use and determine whether a use was fair or not, which created litigation costs and "uncertainty costs." These litigation costs and uncertainty costs, as a result, influence the market.

However, at least as we heard from one VC executive, copyright, unlike patents, does not influence venture capital investments, but are considered a mere business risk. Venture capital in Israel does not fear litigation or uncertainty, and believes that innovation could be achieved even in cases where the business itself goes against principles of copyright.

## 4.5 Conclusions

Israeli fair use was originally a hybrid of the UK fair dealing and the US fair use; however, it has become something different, wider and relevant to the Israeli public. Fair use as detailed in *Premier League* became a cultural right, and was acknowledged as derived from the freedom of expression. While courts misunderstood the legal basis of fair use when ruling so, they ruled, most of the time, to defend what the general public acknowledged as fair.

We believe that there's a lot to be learned from Israeli fair use. Israel is considered as a common law state and courts from various countries could rely on Israeli court decisions in regards to fair use when ruling in cases, though it is uncommon for courts to rely on lower court decisions such as Magistrate Courts or Israeli District Courts, which have actually created an atmosphere enabling more creativity.

More than any other factor, what should be learned is from the Israeli praxis, and not theory, whereby copyright infringement in business is considered as a business risk, and where artists and creators wish to share and allow others to create.

Israel's innovation community is not created solely by case law, but also by people engaging in discourse about rights, and by heavily relying on other's work.

What is also quite unique to Israel is that a material part of its copyrighted material is software and code, not content. This feature makes Israel's view of fair use as distinctive as its culture; as detailed in *Premier League*, copyright has to be in service of culture, as without it, there would be no reason to create.

When we interviewed and surveyed users, we realised that fair use as a cultural concept is distant and unique, and materially differs from what is fair under common law. In this light, fair use has to be adapted to fit what the public grasps as fair, and what it believes it is entitled to do.

We also found that content creators and users differ in their understanding of what content is, and that while some believe that use of a certain kind of content may be legitimate, others may not. For example, when programmers were asked whether they create works based on the work of others, they did not realise that building upon open source applications is such.

Users also tend to prefer to share their works with others, even when they have an option to gain profit from selling such content, and acknowledge the added value in user-generated content, attributes and homages created by their fans. Most content creators enjoyed fan-



content or other non-commercial content, but were unable to define exactly where the line between commercial and non-commercial content stands.

We believe that in order to have a firmer protection of consumer and user rights, fair use has to be established not only as an affirmative defence, but also as a right. Since the Israeli Act allows setting a list of cases where uses may be considered fair, we can only hope that the minister of justice will issue one.

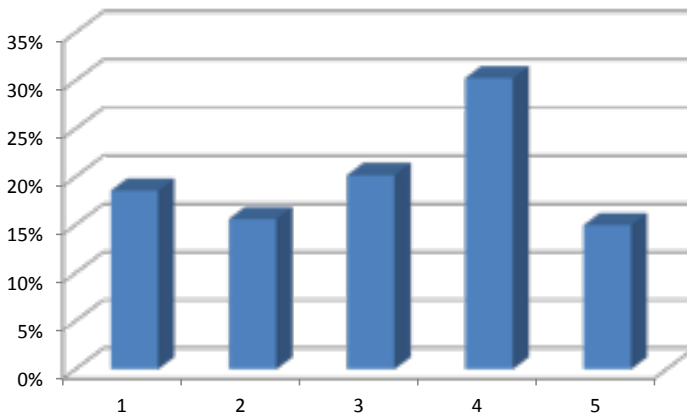
We also deplore the political elements of fair use, as it was subjected in the recent *Wikipedia Bill*, and hope that the government will allow the use of government works without prejudice, and open the use of government services to the general public.

In conclusion, when trying to describe fair use in Israel, one must understand Israeli politics, culture and means of production most of all.

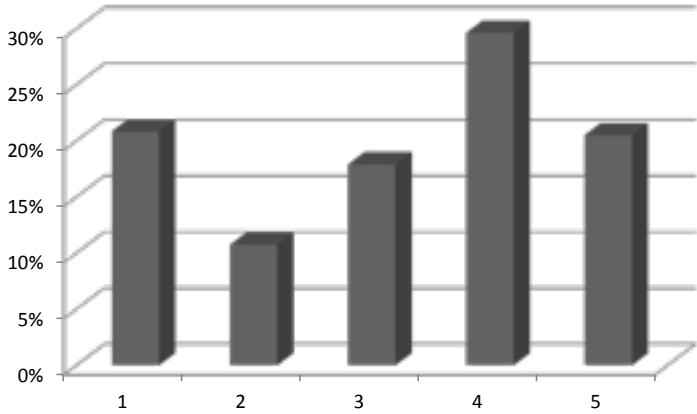
## Appendix: Survey results

*Editor's note: The questionnaire for this survey was adapted from the second phase of the global A2K access barrier survey described in chapters 1 and 2 of this book, with the addition of questions designed for the fair use research conducted only in Israel. The scale from 1 to 5 represents "Don't agree" to "Agree", except for questions 20 to 22 in which it represents "Rarely" to "Frequently".*

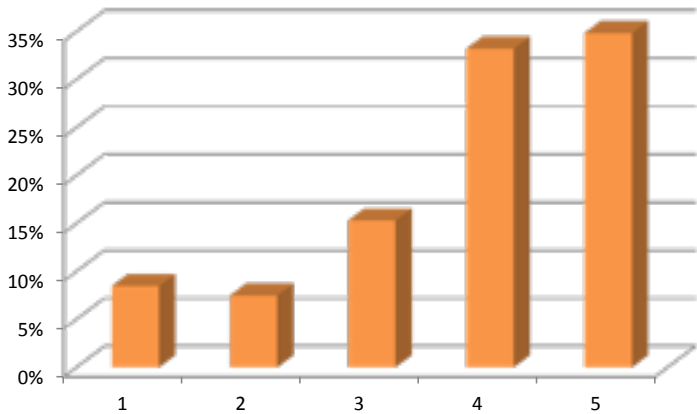
1. The price of a copyrighted work is the parameter that mostly affects my decision whether to buy it or to download a pirated copy of it.



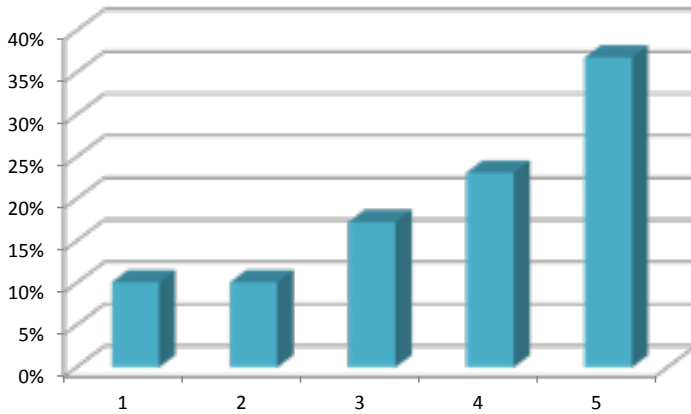
2. The quality of a work is the parameter that mostly affects my decision whether to buy it or to download a pirated copy of it.



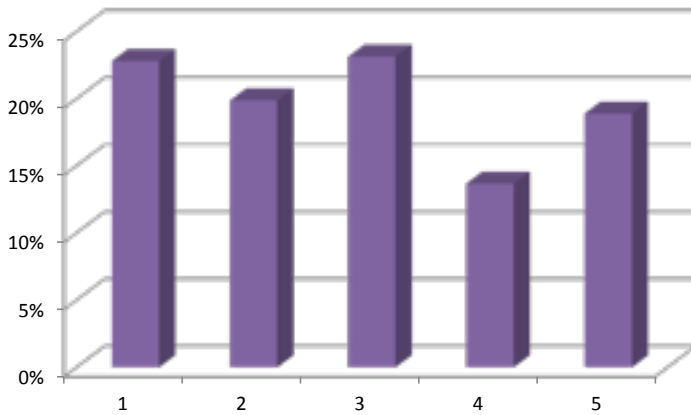
3. The availability of a work is the parameter that mostly affects my decision whether to buy it or to download a pirated copy of it.



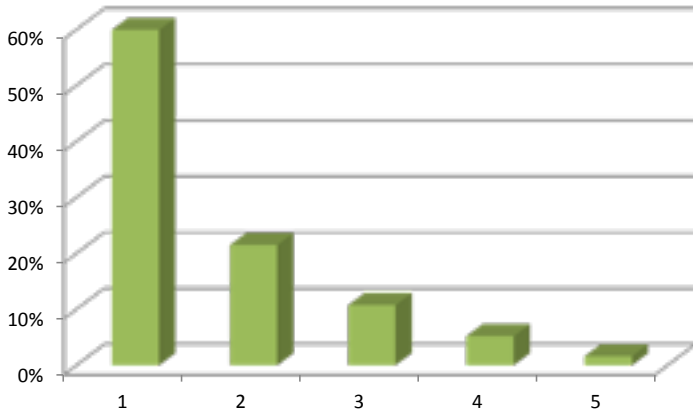
4. There are not enough institutes or libraries where I can borrow copyrighted works from.



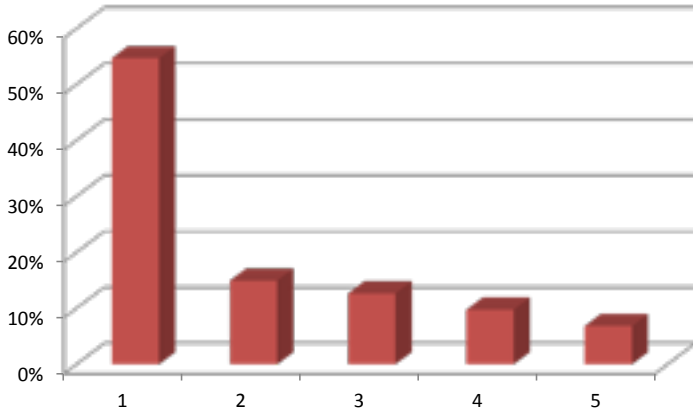
5. There are not enough available copies of the works I usually search for.



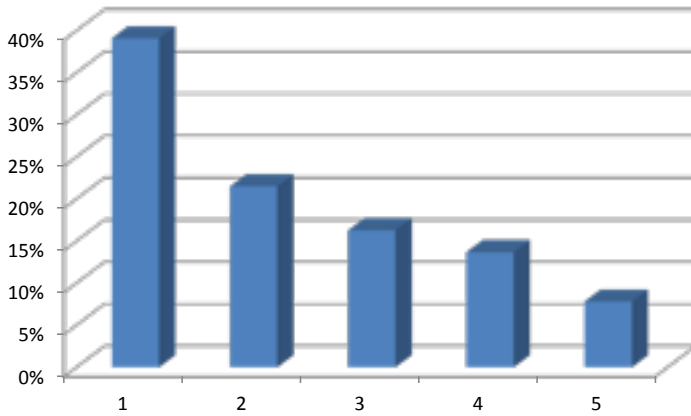
6. I can't copy works that I want to have because of digital or technological restrictions.



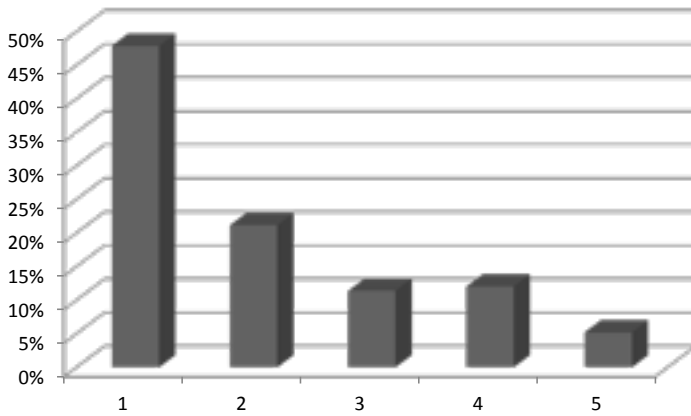
7. I don't have an access to equipment that enables the copy of works I need to copy. For example: I can't save videos I watch on the Internet on my computer and I can't copy videos from my computer in a manner that will enable me to watch them on TV.



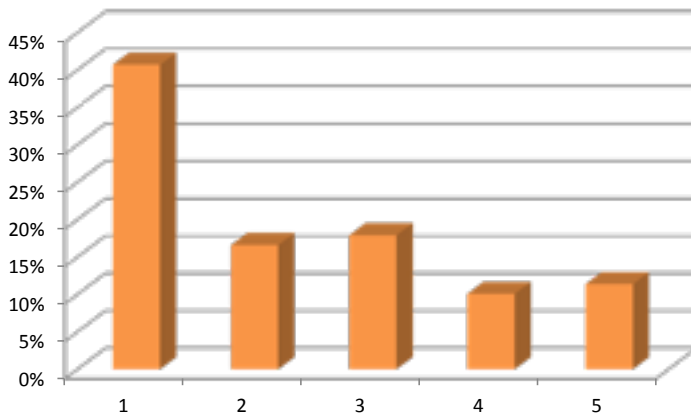
8. Duplicating or copying works takes too many resources from me (time and money).



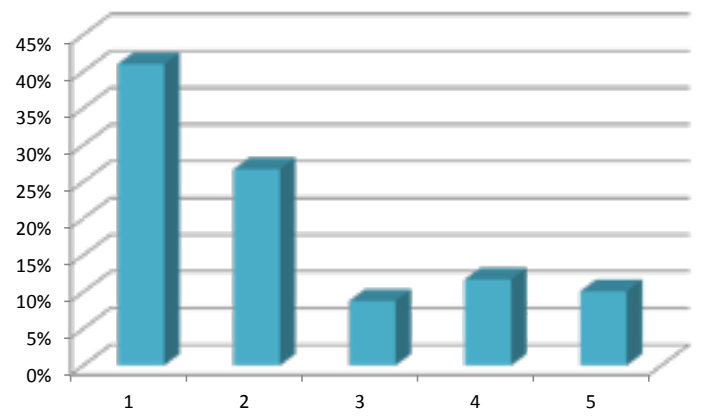
9. It is difficult for me to use works in foreign languages.



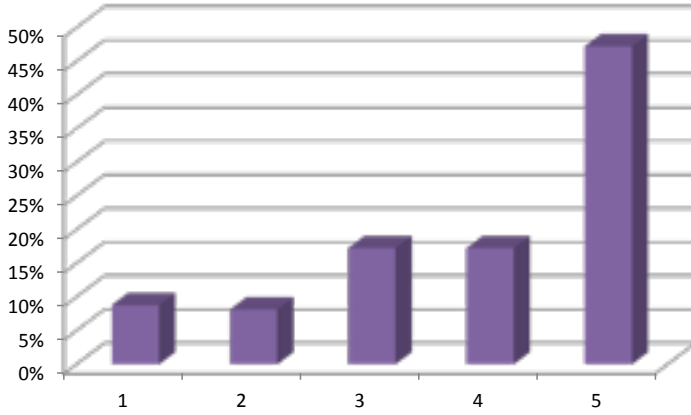
10. I can't choose where and when to use the work.



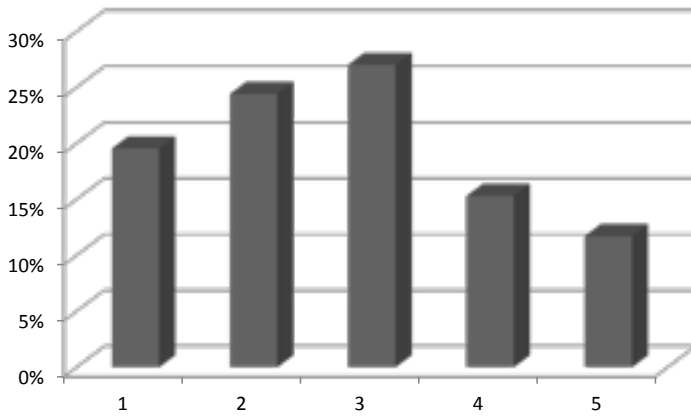
11. I'm afraid of being caught for downloading a pirated copy of a work.



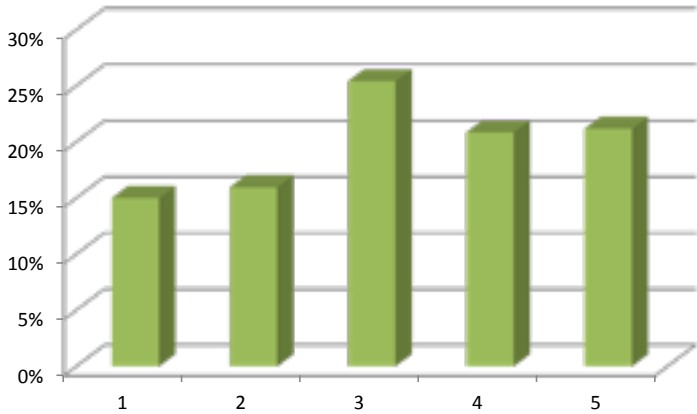
## 12. Purchasing a pirated copy of a work is morally wrong.



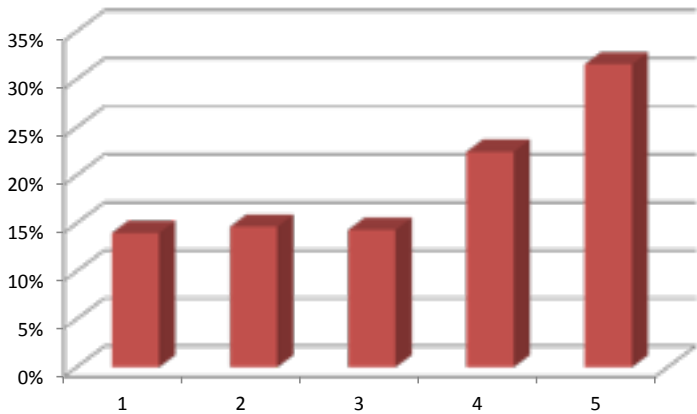
## 13. Downloading a pirated copy of a work is morally wrong.



14. I am permitted to download works and use them, even without the author's authorisation, if I'm doing so for non-commercial gain.

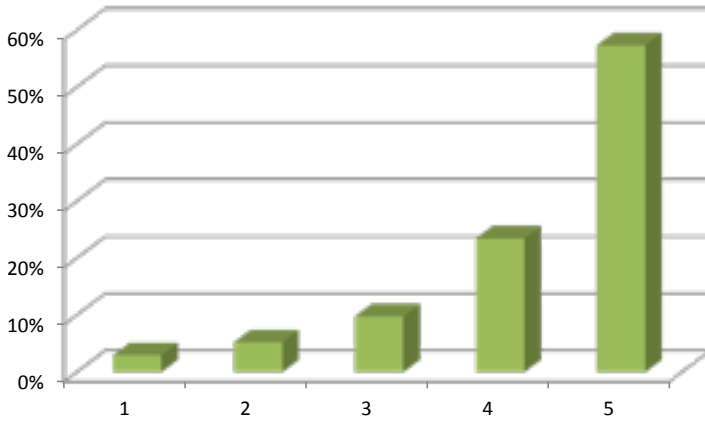


15. After downloading works in a pirated manner, if I find that I like the work, I usually also buy the original copy.

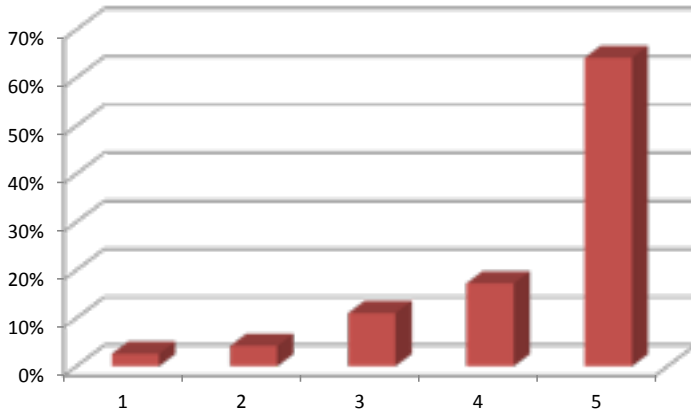




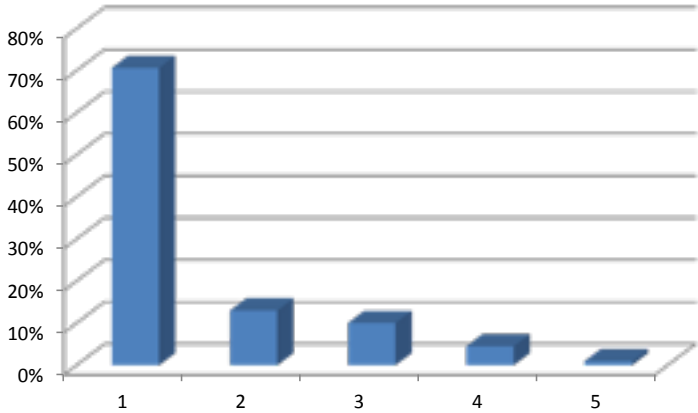
16. If a legit and inexpensive copy of a work is available, I will prefer to buy it rather than download (or buy) a pirated copy.



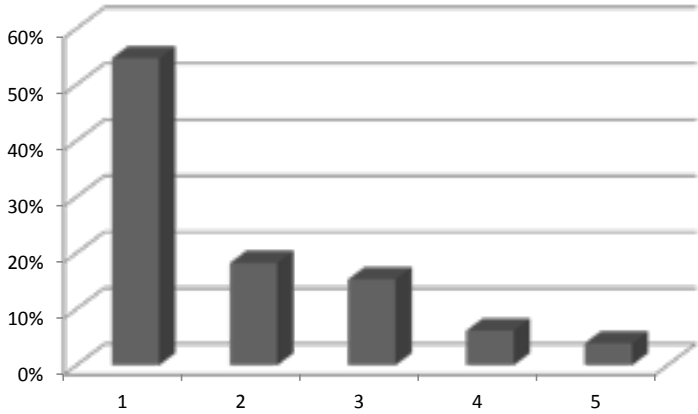
17. There are works that I'm allowed to use and I know how to find them (This section refers to open source and open content works (ie, content in Wikipedia or Creative Commons licensed content)).



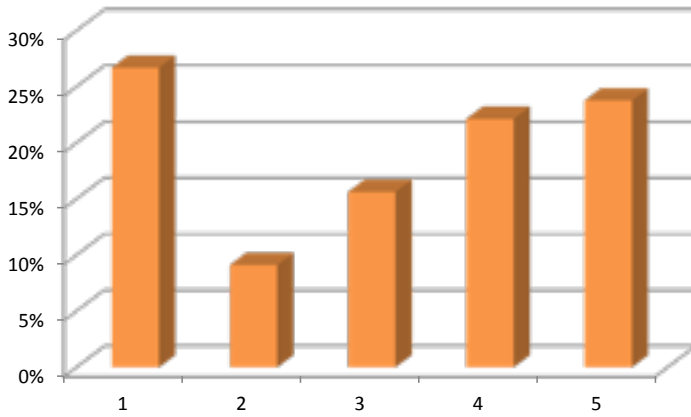
18. If someone allows me to use his work, this work's quality is usually inferior then the quality of a work I paid for.



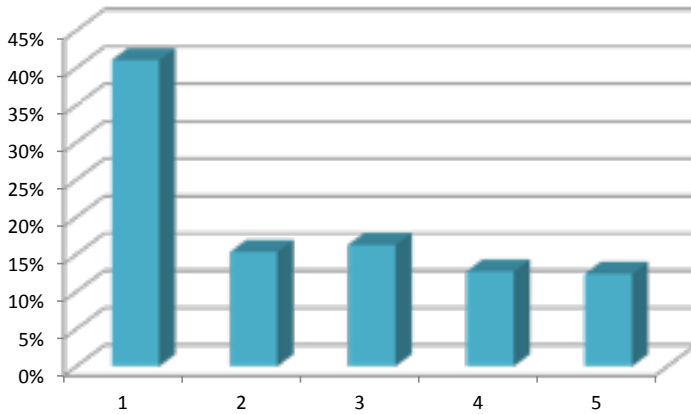
19. It is uncomfortable and inconvenient for me to search, find and use works I'm allowed to use (ie, Creative Commons licensed content, Open Source code, Wikipedia content, etc.)



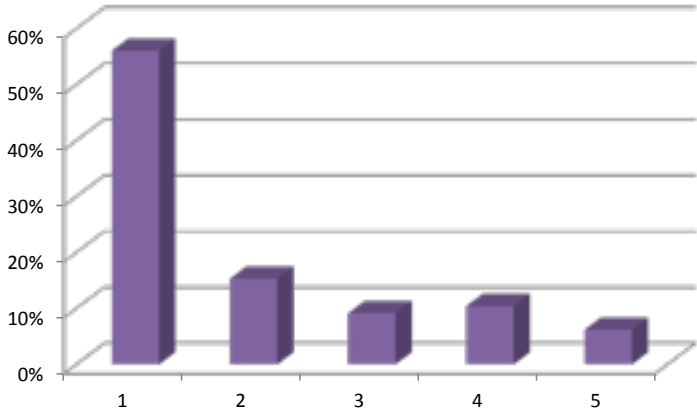
20. I'm sharing my works with friends or via file-sharing services on the net.



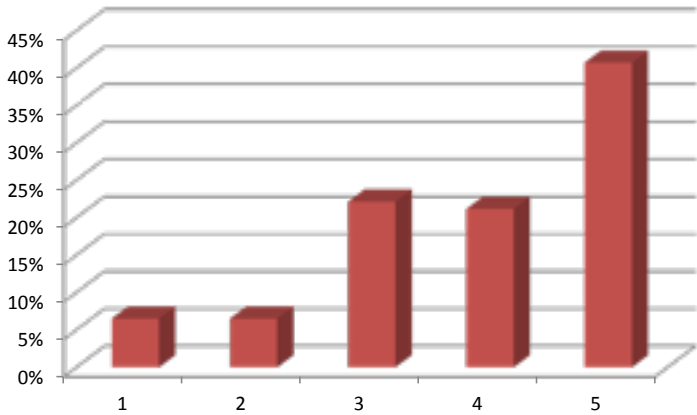
21. I add and edit entries in Wikipedia or upload my works to websites that allow others to use these works.



22. I create and produce works based on others' works (ie, cover versions, mix tapes, remixes, etc).



23. When I produce a work, I prefer that others will use it.



## **Part III**

# **National advocacy and campaigning activities**



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# A brief on important activities on access to knowledge

*Guilherme Varella, IDEC, Brazil*

## **Abstract**

IDEC (Instituto Brasileiro de Defesa do Consumidor) successfully applied for funding from CI to support a public campaign to focus on the ongoing process of reforming the copyright law in Brazil. The support offered by CI was complementary to the advocacy strategy already underway by IDEC in Brazil. This project consisted of four main specific objectives:

1. Advocating for consumer rights in the new copyright law in discussion in Brazil;
2. Articulating with and establishing partnerships with the educational sector;
3. Disseminating information about consumer rights and the copyright law reform in Brazil. The informational materials would point out the problems of existing legislation and the need to revise the current law, advocating the adoption of rules that balance the rights of authors and rights of consumers to access information and culture, allowing full private copying of content in physical or electronic support;
4. Promoting public debate, holding a seminar, where experts, representatives of the federal government, parliamentarians and partner organisations will exhibit their views on the various aspects of the copyright law reform.

This is a report on the activities carried out under the grant.

In order to keep you informed of our key initiatives, here is a brief on important initiatives and meetings in which IDEC participated to pressure the Brazilian Ministry of Culture to open public consultation on the reform of copyright law and to mobilise other ministries and relevant actors on, not only the reform of copyright law, but also the Internet legal framework in Brazil, where we are discussing privacy and net neutrality:

On 23 October 2009, IDEC and other partner organisations sent a letter to the Minister Juca Ferreira (Culture) asking for the immediate publication of the reform of copyright law.

IDEC participated on 9 and 10 November 2009, in the 3rd Congress of Copyright and the Public Interest. During the event, the Ministry of Culture discussed the public consultation for the reform of copyright law.

Since January 2010, IDEC has been articulating a network with civil society organisations that work with access to knowledge and copyright law in several areas: consumers defence, educational rights, cultural politics, students movement, access to information, communication rights, digital culture, musician and artists groups, university professors, etc.

The net was named “Network for the Reform of Copyright Law” and today has 20 more members and an internet blog to keep and encourage the public debate about copyright.<sup>1</sup>

The members of “Network for the Reform of Copyright Law” are:

- Ação Educativa
- ABD EAD
- Casa da Cultura Digital
- Coletivo Ciberativismo
- Coletivo Epidemia
- Comunidade Recursos Educacionais Abertos
- Conselho Nacional de Cineclubes
- CTS/FGV
- CUCA da UNE
- Gpopai/USP
- GTLivro

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<sup>1</sup> <http://www.reformadireitoautor.org>



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- IDEC
  - Instituto NUPEF
  - Intervozes
  - Instituto Paulo Freire
  - Laboratório Brasileiro da Cultura Digital
  - Movimento Mega Não
  - Música Para Baixar
  - Partido Pirata
  - Rede Livre de Compartilhamento da Cultura Digital
  - UNE

On 13 March 2010, IDEC and the Network organised the seminar “The right to education and reform of copyright law,” in Paulo Freire Institute, São Paulo, discussing open educational resources and the consequences of copyright law application in educational politics.

On 5 May, IDEC, with the CTS/FGV and Intervozes, represented the “Network for the Reform of Copyright Law” in a meeting with the Ministry of Civil House. On the occasion, we defended the important point for a democratic copyright reform and delivered a letter to the Chief Minister of Civil House Erenice Guerra, asking for the opening of public consultation immediately.

As a member of the “Network for the Reform of Copyright Law,” IDEC was invited to participate in the First Paulista Meeting of the Public Rights, sponsored by the Association of Cultural Diffusion Broadcast Film Society, in partnership with the Brazilian National Council of Film Societies (CNC), in Atibaia, São Paulo.

On 19 May 2010, IDEC was at the public hearing held by the Committee for Consumer Protection of National Congress to report on the discussions taking place in the Electronic Commerce Forum (FCE). The FCE is a forum that brings together the various actors involved in the issue between representatives of consumers, such as IDEC, companies and specialists, such as the Internet Steering Committee (CGI) in order to study the regulatory frameworks of Internet commerce, identify the technological innovations of this kind of market, ensure consumer rights and harmonise the action of the various sectors involved.

IDEC organised and coordinated a public demonstration in partnership with more than 20 civil society organisations through the opening of the public consultation on the copyright law, held on 26 May 2010, in the Public Prosecutor's Office, in São Paulo. On this occasion, it released the booklet *Copyright Under Discussion*, produced collectively by the members of the Network for the Reform of Copyright Law.



Figure 5.1: *Copyright Under Discussion*

The publication explains about the concept of copyright, the provisions of the current law, the issue of access to knowledge and new technologies, piracy and the civil society proposals to balance the protection of copyright law and the public interest of access to works.

IDEC participated, on 9 June, in the seminar about the reform of copyright law, purposed by CTS/FGV, from Rio de Janeiro.

The Ministry of Culture (MinC) opened on 14 June the public consultation of the draft bill to reform the copyright law (Law 9.610/98). The consultation was to run until 28 July, but has since been extended until 31 August. The reform has been the subject of discussion in society since 2007 and the proposal to

change the law, according to the Ministry of Culture, aims to “harmonise the protection of author’s rights, citizen’s access to knowledge and legal certainty for investors.”

IDEC has actively participated in this discussion, bringing this debate to the daily lives of consumers and showing how copyright is related to everyday practices, such as file-sharing on the Internet, copies, consumption of books, movies, music and use of works for educational purposes.

The performance of IDEC and the Network is achieving a great impact in the media and attention from the press, that has been covering the events, seminars and other important actions. Articles and reviews have been produced by IDEC and members of the Network in the attempt to

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inform people about the debate.

Some challenges are now ahead. One of them is to study the mechanism that incorporates National System of Consumers Defence in the dynamic of state supervision of copyright, and, with all actors of the System, to consolidate a proposal on this type of activity. This is why we are proposing a workshop to be organised together with the national coordinator of the National System of Consumers Defence, which is the Department of Consumer Protection and Defence of the Ministry of Justice to discuss with the National System of Consumers Defence members (civil consumer organisations, public consumer organisations, prosecutors and public attorneys) what are our expectations and position in relation to the mechanism that incorporates National System of Consumers Defence in the dynamic of state supervision of copyright.

Moreover, IDEC, acting in the “Network for the Reform of Copyright Law,” is consolidating its formal contribution to the public consultations on the reform, with input from a workshop, held on 19 July in São Paulo, addressing the following topics: limitations and exceptions of copyright law; regulation and state supervision; new arrangements of production and consumption of cultural products, among others.

All this work of articulation has been a key element of the public consultation on the copyright reform, and essential to ensure basic rights such as access to knowledge and the right to culture in Brazil.



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# Excessive pricing of educational materials in Cameroon

*Dieunedort Wandji, Paul Geremie Bikidik and Charles Forgang, RACE, Cameroon*

## 6.1 Overview

As part of its two-year project on Access to Knowledge jointly funded by Ford Foundation and the Open Society Institute (OSI), Consumers International selected, among others, the project proposal of RACE (Réseau Associatif des Consommateurs de l'Énergie) on **Excessive pricing of educational materials** and awarded a grant of USD\$6,500 for this project activities to be carried out in Cameroon.

### 6.1.1 Our Action

The context that gave rise to the project is that it had been noticed that textbooks were becoming increasingly expensive, outpacing inflation rates. This excessive pricing of educational textbooks seemed to derive from artificially wrought mercantile reasons, and thus depriving millions of students of the resources they needed for right education.

Moreover, there exist in Cameroon obvious educational discrepancies between the various regions, due to cultural drawbacks, local economic level and inappropriate government policies designed to address these

issues. The three northern regions (provinces) for instance, appear to be completely cut off from the national educational system.

The overall objective of this action aimed to contribute towards availability and affordability of educational materials (school textbooks) by getting their supply chain off the ordinary commercial system and bringing the prices down to match the majority's purchasing power in the economy. In addition, textbooks had to be brought within the reach of poor consumers in time.

More specifically, the objectives that this project aimed to achieve are the following:

- Investigate and inform public opinion on the malpractices that might exist behind the excessive pricing of books
- Campaign and lobby public authorities to regulate the book market and take more consumer friendly measures for educational materials
- Set up an independent textbooks distribution network to ensure constant availability of school books at very cheap prices

### 6.1.2 Our Methodology

Our methodology is based on the participative approach to project implementation, which has proven so effective in so many similar projects.

The project objectives have been achieved by pushing in a balanced manner, on campaigning and lobbying drivers on the one hand, and pulling action from stakeholders on the other hand. We involved the actors and stakeholders as much as possible by always placing them in a win-win situation, deriving the interest of the project from their own interest.

Partners such as MPs, parents, school managers, local authorities etc participated in the project mostly to promote their standing in the public eye. By so doing, they provided institutional and media backing to the project.

This official endorsement and media coverage proved very important for such a large-scale project that aimed to impact the whole nation within six months.

We targeted parents associations in our activities because they are the prime victims of excessive pricing on schoolbooks and as such, their inputs in surveys and discussions helped us include more original approaches in finding solutions. They are now the main beneficiaries of

the project, and guarantee sustainability of networking, as they are better placed to assess its benefits.

MPs remain the right tools to shape the legal framework and influence public policies, so that even outside the networks, barriers to access to knowledge could be removed steadily.

## 6.2 The Survey

The survey was a critical part of the project, as it was designed to assess public awareness and tap into the consumers' eventual response to our action.

The questionnaire (see Appendix) consisted of 15 multi-part questions that give the respondent the opportunity to describe their purchasing habits, their wishes and expectations for change. In its first section, the questionnaire records information about the respondent that help us keep track of external factors (age, gender, status, etc.)

The survey was administered to 1,000 respondents across the 10 provinces of Cameroon, exclusively by means of face-to-face interviews with students, parents and teachers. (Though it was more difficult to meet members of the female gender in the three Northern provinces, we tried as much as possible to maintain generally a reasonable balance in terms of age and socio-economic background).

## 6.3 Key findings

The analysis of the survey data left us with the following key findings:

- Only 5% of parents buy the entirety of the required school books for their children.
- Up to 85% percent of students in rural areas go to school round the year without a single book.
- As many as 100% of primary school students have never had a book in rural areas of the Northern provinces.
- 80% of books are bought from second-hand bookshops (although new books tend to be cheaper).
- 65% of parents have never bought a book from a formal bookshop.
- School books are 75 times cheaper at the end of the school/academic year, but only very few parents buy books then.

- School books are not passed down in families because the government change books every year.
- The average cost of all school books per student per year is equivalent to CFA Francs 135,000 (USD 300), a month's pay for a civil servant.
- 97% of parents were willing to start a book network, but did not want any school or council authorities to be involved in its management. They wanted its management to be bestowed wholly upon the PTA associations and networks across many regions in Cameroon.

Investigation was also conducted informally through meetings with bookshop owners, national editors and businessmen. The following conclusion was arrived at:

- The current national policy regarding books is 45 years old and unable to meet today's requirements.
- The national commission responsible for selecting textbooks is regarded as a corrupt organisation that favour some authors and change books in the curricula every year to make more editions and more money.
- CEPER, the national publishing house for school books was privatised and is now more profit-inclined.
- 80% of books used in our schools are still manufactured abroad.
- The initial price of books is four times lower than their actual price on the market because of too many middlemen in the distribution channel.
- Counterfeited books are also a concern for the national publishing house. For every 5000 books legally manufactured, 30,000 counterfeited books from neighbouring countries are found on the market. The publishing house now increases prices to make up for the losses of unsold books, and counterfeiters take advantage of the increased prices to make more money.
- As a result, counterfeited books are sold in bookshops alongside genuine books, at the same (increased) price and it is almost impossible to tell the difference.



- It is reported that bookshop owners get more supplies from counterfeiters, as they provide at cheaper prices.

A national competition was launched with journalists and amateurs to report on the malpractices of booksellers and the reasons why books are becoming very expensive. The best article has been selected and will be adapted for Radio and TV broadcast by early August 2010.

These background activities gave us an overview and factual knowledge of the context, thus helped us customise our action plan and was used as roadmap for project implementation.

## 6.4 Activities

There have been mainly two major activities after the above: Campaigning/Lobbying and Networking.

### 6.4.1 Campaigning / Lobbying

**Activity 1** As groundwork to campaigning and lobbying, we had several meetings with a legal expert to work out a draft bill advocating production of school books on the national territory, rather than abroad; longer duration of manuals on school curriculum (five years instead of one year), low or no taxation on imported school books, and right for individuals/schools to make private copies.

**Activity 2** We then met three influential MPs and popular political leaders in Douala and Yaounde to expose the issue and request their endorsement, by demonstrating what a relevant message this would be for their standing in the public eye.

**Activity 3** In collaboration with the Douala Regional Delegation for Basic Education and Voice of Women (NGO), a national journalism competition was launched in local newspapers, encouraging entrants to investigate the reasons of high pricing of books and expose the malpractice within the book industry in Cameroon. The best article from the journalism competition has been selected and will be adapted here for TV and radio in August 2010. This will be preceded or followed by interactive debates with the listeners/viewers. The reason for this timing is that school resumes in Cameroon usually early September and we want it to be a “hot” debate and relevant issue for consumers.

### 6.4.2 Networking

**Activity 4** Taking advantage of the end of school year in late May and early June meetings were convened in three regions, involving parents from parents teachers associations (PTA), school officials and local authorities, to expose our concept of non-for-profit book distribution network.

*Reminder of the network concept:* Instead paying an average of CFA 5000 (USD 10) parents pay a minimum CFA 500 (USD 1) for a membership card. The money is used to buy books when they become very cheap at the end of the school year. The membership card enables parents to borrow/rent books for a school year rather than buying. If there is any margin, the profit will be invested on buying more books or on Internet access for online research in the municipal library. The management of the finances will bestow upon the mayor, monitored by a finance committee from the parents associations, schools and municipal councils. This is also a good adaptation to the national policy that requires that textbooks be changed every two years.

**Activity 5** The climax of the project was reached at **Malangue High School** in Douala, where the first pilot non-for-profit book distribution centre was launched in the presence of parents, local authorities and the media.

### 6.5 Main Challenges

The media response was not what we had expected; we had to pay for more ads than scheduled, slightly expanding the project's initial budget.

- Due to cultural differences in the northern regions of Cameroon, our male survey agents were not allowed to talk to women which caused the team to spend more time than initially scheduled.
- Though politicians are willing to talk about the issue, changing state laws is proving difficult because the issue of school textbooks in Cameroon involves a lot of interests and the promoters of the present status quo are very powerful high-ranked officials in the government. Our draft bill has still not yet been introduced in the National Assembly.
- We have refrained from publishing the “Black List” of bookshop owners dealing with the counterfeiters (the Project Manager – Die-



Figure 6.1: Launch of the pilot not-for-profit book distribution centre

unedort WANDJI – had an attempt on his life for a similar campaign).

## 6.6 Outcomes and Impact

- Manidem (political party) is now advocating that textbooks for primary schools at least should be free to students and entirely subsidised by the government.
- Public awareness has been raised through the competition, and even before the winning article can be adapted for TV and radio, parents are getting organised to refrain from following the general trends in buying schoolbooks for their children.
- There now exists a draft bill, regarding the national policy on school text books and fight against illegal sale of books.
- Following our campaign and workshops, parents and school managers are getting organised in various locations to launch their “Book networks.”

- We now have a pilot “book distribution channel” at Malangue High School that will help assess the concept and benchmark for other schools across the nation.

## 6.7 Perspectives

- We are going to apply for funding from the PASSOC to replicate non-for-profit book distribution centres in the nine other regions of Cameroon.
- We are going to keep pressing the MPs to introduce the draft bill regarding the national educational policy on books.
- We enter into a discussion and come to an eventual agreement with CEPER to negotiate cheap prices for these “book networks” to buy books directly and in bulk, eliminating the middlemen.
- A side project on recycling books will be developed and integrated in our environmental issues.

## Appendix – Questionnaire

### Interviewee profile

(Please, circle the response that most applies to you)

Gender:

(a) Man (b) Woman

Age Category:

(a) under 18 years (b) 18 – 25 years (c) 26 – 35 years (d) above 35 years

Language of Expression:

(a) English (b) French (c) Other (Please specify)

Region of Residence:

### Questions

1. You are (Please circle the response that best applies to you)
  - a) student

- 
- b) university student
  - c) parent
  - d) b and c
2. How much do you estimate the total cost of the necessary school manuals for you/your children per year?
  3. What period of the year do you buy school manuals? Why?
  4. How do you find the prices of the manuals at the end of the school? (Please circle)
    - a) Cheap
    - b) Very cheap
    - c) More expensive
    - d) Same price as at the beginning of the school year
    - e) I have never tried to find out
  5. Where do you buy school manuals? Why?
  6. How expensive are the books from the “poteau” as compared to those in the bookstores?
  7. Is it customary in your family to pass down books from oldest children to the younger ones? If yes, How many persons can use same book in turn for a given class? If no, why?
  8. Do you exchange books to obtain those of the higher classes or of better ones?
  9. Have ever rented educational material?
  10. How much does the form 4 English book cost at the poteau?
  11. Do you attend the PTA meetings?
  12. If yes, do you discuss issues related to the prices of the books? Why, in your opinion?
  13. If you were asked to rent the school manuals yearly, how much you would you be prepared to pay per book per year?
  14. With whom would you like to deal in this case? (Please circle)

- a) The principal/proviseur
  - b) The president of the PTA
  - c) The Assistant Mayor
  - d) A parent designated by the PTA
  - e) An independent bookstore
15. Your suggestion to make books less expensive

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# A2K advocacy campaign for librarians

*Nirmala Desikan, CAI, India*

## Abstract

The project proposal submitted by the Consumer Association of India (CAI) was for an advocacy campaign to sensitise Knowledge Organisers, Librarians, Information Managers and the Institutes of Higher Education and Research on the Access to Knowledge campaign, barriers to access and open access to knowledge resources. The keystone of this campaign would be a one day seminar for all stakeholders involved, with technical sessions involving specialists in each area as resource persons. Participants would be provided an opportunity to learn about all the developments in this area, exchange views and seek answers to various problems through interactive sessions. This is a report on the outcomes of that seminar.

The seminar was held on 31 July 2010 at the Tamil Nadu Pollution Control Board's Auditorium at Guindy, Chennai. About 140 people attended including CAI staff members. There were 14 representatives from the local press and TV channels.

The seminar opened at 9:30 am, as the dignitaries for the inaugural session, Mr P W C Davidar, IAS, Principal Secretary, Government of Tamil Nadu for Information Technology and Mr N Vittal, IAS Retd, Former Central Vigilance Commissioner, Government of India, and Mr Pranesh Prakash from Centre for Internet and Society, Bangalore, were led to the dais by Mr R Desikan, Trustee of Consumers Association of India.

The proceedings commenced with an invocation song – the Tamil Thai Vazthu, the traditional invocation sung at all state functions. Mr Desikan then welcomed the gathering. He mentioned briefly about the beginnings of CAI and the activities undertaken by the organisation for the benefit of consumers. He mentioned that this was the 26th Seminar to be conducted by CAI since its inception. He welcomed the dignitaries and expressed his happiness at the spontaneous response received for CAI's invitation.

Mr Pranesh Prakash from the Centre for Internet gave an overview of the seminar – the objective of the seminar, how Consumers International and CAI had come together to organise this seminar for the benefit of consumers. He stated that knowledge in earlier times was given away free. Today times have changed and we are now in a regime where there are very strict IPR and copyright laws which do not allow knowledge to be shared. He hinted that patents may have a negative impact on consumers.

Mr Davidar was formally introduced after which he addressed the gathering. He mentioned that there was an imperative need to focus on intellectual property rights and provide more information to the public on what constitutes IPR, how to deal with violations etc. He stated that the awareness level was very low and people were not even aware that they were violating IPR when copying for an essay or assignment.

Plagiarism is a common problem all over the world, he said but in the West, the awareness was high and there was even software available to pick up something that was plagiarised. However, it was not strictly enforced in India. In contrast, he mentioned that there were areas such as environment or health, where knowledge could be shared for the common good.

This was followed by an introduction of the Keynote Speaker, Mr N Vittal, Former Central Vigilance Commissioner. Mr Vittal said that consumers were living in a knowledge economy today. He said that we had a lot to learn from countries like Japan that worked on creating their own process with an end product in mind which was already existent in USA. He quoted from the Upanishads where there were a few stanzas which related to distribution of knowledge.

## **7.1 Access Barriers – Problems and Solutions**

The first technical session was on Access Barriers. The panelists for this session were Dr T N Shanmugam from Anna University, Mr S Arunacha-



lam, Senior Research Fellow, CIS and Ms Nirmita Narasimhan, CIS Bangalore, who were formally introduced to the gathering.

Dr Shanmugam spoke about the “Pentagon formula” for success in business ventures – Creativity, Invention, Innovation, IPR, Entrepreneurship. He also spoke about many inventions in IT technology that have changed the world; and explained in detail about copyrights and patents, IPR dimensions, copyrights, geographical indicators, industrial designs, trade secrets etc.

Mr Arunachalam of CIS talked about the need for democratisation in Access to Knowledge. He said knowledge was of two kinds – one that was given away free and the second kind for which one pays. He said he was concerned with knowledge that is free – which should be easily accessible by everyone. Access to knowledge helps to equip one better, particularly in times of disaster. A recent example to illustrate this was the manner in which the tsunami disaster was handled by different societies.

Mr Arunachalam, a champion for open access, felt that the need of the hour was to create more knowledge and make the best use of it. Open access, he said could help in both areas. He said that there was a wide gap between knowledge and action and requested organisations like CAI to take up this cause and impress upon the agencies and government to mandate open access.

The next speaker was Nirmita Narasimhan also of CIS, Bangalore who addressed the problem of access barriers for persons with disabilities. She mentioned that there are over 70 million people in India who cannot access materials because of their disabilities and non-availability of materials in accessible formats. This has resulted in social exclusion and inability to exercise their right to life, equality and right to information and expression. She spoke in detail about the need for ensuring that information was made available in accessible format in Indian languages. At present it is restricted to a few Indian languages and the titles available were very few. Accessibility, affordability and usability are key to facilitating access to knowledge for all.

## 7.2 IPR and Copyright Law

The panelists for the next session were Mr Chenthilkumar a Chartered Accountant, Mr T Manoharan a representative of the food industry, Mr. Gopakumar Nair, Past President of the Indian Drug Manufacturers Association, Ms. Sunita Sunar a lawyer and Mr Manoj Pillai a senior Supreme Court lawyer. They were all formally introduced to the gathering.



Figure 7.1: Panelists at the A2K seminar

Mr Chenthilkumar spoke on IPR issues from the financial angle. He explained various laws that come under IPR governing the financial angle and outlined the safeguards necessary to protect the IPR of businesses.

Mr T Manoharan, MD of Ajinomoto India Pvt Ltd, spoke about IPR and the food industry. He explained how certain brand names had become generic names in India. The patent law passed in 1970 did not include chemicals and food. However, the amendment bill passed in 2010 includes food products, drugs and chemicals, he said.

The next speaker was Dr Gopakumar Nair representing the pharma industry. He gave an overview of the evolution of the IP laws governing the pharma industry, the number of patents registered and the various amendments that have been passed in India after the TRIPs agreement. He gave a detailed presentation of the timelines for various applications, the process flow of the applications and various factors governing the issue of the patents. He also gave some links to useful websites.

Dr Sunita Sundar the next speaker spoke on IPR and confidential information. She explained in detail about the definition of confidential information and the remedies for breach of confidential information.

Mr Manoj Pillai a senior advocate, spoke on Intellectual Property Rights for the Common Man. He explained in detail about the definitions

of IPR, patents, copyright, trademarks etc and also the details of the processes involved in the registration. He emphasised the fact that there was need for the common man to know about IPR and the laws pertaining to copyright, patents, trademarks etc so that his business activity is not jeopardised. He mentioned that the role of the IPR consultant assumes a great deal of importance in advising his client about various laws and licensing procedures involved.

After a lunch break of about 45 minutes the next technical session resumed. The first speaker was Mr Pranesh Prakash who spoke on copyright law and how it affects consumers. He said the copyright law is not taken seriously, particularly in a country like India. However, if the copyright law with its amendments is strictly enforced, we may end up in a situation where:

1. Images and songs being used in a presentation (even with attribution to the source) is illegal.
2. Public libraries are illegal.
3. Whistling a tune when you work is illegal.
4. Playing a radio loudly in public is illegal.
5. Calling your friends to come over to watch a DVD with you is illegal.
6. Shakespeare, Nabokov, Vyasa, the Beatles, Illairaja, are all thieves.
7. Singing “Happy Birthday” in a restaurant is illegal.
8. Copying music from your CD to your computer/iPod is illegal.
9. A farmer not stopping the wind, bees, and birds from spreading seeds from a neighbouring farm onto his, is illegal.
10. Teachers reading aloud a poem is illegal.
11. Replying to email in a mailing list is illegal.

He illustrated with examples of how the copyright law and IPR work against consumers and authors. He said open access, open source software, Creative Commons and other open licences are the alternatives and are now being looked into.

The next speaker was Dr Badri Seshadri of New Horizon Media representing publishers. He mentioned that he represented the language publishing industry which was in its nascent stages in India. He gave an

overview of the regional publishing industry and the problems faced by them. He was of the view that consumers need to be educated on IPR and copyright laws:

- Publishers and authors have to be taught about the Intellectual Property Rights and the precautions they have to take to protect them.
- Consumers should be given choice and IPR should not be used to prevent a user from ever accessing the content.
- Copyright-free and public domain works should be made into a repository, providing both a free online access and a paid on-demand printed book.
- Authors/creators, publishers and consumers should come together to facilitate flow of content through a sustainable model.

### **7.3 Libraries and Librarians**

Dr Amba Sanjeevi, Retired Deputy Director of CLRI spoke about IPR issues that affect library professionals and how they should safeguard their libraries and library information. Advances in digital communication and technologies have been major factors that necessitate a proper understanding of all the issues involved. These have led to a situation in which the need for awareness of IPR-related issues among library and information professionals (LIP) assumes great importance.

She spoke on the role of the information professional *vis-à-vis* patents, stating that information contained in a patent is often not available elsewhere. It has been estimated that 80% of the information contained in a patent document is never published elsewhere and at times it is the only source of information. If you then consider that nearly a million patents are granted annually it is easy to imagine the vast store of technical information that has to be tapped by the information professional. A patent document contains not just technical information but also other useful information.

Information on more than 60 million patents can thus be accessed. Websites of patent offices of countries can be accessed for specific country information; eg <http://www.uspto.gov/> for US Patents or <http://www.ipo.gov.uk/> for UK patents.

In India, the Patent Information System at Nagpur can be approached for information. The details of the Patent Office India can be found at

<http://www.ipindia.nic.in>. Until the Patents (Amendment) Act of 2005 all information on Indian patents was published in the Gazette of India Part III Section 2. However, this has been discontinued and all details of patents applied for, granted, opposed etc are published in the Official Journal of the Patent Office.<sup>1</sup>

She felt there was a need to include IPR and copyright issues in the Library Science curriculum to equip library science professionals with information on all aspects of IPR. She concluded her speech with a quote from the Chief Executive of the British Library:

There is a supreme irony that just as technology is allowing greater access to books and other creative works than ever before for education and research, new restrictions threaten to lock away digital content in a way we would never countenance for printed material.

The next speaker was a research scholar, Ms Preetika Krishnan who spoke on problems faced by her as a researcher. She discussed the role of ethics to be adopted by researchers and what was fair use of material.

“Ancient as it might sound, there appears no alternative to the much abused word, conscience. Only the researcher’s conscience and academic ethics can prevent plagiarism especially where intellectual theft cannot be proved, and keep readers out of shocking situations of academic fraud,” she said.

The last speaker was Ms Vijaya Sundaram who highlighted instances from her experience as an information professional of over two decades. She cited various instances of how information was shared between individuals through the intranet in her office, emphasising the need for the information professional to be equipped with up-to-date information on the latest developments relating to IPR and copyright. She also explained how the information professional was expected to safeguard information under her control.

Mr M Jagadish, Director of the American Library summed up the day’s proceedings stating that this seminar had set the ball rolling for several seminars on this subject which included such a vast range of topics. The response to this seminar has been overwhelming and he mentioned that all the organisations involved would work together to ensure that information on IPR is made available to the consumer.

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<sup>1</sup> [http://www.patentoffice.nic.in/ipr/patent/journal\\_archieve/journal\\_2010/patent\\_journal\\_2010.htm](http://www.patentoffice.nic.in/ipr/patent/journal_archieve/journal_2010/patent_journal_2010.htm)

The Seminar ended with a vote of thanks to the panelists, sponsors and the participants who all contributed to the success of the seminar.

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# Access to knowledge through permissive copyright law and policy

*Professor Felicia Nwanne Monye, Consumer Awareness Organisation, Nigeria*

## Abstract

One of the greatest problems facing the educational system in Nigeria is inadequate access to educational materials. This imposes a great barrier since some of such materials may either be unavailable or may be priced beyond the reach of an average user.

To address these problems, the Consumer Awareness Organisation Nigeria with support from the Consumers International began a national campaign in Nigeria. A series of activities were proposed. This report covers the activities that have been executed.

These include media campaigns (electronic and print media) and a national workshop. The national workshop and media campaigns were expected to create awareness about the concept of access to knowledge. This was to help create awareness about the problem of lack or inadequate access and identify the areas of the Nigerian Copyright Act that are likely to inhibit access to knowledge. The campaign was also directed to authors to make them less possessive of their intellectual property and to adopt measures that make their works easily accessible to potential users.

The A2K national workshop was held in Enugu Nigeria on 24 June 2010. A total of 338 participants attended the workshop. These included authors, publishers, students, the academia, judiciary,

media houses and non-governmental organisations, and members of the public.

Some comments and responses received during the interactive session revealed that intensive campaign is needed to change the mindset of authors and copyright operators which is largely tilted towards strict protection of copyright.

## **8.1 Abbreviations and glossary**

A2K Access to Knowledge

CAO Consumer Awareness Organisation

FRCN Federal Radio Corporation of Nigeria

NCC Nigerian Copyright Commission

NTA Nigerian Televisions Authority

## **8.2 Introduction**

Following the call by the Consumers International (CI) for interested organisations to bid for the A2K project, the Awareness Organisation, Nigeria was commissioned to execute the project in Nigeria.

The proposal specified the following outputs:

- Possible reform of the Copyright Act by the National Assembly
- The removal or phased removal of taxes and customs duties on books and other educational materials
- The creation of open source learning materials
- Formation of Association of A2K Authors
- Hosting of a national workshop
- Publications from the workshop
- The number of participants at the workshop

The terms of reference stipulated that, Consumer Awareness Organization (the client) shall at the end of the exercise produce a report of the project. This document presents the interim report of the work.



### 8.2.1 Background of the Project Location

Nigeria is located in the West African Sub-Region with Abuja as the federal capital. Time Zone WAT (UTC + 1). She was a British Colony until 1960 (Independence 1 October, 1960). The country has a total population of about 140 million people. The national currency is Naira.

Nigeria is a democratic country operating the presidential system of government. The economic mainstay is petroleum resources (90% annual income). The country has other natural resources many of which are not fully tapped. Examples are coal, tin, zink, limestone, lead, and iron ore. The land is fertile for agriculture, producing cocoa, palm oil, groundnuts, coconuts, rubber, timber and cassava.

### 8.2.2 Problem

A prominent problem that has impeded the universal access to education in Nigeria is that of high cost of educational materials. Many parents cannot afford to provide necessary learning materials for their children. Due to minimal public funding of education in the country, most schools are very poorly equipped with students passing through schools without reading the recommended books.

By pricing books, journals and other educational materials beyond the reach of the potential users (pupils, students, teachers, schools administrators and the wider public) these persons are denied knowledge by the copyright owners. When individuals cannot buy or easily access learning materials, they are condemned to ignorance, poverty and are denied the chance of being useful to themselves and the wider society.

Some authors are very possessive of their intellectual property with the result that they are unwilling to part with their work unless the potential user is able to pay the economic rate. In addition, the Copyright Act contains some provisions which are capable of inhibiting knowledge. Such provisions include the long duration of protection (50-70 years); the restricted permission to libraries to produce only three copies of books that are not available for sale; the condition that educational institutions which reproduce works for educational purposes must destroy such works within 12 months; and the condition that translation of a work cannot take place before one year or three years as the case may be. In addition, the provisions of the Copyright Act relating to voluntary and compulsory licences have remained virtually redundant. The result is scarcity of educational materials, a factor encouraging piracy.

### **8.2.3 Objectives**

The overall objective of this project was to raise awareness about the negative effects of strict copyright law and policy on the social and economic well being of citizens of Nigeria and the economic growth of the country.

The specific objectives of the project are to, amongst others:

1. Create awareness among the citizens on the effects of stringent copyright law and policy.
2. Solicit and obtain tax and other exemptions that unduly add to the cost of books and other educational materials making them out of the reach of the potential users.
3. Solicit the establishment and promotion of open source learning materials in the country.
4. Advocate for the reform of the Copyright Act by the National Assembly to make it more permissive.
5. Form an association of Access to Knowledge (A2K) Authors.

### **8.2.4 Methodology/strategy**

This project was executed by a series of media campaign aimed at creating awareness about the concept and aims of access to knowledge. A prominent component of this campaign was the phone-in programme, an audience participation programme which offers opportunity for interaction between the resource persons and members of the public. This was done in both English and pigeon English. A national workshop was organised to create awareness and gather the views of experts on how to evolve a balance between the legitimate interests of authors and easy access to knowledge by potential users.

### **8.2.5 Stakeholders of the project**

The stakeholders of this project were authors of educational materials; the Federal Government; the media; and the general public. Authors were involved as participants in the workshop to enlighten them on the direct and indirect benefits of making their works accessible to potential users. The National Assembly will pilot the proposed reform of the Copyright Act and other possible bills on access to knowledge; the government

and the Federal Ministry of Finance for tax concession purposes; the media for publicity; and the general public for awareness about the subject matter of the project.

## 8.3 Activities

### 8.3.1 Executed Activities

To following activities have been executed:

#### Media programmes

1. **Media Link**, an Audience Participation phone programme, FRCN Enugu, 4 April 2010
2. **Courtesy Call**, a pre-event publicity programme, FRCN Enugu, 22 June 2010
3. **Wetin De Shele (What is trending?)**, a pigeon English Audience Participation Phone, Programme, FRCN Enugu, 23 June 2010. (NB: This programme which is very popular because of the medium of expression, was mounted a day prior to the workshop to generate public interest in the project and attract the target audience to the work. This and other pre-event publicity programmes achieved the desired goal as the workshop was well attended by all the target stakeholders.)

#### Formation of A2K Authors

Authors who subscribed to the association agreed to donate at least a copy of their book(s) to a public library each year.

#### Identification of the provisions of the Copyright Act requiring amendment

The provisions of the Copyright Act that are capable of inhibiting knowledge have been identified for submission to the National Assembly for possible amendment.

#### National Workshop

This was held in Enugu on 24 June 2010. A total of 338 participants attended the workshop.

Here is a list of papers presented at the workshop:

1. *An overview of the concept of Access to Knowledge*  
Professor Felicia Monye, Faculty of Law, University of Nigeria, Enugu Campus
2. *Mitigating the Copyright Law and Policy for Wider Access to Knowledge in the 21st Century*  
Mrs Nkem Itanyi and Mr Sylvester Anya, Faculty of Law, University of Nigeria, Enugu Campus
3. *Copyright Provisions Impacting on Access to Knowledge: A Comparative Analysis*  
Mr Victor Ozioko, Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka
4. *Access to Knowledge through permissive Copyright Law and Policy*  
Mr Justus Ugwu, Senior Lecturer, Faculty of Law, Enugu State University of Science and Technology, Enugu
5. *Achieving Access to Knowledge through Incentives to Authors*  
Dr Ikenna Chukwu, Senior Lecturer, Department of Marketing, Enugu State University of Science and Technology, Enugu
6. *The Activities of the Nigerian Copyright Commission with particular reference to the issuance of compulsory licences for translation and reproduction of certain works*  
Mr John O Asein, Director, Nigerian Copyright Commission, Abuja
7. *Achieving Access to Knowledge through E-Learning*  
Dr Christian Bolu, Director, ICT/Innovation Centre, University of Nigeria, Nsukka

The following print and electronic media houses attended the workshop:

1. Federal Radio Corporation of Nigeria (FRCN), Enugu
2. Nigerian Television Authority (NTA), Enugu
3. This Day (National Newspaper)
4. The Nation (National Newspaper)
5. Daily Star (State Newspaper)
6. The Light (State Newspaper)
7. The Guardian (National Newspaper)

The event was chaired by a High Court Judge, the Keynote Address by a commissioner/law professor and an expert in intellectual property while the Goodwill Message was delivered by the Director General of the Consumer Protection Council, Abuja. The Director General of the Nigerian Copyright Commission who could not attend as result of other official engagement was represented by a director who presented the Commission's paper.

The workshop papers are being edited for publication.

### **8.3.2 Pending Activities**

As at the date of this interim report, the following activities remain pending:

#### **Sponsored publications in daily and weekly newspapers**

In Nigeria, most media houses are partially commercialised. This makes any media-based programme very expensive. Consequently this limited the scope of the current campaign. Another limitation is the rigid mindset of some authors who see the campaign as a call to reduce the protection offered by the Copyright Act.

#### **Presentation to the National Assembly**

It is planned for the provisions of the Copyright Act identified as capable of inhibiting access to knowledge, to be presented to the National Assembly for possible amendment. A problem we will face is that the level of piracy in Nigeria is high, which is considered as a matter that requires urgent attention rather than the campaign on access to knowledge.

#### **Visit to the Federal Ministry of Finance**

It is also planned to visit the Federal Ministry of Finance for possible reduction in the taxes on printing and educational materials.



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# 1978... what were YOU doing?

*The African Commons Project and the National Consumer Forum, South Africa*

## 9.1 About the campaign

The aim of the campaign was to highlight the need for a review of the South African Copyright Act in light of the new, digital economy. As the current Act is from 1978, the campaign hoped to interest and involve local digital consumers by inviting them to share multimedia “stories” – in video, photograph or text, about what they were doing – or were not doing! – in 1978. Thus the campaign was titled: *1978... what were YOU doing?* The point of this was to illustrate that it is unreasonable to have intellectual property laws created for an analogue world 30 years ago, governing consumer activities in a digital economy.

The project was aimed at “digital consumers,” which are those South Africans who spend at least half an hour on the Internet or email per day as it was believed that these consumers would use the Internet to communicate, access and share cultural products, and transact.

This project was intended to be a viral online campaign using a social media platform and email, to spread awareness about the need for copyright reform within the South African context. The final phase was to make representation via an online petition to the South African government (and in particular, the Department of Trade and Industry) to mobilise for a review of the current copyright act.

The main ideas that the campaign wished to communicate to local consumers were:

- The existence of intellectual property (IP) restrictions, and the call for more stringent rules by large corporations which unnecessarily criminalise ordinary South Africans;
- The understanding that IP is governed locally by the Copyright Act 98 of 1978 and is outdated;
- That there needs to be a review of the Copyright Act in order to protect both consumers and producers of information; and
- The need to gather signatures of digital consumers on a petition addressed to the Department of Trade and Industry.

## **9.2 The Activities**

The following activities were planned:

### **9.2.1 Viral email campaign**

A viral email campaign throughout the duration of the project to be sent to target mailing lists including the NCF mailing list, The African Commons Project network which has their own mailing lists, and university and college mailing lists where possible.

Expected results for activity one would lie in the success of the email content to generate activity and thus have readers pass the mail onto friends and colleagues.

### **9.2.2 Facebook campaign and competition**

A supporting Facebook Page campaign and competition as the “community hub” of the campaign, and including:

- User-driven contest where fans can vote for the week’s best multimedia story, photos or text that illustrate: In 1978 I was...
- Links to resources that will assist digital consumers with the competition and provide richer background information.

Expected results for the activity was to have a good selection of multimedia files uploaded which would indicate adequate consumer activity.



### 9.2.3 Online petition

An online petition which will be hosted on iPetition (<http://www.ipetition.com>) where signatures will be gathered in a letter to the Department of Trade and Industry calling for a consultative and development-focussed review of the copyright act. The petition will be sent to the government at the conclusion of the campaign.

Expected results for the activity was to have between 100 and 500 signatures on the online petition.

## 9.3 The outcomes

### 9.3.1 Email campaign

This included two emailers sent to a database of consumers and other networks. The introductory email campaign was entitled *1978 what were YOU doing?* and was sent out on 24 March 2010 to 666 people. A total of 120 people opened the email which is rather low at 18%. The statistics (below) revealed a high amount of emails remained unopened.

In terms of style, the launch email was designed to provide an amusing glimpse of “if you recognise these things then you remember 1978” and the objective was for readers to identify with the content and then to pass it along to friends and colleagues. However, qualitative investigation post-launch revealed that a number of people did not open the email specifically because it appeared to be one of those pass-it-along emails. It appears as if there was fatigue towards this type of email message.

Despite this, the most popular links clicked on within the emailer were those sending people through to the Facebook page, to the Web



Figure 9.1: Campaign launch email

based version of the email and to the TACP blog entry on access to knowledge.

The second email was sent out on 26 May 2010 to a total of 683 respondents and this email announced the winners of the Facebook competition and included a link to the online petition.

To see if we could improve the click-through rate, it was decided to segment the mailing lists so that both the National Consumer Forum and The African Commons Project mailing lists would receive an email with a specific title referring to their organisation, in the hope that this would be recognised as a non-spam piece of communication. The title was also more self explanatory and included a definite call to action. An example of the title used is as follows: *Sign a NCF petition to promote access to knowledge and competition winners announced.*

However, the open rate remained the same, with around 18% of respondents opening the email.

The most popular links clicked were those directing people to the online petition with 55 click throughs, and around 7 click throughs to the Facebook page.

### **9.3.2 Facebook campaign and competition**

A Facebook page was established which included a competition plugin powered by Wildfire (<http://www.wildfire.com>) which enabled Facebook fans to upload multimedia and for others to vote for the best multimedia entry.

The competition encouraged people to upload photographs and captions around what they were – or were not doing – in 1978. Unfortunately when installing the Wildfire application, we found that only one multimedia type could be chosen for the competition, so the original idea of including a variety of multimedia had to be rethought. It was decided that uploading images rather than video would be easier for local audiences. In order to encourage uploads TACP acquired sponsorship from Plugg (<http://www.plugg.co.za>) a local Internet broadband provider. The company agreed to sponsor a first prize of a year's free broadband.

South Africa History Online (<http://www.saho.org.za>), a local online archive of South African history with the mandate to rewrite, critically examine and teach local history, agreed to include a blurb about the competition and button in their April email newsletter. Creative Commons ZA's project lead, Dave Duarte, also agreed to mention the campaign in the HuddleMind (<http://huddlemind.net/profiles/blog/list>) newsletter which is aimed at local marketers. And the Vega School of Advertis-

The screenshot shows a Facebook page for a campaign. The cover image has a large '78' and the text 'What were you doing?'. The main post is a text update asking for updates on the SA Copyright Act. Below it is a link to 'www.cmfags.com'. There is also a petition link: 'A consultation, development-focused Copyright Review' with the URL 'www.petitions.com'. The page shows engagement metrics like '1 friend likes this' and '81 people like this' with profile pictures of Karen Walters, Pascal Klauer, and Adina Elmoulah.

Figure 9.2: Campaign Facebook page

ing (<http://www.vegaschool.com/>) also included a link in their newsletter aimed at Vega students.

Despite advertising the competition and including an attractive prize, the competition itself resulted in extremely limited activity with a total of six entries.

The Facebook page itself received a total of 82 fans. Again, activity on the page was limited and most activity came from the administrators, namely TACP. Awareness of the page grew in the first couple of months of its launch from end of March to early May, and thereafter fan acquisition began to level off. As expected, the bulk of fans came from South Africa with the remainder coming largely from the United States.

### 9.3.3 Online petition

The online petition was publicly launched via email and the Facebook page on 26 May 2010. Prior to this a group of activists and legal practitioners from within the local A2K network assisted with the drafting of

Home » Categories » Media, Culture and Sports » A consultative, development-focussed Copyright Review

## A consultative, development-focussed Copyright Review

[SIGN](#) [BLOG](#) [SIGNATURES](#) [EMAIL FRIENDS](#)

For more information about why we need a review of the SA Copyright Act, please click on the blog tab above or click here: [http://www.ipetitions.com/petition/1978\\_update/blog](http://www.ipetitions.com/petition/1978_update/blog)

[Sign Petition Now!](#)

**Sponsor**

The National Consumer Forum and The African Commons Project

[Contact Petition Sponsor](#)

**Links**

[National Consumer Forum](#)  
South African non profit organisation concerned with the rights of local consumers.

[The African Commons Project](#)  
Important information and

The National Consumer Forum (NCF) and The African Commons Project (TACP), two registered Section 21 companies operating within South Africa, on behalf of South African consumers hereby request the Minister to urgently consider a consultative, transparent review of the current Copyright Act.

The Act, initially drafted more than 32 years ago, should be reviewed in light of the digital innovations that have occurred within the last three decades which have dramatically altered the way we create, share, distribute and use information materials and cultural products.

The limited monopoly conferred to rights-holders by copyright has the potential, in the absence of adequate legal flexibilities (especially copyright limitations and exceptions) to limit a number of

Figure 9.3: Campaign petition

the letter to the Department of Trade and Industry.

To date the petition has received 104 signatures and these were sent together with the letter to the Department of Trade and Industry via the National Consumer Forum on 5 July.

### 9.3.4 Additional, unplanned activities.

There were additional activities which were used to leverage the campaign. These included:

- Press coverage for the campaign on the Financial Mail Campus website (<http://fmcampus.co.za/digital-and-developing-world-needs-copyright-reform/>).
- Press coverage on Mybroadband.co.za (<http://mybroadband.co.za/news/general/12879-MP3-Format-shifting-allowed-but-pirates-beware.html>).
- Being provided with a free online banner campaign on Polity.org (<http://www.polity.org.za>) a website that aims to deepen democracy through access to information. The campaign lasted for one

week (21 to 28 May) and resulted in 28,000 ad views and 184 click-throughs for the period. There were about six to ten petition signatures that came via this ad campaign.

- A full page spread in the National Consumer Forum's Consumer Faire newspaper.
- Awareness for the online petition via the Facebook Group, *Stop Risa – Converting a CD to MP3 is illegal in South Africa*.
- Promoting the campaign via a speaking engagement at the APC's Media Piracy workshop.
- Promoting the campaign via a speaking engagement at the South African National Council for the Blind's (SANCB) TVI workshop which resulted in additional signatures on the online petition.
- Subsequently becoming involved in the SANCB-led task team around copyright reform in South Africa as a direct outcome of the 1978 campaign.

## 9.4 Strengths and weaknesses

### 9.4.1 Weaknesses

**Slow uptake of the viral email campaign:** One of the reasons for this could be that the databases from which we worked were not up-to-date and so resulted in a reduced open rate. Another reason might be that the popularity of passing along information (viral marketing) has moved from email-based to multimedia. In other words, digital consumers are requiring more sophisticated media to amuse them and catch their imaginations.

**Low activity on the Facebook page:** The lack of understanding around intellectual property on the local level could have been an inhibiting factor where people did not fully understand what the issues were. For example the RISA group – which was responding directly to something that impacts consumers, ie converting music files for personal use – seemed to catch the imagination more successfully than the 1978 campaign.

**Limited competition entries:** Digital South Africans do not appear to be eager to roll up their sleeves and create and upload media. Internal discussion around this low response level has led us to debate local consumer media consumption habits at this point. Perhaps South Africans still feel more comfortable with *consuming* rather than *creating* media. The successful uptake of broadband amongst digital consumers may show a shift towards media creation within the next couple of years.

### 9.4.2 Strengths

**Media awareness:** Interestingly, the media picked up on the 1978 campaign which resulted in some media mentions (as described above) with interest being shown in running follow up stories. Furthermore, the journalists who contacted us are now on our radar and we are on theirs so that pushing additional stories around intellectual property versus the rights of consumers could receive more traction in the future.

**Network development:** Since embarking on the campaign, the network of activists and civil society A2K proponents has become more fully developed. This is not the sole cause of the 1978 campaign. Rather the campaign has helped create a snowball effect that has resulted in the initiation of real dialogue with key players in government. The final phase of the campaign, namely delivering the petition to government, is now incredibly well placed in that it comes at the beginning of the dialogue process and will thus help to further strengthen awareness with government stakeholders around the A2K movement in South Africa.

**Message strengthening:** The campaign has helped distil the complicated IP issue to something that is easy to understand. The message is straightforward: it is time to update the copyright act. This core idea has become helpful for the local A2K networks in making their cause accessible to a wider audience.

## 9.5 Lessons learned

From this project we have learned the following lessons:

- **Beware of passivity.** The advocacy campaign was an important learning curve around *how*, and more importantly, *if* digital South Africans will respond to calls to become actively involved in campaigning. There appears to be a level of apathy. Future campaigns

will need to find unique, low-hassle activities that will appeal to South Africans.

- **Support can be obtained from wider networks.** The campaign helped us tap into the wider A2K networks that we were not previously involved in, and which have their own strengths, followers and momentum.
- **Work together, not in silos.** Everyone wishes that their campaign will be the most successful, but we have learned that by combining overall objectives with other like-minded networks, one's own campaign goals can be met. By sharing our knowledge and campaign goals with groups such as SANCB and APC we have found strength in numbers. Our campaign will be added to the groundswell of voices calling for copyright reform as one more aspect to the larger picture.





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# Reducing the retail prices of educational books in Zambia by removal of import duty

*Zambia Consumer Association (ZACA)*

## 10.1 Background

In January 2010 Consumers International (CI) awarded ZACA a sum of USD\$6,912 to conduct an advocacy project aimed at influencing tax policy measures that would result in the reduction of retail prices of educational books on the Zambian market as a result of removal of 20% import duty on imported educational books in the 2010-2011 national budget. The overall aim of the project was to lower the costs of books and make them more affordable to students in tertiary institutions; the majority of students violate the country's copyright laws by photocopying text books.

Although no impact-assessment was conducted regarding the actual cost reductions that would result from a 20% removal of duty on imported books, it was generally agreed that from an advocacy group's perspective the campaign to reduce the retail prices of books in itself would serve five interrelated objectives:

1. To raise awareness about intellectual property issues vis-à-vis access to knowledge;
2. To highlight some of the barriers to access to knowledge;

3. To highlight the plight of students in Zambia with regards to high prices of educational books;
4. To trigger national empathy towards the plight of students; and
5. To serve as a starting point for further policy measures aimed at reducing cost of educational books on the Zambian market.

## **10.2 Activities**

The following activities were conducted by the association under this project:

### **10.2.1 To build a grass root campaign to influence tax policy measures in the 2010-2011 national budget**

Under this strategy, the Association worked with the Student's Unions in Zambia to build a core-group of campaigners to lobby government to remove the 20% import duty on imported educational books. A one-day meeting of Union leaders from 14 universities in Zambia was convened to plan for the various strategies that would be employed during the course of the project to meet the intended, objectives.

Twenty-eight student leaders (two from each University) attended the meeting which was held at Commonwealth Youth Centre in Lusaka. Although the initiators of the project (ZACA) had specific pre-conceived plans on how the campaign should be conducted, these plans were subjected to a detailed review by the campaign team resulting in some changes and variations in both strategies and budgets.

The specific strategies that were changed were firstly that instead of conducting a television interview for a panel that would speak to the audience about the project without interaction with the audience, a live-phone in radio programme would be conducted on major community radio stations with a view to get input from the public about the campaign objectives. In this instance, eight live programmes on radio were conducted instead of two television interviews. Secondly the two planned rallies were cancelled because the budget session of parliament had not commenced by the end of the project. The budget for rallies was utilised for paying for radio programmes.

### **10.2.2 To influence the 2010-2011 budgetary process in order to obtain a 20% waiver on duty of imported educational books**

Under the above strategy, the following activities were undertaken:

- Students from universities wrote letters to members of parliament within their localities to petition them to raise the issue of removal of 20% import duty on imported books during the budget session of parliament. A total of 184 letters were sent to members of parliament.
- Students wrote letters to the editors of prominent newspapers in Zambia regarding need to waive duty on imported educational books. Seven such letters were published; five in the privately-owned newspapers and two in the state-run newspapers.
- Professor F M Banda, a well-known Zambian Scholar teaching at the University in South Africa, who has a bi-weekly column in one of the privately-owned newspapers, was enlisted and wrote an article in support of the campaign.
- A total of 18 phone-in programmes were conducted on community radio stations to sensitise members of the public about the campaign.
- Petersen, a well-known Zambian artist phoned-in to one of the radio programmes to support the campaign.

## **10.3 Conclusion**

In May 2010 the government through the proposals from the Ministry of Finance invited proposals from the stakeholders in Zambia regarding the issues they want to be considered in the 2010-2011 budget. This is an annual practice that allows citizens to participate in the national budget formulation. Our student's campaign team took advantage of this budget submission window to submit a joint proposal to government to propose for a 20% waiver of import duty on imported books.

This proposal supported by the related advocacy activities outlined above, form a basis for our project. Other activities are still on-going. The budget session of parliament will start sitting in September 2010 and December 2010, it is our intention to intensify our advocacy work when parliament is in session.



## **Part IV**

# **Papers from 2010 CI Global Meeting on A2K**



# Quel rôle pour les acteurs du système éducatif dans l'accès à la connaissance par les TIC – Cas du Maroc

*Najiba El Amrani El Idrissi et Mohammed Abdou Ammor,  
ATLAS-SAÏS, Maroc*

## Résumé

L'intégration des TIC dans le système éducatif permet d'améliorer ses performances. Cette technologie présente des avantages en terme de coûts et de souplesse mais se heurte aux contraintes des droits de Propriété Intellectuelle (PI).

Des moyens alternatifs et gratuits existent mais ne sont pas connus et maîtrisés du large public.

Comment ces contraintes liées aux droits de PI pourraient être traitées pour tirer bénéfice des avantages des TIC dans l'enseignement sans handicaper les utilisateurs par des coûts d'accès exorbitants ?

Une politique de renforcement des capacités des utilisateurs est à développer. La vulgarisation et l'intégration de la formation à l'utilisation des logiciels libres devraient être conduites par le système éducatif. La stratégie doit favoriser la promotion et l'appui aux développeurs de logiciels et contenus libres.

**Mots clés** : intégration des TIC; système éducatif; logiciels libres; formation

## 11.1 Introduction

Il est établi que le développement des nations reste fortement corrélé aux performances de leurs systèmes éducatifs. Ceux-ci présentent ; dans les pays en développement ; des faiblesses liés notamment au défaut d'accès physique de la population aux infrastructures. Le nombre insuffisant et l'éloignement des établissements de diffusion du savoir privent de la formation une large couche de population qui représente un élément essentiel des Objectifs Millénaire de Développement fixés par la communauté internationale.

Par ailleurs il a été déterminé que l'intégration des TIC dans le système éducatif permet sa massification et d'améliorer ses performances. Ainsi cette technologie offre des modes d'accès supplémentaires permettant de s'adapter aux contraintes des apprenants (disponibilité, capacité financière, rythme d'assimilation), de différencier les contenus et de diversifier les méthodes pédagogiques d'apprentissage. L'utilisation des TIC permet d'étendre l'offre de formation à de nouveaux publics (formation continue des actifs ; vulgarisation du savoir. . .). Les Technologies de l'information et de la communication (Internet, intranet, CD-ROM. . .) représentent de ce fait un moyen recommandé pour accompagner la formation des apprenants, la rendre plus efficace et de réduire les coûts de l'enseignement.

De plus l'enseignement permet de profiter des infrastructures installées par le secteur des télécommunications pour atteindre les utilisateurs potentiels d'internet et élargir ainsi le champ des bénéficiaires potentiels.

Toutefois les infrastructures physiques ne sont pas suffisantes dans l'enseignement recourant aux TIC. A coté du matériel, outillage et installation, ce système nécessite également l'utilisation de logiciels pour les faire fonctionner. Or les logiciels les plus usités sont protégés par les droits d'auteur. Sont également protégés par copyright par leurs concepteurs les contenus de formation développés pour les adapter à l'utilisation via les moyens de télécommunication. Cette protection se traduit par des frais qui renchérissent les coûts d'utilisation des modes de formation recourant aux TIC.

Aussi que peuvent faire les acteurs du système éducatif pour accélérer la généralisation des TIC dans l'enseignement public notamment supérieur en raison des enjeux aussi bien pour l'employabilité des lauréats que de l'efficacité du système ?



## **11.2 Politique d'intégration des TIC dans l'enseignement au Maroc**

Le Maroc a initié vers le milieu des années 90 une politique de développement de ces technologies qui ; depuis ; a fait l'objet de renforcement et d'adaptations successives pour exploiter les opportunités de l'usage des Technologies de l'Information et des évolutions induites par la mondialisation en matière de flux d'investissements. Le discours du Roi du 30/07/08 a marqué une impulsion forte en affirmant vouloir assurer l'insertion du Maroc, par ses entreprises et ses universités, dans l'économie mondiale du savoir. Il a ainsi appelé le gouvernement à adopter une nouvelle stratégie dédiée aux secteurs de l'industrie et des services et au développement des nouvelles technologies.

Les orientations de cette politique s'articulent autour de quatre priorités :

- La transformation sociale en favorisant l'accès des citoyens aux échanges et à la connaissance notamment par l'Internet Haut Débit.
- La mise en oeuvre des services publics orientés usagers.
- L'informatisation des PME pour accroître leur productivité.
- Le développement de l'industrie TI en favorisant l'émergence de pôles d'excellence compétitifs et à fort potentiel à l'export.

### **11.2.1 Stratégie**

Une véritable stratégie sectorielle n'a démarrée qu'en 2005. Baptisée e-Maroc 2010, elle représente un saut qualitatif dans cette politique en raison du lancement de chantiers structurants et de l'amélioration notable de l'environnement réglementaire et institutionnel encadrant les TIC au Maroc.

Maroc numérique 2013 représente la deuxième version de cette stratégie nationale et vise à développer une utilisation efficace des TI dans tous les domaines de la vie économique et sociale marocaine. Elle est érigée en priorité pour assurer au pays une croissance et une compétitivité durables.

Les stratégies successives adoptées pour le développement des TIC sont toutes accompagnées par la mise en place d'une politique de formation multidimensionnelle, dans le but de répondre aux besoins en ressources humaines au niveau quantitatif et qualitatif.

Pour la stratégie Maroc Numérique 2013, les initiatives clés prévues pour concrétiser la transformation sociale sont :

- La généralisation de l'usage et l'équipement en TI des acteurs de l'enseignement avec l'objectif d'équiper 100% les établissements scolaires publics ; de former plus de 200 000 enseignants dans le domaine des TI.
- La mobilisation des acteurs publics et privés autour d'offres d'accès aux TI attractives pour les catégories socioprofessionnelles par la création de 400 centres d'accès communautaires publics.
- Le développement de contenu numérique national notamment par la formation de 30000 profils TI.

Il est à souligner que les différentes stratégies d'intégration des TIC dans le système d'enseignement qui se sont relayées reposent toutes sur trois piliers fondamentaux :

- L'infrastructure consistant à équiper les établissements de formation en salles multimédia (dits «Environnements Numériques de Travail») connectées à Internet ;
- La formation qui vise les encadrants et les apprenants. Celle-ci concerne la formation des formateurs à l'utilisation des TIC et la formation des compétences pour répondre aux besoins du secteur ;
- Le contenu concernant le programme pédagogique adapté à l'utilisation pour la formation à distance et en présentiel.

### **11.2.2 Programmes**

La stratégie d'implémentation des TIC dans le système éducatif s'est traduite par des programmes et des plans visant son opérationnalisation. Les principaux programmes mis en œuvre sont Nafida, Génie et Génie sup, INJAZ et Initiative 10000 ingénieurs.

#### **Programme Nafida**

Il vise faciliter l'accès de la famille de l'enseignement aux TIC par la subvention de l'équipement en ordinateurs portables et connexions Internet pour près de 100 000 enseignants. L'objectif étant de permettre d'utiliser ces outils dans le système éducatif national en accédant à des contenus multimédia et à des ressources.

### **Programme Génie**

Lancé pour la période 2006-2009 ; il a visé la généralisation de l'introduction des TIC au sein de tous les établissements scolaires publics (Écoles, Collèges et Lycées). Il repose sur trois axes : l'équipement des salles en ordinateurs avec des connexions internet ; la formation des encadrants (Initiation à l'informatique ; Appropriation des TICE et Maintenance informatique) et les ressources numériques (identification des besoins et des priorités en matière de contenus pédagogiques numériques ; mise en place d'un laboratoire national de développement de contenus numériques et d'un portail TICE).

### **Programme Génie Sup**

Il est dédié au renforcement des formations en TIC dans les établissements de formation supérieurs. C'est un programme très ambitieux puisqu'il vise à :

- Mettre en place des Environnements Numériques de Travail et développer davantage les ressources et les services numériques mis à la disposition des enseignants, du personnel administratif et des étudiants.
- Faciliter l'accès aux services et aux ressources numériques en interne et en externe.
- Soutenir la production des contenus pédagogiques numériques.
- Mettre à niveau les infrastructures numériques.
- Promouvoir la recherche et l'innovation.

### **Initiative gouvernementale 10000 ingénieurs**

C'est un programme visant à renforcer la pédagogie par l'intensification du dispositif de formation type ingénieur. L'objectif étant de doubler l'effectif des ingénieurs à l'horizon 2010 dans les domaines identifiés prioritaires. Pour le secteur des TIC ; l'effectif des lauréats devra tripler pour passer de 1.800 à 4500 par an. Le système de formation national aura par ailleurs à produire 11.500 diplômés tout profil confondu afin de répondre aux besoins du secteur.

### **Programme INJAZ**

Il est destiné aux étudiants du second cycle universitaire dans le domaine de l'ingénierie, des sciences et des technologies de l'information et de la communication. Il vise à mettre à disposition ; des étudiants bénéficiaires un service permettant l'accès et l'usage des TIC durant leurs cursus du second cycle universitaire. Le but étant de rehausser la qualité de l'enseignement et, par conséquent, l'employabilité des lauréats. Cela porte sur la subvention d'achat d'ordinateur portable et l'abonnement à Internet. Il concerne spécialement les étudiants inscrits à l'initiative gouvernementale «10.000 ingénieurs».

S'agissant spécifiquement du développement du software et du contenu pour le e-learning dans le système éducatif, quelques initiatives sont enregistrées. Des projets pilotes ont été lancés dans les différents secteurs d'enseignement. Le département de l'éducation nationale a mis en place le CNREE (Centre National de Rénovation Éducative et d'Expérimentation) chargé des innovations et des expérimentations éducatives. Il a initié un projet de formation des formateurs (enseignants du primaire et du secondaire) basé sur la télévision interactive dans le but de toucher les centres isolés inaccessibles au réseau Internet. Il a été alloué les crédits pour équiper environ 10000 établissements scolaires (écoles, collèges et lycées) en salles multimédia connectées au réseau Internet.

Au niveau de l'université, le besoin en télé-enseignement pour différents types de formations a motivé ; dès 2004 ; la mise en place du Campus virtuel marocain (CVM). C'est une institution de régulation, d'animation et de coordination de la formation ouverte et à distance assistée par les TIC (e-learning). Un projet de mise en place d'une bibliothèque des ressources numériques est en cours d'implémentation. Il vise l'établissement de l'état des lieux des ressources numériques existantes au sein de chaque établissement universitaire du Royaume et de convenir d'une stratégie pour leurs co-développements et à la promotion de leurs usages.

Un centre de recherche ; le Soft Center ; est par ailleurs créé pour le développement des logiciels. Il trouve appui auprès du pôle de compétence STIC ; le réseau de chercheurs et d'experts marocains spécialisés dans les TIC.

Plusieurs universités se trouvent également impliquées dans des projets internationaux tels que par exemple : FORCIIR ; UVA ; EUMEDIS ; THETYS ; PRICAM. De même un réseau (RESATICE) de chercheurs internationaux a été constitué. Il est spécialement orienté pour l'étude des usages des technologies dans l'enseignement.

Malgré le déploiement de ces plans et programmes; les objectifs d'appropriation des TIC par le monde de l'enseignement ne sont pas encore atteints. Le défaut d'offre appropriée ont amené certains jeunes à s'inscrire à des formations ouvertes et à distance auprès d'universités étrangères (américaines, canadiennes, françaises...).

Les bilans des actions entreprises dans ce domaine ne sont effectués que partiellement de telle sorte qu'une évaluation de la pertinence et de l'efficacité de la stratégie n'a pas pu être réalisée. Cela tient à l'insuffisance des ressources allouées pour atteindre les objectifs visés. Une défaillance dans la gouvernance qui assurerait la participation des parties concernées est également mise en cause. Enfin une structure de pilotage; dotée des compétences et des pouvoirs; pour orienter, suivre, évaluer, rectifier et assurer l'implémentation des actions; plans et programmes adoptés fait défaut.

Cette évaluation n'a pas été réalisée non plus dans le cadre de recherche académique probablement par défaut d'informations et de données officielles. Des initiatives isolées et de portées limitées ont été menées par des étudiants ou enseignants dans le cadre de projets de formation. Les enquêtes et les études conduites ont permis de révéler des constatations qualitatives sur l'utilisation des TIC par le monde scolaire et universitaire. Les données avancées ne reflètent pas la réalité mais renseignent bien sur le retard dans l'appropriation des TIC aussi bien par les apprenants que les enseignants. A l'exception d'initiatives personnelles, l'adoption des TIC est le fait des chercheurs ou acteurs spécialisés dans le domaine.

Une enquête menée sur l'intégration des TIC dans l'enseignement public (Iraqi Houssaini Omar; 2006) a conclu que la stratégie menée jusqu'alors a faiblement intégrée les aspects relatifs à la formation et au développement de contenus pédagogiques. Elle s'est concentrée sur l'équipement en ordinateurs seulement. De plus l'équipement en salles multimédia, particulièrement en termes d'ordinateurs, est jugé insuffisant pour permettre une réelle utilisation de l'outil informatique en tant que support pédagogique. Par ailleurs le débit de connexion est insuffisant pour répondre efficacement aux exigences de navigation et de convivialité de l'accès à Internet. Le «prix trop élevé» mentionné par la majorité des interviewés constitue en outre un frein important à l'acquisition du matériel informatique par les enseignants.

Une autre enquête sur l'intégration des TICE dans les pratiques enseignantes (Rhazal; 2007) a dévoilé qu'en dépit du programme génie; l'utilisation des TIC particulièrement chez les enseignants de physique chimie au secondaire reste très faible. Les facteurs en cause révèlent un

manque de compétences des enseignants à l'utilisation des TICE ; un défaut dans la perception de leur apport sur le plan didactique ainsi qu'une infrastructure matérielle et logicielle insuffisante au niveau des laboratoires de physique chimie.

Enfin l'enquête A2K lancée par CI et menée par l'AAS (Association Atlas Sais membre de CI) ayant touché notamment des acteurs du système éducatif marocain a révélé que la majorité manque de compétences pour trouver des alternatives d'accès au matériel protégé par les droits d'auteurs.

Ainsi toutes les études menées ont conclues que les projets de développement des TIC restent de portées limitées par défaut de soutien par des programmes gouvernementaux visant à atteindre une masse critique de bénéficiaires justifiant l'investissement des promoteurs dans le développement des plateformes et des contenus.

Ainsi il s'avère que la politique menée jusqu'ici pour l'intégration des TIC dans l'enseignement a soutenu essentiellement l'axe du matériel et des infrastructures. La promotion de l'équipement n'a pas été accompagnée par celle du développement du contenu ni de celui du software. L'écosystème informatique est dominé par les licences payantes élevant ainsi le coût d'accès. Le budget de l'état ne supporte pas l'acquisition régulière de licences. Les utilisateurs publics ou privés sont tentés de recourir aux programmes piratés ce qui les met en infraction avec la législation de la propriété intellectuelle.

### **11.3 Alternatives aux contraintes de la Propriété Intellectuelle**

Face aux contraintes liées à la propriété intellectuelle qui limitent l'accès à la formation et à la connaissance, diverses approches peuvent être mises en œuvre. Nous proposons dans ce qui suit quelques alternatives qui sont actuellement mal connues et non maîtrisées par le large public.

#### **11.3.1 Vulgarisant des logiciels libres et accès libre**

Des technologies alternatives et gratuites pourraient être mobilisées pour ne pas recourir aux produits et services à licence payante. Il s'agit des logiciels dits libres développés et mis à la disposition du public gratuitement. La liberté d'utilisation comprend celle de copier le programme pour l'utilisation propre ou le partage avec des tiers ainsi que celle de

modifier le programme pour l'adapter du fait que son code source est donné.

Ainsi des logiciels libres ont été développés depuis les années 80 pour des besoins très variés tels que les systèmes d'exploitation ; les navigateurs web ; la bureautique ; les lecteurs multimédia ; les serveurs http ; les gestionnaires de base de données ; la messagerie électronique . . .

Pour le secteur de l'éducation, l'offre couvre les domaines de gestion d'établissements scolaires ou universitaires. Elle comprend des modules de comptabilité, finances, ressources humaines, cursus et scolarité, documentation, communication, formation, pédagogie, travail collaboratif. D'autres concernent la gestion : contenu web, l'apprentissage, les droits numériques, les portails et plates-formes numériques de travail ou d'enseignement (e-learning) etc. . .

En dépit du caractère libre des logiciels, ils sont soumis au droit d'auteur. Celui ci distribue le logiciel accompagné d'une licence libre qui énumère les droits donnés à l'utilisateur. Une large variété de licences existe : licences de type BSD ; GPL (connu sous le sigle Copyleft) ; source ouverte ; source partagée ; logiciels gratuits, logiciels à partager. Ils diffèrent par le degré de liberté qu'elles accordent en matière de redistribution.

La commercialisation des logiciels libres est ainsi possible mais l'exclusivité est interdite. Si les logiciels libres ne permettent pas de rétribution directe des auteurs, la vente de services associés à l'utilisation du logiciel participe au retour sur investissement financier pour les développeurs. Ainsi l'assistance ou l'offre de fonctionnalités spécifiques peuvent être payantes.

Le logiciel libre s'impose donc comme une solution de remplacement moins coûteuse de logiciels propriétaires. Il devient également un produit de plus en plus mis en avant par des revendeurs, pour sa fiabilité (cas de fournisseurs de serveurs) et son coût de licence nul, permettant au client d'investir la différence dans des services associés.

De part leurs atouts, l'intensification de leur utilisation est recommandée. Les intervenants du système éducatif doivent participer au renforcement des capacités des utilisateurs en vulgarisation et intégrant la formation à l'utilisation des logiciels libres. De telles actions participeront à la démystification de ces outils et faciliter leur appropriation par les utilisateurs. Elles baisseraient parallèlement les coûts d'utilisation et d'équipement des apprenants et par suite l'amélioration de l'accès au savoir. Les exploitants des centres d'accès communautaires devraient également bénéficier de formations dédiées pour renforcer leurs capacités dans l'assistance à leur clientèle.

### **11.3.2 Appui au développement et promotion de logiciels et contenus libres**

Les logiciels libres présentent des avantages indéniables de part leur coût et efficacité. Mais ils n'arrivent pas à émerger face au lobbying et aux pratiques de l'industrie des logiciels propriétaires. La part de marché des logiciels libres à travers le monde est dérisoire (moins de 5%). Toutefois la croissance de son marché dépasse les 50 % annuellement comparée au 7% de celui des logiciels propriétaires. Une telle progression trouve son origine dans l'appui qu'apportent certains pays et institutions internationales pour sa promotion et son développement.

Des gouvernements (Afrique du Sud, Argentine, Brésil, Pérou. . .) ont officiellement affiché leur orientation vers le logiciel libre. En France, l'ensemble de l'administration centrale est passé à OpenOffice.org. Même aux USA, le président OBAMA a commandé une étude qui inciterait le gouvernement américain à adopter les logiciels libres pour leurs systèmes TI. La Tunisie ; un pays globalement similaire au Maroc ; s'est même dotée d'un secrétariat aux nouvelles technologies et au logiciel libre.

Au Maroc, le ministère des Finances est le seul qui à faire basculer les installations informatiques de ses départements vers les logiciels libres.

Ces initiatives devraient se renforcer par des programmes et plans pour en constituer une stratégie visant à favoriser la promotion et l'appui aux développeurs.

Les stratégies nationales de développement des logiciels et contenus libres peuvent bénéficier de l'appui de L'UNESCO. En effet, celui-ci a établi un réseau de centres de collaboration occupés dans le renforcement des capacités et fournissant l'assistance technique et les outils éducatifs pour des initiatives d'accès à la connaissance.

Les gouvernements peuvent, par exemple, rendre obligatoire des produits open source dans les services publics. Avec cette approche, les utilisateurs seront formés à l'utilisation de ces logiciels. La politique de promotion pourrait prévoir que l'état rémunère les développeurs de logiciels libres comme elle pourrait allouer des crédits conséquents pour la formation et la recherche dans les institutions du système éducatifs pour la production de logiciels et de contenus libres. A défaut d'une telle démarche, des associations se sont investies dans cette voie comme le cas de l'ADULLACT : Association des Développeurs et Utilisateurs de Logiciels Libres pour l'Administration et les Collectivités Territoriales.

Pendant un cadre devrait être donné pour coordonner et augmenter l'impact des initiatives privées des enseignants. Des réseaux de dif-



fusion et d'échange d'expérience pourraient donner de la visibilité à ce marché pouvant intéresser le secteur privé.

## 11.4 Conclusion

Le Maroc ; à l'instar de nombreux pays ; a stratégiquement retenu comme priorité le développement du secteur des TIC notamment pour son rôle déterminant dans l'accès au savoir particulièrement dans le domaine de la formation.

Cependant et face à une demande croissante et variée en terme de formation, cette stratégie n'a pas intégré suffisamment certains axes pour vaincre les contraintes techniques et financières limitant des segments des populations pouvant bénéficier des formations et de l'accès au savoir. Il est ainsi des coûts élevés des équipements ; de connexion et du manque de compétences attendues pour les candidats à l'utilisation de cette technologie. D'autres contraintes liées au coût sont particulièrement inhérentes à l'hégémonie des systèmes utilisant les logiciels propriétaires.

Les gouvernements et les instances chargées de la promotion de la connaissance et de l'éducation devraient renforcer et coordonner leurs politiques et notamment pour la promotion des logiciels et contenus libres. Des choix doivent être opérées par les décideurs pour les rendre obligatoires dans les institutions publiques et spécialement dans l'enseignement. Ceci n'est pas incompatible avec leur coexistence avec les autres systèmes utilisant les logiciels privés.

Avec de telles orientations ; les conditions seraient créées pour un environnement encourageant le recours à ces technologies par les utilisateurs et les développeurs. La communauté du système éducatif pourrait trouver les outils et le cadre pour améliorer la pédagogie et augmenter la population du public touchée par la formation.

Bien évidemment des choix coordonnés avec les parties prenantes nationales et internationales devraient être faits dans le but de promouvoir, développer, mutualiser et maintenir un patrimoine commun de logiciels et de contenus libres utiles aux missions de service d'accès à la connaissance. Ainsi les logiciels libres à promouvoir sont ceux qui favoriseraient l'interopérabilité en respectant les formats standards ouverts.

La société civile pourrait parallèlement jouer un rôle pour exercer le lobbying sur les gouvernements afin que leur politique soit plus favorable au développement de ces technologies. Des campagnes concertées avec le mouvement des consommateurs sont à encourager.

Les pouvoirs publics ont la responsabilité de créer le cadre réglementaire et institutionnel pour que ces organisations puissent se développer (techniquement; financièrement et stratégiquement). En renforçant les organisations des consommateurs au niveau des pays; celles les fédérant à l'échelle internationale peuvent devenir encore plus efficaces et renforcer la position des pays oeuvrant pour une régulation internationale des droits de PI plus favorable à l'accès à la connaissance.

Ainsi les moyens et l'accès à l'information dans les structures publiques de formation, d'éducation et de documentation pourraient être gratuitement assurés aux utilisateurs. Des forfaits peuvent être payés aux auteurs ou ayants droits via un fond collectif alimenté par les pays bénéficiaires et les donateurs (UNESCO; pays industrialisés; fondations...).

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# Mapping A2K Advocacy

*Eddan Katz, Electronic Frontier Foundation*

Access to Knowledge (A2K) is about intellectual property (IP), but it is about a lot more than that.<sup>1</sup> It is about the new wealth generated in the transition to a global knowledge economy and the democratising freedoms enabled by the information society. A2K is information policy rooted in human development and human rights and also in the demands of social justice,<sup>2</sup> distributive equality,<sup>3</sup> and identity politics.<sup>4</sup> A2K is also a positive public interest agenda that affirms social norms and production models facilitating peer collaboration and democratic participation. There are groups identified with A2K that advocate for international and domestic legal reform enabling flexibility for countries in various stages of economic development with different cultural contexts. Licensing frameworks for the dissemination of various kinds of knowledge to build the information commons is an important focus of A2K solutions. A2K suggests a new narrative about globalisation revealed in the direction and control of information flows in science, education, culture, and other areas of knowledge. It is the normative foundation of an information age conscious of the social responsibility embedded in our technological infrastructures. This essay is an attempt to make sense of A2K from the policy level, in the networks of movements for whom the idea of A2K resonates.

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<sup>1</sup> Jack Balkin, "What is Access to Knowledge?" April 21, 2006, Balkinization Blog. <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html>

<sup>2</sup> Yochai Benkler, *The Wealth of Networks* (Yale University Press, 2006). Ch. 9

<sup>3</sup> Margaret Chon, "Intellectual Property and the Development Divide," 27 *Cardozo Law Review* 2813 (2006)

<sup>4</sup> Madhavi Sunder, "IP3," 59 *Stanford Law Review* 257 (2006)

Access to Knowledge is as much about technology as it is about the laws that govern it. As the technological infrastructures of the digitally networked environment are still being built and the human genome is being sequenced, A2K brings attention not only to law, but also to the design of these technologies. We now recognise that values are embedded in design choices and that they embody our social and economic politics. This revelation of the regulatory nature of technology itself is a significant reason why the theme of open infrastructures, in both their legal and in their engineering forms, is pervasive in the solution spaces of A2K. The tools and platforms with which new technologies are built end up having significant impact on the fair and just distribution of knowledge in the information age.

This essay is an attempt to take stock of the emergence of A2K – as a theoretical framework, as a set of policy proposals, and as a collection of social movements. These individual instances of policy advocacy against the imbalanced control of information and knowledge in specific industry sectors have recently recognised their common cause across the various communities of A2K. The cross-fertilisation of people, ideas, and policy spaces amongst these constituent groups has enabled the advancement of A2K solutions of open licensing structures and peer production models, for example, to vastly different policy areas in public health, food security, education, and communication, to name a few. In-depth analysis of the economic, legal, and political aspects of A2K issues have been developed by the leaders who have collectively forged this movement, whose work is represented in this volume and elsewhere. This essay is more of a map and a proposal for understanding the connections between groups.

This mapping of A2K also tries to highlight this juncture of A2K when the idea has spread beyond the IP community. These partner movements have their own histories, with different institutions as their focal point and different legal and social frameworks guiding their efforts. The Information and Communication Technologies for Development (ICT4D) communities that coalesced around the World Summit on the Information Society (WSIS) meetings and the umbrella term Global Information Society (GIS), for example, are similarly concerned with the implications of ownership of and control over the layers of information in the technologies at the heart of the knowledge economy.<sup>5</sup> Indigenous rights and traditional knowledge movements share the call for more equitable dis-

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<sup>5</sup> William J. Drake and Rikke Frank Jørgensen, "Introduction." *Human Rights in the Global Information Society*. Jørgensen, Rikke Frank, ed. (MIT Press, 2006)

tribution of the wealth of knowledge in the global economy and are reacting to the injustices of *status quo* international intellectual property and information policy. Strategic engagement between these and parallel communities of interest in collaborative has the potential to be a formidable global coalition on behalf of social justice and the public interest in technology and information policy.

This essay arranges advocacy efforts according to eleven policy areas organised under four broad categories of knowledge and information: (1) Food and Health; (2) Education and Science; (3) Culture and Media; and (4) Communication and Infrastructure. These categories do not represent a theoretical typology of knowledge but rather a means to make sense of the range of issues, institutions, and expertise. In this outline map of issues, the opportunities for collaborations across movements become more apparent and the existence of complementary concepts and reinforcing ideas more useful.

## 12.1 The Origins of A2K

We live in an era when information and knowledge are the raw materials of new technologies. The social and economic value of knowledge is understood to be at the centre of innovation and creativity and therefore the locus of power and wealth.<sup>6</sup> Productivity in the information age is about the construction and manipulation of knowledge. The very means of communication that enable people to work with each other in the globalised economy takes place over digital networks of information technology. Technical expertise previously considered to be within entirely different domains of knowledge starts seeming more alike when information processing becomes core to research and development. The increasing centrality of information and knowledge to social and economic life in turn exposes information policy to the political pressures commensurate with these higher stakes.

Legal restrictions on information flow and knowledge sharing shape how markets work in today's globalised world. IP has been the centre of attention in the knowledge economy because it is the legal regime most readily available to extract revenue from the knowledge and information components of technology. The objective of IP is to balance between the need to provide incentives to creators and owners and the benefits derived from allowing the general public to access and use those works. A2K

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<sup>6</sup> Jamie Boyle, "A Politics of intellectual property: Environmentalism for the Net," 47 Duke Law Journal 87 (1997)

and the various social movements of which it is composed unites in the criticism of the expansion of the exclusive rights of IP at the expense of public access. This tension between the public and private interest in knowledge production becomes problematic as innovation in the information layer of technologies continues to transform more and more aspects of daily life. It is especially when IP protection impacts the access to public goods such as health, education, culture, and agriculture that the imbalance of excessive privatisation is most apparent. As the brief history below of the expansion of IP and the harmonisation of international norms in favour of IP holders suggests, the counter-movement against this momentum has been the strongest unifying force of A2K.<sup>7</sup>

### 12.1.1 IP and International Trade

There have been international efforts since the late 19th Century to promote the protection of IP throughout the world, but it is over the last 20 years that harmonisation has intensified. Until recently, the global IP regime still afforded considerable flexibility to countries. This flexibility was to be challenged in the early 1980s by a strategic alliance of multinational corporations who successfully moved IP into the international trade regime. This private sector mobilisation process began with efforts to influence US trade policy by agri-biotech and pharmaceutical companies such as Monsanto and Pfizer joining forces with the International Anti-Counterfeiting Coalition (protecting trademarks in luxury goods) and the Copyright Alliance (composed of entertainment and publishing companies).<sup>8</sup> These US-based multinational corporations lobbied the US Trade Representative (USTR) to negotiate increased IP protection and enforcement in bilateral negotiations with US trade partners. In a period when the US trade deficit was growing, especially in manufacturing industries, this alliance was successful in convincing trade negotiators that greater IP protection abroad would provide the best means of remaining competitive in the global marketplace. Utilising section 301 of the US Trade Act, which enables the US government to withdraw trade benefits and impose tariffs on goods, the USTR had an important enforcement tool to pressure governments into maximising their IP laws. The merging of IP with international trade was a fundamental shift for IP, now linked with rules about entirely different areas such as textiles, agriculture, and other traditional products.

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<sup>7</sup> Amy Kapczynski, "The Emerging Access to Knowledge Movement and the New Politics of Intellectual Property Law," *Yale Law Journal* (2008).

<sup>8</sup> Susan Sell. *Private Power, Public Law*. (Cambridge University Press, 2003)



The push for increased IP rights around the world concentrated on the World Trade Organisation (WTO) round of trade negotiations culminating in the signing of the Trade Related aspects of Intellectual Property (TRIPs) agreement in 1994. The TRIPS agreement aimed to harmonise IP globally by setting minimum standards for protection by which all WTO member states have to abide. Enforced by a dispute resolution process to adjudicate claimed violations of its provisions, the TRIPS agreement covers a wide range of IP protection from patents, copyright, and trademarks to geographical indications, protection for undisclosed information, and database rights. With WTO backing of these enforcement mechanisms TRIPS became the developed countries' choice vehicle for the globalisation of IP protection, putting pressure on WIPO's influence over IP.

### **12.1.2 Civil Society Mobilisation**

Soon after the TRIPs agreement was signed, a number of civil society groups began mobilising against the new international legal regime. The coordinated IP alliance had no countervailing framework on behalf of the public interest to create balanced policy. Though there are many examples of mobilisation around A2K-related issues over the past decade in various areas of policy as recounted in the mapping section, it was the intersection of the Access to Medicines and Digital Rights movements that formed the initial core of A2K. The Access to Medicines campaign, spearheaded by the Consumer Project on Technology (CPTech), Essential Action, and Health Action International began organising around the pricing of drugs in the US and meeting to talk about healthcare and the role of the pharmaceutical industry in the negotiations of TRIPs. Health Action International, an Amsterdam-based coalition of consumer, health, and development groups, organised the first NGO meeting on healthcare and TRIPs in 1996. These groups, joined by Oxfam, Medicines Sans Frontières (MSF), and ACT UP, among others, brought their issues to the World Health Organisation (WHO), a UN agency specialising in health policy. These civil society groups found important allies in the developing country delegates at the WTO, WIPO, and other UN agencies also concerned about the impact of TRIPs. They coalesced around a set of policy prescriptions that included compulsory licensing schemes and parallel importing policies that would make essential drugs available to developing countries at affordable prices. These efforts culminated in the Doha Declaration at the WTO, signed in 2001, which carried a powerful message that the TRIPs agreement should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and

in particular to promote access to medicines for all. There was a recognition that this potent message should be carried to other areas of the knowledge economy.

In the digital realm, a parallel counter-mobilisation was taking place after the signing of the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) in 1996, designed to build new foundations for a copyright regime that reconstructed protection against copying in the digitally networked environment. These treaties were heavily influenced by the White Paper prepared by the Clinton Administration in 1995 articulating the need for a paradigm shift in copyright enforcement because of the new threats of piracy in a digital environment that makes copying easy, inexpensive, and hard to control. The firms pushing for these proposals both in the US and at WIPO were the major players in the movie and music industries, publishing, and software. After passage of the WCT, a group in the US called the Digital Future Coalition, made up of library associations, law professors, civil liberties organisations, as well as representatives of computer scientists, Internet service providers, and consumer electronics manufacturers joined together to push for exceptions and limitations in the American legislative implementation of the WCT called the Digital Millennium Copyright Act (DMCA) of 1998. The DMCA exceptions have generally turned out to be too narrow for substantial flexibility. Public attention to digital rights grew with a series of cases, including a criminal prosecution, under the DMCA anti-circumvention provisions. Peer-to-peer (P2P) networks like Napster and Kazaa were enormously popular around the world, but were also facing litigation in the US and Europe about their secondary liability for infringement. The duration of copyright was simultaneously being expanded in the Sonny Bono Copyright Term Extension Act in 1998, and was challenged in the highly publicised *Eldred v. Ashcroft* case which reached the Supreme Court and was argued by Larry Lessig. Losses in the courts and in legislation led to a focus on the potential for changing copyright norms and practices through licensing. Recognising the success of open licensing in software, the Creative Commons licenses emphasized the sharing aspects of licensing creative works with simplified choices tailored to online publishing norms. A digital rights movement had emerged with civil society leaders like the Electronic Frontier Foundation (EFF), Public Knowledge, European Digital Rights (EDRI), and OneWorld International's Open Knowledge Network (OKN).

### 12.1.3 A2K as a Social Movement

The origins of the framing of Access to Knowledge and the term A2K came about in a series of key meetings, conferences, and declarations inspired by these developments. In particular, the UK Commission on Intellectual Property Rights published a 2002 report “Integrating Intellectual Property Rights and Development Policy,” encouraged developing country delegates and civil society organisations to push for reform in nearly all areas of the international IP regime. Organisations based in Geneva like the International Centre for Trade and Sustainable Development (ICTSD), the South Centre, and Quaker United Nations Office (QUNO) began tracking IP discussions in the UN agencies and produced foundational research and criticism on a wide range of IP and development issues. They held consultations with developing country delegates to push for reform at WIPO. The TransAtlantic Consumer Dialogue (TACD), a forum of US and EU consumer organisations held meetings that brought together government officials, academics, activists, and a wide range of experts under the banner of Access to Knowledge, on issues such as Global Access to Essential Learning Tools. The TACD meeting timed just before the WIPO General Assembly in September, 2004 resulted in a Declaration on the Future of WIPO, describing this moment as a “fork in our moral code,” and supported the delegates calling for a Development Agenda at WIPO. Work began on a Treaty on Access to Knowledge and Technology, the first draft of which was constructed over a mailing list and included a collection of specific provisions of IP reforms and open infrastructure solutions. Academic centres at universities around the world now regularly hold conferences discussing and debating A2K and its various policy issues across industry sectors and academic disciplines.

### 12.1.4 The Development Agenda at WIPO

One of WIPO’s key functions is propagating the implementation of treaties such as TRIPs by providing developing countries with “technical assistance” to bring their laws into compliance with international standards. As IP has emerged as the legal regime most immediately governing the information economy, the technical expertise propagated by WIPO is at the crux of establishing global policies impacting access to knowledge. Having gained a reputation during the 1990s for primarily serving the interests of multi-national corporations benefiting from strict intellectual property protection, the mandate of WIPO is now being revisited. The prevailing sense of its mission was influenced primarily by a founding

1967 document, was “to promote the protection of intellectual property throughout the world.”

At WIPO’s General Assembly in 2004, Argentina and Brazil introduced a proposal for the “Establishment of a Development Agenda for WIPO.” Referring to the great “knowledge gap” and “digital divide” that pervades many parts of the world, the Friends of Development (FOD), a group of 12 countries, insisted on attention to the “development dimension” in the promulgation of IP law.<sup>9</sup> The declaration criticised the stated mission of the organisation as promoting IP as an end in itself, rather than for the progress of science, enabling innovation, and encouraging creativity. They also criticised the push for harmonisation of global intellectual property standards as inconsistent with the notion of law tailored to fit countries in different stages of development.

In September 2007, the WIPO General Assembly officially adopted the principles for the Development Agenda for WIPO. Collectively, the proposals represent a comprehensive challenge to understanding WIPO’s mission as being narrowly about the promotion of IP. The explicit incorporation of the public domain in the normative processes of WIPO and the initiation of discussions on access to knowledge signifies that the promotion of IP can no longer be the presumed starting point for the regulation of knowledge. It is in fact one of the principles of the Development Agenda to share experiences about open collaborative projects as alternatives to IP. Yet the Development Agenda principles also help guide locating the brokerage points of the constituent movements of A2K with concepts and institutions other than those focused on IP. Most significantly for the technology emphasis of A2K, the principles move the development dimension of IP to interface with access to technology frameworks such as promoting information and communication technologies (ICTs) for development, bridging the digital divide, and exploring the role of IP in technology transfer. It calls for WIPO to better integrate with other UN institutions and to incorporate the outcomes of the WSIS process and the principles of the Digital Solidarity Fund.

## 12.2 Mapping Out A2K

The following is an attempt to map out advocacy efforts around A2K according to four broad categories of knowledge and information: (1) Food and Health; (2) Education and Science; (3) Culture and Media; and (4)

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<sup>9</sup> Signatory countries included Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela.

Communication and Infrastructure. Clusters of advocacy campaigns are further identified within the more general policy areas of each category. A pattern emerges in the clusters of activity when the constituent groups are categorised by areas of knowledge and industry sectors. The centres of advocacy efforts generally focus on three different levels of policy formation: (1) Regulations and Institutions, including international treaties and national legislation; (2) Production Models and Public Services, such as licensing models and public institutions; and (3) Technologies, like research tools and consumer products. The outline below summarises the sampling of policy issue areas identified.

### **Food and Health**

Agriculture	<i>GMOs and patents; open research tools; terminator seeds</i>
Genetic Resources	<i>disclosure of origin; community benefit sharing; knowledge registries</i>
Health	<i>access to medicines, innovation prize funds; neglected diseases research</i>

### **Education and Science**

Science	<i>database rights, open access journals; distributed computing</i>
Education	<i>copyright exceptions; open educational resources; low-cost laptops</i>
Libraries	<i>digital copyright; access to information; digital archives</i>

### **Culture and Media**

Culture	<i>global public sphere; creative commons; peer production</i>
Software	<i>software patents; free and open source; digital rights management</i>

**Communication and Infrastructure**

ICT	<i>universal access; spectrum policy; mobile internet</i>
Infrastructure	<i>Internet governance; open standards; internationalised domain names</i>
Information	<i>transparency; privatisation of public services; e-government</i>

**12.2.1 Food and Health****Agriculture and IP**

Seeds, which had been traditionally regarded as a public good, have become increasingly commercialised and monopolised as genetic engineering became the dominant technology of agro-biotech business. Genetically modified crops, plant varieties and other agricultural innovation is governed by a complex system of international norms and regulations established in several different international bodies, not always consistent: TRIPs at the WTO; the Convention on Biological Diversity (CBD) administered by the Conference of Parties (COP); the Commission on Genetic Resources for Food and Agriculture (CGRFA) at the Food and Agriculture Organisation (FAO); and the Union for the Protection of Plant Varieties (UPOV). International NGOs like Genetic Resources Action International (GRAIN), ActionAid, the Centre for International Environmental Law (CIEL) joined together with developing countries to address the imbalance of breeders rights with the countervailing notion of farmer's rights to acknowledge the contribution that farmers have made in conserving and developing genetic resources. At the international policy level, developing countries argue for greater flexibility for nations in granting patents for seeds in order to preserve smaller farms and traditional agricultural practices. Some developing country advocates turn the rhetoric around, claiming biopiracy in the tragic irony of cases where multi-national seed companies claimed exclusive rights on improved varieties of genetic resources taken from the farmers now blocked from accessing or unable to afford the new breed.

In the realm of production models, new licensing structures have emerged based in the open access to biological research and technologies. The Biological Innovation for an Open Society (BIOS) project based at the Centre for the Application for Molecular Biology to International Agriculture (CAMBIA) built an open bioinformatics toolkit that enables

decentralised innovation and the creation of a repository of openly licensed technologies. It is inspired by the open source software movement and is designed to compete directly with the biotech industry structure of royalty payments, proprietary research, and closed development processes.

In policy debate over technological design, Genetic Use Restriction Technologies (GURTs), more commonly known as “Terminator” seeds, disable the natural reproduction of plants by making the harvested seeds sterile. These terminator seeds have been engineered to prevent farmers or competitors from accessing the seeds. The technology itself supports the business model of closely held IP and monopolisation of innovative technology through genetically engineering sterilisation. Discussions about GURTs were heated at the last COP meeting on the Biodiversity Convention in March, 2006. The de facto moratorium on GURTs technology that was adopted in the 2000 session of the CBD was reaffirmed, but an opening was left for a shift towards national level decision-making on the issue.

### **Genetic Resources and Traditional Knowledge**

The CBD is the starting point for international level policy-making regarding traditional knowledge and genetic resources. The genetic resources of developing countries have been explored, collected, and exploited by institutions and multinational corporations from developed countries with little to no compensation to the original knowledge holders and local communities. The CBD framework, intended to respond to these inequities, is rooted in the concern with conservation of biodiversity and preservation of local culture. It is also about protection, with national governments introducing legislation to prevent misappropriation, regulate access to their genetic resources, and ensuring equitable sharing of benefits. At the WTO, developing countries have proposed the amendment of TRIPs, in light of the CBD, to require the disclosure of the country origin of the biological resource and the presentation of evidence of existence of the access contract in patent filing procedures. At WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has stalled in deliberations over the introduction of traditional knowledge protection and its compatibility with the international IP system. Many of the same international NGOs involved in the seed issues, notably GRAIN and CIEL, work along with other groups like Erosion, Technology and Con-

centration (ETC) and Third World Network in the various international fora where Traditional Knowledge and Genetic Resources are discussed.

Activity within the policy space of production models in Traditional Knowledge and Genetic Resources has two divergent areas of focus. The primary focus of indigenous rights and traditional knowledge activists in this space is the equitable distribution of compensation in Access and Benefit Sharing (ABS) agreements. Currently, these agreements and the national legislations supporting them are based in property-contract models, where an owner representing a community negotiates licenses. The equitable distribution that underlies the intent of these agreements is consistent with A2K development goals. It is the notion that perpetuation is the model to address these inequalities is not consistent with the open models of A2K. There are, however, solutions that do not rely on a property model, that are gaining in credibility. Proposals for liability rules rather than grants of IP would trigger the benefit sharing in cases of misappropriation and anti-competitive behaviour. Technologies such as the Archaeological Markup Language of the Alexandria Archive Institute enable the preservation of traditional knowledge by making the knowledge easily searchable and publicly accessible. The focus of technological efforts is to document traditional knowledge and make it accessible for annotation, discussion, and protection.

### **Access to Medicines**

The important role that the Access to Medicines movement has played in A2K is recounted above and has been explored extensively elsewhere. The achievement of the Doha Declaration victory that reaffirmed development concerns into the formal IP system offers an important lesson in the strategy of regime shifting within international decision-making bodies. In reaction to the TRIPs agreement, developing country governments and health activists brought their concerns about access to medicines to the World Health Organisation (WHO), where public health is the fundamental mandate and the core expertise rather than the trade delegates at the WTO. The discussions that led to the Doha Declaration began at the WHO in 1996 and became concretised in 1998 in recommendations for the implementation of TRIPs in such a way that balances IP and public health concerns. The regime-shifting strategy, developed in an influential article by Laurence Helfer, suggests that bringing IP-related issues and policy solutions to international decision-making bodies with mandates over areas of policy such as health (WHO), food security (FAO), and



education (UNESCO) offers a way to strike balance in the international IP regime decision-making bodies of the WTO and WIPO.

Access to Medicines activists have also succeeded in moving policy makers to an increased acceptance of alternative production models for medicine. They point out that drug prices are too tightly linked to the research and development models of the pharmaceutical industry. The Doha Declaration supported the use of compulsory licensing of patents on essential drugs on the part of developing countries to address public health emergencies. While the exercise of this option on the part of developing country governments has consistently encountered fear of retaliation and lack of technical assistance in implementation, the increased awareness and acceptance of these collective management mechanisms open up the possibilities of further exploiting TRIPs flexibilities. The proposal for a Medical Research and Development Treaty shifts the economic incentives further away from the patent system and creates a medical innovation prize fund to reward development of medicines addressing public health priorities. Discussions about the R&D treaty are taking place in the new Intergovernmental Working Group on Public Health (IGWG) at the WHO, established in 2006. Efforts are also focused on national implementation of the prize fund idea, including increased support in the US.

The intensive information processing involved in biomedical research is often identified as a main reason that drug development usually requires expensive investments by large corporations. New innovations in distributed network processing, where networks of computers share the processing load of analysing data and building databases, have shown that this is not necessarily the case. By downloading a software client that runs in the background or as a screensaver when a computer is idle, any Internet user can contribute some of their computer cycles to a biomedical research project. Projects such as IBM's World Community Grid and the Africa@Home's Malariaccontrol.net are able to overcome the costs of computer processing through these volunteer network technologies.

## **12.2.2 Education and Science**

### **Access to Scientific Knowledge**

Scientific research in the information age is often expensive, collaborative, multinational, and data intensive. At the policy level of international law, the focus of access to scientific knowledge is on different coun-

tries' domestic legal regimes offering different levels of protection for databases of information. Under European Union law, for example, the Database Directive gives proprietary rights in information to database owners, a *sui generis* IP regime. Access to science advocates point out that the database industries in the US thrive at least as much as, if not more than their European counterparts despite the lack of proprietary protection for databases. Another area of focus for the open science and open access communities is the public domain status of publicly-funded research. Campaigns have centred around enacting national legislation that research funded by the government, and in turn the public, should be presumed to remain freely accessible by the public, with limited exceptions for national security and other sensitive information concerns.

The success of the Open Access movement in reorienting the publication models of research is largely due to the innovative efforts of the scientific community. The willingness to freely share knowledge and information may be the consistency of these commons-based models with the norms of academic and scientific researchers, where reputation economies dominate. Open Access grew out of a reaction to the increased monopolisation of the academic journal publishing market and the increasing costs for universities and libraries to get access to those materials. Major initiatives like Biomed Central and the Public Library of Science (PLoS) in the US and the National Programme on Technology Enhanced Learning (NPTEL) in India have created large repositories of research and data outputs of science that are freely available. The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities was signed in 2003 by the major science organisations and university associations and is a foundational document of the Open Access movement. It expresses the commitment of the producers of scientific knowledge, the universities and the research centres, to shift the fundamental baseline of the dissemination of their work to the public.

### **Digital Education**

There are an increasing number of emerging technologies that enable educators to innovate all aspects of the learning experience. Advances in Internet access, digitalisation, and collaborative network environments facilitate the education of individuals and communities in ways previously unimaginable. These new technologies and the dissemination of resources however, are subject to IP rules that had not contemplated the context of digital education. The focus of A2K advocacy is on the affordability of textbooks and the new challenges for copyright law in the con-

text of digital education. International debate has concentrated on the exceptions to and limitations on copyright (ELCs) the flexibility of implementation of minimum copyright protection standards provided for by article 13 of TRIPs. National implementation of educational exceptions and limitations vary widely and are generally constructed with a narrow scope, often due to uncertainty about the criteria for ELCs in the Berne three-step test. At the 12th and 13th sessions of the Standing Committee on Copyright and Related Rights (SCCR) at WIPO, Chile proposed the establishment of minimum standards for ELCs in national implementation and technical assistance to creating balanced legislation. Similar discussions are taking place at other international fora, such as the Intellectual Property Rights Expert Group (IPEG) at the Asia-Pacific Economic Cooperation (APEC) forum, at the Communication and Information sector and the International Institute for Education Planning (IIEP) at UNESCO, and at the Internet Governance Forum (IGF).

Open Education Resources (OER) are teaching, learning, and research resources that are in the public domain or are licensed to allow for free use and repurposing. The OER movement is best known for the Open CourseWare (OCW) projects at MIT, Utah State, and others and the Open University programmes in the UK and the Netherlands, the India National Knowledge Commission, and African Virtual University. These fast growing projects, using Creative Commons licensing represent an ambitious effort to compete with educational resources from traditional publishers that are expensive due to royalties. Challenges for the OER community include the complications of OER and copyrighted resources used together and formalising school procurement of OER materials. The Cape Town Open Education Declaration calls for educators and learners, authors and publishers, and government and school boards to implement strategies to have OERs further penetrate the educational systems. In addition to licensing efforts, the institutions of learning are changing their production models in the form of distance education and virtual universities. These schools have special needs in regard to copyright because the whole educational experience is recorded and transmitted. Distance Education IP policy has to strike a balance in the availability of resources in flexible ways and the prevention of unauthorised copying outside the learning environment.

There are many different initiatives that focus on technology transfer as a means to facilitate development. Computer Aid International, for example, is an NGO that takes donated computers, refurbishes them, and distributes them in developing countries. The One Laptop Per Child (OLPC) is a unique programme and technology more consistent with

A2K, that brings low cost laptops to school children villages at a time. The computer's design is oriented towards learning computer skills, by simplifying taking it apart and repairing it so that even a child could do it. It is also manufactured to overcome infrastructure problems like lack of electricity problems by using a hand crank. OLPC also helps solve internet access problems and fosters community by creating a mesh network connected through transmitters embedded in each laptop.

### **Libraries and Archives**

Libraries are treated separately in this mapping of A2K because of their central role as knowledge intermediaries. They have historically been the central hubs of the public knowledge infrastructure, in the preservation, archiving, and dissemination of books, journals, and other media. As public centres of information and knowledge, they often play an important role in the education of local communities and the training in literacy in various forms, including computer skills. The librarian community has been especially active in A2K issues because of this role as knowledge intermediaries, but also because of the paradigm shift libraries are undergoing in the digital age. With physical books and journals, libraries preserved, archived, and disseminated knowledge by being protective of their collections. In the digital age, the functions of libraries are more efficiently accomplished through digitisation and duplication and through connected networks of repositories of resources. In their special function of disseminating knowledge to the public, libraries generally need special exemptions for the use of copyrighted works, especially in the digital age when digitisation, archiving, and dissemination all technically involve making copies.

International organisations such as the International Federation of Library Associations and Institutions (IFLA), Electronic Information for Libraries (eIFL.net), and the Association of Research Libraries (ARL) have been actively engaged in A2K efforts and have played an important role in representing the public interest of information policy. The advocacy branches of these organisations have been at the forefront of issues like making government-funded research freely available, arguing for standards of exceptions and limitations to copyright for more public access, and supporting the Development Agenda at WIPO. They also work on advocacy for copyright reform on the national level, with a network of policy experts engaged in the political process and who raise awareness of these issues locally. UNESCO is very active in supporting libraries all around the world, with capacity building programmes helping implement new

technologies and training librarians on how to use digital tools. Other agencies within the UN system have invested in making their collections freely available in projects like the Access to Global Online Research in Agriculture (AGORA) programme of the FAO, the Health InterNetwork Access to Research Initiative (HINARI) programme of the WHO, and the Online Access to Research in the Environment (OARE) programme of the United Nations Environment Programme (UNEP).

In the realm of production models, Open Access has brought libraries together with academic and scientific associations to change the way that resources are accessed. Open access generally means making literature available for free on the Internet with the expectation that the resource will be copied, downloaded, searched, and other uses but without expectation of payment. It is about self-archiving of resources and the publication in open access journals that make works freely available. As described in the discussion of scientific knowledge, Open Access has been an important means to make scientific research and data more widely available and accessible. In the context of libraries, Open Access represents a new model for the library's role in the dissemination of knowledge. Libraries are important for Open Access not because they house materials, but as the gateway for public access to resources, providing the training and expertise on how to navigate resources online. New public-private partnerships such as JSTOR's African Access Initiative between database owners, publishers and libraries are enabling resources to be available for free to developing countries while maintaining their business models in developed countries.

The technology of storage and lending for libraries and archives has changed fundamentally in the digital environment. The books and journals of the physical library are now stored on computer servers and distributed electronically. The model has also changed from that of library purchasing to the licensing of materials for a certain duration and limited in use by technological protection measures (TPMs). Digitisation is the technology that opens up volumes of knowledge for greater access by making books and articles searchable, making it easy to extract portions, and other word-processing functionalities. Projects to make the world's books available electronically date back to Project Gutenberg, started in 1971, and now there are major state-sponsored digitisation projects in Australia, Japan, Germany, France, the UK, and the US aiming to store and preserve knowledge and national heritage. Controversy has arisen in some of the commercial digitisation projects of America's university libraries, most notably Google Book Search, over the digitisation of works still in copyright. Projects like the Open Content Alliance, which include

many of Google's rivals, restrict their scanning to works in the public domain and out of print books. Internet Archive, a non-profit Internet Library, has been archiving web pages, audio, video, and software since 1999. Internet Archive's BookMobile project is a mobile digital library on tour that is capable of downloading public domain books from the Internet via satellite and printing them anywhere.

### **12.2.3 Culture and Media**

#### **Culture**

There are many ways in which culture, in terms of information flow, is regulated in international instruments and national laws. The endorsement of communication rights and the social movement that coalesced around this theme during the WSIS process however, can complement the licensing and technology development efforts of A2K. Communication rights, broadly defined, ensure the capacity of people and communities to use communication and media to pursue their goals in the economic, political, social, and cultural spheres.<sup>10</sup> They are distinct from freedom of expression because of the emphasis on the communication environment, including the mediating and filtering role of media and government in the creation the public sphere. Communication rights advocacy groups support digital rights, the public domain, and universal access, but are particularly active in media concentration and corporate media dominance issues. They support a vision of the information society that values participatory democracy and democratic culture.

The Creative Commons (CC) set of licenses were created to counter the proprietisation of culture by reorienting authors' expectations. Rather than publishing works with restrictive licenses and "all rights reserved," CC promotes sharing as the baseline of publication, with options for a limited claim of rights, like attribution. The licenses are premised on the digital culture norms of remixing previous works to create new ones. By linking the CC license to code accompanying digital works, a repository of works has been developed that not only helps build the commons in cultural works, but whose metadata enables searching and indexing too. iCommons, the international organisation that grew out of Creative Commons and the global effort to translate the licenses into as many languages as possible, has created a network of information commons activists and experts all over the world. They meet at an annual summit

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<sup>10</sup> CRIS Campaign, *Assessing Communication Rights: A Handbook* (2005)

and support A2K efforts such as open access, open education, free software, and free culture with collaborative projects across its network year round.

The evolution of P2P networks, and their decentralisation of the dissemination of culture, has been one of the most controversial technologies of the digital age. The lack of a sustainable compensation model and the routing around the distribution chains of the entertainment industries, P2P has collided with copyright law head on. The court cases charging P2P networks like Napster and Kazaa with liability for copyright infringement have been brought in several countries all over the world. Yet the connection between P2P architecture and the piracy of music and movies has become more nuanced as P2P networks for file sharing in the business environment and networks of CC and public domain materials have become more visible. Organisations such as the Foundation for P2P Alternatives, an information clearinghouse on P2P, emphasise the cooperative nature of P2P technologies and advocate for a broader understanding of P2P than as media file sharing software. Technologies such as wikis, social networking websites, and other peer production projects collectively described as Web 2.0, have demonstrated the social and economic value of collaborative tools. P2P is important to A2K because of the knowledge creation as well as knowledge consumption architecture of these tools.

## **Software**

The extension of patent protection to software has met with notable resistance internationally. The political economy of support for software patents has changed dramatically as major software companies have reconsidered the tradeoff between licensing revenue from patents and the litigation costs of infringement cases in products that are increasingly complex in their interdependent components with patent claims from multiple sources. At WIPO's Standing Committee on the Law of Patents (SCP), the draft Substantive Patent Law Treaty (SPLT), an attempt to harmonise rules regarding the grant of patents, has been stalled indefinitely. After the "Friends of Development" delegates insisted on simultaneous discussion of provisions on anti-competitive practices and public interest flexibilities, the lack of agreement was evident and the objective of the SCP unclear. The debate over software patents rose to levels of public protest in 2005 in Europe, as the European Commission (EC) clashed with the European Parliament (EP) over the inclusion of "computer-implemented inventions" as patentable subject matter in the European

Patent Office (EPO). Civil society groups such as the Foundation for a Free Information Infrastructure (FFII) and the Free Software Foundation Europe (FSF-E) successfully mobilised support for parliament members to reject the EC's proposal. The uncertainty over the future of patents is evident in the EPO's publication of Scenarios of the Future, in which four scenarios ranging from tightened harmonisation of patents to an "access to knowledge" approach of treating software as a public good.

It is in the realm of software that a viable and competitive commons-based production model has been most successful. Free and Open Source Software (F/OSS) describes not only a licensing model and social movement, but the creation of new economic institutions. The F/OSS production model is based in granting user's rights to access the source code underlying a program and to run, copy, redistribute, and modify the code. It is often called "copyleft" and relies on the structures of copyright to contractually bind future users to release new derivative works under the same license. There are now many variants on F/OSS licensing models, but the origin of "free software" is credited to the GNU Public License (GPL), developed by Richard Stallman and the Free Software Foundation (FSF). The latest version, GPL v.3 was released in 2007 after feedback and input from software programmers and F/OSS advocates all over the world, with a focus on making the GPL contractually binding in the various countries in which it is used. As F/OSS programs continue to penetrate mainstream products, lawsuits over GPL infringement are increasing and testing its provisions. Since the cost of the software is not in the royalty payments for the code but in the customisation and the servicing, many developing country governments have seen an opportunity for developing domestic software industries by encouraging open source software through government procurement strategies.

The introduction of Digital Rights Management (DRM) technology to software and digital media is the regulation of access and use by technological means. Files embedded with DRM systems prevent the use of digital media in ways other than those intended by the content producers and are enforced automatically through code. The motivation behind DRM was the premise that the decentralised nature of the Internet meant that piracy needed to be prevented before any unauthorised copying took place, rather than after infringement occurs as in traditional copyright law. In order for DRM to work, legal fortification of these systems need to be promulgated to prevent the circumvention of DRM. Battles over the implementation of the WCT, which contains the anti-circumvention provisions, have taken place in several countries, with A2K advocates lobbying for more flexible rules and exceptions. There are also policy battles



taking place however in the design of the DRM systems themselves. With core DRM technology controlled through patents by few vendors with the entertainment industries as the main clients, the strict permissions model of DRM dominates. Development of alternative formulations of DRM, that allow more user flexibility or negotiation for example, are developed as the variety of files DRM is used for changes.

## **12.2.4 Communication and Infrastructure**

### **Information and Communication Technologies**

There is increasing evidence of the connection between economic development and access to ICTs. So much social and economic activity takes place over the digital networks that the lack of access can impede both economic and social growth. And it is the rural communities, with the distances they must travel, who have the lowest rates of access to ICTs and could benefit most from ICTs for getting information and communicating remotely. Governments can take steps towards bridging this “digital divide” by implementing universal access policies that aim to enable access to entire populations. This includes creating incentives for private sector investment, building infrastructure, and adopting technology neutral licensing practices enabling service provider to compete and develop cost-effective services. Since remote and sparsely populated areas may not be worth the private investment, the establishment of universal access/service funds help finance extension of service to some areas. Universal access does not necessarily seek to bring access to every home like universal service, and promotes the creation of telecentres and other community institutions that enable access. The International Telecommunications Union (ITU) is a specialised UN agency whose mandate includes promoting the development of telecommunications networks and access to ICT services in developing countries. In addition to developing technology standards, allocating radio frequencies, and publishing research, the ITU provides information and technical assistance to developing country governments.

Spectrum allocation is the policy area of focus for information commons advocates. Governments have historically managed the use of radio spectrum for different technologies in order to prevent interference on a technical level and to regulate uses on behalf of the public for social purposes. Licensing spectrum from the government is very expensive and is practically available only to large telecommunications companies. With the advent of wireless technologies using short range sig-

nals and dynamically finding frequencies, the use of unlicensed spectrum has allowed innovators to invent new uses. The success of Wi-Fi, the fast-growing wireless internet access standard, is the prime example of how unlicensed spectrum can lead to unanticipated innovation. Open Spectrum advocates lobby for the expansion of unlicensed spectrum in individual countries, which receive guidelines from the ITU but have flexibility in implementing their own spectrum policy. The growth of Wi-Fi as a means of internet access has also led to new efforts to provide access to the public. Municipal Wi-Fi projects has government take the lead in providing internet access to an entire city, while community wireless projects are formed by individuals who collectively create a mesh network that covers a particular region.

The widest penetration of ICTs all over the world, but especially in developing countries, is the mobile phone. More than 20% of the population in Africa have mobile phones, which is particularly high considering the phone landline rate is less than 10%. Mobile phones enable farmers and craftsmen to get information about market prices to increase their bargaining power in sales. Short Messaging Service (SMS) on mobile phones, also called text messaging, has played an important role in sharing political information, forwarded along virally and outside of government control. SMS has also been used to organise social protests to coordinate activity spontaneously with live messages distributed to the group. The most significant mobile phone application for economic growth in the developing world has been the introduction of micro payment systems on mobile phones. Services like SMART in the Philippines, Fundamo in South Africa, Safaricom in Kenya, and a growing number of mobile payment companies allow users to prepay for cashless credit on their phone, connected to a bank. In addition to facilitating remote payment through the cell phone network, these services provide banking and credit to populations that have previously been limited to cash transactions.

### **Internet Infrastructure**

Internet governance is defined in its narrower sense to mean “collective action, by governments and/or the private sector operators of the networks connected by the Internet, to establish agreement about the standards, policies, rules, and enforcement and dispute resolution procedures to apply to global internet networking activities.”<sup>11</sup> Technically, the In-

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<sup>11</sup> The Internet Governance Project, *Internet Governance: The State of Play*. (Sept. 9, 2004)

ternet is not a collection of applications or hardware devices, but rather a set of protocols that enable the networking of networks. Given the global nature of the Internet and the technological mode of its rulemaking, governance of the Internet does not fit neatly into existing international institutions. The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit public benefit corporation based in California and formally under contract with the US Department of Commerce to manage the domain name system (DNS). Under ICANN, a new global regime for trademark law was established with the Uniform Dispute Resolution Process (UDRP), administered by WIPO, which resolves disputes regarding use of words in domain names that are claimed to be controlled exclusively by trademark. ICANN's controversial connection to the US government prompted the UN member states and the ITU to start the WSIS process that resulted in the establishment of the IGF. The WSIS process and the IGF emphasise multi-stakeholder discussion and participation from civil society, governments, and the private sector. The IGF has also expanded the subject matter of Internet Governance to include a broad range of issues of human and civil rights such as privacy and freedom of expression, IP regarding filtering and digital content, competition policy and consumer protection, and cybersecurity and spam. The inclusive nature of the IGF and the creation of multi-stakeholder dynamic coalitions on privacy and free speech, as well as on gender and ICTs, digital education, and one on A2K.

ICT standards-setting plays a central governance role in the information society by serving as the bridge that makes interoperability of separately created technology possible. Standards-setting takes place in international bodies such as the ITU and the International Organisation for Standards (ISO), is developed on the national level, in non-profit entities such as the Internet Engineering Task Force (IETF) and the World Wide Web Consortium (W3C), within trade associations like the Institute of Electrical and Electronic Engineers (IEEE), as well as a growing number of consortia and private companies. These supranational entities have different rules about democratic participation, IP, and governance practices and have created uncertainty about their practical authority. An important A2K issue arises when a company that takes part in a standards-setting process owns patents on aspects of the standard that would require the payment of licensing fees on any technology built on it. The licensing fees can be waived and they can be based on a reasonable and non-discriminatory (RAND) fee, but there is little structured safeguards to keep a company from exploiting their patent in the standard, especially since it is difficult to switch from a standard once it is set.

The A2K Draft Treaty includes a provision addressing the patent problem by enabling governments to consider lack of disclosure to be patent misuse and not recognise the patent. A2K advocates argue for the adoption of open standards principles in standards-setting bodies and in government regulation over these entities. One particular A2K campaign is to encourage the procurement of open standards by governments, including the Open Document Format (ODF) which competes directly with Microsoft Office.

Domain names were originally limited to the letters A to Z, the numbers 0-9, and the hyphen. As the Internet has expanded, so has the number of users who use alphabets based on alternative scripts, such as Russian or Chinese. Advocates from these countries want to have the ability to register Internationalised Domain Names (IDNs) in characters from their own languages rather than the Roman alphabet. They argue not only that IDNs are important to self-determination in Internet Governance, but also that individual's capability to participate and navigate online is diminished. ICANN is testing the use of TLDs, but many have grown impatient with the process. The creation of an alternative domain name system that does recognise IDNs threatens to splinter the Internet.

### **Public Information**

There has been great success over the past two decades in promulgating laws to protect freedom of information and the infrastructure enabling access to information has significantly improved. Along with the success of implementing more Access to Information (ATI) regimes around the world though is the disappointment in the breadth of the population making use of these new laws. Rather than the direct democratic participation of the ordinary citizen, it appears that generally only a small national elite actually takes advantage of their rights to information. One set of explanations for the public benefits of this information asymmetry is the multiplying effect of journalists gaining access to information to report to the public and NGO representation of public interest in making use of ATI laws. These explanations focus on the access to facts and data in tracing the impact of information.

Another important debate within the ATI community to which discussions about access to knowledge can be useful is access to privately held information. As information about public functions is increasingly privately-owned, the limitations of freedom of information laws holding only governments accountable become apparent. Strategies that try to apply the values of transparency and democracy as applied to govern-

ments come up against intellectual property. Market-driven economies tend to protect the property rights of the corporate information owners. Yet there are internal balances in intellectual property between the principle of incentives and rewards for creators and the increasingly neglected principle of access for the general public that ought to be further explored within an ATI framework.

Up until recently, efforts to support ATI and the work being done on Access to Knowledge have not found their intersection. There are immediate and obvious connections as both relate to data and information and are primarily concerned with social justice, civil rights, and human development. Yet discussions about these two related concepts of powerful significance to the information society and the knowledge economy have diverged. The right to information aims towards the democratisation of the public sphere and constitutional fundamental rights. Access to Knowledge is oriented towards the intersection of innovation and development. ATI campaigns have generally been framed around access to state controlled information with a view to empowering citizen actors to hold the state accountable. Access to Knowledge policy proposals, focused on intellectual property and telecommunications law, is framed around control of private knowledge and information.



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# Libraries and Access to Knowledge – Partners with Consumers

*Mariana Harjevschi, eIFL IP, country coordinator*

## 13.1 Introduction

I would like to thank Consumers International for the opportunity to talk to you today at this Global Meeting on A2K 2010. I would like to thank eIFL.net for facilitating and supporting to deliver this presentation on *Libraries and Access to Knowledge – Partners with Consumers*.

My name is Mariana Harjevschi and I work at the Public Law Library in Chisinau, the capital of Moldova. Libraries in Moldova work together in a consortium called eIFL Direct Moldova, under the umbrella of the Library Association of Moldova. eIFL Direct Moldova is a member of eIFL.net, an international NGO that works with libraries around the world to enable sustainable access to high quality digital information for people in developing and transition countries.

## 13.2 About eIFL.net and eIFL-IP

The mission of eIFL.net is to enable access to knowledge through libraries in developing and transition countries to contribute to sustainable economic and social development. eIFL.net began by advocating for affordable access to commercial e-journals for academic and research libraries in Central and Eastern Europe. Today, eIFL.net partners with libraries

and library consortia in over 45 developing and transition countries in Africa, Asia and Europe. The eIFL network has also expanded to include programmes designed to increase access to information, programmes on open access, free and open source software, use of innovative technology in public libraries, copyright and libraries.

The programme “Advocacy for access to knowledge: copyright and libraries”, is known as eIFL-IP. The goal of eIFL-IP is to protect and promote the interests of libraries and their users in eIFL member countries in copyright issues. eIFL-IP has created a network of library copyright specialists nominated by each national library consortium; it provides training and builds capacity in copyright issues for libraries across the eIFL.net community, and advocates for balanced national and international laws. I was nominated by eIFL Direct Moldova as the eIFL-IP librarian responsible for library copyright issues in Moldova. The eIFL-IP programme is broadly equivalent to the A2K programme at Consumers International. The eIFL-IP Programme Manager is Teresa Hackett.

### **13.3 A2K, Copyright and Libraries**

Access to knowledge (A2K) is essential for the functioning of open and democratic societies, economic development and innovation, culture and creativity. As the mission of libraries is to provide access to the world’s cultural and scientific knowledge for current and future generations, we play a key role in the global A2K movement.

The delivery of high quality library services helps guarantee universal and equitable access to information, ideas and works of the imagination that people, communities and organisations need for their social, educational, cultural, democratic and economic well-being. Libraries are essential for a well-informed citizenry. Different types of libraries serve different user groups: from national libraries, public libraries, academic and research libraries to special and workplace libraries.

Libraries also have a major interest in copyright. This is because copyright law governs the ownership, control and distribution of knowledge. As the role of libraries is to provide people with access to knowledge and information, copyright is therefore a professional issue for librarians and a core concern for organisations representing libraries. The mission of publicly-funded libraries is to operate for the public benefit supporting education and training, access to knowledge, information and culture.

Recognising that the original purpose of copyright is to encourage creativity and learning, exceptions and limitations to copyright are



the cornerstone of access to copyrighted content for libraries and consumers. Without exceptions and limitations, copyright owners would have a complete monopoly over use of copyrighted materials. As works in copyright could only be sold and lent, libraries, and the people who use libraries, could only view or read copyrighted materials. All other uses would require permission. This is impractical both for libraries and consumers and would threaten the core functioning of libraries, as well as interfere with the free flow of information in society, and the public interest considerations intended by the copyright system.

Digital technologies are transforming how copyrighted works are created, disseminated and used, as well as how libraries and archives preserve and make these works available. Library projects to digitise their collections are often part of national cultural policy. Millions of academics and researchers in developing and transition countries are benefiting from access to major databases of journals in humanities and literature, science and technology, through their libraries. Nowadays, the library is no longer confined to a physical space. Access to library resources, such as, electronic journals, is frequently available directly on the workplace desktop or mobile device of the student.

Libraries cherish the public policy goals enshrined in the principle of exceptions and limitations, and insist on their continued applicability in the digital age. Librarians seek to ensure that existing exceptions and limitations made for the print world are extended to the digital environment and that new exceptions appropriate to the new technologies are crafted. The digital environment has transformed how we access and use knowledge, while the purposes remain steadfast; access to knowledge for education and research and to foster creativity and innovation. Copyright law in the digital age must continue to reflect this reality.

### **13.4 Advocacy for Fair Copyright Laws: the role of libraries; Moldova case study**

I would like to tell you about a library copyright project in Moldova. In 2008, we held our first international workshop called Copyright: Enabling Access or Creating Roadblocks for Libraries? In the short time since then, the library community in Moldova has become recognised as a stakeholder by our policy makers, we have been invited to take part in discussions on the draft copyright law and we have submitted amendments, with the result that the draft text has improved. We would like to strengthen our ties with consumer organisations because we have com-

mon interests and I think that we can learn from each other. I hope that this example will generate ideas for how we can work together.

The project began in February 2009 and was funded by Soros-Moldova Foundation under the Soros programme *Strengthening the non-governmental Sector in Moldova*. The project is entitled *Advocacy for Fair Copyright Laws: the Role of Libraries*.

The goal and objectives were to:

- Organise an advocacy campaign to positively influence the new draft copyright law, so that it reflects the public interest and the real needs of Moldovan libraries and people who use libraries.
- Empower the library community to advocate for a fair and balanced copyright law.
- Enable the participation of the Moldovan library community in international library discussions on copyright issues.
- Evaluate the new draft Moldovan copyright law and make recommendations for its improvement.

There were five key target groups:

- People who use libraries eg academics and researchers, students, information seeking citizens.
- The library community eg librarians, knowledge workers.
- Civil society allies in eg NGOs representing consumers, people with disabilities, student groups, open source software advocates.
- Policy makers eg ministry officials.
- Elected representatives e.g. politicians, parliamentarians, particularly the Parliament Committee for Culture, Science and Education.

The project had two approaches: *advocacy* and *awareness-raising*.

The *advocacy component* focused on a specific piece of legislation, the Draft Law on Copyright and Related Rights that was before Parliament in 2009. Following an evaluation, we found that the draft law was more restrictive than the copyright laws in other European countries, so our aim was to improve this. Thus, the project focused on the exact status of the draft law at that time and interventions were done accordingly. The

library community built a relationship with the government copyright office, the State Agency on Intellectual Property, responsible for developing the draft law. To strengthen our capacity, a library copyright committee was established to build expertise and knowledge within the Library Association of Moldova. We also reached out to allies, and tried to identify civil society organisations that shared common interests as users of copyrighted content eg Centre for Legal Assistance for Disabled Persons.

One of the major activities that we undertook was to commission a detailed evaluation of the draft law by an international copyright expert, with recommendations for its improvement. We then lobbied the target groups for amendments. We organised a joint seminar with the State Agency on Intellectual Property attended by 35 key policy-makers and librarians in December 2009. The audience included representatives from different ministries, such as Justice, Education and Youth, Culture and Tourism, Information Technologies, and elected representatives from parliamentary committees.

Moldova has also become more visible internationally. In 2008, I was part of the eIFL delegation at the WIPO copyright committee meeting in Geneva, and had the opportunity to experience international policymaking, talking to many government delegates, including Moldova! In 2009, I was appointed to the IFLA copyright committee and am learning more about copyright issues affecting many other countries, as well as contributing my experience.

The *awareness-raising* component focused more widely on promoting the major exceptions and limitations for libraries in the digital environment. The target groups were the library community, people who use libraries and civil society allies. The aim was to raise awareness of the role of copyright and access to knowledge. The awareness-raising work served as a good mobilising factor. This is an area where it would be especially helpful to cooperate with consumer organisations.

The first activity was to create a special Webpage on the Library Association website that included information and documentation on copyright, and a space for people to express personal views about copyright and libraries in the digital environment. This is a unique and solely electronic platform for librarians from Moldova. The project team also developed an information pack on library copyright issues from existing key resources. We translated key documents, and we created colourful brochures and posters for distribution to public, national and university libraries in Moldova.

In April 2010, the draft law has still not been passed by parliament, so we don't know the final ending. But we do know that in 2009, eIFL-

IP Moldova became recognised as a stakeholder by our government and that we were able to improve the draft law to *allow libraries to reproduce works for replacement purposes, deliver interlibrary loan for free for users, reproduce for research or private purposes, and provisions for persons with disabilities, particularly the visually impaired*. This was a big achievement! The library community still has concerns about orphan works. So our work will continue.

We welcome the opportunity to make alliances with consumer groups in Moldova and internationally, so that we have a better chance of improving the draft law for everyone's benefit.

### **13.5 Partnering consumer organisations and libraries**

How can libraries and consumer organisations start to work together? I would like to suggest some concrete steps to begin.

#### **1. Connect CI members with eIFL members**

Because CI and eIFL both have programmes on A2K, we have a good start. eIFL has a network of librarians who have been trained in copyright and advocacy. They can help to support CI members with copyright issues and campaigns. They can work together to form alliances and speak with one strong voice to the national copyright office. Please introduce yourself to the eIFL-IP librarian when you go home (see the Annex).

#### **2. Form national A2K alliances**

Form a national coalition of consumers and libraries to develop strong and effective impact on policy-making. Four of the six CI countries selected for grants to support advocacy or campaign activities are also eIFL countries. These are CI members CAO Nigeria, NCF South Africa, RACE Cameroon, and ZACA Zambia. As a pilot, each one should make contact with the eIFL-IP librarian in their country to discuss cooperation.

#### **3. Include libraries in CI projects**

For example,

- Gain a more detailed and comprehensive understanding of copyright laws by expanding the *Global survey of the barriers consumers face in accessing copyright material* to eIFL's members.

- Expand the *Case study research on the impact of consumer-friendly copyright limitations and exceptions* on eIFL's members.
- cooperate with eIFL.net on the *Copyright and Access to Knowledge Study*, this can be an efficient support for gaining policy recommendations on flexibilities in copyright laws.

## 13.6 eIFL-IP Tools and Resources

Finally, I would like to highlight some resources developed by eIFL.net that you might find useful. They are all available on the eIFL website and can be freely distributed, re-used, modified and translated. Some have already been translated into several languages.

### **eIFL Handbook on Copyright and Related Issues for Libraries Handbook**

This is a practical guide to topical legal questions affecting the information work of libraries in the fast moving digital environment. Each topic is described briefly, the main policy aspects for libraries are outlined, and there are links to library policy statements for further reading.

### **“Copyright for Librarians,” an Online Open Curriculum on Copyright Law**

Launched in March, this course was developed with the Berkman Centre for Internet and Society at Harvard Law School. It aims to inform librarians about copyright law in general, as well as the aspects of copyright law that most affect libraries, especially those in developing and transition countries. The course materials – nine modules organised into five different levels – can be used as the basis for a self-taught course, a traditional classroom-based course, or as a distance-learning course.

### **Statement of Principles on Copyright Exceptions and Limitations for Libraries**

This sets out the main issues of concern for libraries, including preservation, reproduction for research or private purposes, provisions for people with disabilities and more.

### **eIFL-IP Draft Law on Copyright including Model Exceptions and Limitations for Libraries and Consumers**

The first of its kind, this provides practical support and guidance for librarians – and their legal advisors and policy makers, when national laws are being updated. It contains provisions that support access to knowledge and the public interest of libraries and consumers.

#### ***Copyright Watch***

Copyright Watch is a public website that collects national copyright laws from around the world.

Launched by eIFL and the Electronic Frontier Foundation (EFF), it is the first comprehensive and up-to-date online repository of national copyright laws, and aims to increase transparency when copyright laws are being updated.

### **13.7 Conclusions**

We hope that the contribution of eIFL.net in developing and transition countries to copyright will help to provide consumers and researchers with new ways to gain access to knowledge.

Consumer organisations are natural allies for libraries in copyright issues. We welcome a dialogue and any ideas on how we can work together.

Thank you for listening and I'll be glad to take any questions.

### **Appendix – Countries where CI and eIFL have members**

For a full list of eIFL copyright librarians, go to <http://www.eifl.net/>.

<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Africa</b>		
<b>Botswana</b>	Department of Trade and Consumer Affairs	<i>Kgomotso F Radijeng</i> , Botswana National Productivity Centre, kgomotsoR@BNPC.bw
<b>Cameroon</b>	RACE: Réseau Associatif des Consommateurs de l'Énergie – Energy Consumer Associations Network	<i>Alexis Eyangou Mouen</i> University of Yaounde mouen@yahoo.com eIFL.net consortium: Consortium of Cameroon University and Research Libraries (COCUREL)

<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Ethiopia</b>	Ethiopian Consumer Protection Association (ECOPA)	Derib Erget Mamuye e.derib@yahoo.com Consortium of Ethiopian Academic and Research Libraries (CEARL) IP Librarian Position Vacant
<b>Ghana</b>	a) Consumer Advocacy Centre b) Consumers Association of Ghana (CAG)	<i>Valentina Bannerman</i> University of Education, Winneba valnin@yahoo.com eIFL.net consortium: Consortium of Academic and Research Libraries in Ghana (CARLIGH)
<b>Jordan</b>	National Society For Consumer Protection (NSCP)	<i>Mohammad Z. Raqab</i> University of Jordan mraqab@ju.edu.jo eIFL.net consortium: Center of Excellence for Jordanian Public University Libraries (CoE for JoPULs)
<b>Kenya</b>	Consumer Information Network of Kenya (CIN) (Executive) a) African Woman and Child Feature Service (AWC) b) Youth Education Network (YEN)	<i>Dr. Japhet N. Otike</i> Moi University, Faculty of Information Science jnotike@yahoo.com eIFL.net consortium: Kenya Libraries and Information Services Consortium (KLISC)
<b>Lesotho</b>	Ministry of Trade and Industry, Cooperatives & Marketing (Consumer Section)	<i>Tseli Moshoeshoe</i> Organisation: National University Library mamahlape@gmail.com eIFL.net consortium: Lesotho Library Consortium (LELICO)
<b>Malawi</b>	CAMA: Consumer Association of Malawi	<i>Kondwani Wella</i> Kamuzu College of Nursing kwella@kcn.unima.mw eIFL.net consortium: Malawi Library and Information Consortium (MALICO)

<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Mali</b>	ASCOMA: Consumers' Association of Mali – Association des Consommateurs du Mali REDECOMA: Consumer Defence Group of Mali – Regroupement pour la défense des consommateurs du Mali	<i>Abdrahamane Anne</i> Faculté de Médecine, de Pharmacie et d'Odontostomologie aanabdaa@yahoo.fr eIFL.net consortium: Consortium Malien des Bibliothèques (COMBI)
<b>Mozambique</b>	a) DECOM: Consumer Defence Association – Associação de Defesa do Consumidor b) Pro Consumers	Aissa Mitha Issak amissak@apolitecnica.ac.mz  IP Librarian Position Vacant
<b>Nepal</b>	Socio Economic Welfare Action for Women and Children – SEWA Nepal	Khrisna Mani Bhandary tucl@healthnet.org.np IP Librarian Position Vacant
<b>Nigeria</b>	a) Consumer Awareness Organisation (CAO) b) Consumer Protection Organization of Nigeria (CPON) c) Consumers Empowerment Organisation of Nigeria (CEON) Consumer Protection Council	<i>Rilwanu Adbulsalami</i> Kaduna State University rilwanu@hotmail.com eIFL.net consortium: Nigerian University Libraries Consortium (NULIB CONSULTS NIG. Ltd)
<b>Sénégal</b>	Association for the Defence of Consumers and the Environment – Association pour la Défense de l'Environnement et des Consommateurs (ADEC)	<i>Awa Cissé</i> Université Cheikh Anta Diop de Dakar cisseawa@yahoo.fr eIFL.net consortium: Consortium des Bibliothèques de l'Enseignement Supérieur du Sénégal (COBESS)
<b>South Africa</b>	National Consumer Forum (NCF) Office of Consumer Protection, Department of Trade and Industry	<i>Denise Nicholson</i> University of the Witwatersrand Denise.Nicholson@wits.ac.za eIFL.net consortium: Coalition of South African Library Consortia (COSALC)



<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Tanzania</b>	Tanzania Consumer Advocacy Society (TCAS)	Africa J Bwamkuu jbwamkuu@gmail.com Consortium for Tanzania Universities and Research Libraries (COTUL) IP Librarian Position Vacant
<b>Zambia</b>	Zambian Consumer Association (ZACA) Zambia Competition Commission (ZCC)	<i>Benson Njobvu</i> University of Zambia benson.njobvu@gmail.com eIFL.net consortium: Zambia Library Consortium (ZALICO)
<b>Zimbabwe</b>	Consumer Council of Zimbabwe (CCZ) Ministry of Industry and International Trade – Zimbabwe	<i>Kathy Matsika</i> National University of Science & Technology kmatsika@nust.ac.zw eIFL.net consortium: Zimbabwe University Libraries Consortium (ZULC)
<b>Asia Pacific</b>		
<b>Mongolia</b>	National Federation of Mongolian Consumers' Association (MCA) Authority for Fair Competition and Consumer Protection	<i>Baljid Dashdeleg</i> Open Society Forum baljid@forum.mn eIFL.net consortium: Mongolian Consortium of Libraries (MCL)
<b>China</b>	China Consumers' Association Consumers Foundation Chinese Taipei	<i>Ms Lingling Zhou</i> National Science Library, Chinese Academy of Sciences zhoull@mail.las.ac.cn eIFL.net consortium: Chinese Science Digital Library/National Science and Technology Library
<b>Central Asia and Middle East</b>		
<b>Azerbaijan</b>	Independent Consumers Union (ICU) ICU: Independent Consumers Union – Azad Ýstehlakçýlar Birliyi	<i>Shahla Khudiyeva</i> Organisation: American Center shkhudiyeva@gmail.com eIFL.net consortium: Azerbaijan Library and Information Consortium For Availability of Electronic Information (AzLIC)

<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Egypt</b>	The Consumer Protection Agency; Ministry of Trade and Industry	<i>Hala Essalmawi</i> Bibliotheca Alexandrina Hala.Essalmawi@bibalex.org eIFL.net consortium: Under construction
<b>Tajikistan</b>	Consumers' Union of Tajikistan	<i>Alla Aslitdinova</i> Central Scientific Library of the Academy of Sciences marjona@mail.ru eIFL.net consortium: In progress
<b>Europe</b>		
<b>Albania</b>	ACA: Albanian Consumers Association – Shoqata e Konsumatorit Shqiptar	<i>Aleksandra Xhamo</i> University of New York, Tirana axhamo@yahoo.com eIFL.net consortium: Consortium of Albanian Libraries
<b>Armenia</b>	a) ANNA – National Association of Consumers b) Protection of Consumers' Rights – Sparoxneri iravunqneri pashtpanutjun c) The Union "21 Century"	<i>Hasmik Galstyan</i> American University of Armenia hgalst@aua.am eIFL.net consortium: Electronic Library Consortium of Armenia (ELCA)
<b>Belarus</b>	Belorusskoe Obstestvo Zastity Potrehitelei (BOZP)	<i>Oksana Voronetskaya</i> National Library of Belarus voronetskaya@nlb.by eIFL.net consortium: BelLibNet
<b>Bulgaria</b>	Bulgarian National Consumer Association	<i>Toshka Borisova</i> American University in Bulgaria toshka@aubg.bg eIFL.net consortium: Bulgarian Information Consortium (BIC)
<b>Estonia</b>	Estonian Consumers Union	<i>Kalju Tammaru</i> Estonian Deposit Library kalju@hoiuraamatukogu.ee eIFL.net consortium: Consortium of Estonian Libraries Network (ELNET)
<b>Georgia</b>	a) Consumers' Federation of Georgia b) Consumers Union of Georgia	<i>Lela Nanuashvili</i> Transnational Crime and Corruption Centre lelatbi@hotmail.com eIFL.net consortium: GILISC

<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Latvia</b>	Consumer Rights Protection Centre of Republic of Latvia	<i>Antra Indriksone</i> National Library of Latvia antra.indriksone@lnb.lv eIFL.net consortium: State agency "Culture information systems"
<b>Lithuania</b>	WLCF: Vakarų Lietuvos Vartotojų Federacija – Western Lithuania Consumer Federation	<i>Emilija Banionyte</i> Vilnius Pedagogical University Library emilija.banionyte@vpu.lt eIFL.net consortium: Lithuanian Research Library Consortium (LMBA)
<b>Macedonia</b>	Consumers Organisation of Macedonia (COM) – Organizacija na potrosuvacite na Makedonija (OPM)	<i>Miodrag Dadasovic</i> National and University Library miodrag@nubsk.edu.mk eIFL.net consortium: Macedonian Electronic Libraries (MEL)
<b>Poland</b>	Polish Consumer Federation – Federacja Konsumentów Association of Polish Consumers – Stowarzyszenie Konsumentów Polskich	<i>Michał Kordek</i> Poznan Foundation of Scientific Libraries kordekm@amu.edu.pl eIFL.net consortium: Poznan Foundation of Scientific Libraries
<b>Russia</b>	Interrepublican Confederation of Consumer Societies (Konfop) Consumers Union of Russia Ministry of Trade and Foreign Economic Cooperation, Republic of Tatarstan	<i>Irina Razumova</i> Arctic and Antarctic Research Institute razumova@neicon.ru eIFL.net consortium: National Electronic Information Consortium (NEICON)

<b>Country</b>	<b>CI</b>	<b>eIFL copyright librarian</b>
<b>Serbia</b>	a) APOS: Association of Consumers of Serbia b) Asocijacija potrošača Srbije c) CPMB: Consumer Protection Movement of Belgrade – Pokret za zastitu potrosaca Beograd d) NOPS: National Consumer Organisation of Serbia – Nacionalna Organizacija Potrosaca Srbije	<i>Tatjana Brzulovic Stanisavljevic</i> University Library Belgrade brzulovic@unilib.bg.ac.yu eIFL.net consortium: Serbian Library Consortium for Coordinated Acquisition (KoBSON)
<b>Slovenia</b>	ZPS: Slovene Consumers' Association - Zveza Potrošnikov Slovenije	<i>Stanislav Bahor</i> National and University Library of Ljubljana stanislav.bahor@nuk.uni-lj.si eIFL.net consortium: Consortium of Slovene Electronic Collections (COSEC)
<b>Ukraine</b>	DSSU: Ukraine State Committee for Technical Regulation and Consumer Policy	<i>Oleksii Vasyliiev</i> Informatio-Consortium informatio.consortium@gmail.com eIFL.net consortium: Association "Informatio - Consortium"

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# IDEC campaign and Brazilian reform of copyright law

*Guilherme Varella, IDEC, Brazil*

## 14.1 Introduction – IDEC activity in copyright

Access to information is a basic premise for the realisation of citizenship, which is a fundamental right for every person. The full realisation of citizenship depends necessarily on making this right effective. For the consumers' rights to be observed in the sphere of citizenship, respect towards the right to information is absolutely essential.

In the current scenario, access to information, culture and knowledge is at a peculiar stage. Many possibilities are opened and the convergence of various technologies and services facilitates the use of integrated tools for access to goods, works and content in different ways. Interactivity arises as an important phenomenon to consumer empowerment and, consequently, to a new role that can be assigned, ranging from passivity to an active position of producer and creator.

The Internet extends the capabilities of the so-called real environment and shows signs of its actual potential for democratisation: it creates an environment in which exchanges of books, products, goods and information are direct, quick and dynamic. Most of the time, without the need for intermediaries. The relations of consumption are catalysed and access to goods of all kinds is greatly facilitated.

In this context, there are the rights and demands of the consumer-citizen. On the other hand, there are the laws that regulate the use, cir-

ulation and sharing of educational and cultural works, expanding or restricting the range of access to them.

With a direct relation to this situation, the Brazilian reform process of the copyright law (Law 9.610/98) gains relevance.

The regulation of copyright affects the relations of consumption, citizenship and the right to education directly and indirectly. The Brazilian copyright system has proved itself insufficient and inadequate to handle the new demands that emerge with the technological age. It comes out restrictive, inflexible and less dedicated to the public interest. Reform therefore becomes imperative for the effective access to goods and their proper use.

The Brazilian Institute for Consumer Defence (IDEC) has worked nationally and internationally on the issue of copyright from the consumers' point of view. With the support of Consumers International, its A2K project, the Ford Foundation and the Open Society Institute, IDEC develops projects of civil society to debate the issue and to enable consumer awareness relating to copyright. IDEC has a steady job of advocacy and helps to consolidate improvements in the Brazilian law, always in order to reach a balance between recognition of the author and access to cultural heritage – and all relationships of symbolic exchanges and creative economy related to it.

IDEC maintains a programme of copyright and access to knowledge that articulates a network to organise seminars and to produce content on the subject. It also works in the organisation of civil society to formulate joint proposals to the government.

## **14.2 The context**

In Brazil, copyright is ruled by the law number 9.610, from 1998, the Copyright Law. Since its implementation, this legislation has not undergone any adjustment that addressed the new demands for access to culture and knowledge, new opportunities arising from technological innovations and the increasing daily use of the Internet.

Beyond the debate about the regulation of copyright in the digital age, in a previous diagnosis, Brazilian copyright law has proven itself insufficient and inadequate to account for the realisation of the fundamental rights of citizens and consumers. The right to education and access to culture, information and knowledge are constitutional rights with meagre conditions to be realised under the aegis of the current copyright law.

Such situation is evident when considering some key points of the law, for example:

- Its incompatibility with the new uses of works permitted by new technologies.
- The absence of a clause that allows the full use of copyright works for educational and scientific purposes.
- The incompatibility with the appropriate preservation work of organisations to protect the cultural heritage.
- Insufficient guarantees for access to works in the public domain.
- Inadequate protection of authors in their relationship with cultural intermediaries.

In that context, the current copyright law does not serve the public interest, through the protection of fundamental rights and the full exercise of citizenship, which is necessary to respect consumers' rights.

A reform of the copyright law is ongoing in the country. The process has been conducted by the Ministry of Culture since 2007, with debates, public hearings and input from various organisations involved with the subject, among them, IDEC.

The draft bill proposing the reform of the copyright law was released for public consultation since 14 June 2010 and remains open to receive contributions from society up to 31 August.<sup>1</sup> After that, the suggestions will be compiled by Government and the draft bill will be sent to Congress for a vote. The consultation was expected to begin at the beginning of the last year and happens, now, at a difficult political moment for its approval, because 2010 is an election year.

In this sense, as a defender of the citizens' and consumers' rights, IDEC is acting for the reform to be discussed and implemented. An exercise that happens through the work of institutional liaison with partner organisations to produce content for consumer awareness regarding their rights in the sphere of copyright. It happens through organised pressure on the executive and legislative branches, and by the organisation of public debates showing the importance of the issue for society.

The goal of IDEC, with these actions, is to help ensure the consumer's right to knowledge, culture and information and to assure an effective balance between copyright protection and public interest.

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<sup>1</sup> This section of the paper has been updated as at 26 July 2010, following its earlier delivery at the 2010 CI Global Meeting on A2K.

### 14.3 The reform of copyright law in Brazil

Since 2007, the Federal Government has conducted a process of discussion about the Brazilian copyright law. Discussions and seminars were conducted and contributions were collected from many sectors of society, from record and publishing companies to organisations of civil society that work with this subject.

In effect since 1998, the law 9.610/98 is considered inadequate by many organisations that study the subject, among them IDEC. The government itself has consolidated its position about the copyright, considering it insufficient to fully realise the right of access to culture, art, science and education. The reform is intended to make the law more flexible and to reconcile the right of authors to receive for their works with the fundamental guarantee of access to knowledge by the population.

According to the proposal of the Ministry, various points of the law should be reformed, aiming at the realisation of this public interest. Among them, some are worth mentioning briefly:

- I. **Principles:** there must be a balance between copyright protection and the guarantee of the full exercise of cultural rights and other fundamental rights. The purposes of the law are: to encourage artistic creation and cultural diversity, to ensure freedom of expression and access to culture, education, information and knowledge; to harmonise the interests of copyright holders and society.
- II. **Limitations to copyright are allowed:**
  1. Reproduction of works that are legitimately acquired, made in a single copy by the own scribe for private and non-commercial use.
  2. Reproduction of works legitimately acquired for purposes of portability or interoperability.
  3. Reproduction of speeches, conferences and classes, the publication being prohibited.
  4. Reproduction and distribution of works to be used by people with disabilities, and reproduction for use in a resume or portfolio.
  5. Use of short extracts from works of any kind, or full works in the case of visual arts.
  6. Reproduction of works by museums, libraries and archives for conservation, archiving and preservation.



7. Display of visual and musical performances without gainful intent, being free for educational purposes, cultural diffusion and to stimulate debate.
  8. Reproduction of out of print works.
- III. **Private copy:** Provision of reproduction by any means or process of any work legitimately acquired, if made in one copy and by the copyist, for his private and non-commercial use.
  - IV. **Charging for photocopies:** Total or partial reproduction of literary works undertaken for commercial purposes should be subject to payment, in order to remunerate the authors for their reproduced works. The collection and distribution of this remuneration will be made through a collective management entity created for this purpose.
  - V. **Prohibition of the mechanism that enables artificial bribes for the public performance of works and phonograms:** Most common in Brazil and so-called “Jabá”. It creates penalties for those who offer or receive advantage to increase the public performance of works or phonograms.
  - VI. **Government supervision of copyright management organisations:** The state will have the function to supervise the collective management of rights and to mediate disputes and arbitration. In the proposal, this is the role of the Ministry of Culture, but there is future the possibility of creating a new government agency for that purpose.
  - VII. **Including the National System of Competition and Consumer’s Defence in the dynamic of supervision:** Both systems will be part of the dynamic of collective management bodies supervision, receiving complaints of abuses and violations by these associations.
  - VIII. **Duties of the collective management bodies:** The collective management bodies must be approved by the State and shall give wide publicity of their acts, particularly the regulations on collection and distribution.
  - IX. **Duration of economic rights:** The life of the author plus 70 years.
  - X. **Non-voluntary licenses:** Creation of non-voluntary licenses to be required when the work is sold out, is an orphaned-work or when unreasonable obstacles are created for the exploitation of the work.

- XI. **Revision of contracts:** The revision or termination of copyright contracts may be pled by virtue of extreme, unforeseeable and extraordinary events, or in case of one-sided contracts.
- XII. **Copyrighted works:** Subtitles become subject to copyright of the author; but technical standards are not protected by copyright.
- XIII. **Numbering works:** Copies are to be numbered, either by numbering the copies or electronic controls.
- XIV. **Format shifting:** The new text provides for shifting formats (from a CD to the MP3 player, for example) – for the purpose of interoperability.
- XV. **Reproduction for preservation of cultural heritage:** It is allowed for libraries, museums and film to freely make copies to preserve the cultural heritage of the country.
- XVI. **Sold out works:** Authorising free copying for non-commercial purposes of out of print works.

#### 14.4 The range of discussion

Several organisations and social movements related to communication, culture and education, who believe that the Brazilian legislation should be made flexible to democratise access to goods, in fact, consider the interests of the author and make them compatible with the public interest. They criticise the rigidity of the law, which has few restrictions and limitations, and a narrow margin for fair, educational and private use without commercial purposes.

On the other side are those who believe the current law is sufficient to ensure the rights of authors and to share their works with society. They are basically the representatives of book publishers and bodies of collection of copyrights, led by Central Office Copyright Collection (Ecad).

Ecad is a private organisation, created by Law 5.988, from 1973, and was preserved by Law 9.610, 1998, the current copyright law. It is responsible for centralising the collection of royalties for financial exploitation and public display of works and to make payment to the artists. However, there is no public control over it, nor any agency responsible for monitoring its accounts and its tax assessment in case of improper dealing.

The draft bill presented by the government proposes public supervision through the Ministry of Culture. Yet without an exact legal structure,

the Ministry will be responsible for regulating the standards of collection and distribution rights in the country and for supervising Ecad and other entities of collective management of copyright, in order to defend, also, the same authors' interests against the companies that publish or record their works.

The idea is to give greater transparency in the processes of collection, distribution and provision of finance, a historical demand of cultural organisations that work in this field.

To sum up, the weight of these intermediaries, nowadays, is absolutely dominant in the production and distribution of cultural assets. Not only don't they adequately remunerate the author, but also go against the public will and that of history itself. What we see is a criminalisation of society, by the copyright holders, mostly large corporations in the music and publishing business, acting through their representative associations: ABDR (Brazilian Association of Reprographic Rights), ABPD (Brazilian Association of Record Producers), APCM (Association of Film and Music Piracy), Abramus (Brazilian Association of Music and Arts), Ecad (Central Bureau of Collection and Distribution of Copyright), among others.

This group of organisations has launched the CNCDA (National Committee for Culture and Copyright Law), a front of resistance to any change in the law. Under the pretext of defending the "national culture," the committee disseminates innocuous "anti-piracy" propaganda and preaches the sharing and use of works as an affront to copyright. It's more than a repressive discourse, it is completely obsolete.

The copyright law should serve the purpose of balancing the legal interests and the needs of different stakeholders, dealing with moral and economic conflicts, related to forms of expression, use and dissemination of ideas. However, now it supports temporary monopoly rights granted to the author/creator.

Brazilian society is doubly the victim of copyright law in force: as a consumer, it is criminalised for consuming cultural goods and purchasing unauthorised copies (stigmatised "piracy"), as a citizen, has its rights injured by the denial of access to culture, through the high prices charged by the recording industry; hardly suitable for a country of democratic and sovereign intent.

Industry associations broadcast advertisements that abuse common sense, establishing a direct relationship between piracy and violence, drug dealing or organised crime. Furthermore, the losses they claim are presented without the exposure to a rigorous methodology, which gives veracity to the numbers presented.

In the emblematic case of photocopying, the ABDR, one of these associations, provides broad support for political and ideological repression against the practice of photocopying, absolutely essential to the formation of a student in an environment where the cost of books is too expensive by Brazilian standards.

The actions of these intermediaries favour only the assets and individualistic ends of copyright owners, to the detriment of the need to look to the public interest in dissemination of works. They would maintain the current law applicable to them, even as it is heavy and impedes the process of production and access to works – a white elephant of copyright.

### **14.5 Main points for the consumer**

A sticking point relates to the possibility of reproduction of works for fair, private, non-commercial and educational use – a provision of great importance in the law by referring directly to the right of access to culture and education.

In the proposed reform of the law, there is no specific clause that allows copying for educational purposes. At the same time, it allows full private copying (single copy), made by the copyist for their own use. This brings an ambiguity in relation to consumption: it's impossible to know if just the consumer himself can perform the copy (as it is done with music and movies) or if it may require a third party.

Moreover, for the services of photocopiers, ever present in universities and other educational institutions, by the new law, it is necessary to have permission from authors whose works are protected, or from collective associations that represent them. Besides, it is necessary to pay them a fee.

A serious problem, too, is the fact that the authors associations do not agree with any kind of copying, not even for educational purposes, and possibly will not allow such copying.

In addition, in this bill there is no regulation of dynamic content-sharing on the Internet. Needed is a chapter on “digital rights” covering peer to peer (p2p) file sharing and about the complete liberation of digital copying. A subject that meshes with the recent proposal of an Internet legal framework, in progress concurrently in the country.

With respect to conditions of full access to culture and knowledge, another important point refers to works in the public domain, or those who may circulate and be available regardless of authorisation. Works that are part of the public cultural heritage.

In Brazil, the works are protected during the life of the author and 70 years after the author's death, when they come into the public domain. The Berne Convention and TRIPS, international standards that are followed in the country, force countries to protect the works for only 50 years. Nevertheless, the reform of the law does not decrease the time of making a work available to the public domain, and thus, it wastes 20 years of free access to knowledge produced, which turns out to be, somehow, brokered by publishing and recording groups.

This possibility of copyright flexibility to obtain a public benefit, educational or didactic, is technically considered a "limitation" to copyright. Brazilian law can be considered one of the strictest in the world, bringing prohibitions that do not exist in many other countries. According to a study conducted by Consumers International, last year, Brazil has the worst grade (F) in the ranking of limitations to copyright for educational purposes.

Countries like the US, Canada, Philippines, Australia, Croatia, Norway, among others, allow a full copy of the work under specific circumstances, such as for the use by people with disabilities in perception, for study purposes or for purposes of work's conservation.

## **14.6 Copyright and education**

In the educational field, the situation makes that demand urgent. Currently, the law does not allow consumers to take photocopies of books for their own research. It just allows "small portions" without specifying exactly their size. A college student, for example, who will not sell or distribute the material, cannot copy an indispensable book for a subject. Even a book that is too expensive if purchased at the bookstore. Teachers themselves, in another educational example, cannot show films to students without the express permission of the copyright owners.

Thus, in education, the debate on copyright reform, for the realisation of consumer rights, is essential. Likewise the debate about the need for flexibility in the law for access to cultural and intellectual works by citizens with disabilities, to copy for private non-profit use and the use of protected works for educational and scientific purposes.

## **14.7 The consumer and the copyright law**

The regulation of copyright affects directly and indirectly consumer relations at the different levels at which they are established. Access to

cultural goods, the acquisition of books, music, movies, paintings, photographs, their use and circulation, all of this is covered by copyright. Depending on the level of flexibility that the regulation allows, all that content is more or less easily available to consumers. It will be more or less expensive, and thus, with greater or fewer access conditions.

The Internet has created an environment in which exchanges are much more facilitated. Today, on the Internet, to download and listen to music, watch movies, to make a private copy for endless consumption, reading books and sharing information are everyday actions that have increased the freedom of access to knowledge and culture. A reality increasingly consolidated in the Brazilian scenario.

In this framework, naturally, the law should protect those who produce the works: to protect the copyright of the writers, directors, musicians, composers, artists. However, contrary to the impulse of free access to works and the consequent democratisation of the knowledge it provides, the Brazilian copyright law is too rigid, banning access by consumers, to goods for fair use. At the same time, the law does not even contemplate the real need of the authors. An anachronistic situation, in which the law favours neither the public nor the copyright owners.

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Excluding the cover artwork, this book was produced entirely using open source software. The book was edited in L<sup>A</sup>T<sub>E</sub>X, formatted using the Memoir class for E<sup>T</sup><sub>X</sub> (respectively developed by Peter R Wilson and Leslie Lamport), and typeset using T<sub>E</sub>X (created by Donald Knuth). The body text is set with the Utopia face at 11 points on a 13 point leading, and the heading text in Avant Garde (both released under open licences by the Adobe foundry).

# Access to knowledge for consumers

## Reports of Campaigns and Research 2008–2010

As the peak body of the global consumer movement, Consumers International believes that a knowledge society can be developed only when there is access to information on all fronts. Such a society is sustainable when access to knowledge is unhampered and inclusive, promoting co-operative forms of knowledge production as the basis for innovation and creativity.

In this context, Consumers International and its members from around the world have engaged in a series of research and advocacy programmes on access to knowledge from 2008 to 2010, with the support of Ford Foundation and the Open Society Institute. This volume presents the results of these activities, including:

- A global survey of consumers, revealing for the first time the extent of the barriers that they face in accessing and using copyright materials.
- Research from Australia and Israel on the impact of reforms to those countries' copyright laws which introduced new flexibilities for consumers.
- Advocacy and campaigning activities in India, Nigeria, Brazil, South Africa, Cameroon and Zambia focussed on improving access to knowledge for consumers.



Consumers International  
Kuala Lumpur Office for Asia Pacific and the Middle East  
Lot 5-1 Wisma WIM, 7 Jalan Abang Haji Openg  
TTDI, 60000 Kuala Lumpur, Malaysia  
Tel: +60 3 7726 1599



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