

## Unlocking the Potential of Copyright Limitations and Exceptions (L&Es)

By Faith O. Majekolagbe \*

### ABSTRACT

Copyright limitations and exceptions (L&Es) are vital tools for creativity, innovation, access to knowledge and education, and human capital formation. All of these are crucial to the development of societies and achieving the United Nations' Sustainable Development Goals (SDGs). A strong system of well-defined copyright L&Es guarantees the public adequate access and use of the cultural goods and knowledge that are critical to achieving development goals. This paper identifies and discusses specific clusters of L&Es that are essential for achieving the SDGs. These clusters should be recognized and implemented in copyright laws at national, regional, and international levels to strengthen development objectives. Instead of applying specific L&Es to all countries, regardless of their unique developmental needs, recognizing these clusters of L&Es could help design an approach to international copyright law that is centred around development. Ultimately, this approach would provide greater flexibility in designing development programs that align with the SDGs and recognize copyright law's inherent development rationale.

**KEYWORDS:** Copyright limitations and exceptions (L&Es), Sustainable Development Goals (SDGs), copyright law, innovation, access to knowledge, right to research.

*Les limitations et exceptions au droit d'auteur sont essentielles pour favoriser la créativité, l'innovation, l'accès à la connaissance et à l'éducation, et la formation du capital humain, qui sont des facteurs clés dans le cadre de la réalisation des objectifs de développement durable (ODD) définis par les Nations Unies à l'échelle mondiale. Un régime efficace et bien défini de protection des droits d'auteur garantit au grand public un accès et une utilisation adéquats des biens culturels et des connaissances qui favorisent la réalisation de ces objectifs. Le présent document recense et examine les catégories spécifiques de limitations et d'exceptions au droit d'auteur qui sont nécessaires au renforcement des ODD et doivent, à ce titre, être retenus et mis en œuvre dans les lois relatives au droit d'auteur aux niveaux national, régional et international. L'objectif est de favoriser une approche de la législation internationale sur le droit d'auteur centrée sur le développement qui tient compte des besoins spécifiques de chaque pays dans ce domaine. En fin de compte, cette approche offrirait une plus grande flexibilité dans la conception de programmes de développement qui s'alignent sur les ODD et reconnaissent le rôle du droit d'auteur en tant qu'outil de développement.*

**MOTS-CLÉS:** Limitations et exceptions au droit d'auteur, objectifs de développement durable (ODD), droit d'auteur, innovation, accès à la connaissance, droit à la recherche.

### KEY MESSAGES

"There is still enough wiggle room for countries, especially developing countries, to utilise copyright L&Es to promote their development priorities. This wiggle room should be fully utilised to unlock the potential of copyright L&Es for human flourishing."

"If copyright laws are too restrictive and limit access to information and knowledge, they can hinder the ability of individuals and institutions to acquire and use the information to improve their skills and knowledge. This, in turn, can limit the development of a country's human capital, which is a critical component of its economic growth and development."

"To advance progress in the realisation of the SDGs and foster even and sustainable development, copyright L&Es must be embraced as necessary and important tools, as L&Es promote creativity, innovation, access to knowledge and education and the formation of human capital."

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*Las limitaciones y excepciones (L&E) al derecho de autor son herramientas vitales para la creatividad, la innovación, el acceso al conocimiento y a la educación, y la formación de capital humano. Todos ellos son cruciales para el desarrollo de las sociedades y la consecución de los Objetivos de Desarrollo Sostenible (ODS) de las Naciones Unidas. Un sistema sólido de L&E bien definidas en materia de derechos de autor garantiza al público un acceso y uso adecuados de los bienes y conocimientos culturales que son fundamentales para alcanzar los objetivos de desarrollo. Este documento identifica y analiza grupos específicos de L&E esenciales para el logro de los ODS. Estos grupos deben ser reconocidos e implementados en las leyes de derechos de autor a nivel nacional, regional e internacional para fortalecer los objetivos de desarrollo. En lugar de aplicar L&E específicas a todos los países, independientemente de sus necesidades únicas de desarrollo, el reconocimiento de estos grupos de L&E podría ayudar a diseñar un enfoque de la legislación internacional de derechos de autor centrado en el desarrollo. En última instancia, este enfoque proporcionaría una mayor flexibilidad en la concepción de programas de desarrollo que se alineen con los ODS y reconozcan la lógica de desarrollo inherente a la ley de derechos de autor.*

**PALABRAS CLAVES:** Limitaciones y excepciones al derecho de autor (L&E), Objetivos de Desarrollo Sostenible (ODS), legislación sobre derechos de autor, innovación, acceso al conocimiento, derecho a la investigación.

## I. Introduction

In many countries, copyright laws are designed to advance the public interest by incentivizing creativity, knowledge production and the dissemination of information, all of which are important building blocks for human development and progress. Accordingly, the grant of copyright is not an end in itself, but a means to an end. Since copyrights restrict access to knowledge (see below), an important dimension of securing copyright's goals is to ensure effective public access and use of the knowledge and cultural goods to which copyright law is directed. To this end, exclusive rights (copyrights and related/neighboring rights) must be balanced with copyright limitations and exceptions (L&Es). "Limitations" and "exceptions" are terms which are often used jointly in copyright policy and scholarship to describe legal provisions that: (i) place restrictions and set boundaries on the exploitation of an exclusive right by the copyright owner, and (ii) curtail the application of an exclusive right such that some or all users have the legal "right" to do an act that would otherwise have been within the exclusive control of the copyright owner.<sup>1</sup>

Any attempt to promote development through copyright law requires thoughtful integration of both exclusive rights and L&Es (two necessary sides of the same coin) in the design of national and multilateral copyright regimes. However, the international copyright system has histori-

cally prioritized exclusive rights, while resisting the role of L&Es as formal tools of cultural and authorial flourishing. The emphasis on exclusive rights and the inattention to copyright L&Es are reflected in the paradigmatic model enshrined in international copyright law, i.e., the obligation for countries to ensure mandatory minimum rights for copyright owners, but only a discretionary zone for countries to adopt L&Es. Other than the mandatory quotation exception in Article 9 of the Berne Convention and the more recent mandatory exception codified in the Marrakesh Treaty (considered to be a historic achievement), international copyright instruments, such as the Berne Convention and the multiple other treaties administered by the World Intellectual Property Organization (WIPO), in addition to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) administered by the World Trade Organization (WTO), do not provide for mandatory minimum L&Es.

The non-integration of L&Es into international copyright policy at WIPO and WTO sends an erroneous signal to countries - especially developing countries - that the most important rules needed for the attainment of their development goals are the granting of exclusive rights. However, the causal relationship between copyright and development is equivocal, even in developed countries.<sup>2</sup> The presumption that strong copyright regulations will inevitably result in greater creativity, innovation, and growth of local creative industries is highly questionable. It ignores the fact that creativity and innovation thrive when the cost of accessing information and borrowing from existing ideas are significantly reduced rather than increased through the creation of information monopolies.<sup>3</sup> The stronger the scope of copyright protection and the longer the duration of protection, the costlier access to information and knowledge becomes and the more difficult it is to build on existing works to create new works. Unduly rigid copyright laws can, therefore, inhibit creativity, innovation, and development and widen the information, knowledge, and technology divides between the Global North and the Global South.

Although copyright L&Es do not take the central stage within the international copyright system in the way that exclusive rights do, countries have leeway within the framework of international copyright law to integrate them within their national systems. The TRIPS Agreement is clear on this.<sup>4</sup> Despite the so-called 'three-step test', there

<sup>1</sup> Daniel J. Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations", *University of Ottawa Law & Technology Journal*, Vol. 5 (2008), p. 3; Andrew Rens, "Implementing WIPO's Development Agenda: Treaty Provisions on Minimum Exceptions and Limitations for Education", in *Implementing the World Intellectual Property Organization's Developing Agenda*, Jeremy de Beer, ed., (Wilfrid Laurier University Press, 2009), p. 160.

<sup>2</sup> Pedro Cunha Neves *et al.*, "The Link between Intellectual Property Rights, Innovation, and Growth: A Meta-analysis", *Economic Modelling*, Vol. 97 (2021), p. 196.

<sup>3</sup> See Emmanuelle Auriol, Sara Biancini and Rodrigo Paillacar, "Intellectual Property Rights Protection and Trade: An Empirical Analysis", *World Development*, Vol. 162 (2023), pp. 1-2; Neves *et al.*, *supra* note 2, p. 197; Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (The New Press, 2007), pp. 1-2.

<sup>4</sup> Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1C "Agreement on Trade-Related Aspects of Intellectual Property Rights" (as amended on 23 January 2017), art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder").

is still enough wiggle room for countries, especially developing countries, to utilise copyright L&Es to promote their development priorities. The main argument of this paper is that this wiggle room should be fully utilised to unlock the potential of copyright L&Es for human flourishing. In this paper, after this introduction, I discuss the role of copyright L&Es in ensuring even and sustainable development, specifically with respect to the fulfilment of the United Nations (UN) Sustainable Development Goals (SDGs). It then identifies how to craft pro-development L&Es, based on clusters of L&Es that are closely tied to the SDGs and which should be recognised in national and international copyright L&Es instruments and policies. The conclusion ensues.

## II. Copyright and Development: The Role of L&Es in Fulfilling the SDGs

It is indisputable that development cannot be measured solely by the gross domestic product (GDP) of a country,<sup>5</sup> and that it must encompass a sustainable, environmental, sociological, and physical well-being. The UN 2030 Agenda for Sustainable Development recognises the multi-dimensional nature of development and the importance of sustainable development.<sup>6</sup> It defines development in terms of people, planet, and prosperity and premises global development on the achievement of 17 sustainable development goals (SDGs).<sup>7</sup> Accordingly, a well-designed copyright system can contribute meaningfully to many of the SDGs, particularly given the critical input of knowledge goods to a wide array of them. To do so, copyright law requires (and should promote) a robust public domain to support access to knowledge/information and contribute to the formation of human capital and the development of absorptive capacity for the costs of copyright protection.<sup>8</sup>

With regards to copyrights and its relation to development, while the view of supporters of strong copyright laws is that exclusive rights alone facilitate creativity and innovation or the continued production of knowledge, the empirical and historical data point in a different direction. Proponents of maximalist protection are often silent on the access side of protection – which is a necessary precondition for knowledge production. Creators and innovators draw from existing resources to develop and produce new resources.<sup>9</sup> It is therefore important to balance the protection of copyrighted works and access

5 See Amartya Sen, "Development as Capability Expansion", *Journal of Development Planning*, Vol. 19 (1989), p. 42 ("a country can be very rich in conventional economic terms ... and still be very poor in the achieved quality of human life").

6 See Transforming our World: The 2030 Agenda for Sustainable Development, UNGA 70th session, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015).

7 *Ibid.*

8 Ruth L. Okediji, "Reframing International Copyright Limitations and Exceptions as Development Policy", in *Copyright Law in an Age of Exceptions and Limitations*, Ruth L. Okediji, ed. (Cambridge University Press, 2017), p. 463.

9 Jenny L. Sheridan, "Copyright's Knowledge Principle", *Vanderbilt Journal of Entertainment and Technology Law*, Vol. 17 (2014), p. 42 and 51; Ruth L. Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries", Issue Paper No. 15 (International Centre for Trade and Sustainable Development & UNCTAD, March 2006), p. ix.

to such works, both for the preservation of present and future creativity. The empowerment and furtherance of creativity and innovation is a vital function of copyright L&Es.<sup>10</sup> Grants of exclusive rights without appropriate corresponding L&Es have significant adverse effects on development both because they unduly burden downstream creativity and innovation and because proprietary rights can be anti-competitive.<sup>11</sup>

Moreover, it is also important to state that for a country to become one that can bear the costs of strong copyright protection, it must begin as a country with adequate flexibility in its copyright law to enable access to the knowledge and ideas that would help build its human capital. Until an economy is well developed, its capacity to absorb the costs of copyright protection will be small and limited. Countries are better able to support strong copyrights as they advance economically.<sup>12</sup> The United States is a prime example of this fact. For almost a century, the US refused to join the Berne Union and avoided the strong copyright obligations under the Berne Convention until it was economically advanced enough to bear the costs associated with strong copyrights. What a country's copyright regime should look like ought to depend on the country's level of economic development.<sup>13</sup> The more a weak country continues to strengthen its copyright protection without integrating a robust set of L&Es in its copyright law, the more that country loses its opportunity to build its human capital and become a country with the capacity to absorb the cost of strong copyright protection.

Taking that into account, this section will address some ways in which copyright L&Es promote development and the fulfilment of the SDGs, both directly and indirectly.

### A. Innovation, industrialisation and sustainable economic growth: the case of computer software and AI development via copyright L&Es

Key to SDG8 is the promotion of "sustained and sustainable economic growth", while SDG9 also seeks to "foster innovation". Many argue that innovation drives and sustains economic growth in any nation,<sup>14</sup> and it is generally agreed that knowledge has played a vital role in recent economic growth.<sup>15</sup> Tangible assets like land, labour, and capital used to be the key drivers of economic growth, but knowledge is the leading driver of economic growth in this era.<sup>16</sup> However, the effects of this broader context are not

10 See Farida Shaheed (Special Rapporteur), Report of the Special Rapporteur in the Field of Cultural Rights, United Nations Doc No. A/HRC/28/57 (24th December 2014), para. 63.

11 Okediji, *supra* note 9, p. x.

12 Walter G. Park, "The Copyright Dilemma: Copyright Systems, Innovation and Economic Development", *Journal of International Affairs*, Vol. 64, No. 1 (2010), p. 65.

13 *Ibid.*

14 Ian E. Maxwell, *Managing Sustainable Innovation* (Springer, 2009), p. 1.

15 Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (World Intellectual Property Organization, 2003), p. 24.

16 See Jonathan Haskel and Stian Westlake, *Capitalism without Capital: The Rise of the Intangible Economy* (Princeton University Press, 2018).

evenly felt in all countries: developing countries do not automatically accrue benefits from this transition, and are often even negatively affected by it.

One concrete area that is at the core of the copyright system is computer software, one of the current drivers of innovation. This is due to the fact that copyright protects the written instructions or codes from which software is created.<sup>17</sup> The software industry has been driving innovation in education, entertainment, transportation, and several other fields.<sup>18</sup> Since software is created by using instructions in words, or a source code,<sup>19</sup> it follows that to sustain innovation in computer software, access to the underlying instruction and source code is vital. However, because software is eligible for copyright protection, one cannot in principle legally reproduce, modify, adapt, disseminate, and use the software code without obtaining the licence of the copyright owner. Yet, “modifying, improving, integrating and ‘tweaking’ source codes is a centre-piece of the software development ‘trade’; these activities lead to computer innovation”.<sup>20</sup>

Furthermore, breakthroughs in artificial intelligence (AI) development, including the widespread application of machine learning in different fields, are mainly connected to and made possible by the availability of large volumes of machine-readable digital content online and the increase in computing capacity to mine data.<sup>21</sup> Exclusive rights in digital content, without corresponding L&Es to promote innovation, can stifle the development of AI systems by impeding the access to large amounts of data and the corresponding text and data mining (TDM) (see below).

## **B. Education and access to knowledge: L&Es to fulfil SDG4**

Copyright L&Es are equally important legal tools for promoting education, including research and access to knowledge. The education goal (SDG4) is to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.” Historically, copyright has always played a role in the furtherance of learning. The first English copyright statute, the 1709 *Statute of Anne*, was described in its long title as “an act for the encouragement of learning”.<sup>22</sup> Speaking about the objective of the Statute of Anne and Australia’s Copyright Act, the High Court of Australia in *IceTV Pty Ltd v Nine Network Australia*

<sup>17</sup> See Idris, *supra* note 15, p. 209.

<sup>18</sup> *Ibid.*, p. 210.

<sup>19</sup> *Ibid.*, p. 210.

<sup>20</sup> Alan Story, “Don’t Ignore Copyright, the ‘Sleeping Giant’ on the TRIPS and International Educational Agenda”, in *Global Intellectual Property Rights: Knowledge, Access and Development*, Peter Drahos and Ruth Mayne, eds. (Palgrave Macmillan, 2002), pp. 135–36.

<sup>21</sup> Innovation, Science and Economic Development Canada, “A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things” (Ministry of Industry, 2021), p. 4. Available from <https://www.ic.gc.ca/eic/site/693.nsf/eng/00316.html>; Josef Drexl *et al.*, “Technical Aspects of Artificial Intelligence: An Understanding from an Intellectual Property Law Perspective”, Max Planck Institute for Innovation and Competition Research Paper No. 19-13 (October 2019), p. 4; Theodoros Chiou, “Copyright Lessons on Machine Learning: What Impact on Algorithmic Art?”, *Journal of Intellectual Property, Information Technology and Electronic Commerce*, Vol. 10 (2019), p. 399.

<sup>22</sup> The Statute of Anne (April 10, 1710), 8 Anne, c. 19.

*Pty Limited* noted that “[t]he “social contract” envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.” The significance of copyright to education is also acknowledged in Article 10(2) of the Berne Convention which allows States to include in their national copyright laws, an exception or limitation that “permit[s] the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recording for *teaching*”.<sup>23</sup> The WIPO Copyright Treaty (WCT)<sup>24</sup> also acknowledges the intention to promote education through copyright laws, including the Berne Convention. In its preamble, the WCT “[recognized] the need to maintain a balance between the rights of authors and the larger public interest, *particularly education, research and access to information*, as reflected in the Berne Convention”.

Copyright exceptions can and should be tailored to support educational and research activities in both digital and non-digital environments. Educational instruction, conduct of research, access to information and learning are increasingly or even mainly digitized. Copyright exceptions that do not permit digital access and use of copyrighted works can hardly provide meaningful support for education, research and access to knowledge/information. For example, a copyright exception that only permits reprographic copying for educational instruction cannot be relied on to provide digital copies of digital-born works to students for educational purposes. Also, where a library is only permitted under copyright law to provide access to its collection in the same format in which it acquired the works without the freedom to digitise its print collections for the purpose of making them available to patrons through a controlled digital lending, such library will not be able to make the most of digital technologies to provide access to works for education and research beyond its physical walls. In many cases, this becomes access-denying in circumstances where library users cannot make it to the library due to geographical reasons (e.g., living in a remote rural area), for reasons of physical disability, or due to restricted movement such as during public health emergencies or wars.

While the Berne Convention and the exceptions contained therein were concluded in the pre-digital age, the WCT, a special agreement under the Berne Convention, clarifies that countries can “carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention”.<sup>25</sup> Countries should therefore expressly extend existing L&Es in their national laws to the digital environment. In addition to this, it might be necessary for countries to develop

<sup>23</sup> Emphasis supplied.

<sup>24</sup> WIPO Copyright Treaty, opened for signature 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002).

<sup>25</sup> Agreed Statement Concerning Article 10 of the WIPO Copyright Treaty.

new L&Es for the digital environment since it may be difficult to interpret some existing exceptions as applying to the digital environment. In this regard, the WCT permits “Contracting Parties to devise new exceptions and limitations that are appropriate in the digital environment”.<sup>26</sup> Countries should therefore explore this flexibility in the WCT to develop L&Es that are appropriate for supporting education, research and access to information in the digital age.

In regions where women and girls are not allowed to go to schools unchaperoned or at all, supporting digital access to education and information through copyright systems may be a great means of providing equal educational opportunities, thereby making progress towards the education goal (SDG4) and the gender equality goal (SDG5). Access to education and knowledge through digital and online networks can also help women who would otherwise not be able to go into a physical classroom or library because of competing care responsibilities to acquire education and knowledge. However, where copyright laws mount up barriers to providing this form of access for individuals and institutions, it becomes impossible or more expensive to fully harness the potential of digital technologies to close gender and education gaps in societies.

Furthermore, an effective educational system is dependent on an adequate supply of books and other educational materials.<sup>27</sup> The quality of learning and teaching is strongly influenced by access to knowledge resources and portals of knowledge resources (such as libraries). *The Dakar Framework for Action*, adopted by the World Education Forum (WEF), highlighted the availability of affordable textbooks and other learning materials as vital to improving education quality.<sup>28</sup> *The 2015 Global EFA Report* also identified three factors that support good quality teaching and learning, the first of which is “the supply, distribution and use of learning materials.”<sup>29</sup> In a policy paper, the Global Education Monitoring Report highlighted that “next to an engaged and prepared teacher, well-designed textbooks in sufficient quantities are the most effective way to improve instruction and learning.”<sup>30</sup> Despite these, the policy paper shows that in many countries students at all levels of education either do not have textbooks at all or must share limited copies with many other students.<sup>31</sup> In a report on the challenges that undermined the realisation of the education goal in the Millennium Declaration between 2000 and 2015, the scarcity of textbooks was

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *The Dakar Framework for Action* (United Nations Educational, Scientific and Cultural Organization, 2000), p. 28.

<sup>29</sup> The other two being “a secure, accessible physical environment with appropriate facilities; and time spent in the classroom.” United Nations Educational, Scientific and Cultural Organization (UNESCO), *Education for All 2000-2015: Achievements and Challenges* (EFA Global Monitoring Report 2015), p. 203.

<sup>30</sup> Global Education Monitoring Report, “Every Child Should Have a Textbook”, Policy Paper No. 23 (United Nations Educational, Scientific and Cultural Organization, January 2016), p. 1. Global Education Monitoring Report is the UNESCO independent team monitoring the progress on SDG4.

<sup>31</sup> *Ibid.*, p. 1.

identified as a serious challenge that affected the achievement of the desired level of education quality.<sup>32</sup> Overall, the availability of textbooks remains severely limited<sup>33</sup>: millions of students around the world do not even have access to textbooks at all.<sup>34</sup> Considering that the net cost of digital access to educational and research materials for learners could be zero where appropriate digital technologies are available, copyright L&Es that support the re-production and distribution of digital copies of works for educational uses could facilitate equal access to affordable educational materials for all.

### C. Education, access to knowledge and other SDGs

The role that copyright plays in access to knowledge and education can significantly affect progress in other areas of sustainable and human development. Access to knowledge, including formal knowledge, is a foundational requirement for sustainable development. As noted above, knowledge is also considered “a resource of unique importance to human development”.<sup>35</sup> It is an essential input for education, scientific progress, awareness, informed action, skills acquisition, technological advancement, and cultural growth.<sup>36</sup> Education is “a means by which progress on the other SDGs ... can be secured.”<sup>37</sup> As the United Nations Educational, Scientific and Cultural Organization (UNESCO) observes, failure to actualise SDG4 (quality education and lifelong learning) may “hamper progress towards each and every development goal.”<sup>38</sup> Education is therefore considered key to realising all the other SDGs.<sup>39</sup>

In each of the SDGs, there is “at least one target that involves learning, training, education or at the very least raising awareness of core sustainable development issues”.<sup>40</sup> SDG1 (End Poverty) and SDG4 (Quality Education) are “intricately linked”.<sup>41</sup> Recent evidence reveals that increasing the years of schooling among adults by two years would help lift about 60 million people out of poverty.<sup>42</sup> Further, completing primary and secondary school education by adult population would lift over 420 million people out of

<sup>32</sup> UNESCO, *Education for All 2000-2015*, *supra* note 29, p. 187.

<sup>33</sup> *Ibid.*, p. 203.

<sup>34</sup> Global Education Monitoring Report, *supra* note 30, p. 2.

<sup>35</sup> Lea Shaver, “Intellectual Property, Innovation and Development: The Access to Knowledge Approach”, in *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development*, Lea Shaver, ed. (Bloomsbury Academic, 2010), p. 6.

<sup>36</sup> Garry Jacobs and N. Asokan, “Knowledge for Development” (2000, Vision 2020 Presentation to the Planning Commission, Government of India). Available from [https://www.icpd.org/development\\_strategies/Knowledge%20for%20Development.htm](https://www.icpd.org/development_strategies/Knowledge%20for%20Development.htm).

<sup>37</sup> International Council for Science and International Social Science Council, *Review of Targets for the Sustainable Development Goals: The Science Perspective* (International Council for Science, 2015), p. 29.

<sup>38</sup> United Nations Educational, Scientific and Cultural Organization, *Education for People and Planet: Creating Sustainable Futures for All* (Global Education Monitoring Report 2016), p. i.

<sup>39</sup> *Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4* (United Nations Educational, Scientific and Cultural Organization, 2016), p. 24; UNESCO Institute for Statistics (UIS) and Global Education Monitoring (GEM) Report, “Reducing Global Poverty through Universal Primary and Secondary Education”, Policy Paper 32 / Fact Sheet 44 (June 2017), p. 1.

<sup>40</sup> *Ibid.*, p. 9.

<sup>41</sup> *Ibid.*, p. 1.

<sup>42</sup> *Ibid.*, p. 11.

poverty, thereby more than halving the global number of poor people.<sup>43</sup> Poverty reduces significantly and faster in places where literacy rates are high.<sup>44</sup> Education increases economic growth and economic growth “is a major determinant of poverty reduction”.<sup>45</sup>

Education also provides people with the knowledge and skills needed to improve their productivity and make them employable.<sup>46</sup> Gainful employment increases the likelihood of people moving out of their poverty since their income increases through employment.<sup>47</sup> All forms of education rely on access to learning materials to produce the learning outcomes that are capable of lifting people out of poverty.<sup>48</sup> Therefore, the more arrangements society makes for affordable and equitable access to learning materials, including digital and online materials, the more likely it is to lift its people out of poverty and achieve SDG1. It is imperative that these arrangements include legal arrangements in the form of copyright L&Es that foster access to learning materials, particularly in developing countries.

Education is also recognised as a powerful key to ending hunger and promoting improved nutrition,<sup>49</sup> thereby making it a significant input in achieving SDG2 (Zero Hunger). Lack of quality education reduces the capacity to earn and thus, increases the risk of hunger.<sup>50</sup> Access to education for the poor and other disadvantaged groups is necessary to achieve food security.<sup>51</sup> Lack of quality education also reduces productivity and employability and these in turn lead directly to poverty and hunger.<sup>52</sup> Also, access to quality education, particularly for women, leads to improved child nutrition.<sup>53</sup> In most rural areas, a higher level of undernourishment correlates with a lower level of literacy.<sup>54</sup>

Education is closely connected with good health (SDG3).<sup>55</sup> Education can help keep people in good health or improve their health and overall wellbeing.<sup>56</sup> The general knowledge and skills acquired through education facilitate access to health-related knowledge, help people better understand information on disease prevention and treatment, and choose healthy lifestyles.<sup>57</sup> Educated people are also likely to have a better mastery of health knowledge, seek

medical advice, and adhere to medical treatment.<sup>58</sup> Education is also important to create awareness about diseases and engenders behavioural changes, where necessary. One of the targets associated with SDG3 is to “ensure universal access to sexual and reproductive health-care ... information and education”. It is believed that access to information and education on sexual and reproductive health may effectively help women plan childbirth and avoid unsafe abortion and sexual relations.<sup>59</sup>

In a study on the role of education in achieving SDG3, researchers found that the graduates of the university in which they did their undergraduate studies were well placed to contribute to improvements in the health of the people in their society through access to education and research, even when education takes place on an online platform.<sup>60</sup> Accordingly, maximizing the potential of online educational technologies to deliver educational instruction to distance learners might help make more people health literate and improve health outcomes. The World Health Organization (WHO) recognise health literacy as a key to meeting health-related goals of the world.<sup>61</sup> There is evidence that education and literacy contribute more to the health status of a country than its Gross National Product and this is also the case in developed countries where higher levels of education have been linked to lower morbidity and mortality rates.<sup>62</sup>

Access to knowledge from health research is also integral to building strong health systems. According to the World Report on Knowledge for Better Health, “the application of knowledge from health research has underpinned many of the gains in health and economic development in countries all over the world.”<sup>63</sup> Yet, copyright control restricts access to health research by increasing the cost of purchasing, subscribing to or otherwise accessing health research publications.<sup>64</sup> While the problem of access to health research publications is more acute in developing countries, it is also a significant problem in developed countries.<sup>65</sup> Countries must ensure that they develop L&Es that can foster affordable access to health research.

Access to knowledge can also help to reduce existing inequalities among countries. SDG10 is focused on reducing

43 *Ibid.*

44 Food and Agriculture Organization of the United Nations (FAO), *The State of Food Insecurity in the World 2005*, p. 10.

45 UNESCO Institute for Statistics (UIS) and Global Education Monitoring (GEM) Report, *supra* note 39, p. 12.

46 *Ibid.*

47 *Ibid.*, p. 11.

48 See UNESCO, *Education for People and Planet*, *supra* note 38, pp. 8-9.

49 FAO, *supra* note 44, p. 14.

50 *Ibid.*, p. 2.

51 The World Food Summit Plan of Action adopted at the World Food Summit in Rome, November 1996, para. 22. (“Food Security exists when all the people, at all times, have the physical and economic access to sufficient, safe, nutritious food for a healthy and active life. – para. 1”)

52 FAO, *supra* note 44, p. 14.

53 *Ibid.*

54 Francesco Burchi and Pasquale De Muro, “Education for Rural People: A Neglected Key to Food Security”, Working Paper No. 78 (Dipartimento di Economia, Università degli Studi “Roma Tre”, 2007), p. 7.

55 UNESCO, *Education for People and Planet*, *supra* note 38, p. 77.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 See *Ibid.*, p. 84.

60 Sanjeev Sridharan *et al.*, “The Potential of an Online Educational Platform to Contribute to Achieving Sustainable Development Goals: A Mixed-methods Evaluation of the Peoples-uni Online Platform”, *Health Research Policy and Systems*, Vol. 16 (2018). Available from <https://doi.org/10.1186/s12961-018-0381-2>.

61 World Health Organization (WHO) & United Nations Development Program (UNDP), “Policy brief 4: Health Literacy” in 9th Global Conference on Health Promotion (2016).

62 Nancy Adler *et al.*, “Socioeconomic Status and Health: The Challenge of the Gradient”, in *Health and Human Rights: A Reader*, Jonathan M. Mann *et al.*, eds. (Routledge, 1999), pp. 182-85; Shyam Sundar Budhathoki *et al.*, “The Potential of Health Literacy to Address the Health Related UN Sustainable Development Goal 3 (SDG3) in Nepal: A Rapid Review”, *BMC Health Services Research*, Vol. 17 (2017), DOI 10.1186/s12913-017-2183-6, p. 1.

63 Budhathoki *et al.*, *supra* note 62, p. 1.

64 Faith O. Aboyeji, “Access to Health and Medical Research: Lessons from the COVID-19 Pandemic”, *Journal of Law and Medicine*, Vol. 27, No. 3 (2020), p. 905.

65 *Ibid.*, p. 907.

inequalities within and among countries. The UN has also acknowledged the great potential of information and knowledge “to accelerate human progress, to bridge the digital divide and to develop knowledge societies”.<sup>66</sup> As Gervais succinctly puts it, lack of access to knowledge can widen the knowledge gap that already exists between countries that are “not globally competitive as knowledge and innovation producers”<sup>67</sup> and “the most advanced economies.”<sup>68</sup> This is especially so since most educational resources are “often made for and controlled by entities in countries that currently dominate the global innovation game”<sup>69</sup> and these tools are not readily available in less developed countries. The world is in an era where global and domestic economies are greatly influenced by access to and use of knowledge.<sup>70</sup> This in turn affects the wealth of individuals and nations and can account for the widening inequalities.<sup>71</sup>

By promoting enhanced access to knowledge, copyright L&Es can facilitate the cultivation of human capital and absorptive capacity for strong copyrights.<sup>72</sup> The United Nations Development Programme (UNDP) recognises the ability to be knowledgeable as a basic and critical capability that people must have to participate in and contribute to society.<sup>73</sup> Access to knowledge must be made available and increased for human development.<sup>74</sup> If the ability to access knowledge is not available, many opportunities for human development will remain inaccessible.<sup>75</sup> Education is a direct determinant of human capability and a “constituent component” of development.<sup>76</sup> The arrangements society makes for formal and informal education and knowledge acquisition contribute to the general capability of a person to develop.<sup>77</sup> Having an educated population increases the human capital in a country as such a population will be more productive than a population that is not educated or does not have access to knowledge.

Copyright laws are intended to protect the intellectual property rights of creators and incentivize them

<sup>66</sup> Transforming our World, *supra* note 6, p. 5, para. 15.

<sup>67</sup> Daniel Gervais, “Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright”, *Journal of the Copyright Society of the U.S.A.*, Vol. 57 (2010), p. 507.

<sup>68</sup> *Ibid.*

<sup>69</sup> Margaret Chon, “Intellectual Property and the Development Divide”, *Cardozo Law Review*, Vol. 27 (2006), p. 2825.

<sup>70</sup> Jonathan Haskel and Stian Westlake, *Capitalism without Capital: The Rise of the Intangible Economy* (Princeton University Press, 2018).

<sup>71</sup> *Ibid.*, pp. 118-24.

<sup>72</sup> Okediji, “Reframing International Copyright Limitations and Exceptions as Development Policy”, *supra* note 8, p. 463.

<sup>73</sup> United Nations Development Programme (UNDP), *Human Development Report 1995: Gender and Human Development*, p. 18.

<sup>74</sup> United Nations Development Programme, *Human Development Report 1990: Concept and Measurement of Human Development* (Oxford University Press, 1990), p. 9.

<sup>75</sup> *Ibid.*, p. 10.

<sup>76</sup> Amartya Sen, *Development as Freedom* (Oxford University Press, 1999), p. 5.

<sup>77</sup> *Ibid.*, pp. 38-9.

to produce new works by giving them exclusive rights to control how their works are used and distributed. However, if copyright laws are too restrictive and limit access to information and knowledge, they can hinder the ability of individuals and institutions to acquire and use the information to improve their skills and knowledge. This, in turn, can limit the development of a country’s human capital, which is a critical component of its economic growth and development. Therefore, striking a balance between protecting copyright in works and ensuring access to information and knowledge is important for promoting human capital development. Copyrighted works contribute to the pool of human knowledge and access to that knowledge can lead to human capital development which directly affects economic development (SDG8).<sup>78</sup> To ensure that people can access, engage with, and use the large pool of knowledge, the production of which has been incentivized by copyright protection, copyright L&Es must become an integral part of the copyright system.

### III. Creating Pro-Development Limitations and Exceptions

L&Es that lower access costs, permit certain uses of content without the need for the rightsholder’s consent and that expand the commons are especially pro-development and closely tied to many of the SDGs, including SDGs 1, 2, 3, 4, 5, 8, 9 and 10 (as exposed in the previous section). These L&Es should be prioritised in national and international copyright regimes and elevated as affirmative rights, with corresponding obligations where necessary, in order to facilitate an even and sustainable development.

All countries have copyright L&Es in their laws, but these vary extensively from one country to another. A country should peg its array of exceptions to its level of development: the less developed a country is, the stronger and more robust its suite of L&Es should be. In furtherance, countries should avoid tensions within both national and international copyright laws that are anaemic to the SDGs. For example, where a copyright system neglects copyright L&Es, the result might be a lack of progress in access to knowledge and education (which, as exposed in the section above, fosters even and sustainable development).

This section highlights copyright L&Es that are specifically and structurally tied to the SDGs and to which countries and international institutions should pay attention. It identifies five clusters of L&Es that are germane to development – those that (1) promote innovation and creativity; (2) facilitate teaching, learning and research; (3) protect and advance the work of educational, research and cultural institutions; (4) address inequality and discrimination and protect vulne-

<sup>78</sup> Park, *supra* note 12, p. 58.

nable groups; and (5) preserve access to knowledge/information in challenging or exceptional situations.

## A. L&Es for innovation and creativity

### i. Idea-expression dichotomy

The idea-expression dichotomy is a long-standing exception to copyright protection.<sup>79</sup> By this doctrine, copyright law makes a distinction between the idea in a work (which is not protected) and the original expression of the idea (which is protected). Copyright protection in a work does not extend to the underlying idea in the work but only to the expression of that idea.<sup>80</sup> The idea-expression dichotomy ensures that no one obtains a monopoly over ideas.<sup>81</sup> The rationale behind the idea-expression dichotomy is that extending copyright protection to ideas would stifle innovation and access to the ideas needed for the subsequent creation of works.<sup>82</sup> As O'Connor J. held in *Feist Publications, Inc. v. Rural Telephone Service Co.*, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work".<sup>83</sup> Ideas are recyclable and reusable by other creators to sustain the production of knowledge and further expand the public domain. By the same logic, facts,<sup>84</sup> data, principles,<sup>85</sup> methods of operation,<sup>86</sup> processes and *scènes à faire*<sup>87</sup> are also excluded from protection through the copyright system. This exclusion from copyright protection of certain elements of a protected work is codified in article 9(2) of the *TRIPS Agreement* which provides that "copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." Article 2 of the *WCT* is similarly worded.<sup>88</sup>

To ensure that this widely recognised copyright ex-

<sup>79</sup> See Edward Samuels, "The Idea-Expression Dichotomy in Copyright Law", *Tennessee Law Review*, Vol. 56 (1989), p. 321 for an extensive discussion of the idea/expression dichotomy. See also Richard H. Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law", *Pace Law Review*, Vol. 10 (1990), p. 551.

<sup>80</sup> *Ibid.* See *Designers Guild Ltd v. Russell Williams (Textiles) Ltd.* [2000] 1 W.L.R. 2416.

<sup>81</sup> In *Bauman v. Fussell* [1978] R.P.C. 485, the defendant was inspired by a photograph to make a painting. The court considered whether the taking of the idea in the photograph constituted copyright infringement. The court held that all that the painter took was the idea of the birds in the picture to make a painting of birds of his own and that the painter was free to do so.

<sup>82</sup> Jones, *supra* note 79, p. 561.

<sup>83</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 U.S. 340, 349 (1991).

<sup>84</sup> See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2nd Cir. 1980).

<sup>85</sup> See *Borden v. General Motors Corp.*, 28 F. Supp. 330 (U.S.: District Court, New York, 1939).

<sup>86</sup> See *Baker v. Selden*, 101 U.S. 99 (U.S.: Supreme Court, 1879).

<sup>87</sup> *Scènes à faire* are "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that *scènes à faire* are not copyrightable as a matter of law." *Hoehling v. Universal City Studios, Inc.*, *supra* note 84, 979.

<sup>88</sup> *WCT*, art. 2 provides thus: "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

ception remains potent as a tool for enabling creativity, innovation and the free exchange of ideas, private ordering mechanisms such as contracts that seek to expand the scope of copyright protection to these unprotected elements must be pushed against and expressly overridden by copyright law (also see below).

Furthermore, in the current data economy, where data is an integral building block for innovation in many industries, it is important for States to expressly exclude protection for unoriginal compilations of data from the scope of copyright protection. In the 2030 Agenda for Sustainable Development, one of the indicators of SDG8 is the promotion of "development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises".<sup>89</sup> The free and unrestricted flow or exchange of ideas can foster creativity and innovation: in many creative industries, especially the film industry, ideas are often reused and recycled to create new movies; many of today's content producers on social media employ the same ideas that are expressed in diverse ways to make a living in the entertainment world; the freedom to use historical facts without fear of copyright infringement is also helpful for the creative industry.

The preservation of copyright's fundamental distinction between ideas and expression could also be significant in the development of modern technologies like AI, since it allows non-expressive uses of copyrighted works such as the mining of works to be deemed outside the scope of exclusive rights. This lowers the costs of innovation and eliminates the access barriers that are exacerbated when large volumes of digital and online materials are to be mined for purposes of research and innovation. The non-protection of certain elements of a work thus contributes immensely to creativity and innovation (SDG9) which in turn promotes a "sustained, inclusive and sustainable economic growth" (SDG8).

### ii. Private use / private study exception

A private use / private study exception allows individuals to reproduce, modify, and otherwise use lawfully obtained copies of copyrighted works for their own private purposes. It is integral to promoting creativity and innovation<sup>90</sup>, as it can foster and lower the costs of individual creativity and innovation. For instance, an individual would be more motivated to reverse engineer a device and access the software code in their attempt at developing a technical solution or device

<sup>89</sup> Transforming our World, *supra* note 6, p. 19, para. 8.3.

<sup>90</sup> P. Bernt Hugenholtz and Ruth L Okediji, "Conceiving an International Instrument on Limitations and Exceptions to Copyright" (Open Society Initiative Final Report, 6 March 2008), p. 43.



if there are no copyright-related costs attached to their exploratory innovative exercise.

### iii. Parody exception

The parodying of works should be permitted as it could support creative freedom and lower the costs of creating new works or transforming existing ones. In the social media age, permitting parody becomes even more important as many entertainers on social media have carved a creative niche for themselves by expressing humour by evoking a well-known image, song or audio-visual. In many developing countries, it had led to the rise of self-made entertainers who make a living off platforms like YouTube, TikTok and Instagram. The income-generating potential of acts of parody makes it significant for socio-economic development, while also boosting the local creative industry of a country, not to mention freedom of expression.

### iv. Temporary and non-expressive copying

To foster digital innovation, it is important that countries recognise that many digital technologies carry out necessary technological processes by temporarily reproducing the work to be processed. Oftentimes, the reproduction only exists for the duration of the technological process and the reproduced work is not communicated in a way that competes with the channels of exploitation of the reproduced and processed work. Permitting temporary and non-expressive copying is important to facilitate text and data mining and the development of AI systems. Both processes involve the processing of large digital content through computing technologies that temporarily reproduce or mine the works for the duration of the technological process of training a machine learning model on the input works. Considering the large volume and velocity of digital content involved in machine learning and the temporary nature of the reproduction that takes place, it is only reasonable that permission be given through the system of L&Es and not through direct negotiated licence. To rely on the latter is to mount up a significant barrier to the development of frontier technologies, thereby stifling innovation.

### v. Exceptions relating to computer programs

The copyright protection of the source codes underlying computer programs without a set of L&Es could be harmful to innovation in the development and repair of devices. It could also impact the development of human capital and have significant environmental consequences. For instance, if a person purchases a device with a proprietary computer program and wants to create other programs that would be interoperable with the original computer program, they would have to copy the source of the program and in some cases, circumvent digital locks to make the program interoperable or even assess the interoperability of the programs. If the act of copying and circum-

venting digital locks for the purpose of interoperability of computer programs is not allowed under a copyright exception, there would be a need to obtain a licence which may be difficult to get or increase the cost of innovating to an extent that makes the act of innovation too expensive and undesirable. Further, the owner of the original computer program might be unwilling to grant a licence to prevent competition and maintain a market monopoly, which again harms innovation. Where the copying or adaptation of a computer program is necessary for repairing a device, it is important that the act be exempted from copyright control to create a market for repairers and also reduce technological waste. An exception should also be granted for the purposes of reverse engineering of computer software.

## B. L&Es for teaching, learning and research

Copyright exceptions designed to support teaching, learning and research must be focused on providing both copy-access and use-access to copyrighted materials. Teaching and other educational use exceptions are considered acceptable under the Berne Convention and have long been features of national copyright laws.<sup>91</sup> Educational and research activities that happen in the digital environment must be recognised and enabled through copyright L&Es.

Exceptions that support copy access are those that allow the reproduction of works without the permission of the copyright owner. For example, students should be allowed to copy portions of copyrighted works for educational purposes and teachers should be permitted to make multiple copies of works for student use or share a copy of a work through a digital education platform with students. Use-access L&Es on the other hand allow users to do other acts that do not require making a copy of the work. This includes the display or communication of a copyrighted work in a classroom for instructional purposes. For example, in the context of online teaching, a teacher may own a copy of a textbook that she requires for teaching a class remotely and might want to digitise some portion of that book to display on her computer screen to illustrate certain points to her students in the course of teaching. In the absence of both copy-access and use-access limitations, she will not be able to digitise (or copy) the work and then display and communicate it (i.e., use it) via internet networks to her students who are remotely connected to the class without seeking and obtaining a licence from the copyright holder. As is most often the case, especially for post-secondary teaching, if the teacher needs to copy and use more than one material, including materials readily available online, she will need to obtain a licence if the copying and usage are not excused via copyright L&Es. In the case of online materials, it is practically impossible for even the most well-funded

<sup>91</sup> See Berne Convention, articles 9(2) & 10; Daniel Seng, Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities, WIPO Doc No. SCCR/35/5/REV (2017).

institutions to seek and obtain licences to copy and use the wide array of educationally useful materials that are available online today. Thus, in the absence of L&Es that permit educational uses of these materials, educators will be rendered handicapped by copyright law.

The use of copyrighted works for research purposes should be permitted under copyright law, including uses that involve the reproduction of an entire work for the purpose of digitally mining the work for information generation and discovery. Text and data mining has the potential to generate new information/knowledge from existing knowledge which can be useful in the field of health and medicine to predict and prevent new patterns of diseases.<sup>92</sup> For example, a Canadian start-up, BlueDot, discovered the novel coronavirus in late 2019 through text and data mining, even before the World Health Organization (WHO) informed the public about the virus later in 2020.

<sup>93</sup>

### C. L&Es for institutions

Certain institutions play a crucial role in advancing education and research and promoting access to knowledge. Their work in these areas is integral to advancing the educational goal (SDG4) in a way that also advances other SDGs. In this regard, the role of academic or research institutions and libraries, archives & museums cannot be overstated. Academic and research institutions are key to fostering education and public interest research and the formation of human capital. In carrying out their activities, these institutions would necessarily engage in the use of copyrighted works in ways that are within the exclusive rights of the copyright owner. Yet, even the most financially affluent institutions cannot afford to pay for the full range of works that might be needed for advancing their development-serving activities. Safe harbour provisions in the form of L&Es that permit the doing of certain non-profit acts for teaching and research in these institutions without the risk of copyright liabilities should be included in national and international copyright laws.

Libraries and other cultural institutions should be allowed to make copies of works in their collection available to the public. Libraries can play a huge role in expanding access to knowledge and education if they are enabled to provide access through copyright L&Es. With the aid of digital technologies, libraries can empower people for their own self-development without the need for them to walk into a physical library room. As such both physical and digital lending should be permitted without the need for copyright licenses. Libraries should be allowed to reproduce portions of works for readers, researchers,

<sup>92</sup> Sean Flynn et al., "Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action", Joint PIJIP/TLS Research Paper Series 48 (2020), p. 3.

<sup>93</sup> Mark Prosser, "How AI Helped Predict the Coronavirus Outbreak Before It Happened", Singularity Hub, 5 February 2020. Available from <https://singularity-hub.com/2020/02/05/how-ai-helped-predict-the-coronavirus-outbreak-before-it-happened/>.

and other library users. They should also be permitted to engage in any act necessary for preserving the materials in their collections against loss, damage or technological obsolescence and for restoring or replacing materials that have become lost, damaged or unusable.

### D. L&Es for vulnerable and disadvantaged groups

One of the aims of the 2030 Agenda for Sustainable Development is to reduce inequalities and ensure even development among peoples, groups and countries.<sup>94</sup> The copyright system sometimes bolsters existing inequalities in societies by preventing the doing of acts that could facilitate equal access to knowledge and information for vulnerable groups. For instance, the making of accessible format copies of works for persons with disabilities that prevent them from accessing works in the dominant ways that copyright markets cater to could be impeded by the exclusive rights of reproduction and adaptation. To ensure that even progress is made in the achievement of the SDGs amongst groups, it is important for countries to recognise L&Es that allow vulnerable groups, especially people living with disabilities, to benefit from knowledge goods. The Marrakesh Treaty requires countries to recognise certain L&Es for the purpose of facilitating access to accessible format copies of published works for visually impaired and print-disabled persons.<sup>95</sup> The implementation of these exceptions provides equal opportunities for the complete development of the beneficiaries and should be prioritised by all countries.

Countries must also take steps beyond the Marrakesh Treaty to devise L&Es that support the adaptation of existing works to create accessible works for persons with other physical and learning disabilities that are not covered under the Marrakesh Treaty. There is enough wiggle room under the Berne and TRIPS three-step test for such exceptions.

### E. L&Es for exceptional or challenging situations

In certain exceptional or challenging situations, such as the outbreak of a highly contagious virus or the outbreak of a war, it is very difficult or impossible to obtain copyright licenses for access, use and dissemination of copyrighted works. For that reason, it is important that there are L&Es on exclusive rights that permit people to engage in acts that would otherwise require permission in regular times. In particular, if there are technological tools that could help sustain the delivery of education and the furtherance of knowledge and research activities, even in very challenging situations such as during the recent COVID-19 pandemic, access to knowledge and education should not be disrupted on the basis of copyright restrictions.

<sup>94</sup> See Transforming our World, *supra* note 6, p. 21; UNESCO, *Education for People and Planet*, *supra* note 38, p. 4.

<sup>95</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, opened for signature 27 June 2013 (entered into force 30 September 2016).

### **F. Safeguard to ensure that L&Es will be effectively enjoyed and utilised: technological protection measures and contract override**

In addition to the clusters of L&Es described above, it is necessary to have some safeguards in the form of L&E provisions in copyright laws to ensure that users are not prevented from enjoying and benefiting from the freedoms granted to them. Notably, provisions for guarding against the use of technological tools and contractual agreements in ways that undermine user freedoms under copyright law are noteworthy and must be integrated in national laws. The WCT requires States to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”.<sup>96</sup> The WCT, however, neither regulates the use of technological protection measures (TPMs) by rightsholders in circumstances where it can limit the enjoyment of user freedoms in copyright law nor provides limitations on the range of measures that can be taken by States to protect against circumvention of TPMs by users. Yet, TPMs can be used to undermine user freedoms as they can restrict both infringing and non-infringing uses of copyrighted works.<sup>97</sup> To safeguard user freedoms on L&Es, it is necessary that users should be allowed to circumvent TPMs that limit access to and use of a work in ways that are otherwise permitted under copyright law, to the extent that such circumvention is necessary to engage in non-infringing uses of the work.

Technological advances have also made it possible for distributors of literary works to adopt a business model that involves licensing works and not selling a copy of a work outright to users. As such, users (both institutional and individual users) sometimes “purchase” a licence to access literary works, subject to a number of licensing terms.<sup>98</sup> Many of these terms circumscribe activities that are otherwise allowed under copyright L&Es.<sup>99</sup> Considering this fact, there should be a provision in copyright laws that declares any term in a contract that purports to prevent or limit the enjoyment of copyright L&Es unenforceable.

<sup>96</sup> WIPO Copyright Treaty, art 11.

<sup>97</sup> Benton J. Gaffney, “Copyright Statutes that Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act”, *Washington Law Review*, Vol. 75, No. 2 (2000), p. 636 (“the effectiveness of the statutory exemption for non-infringing uses is substantially lessened by Congress’s strict prohibitions against the manufacture and distribution of technologies designed to circumvent protective measures”).

<sup>98</sup> Seng, *supra* note 91, p. 10.

<sup>99</sup> *Ibid.*

## **IV. Conclusion**

In the public interest, copyright owners cannot and should not be allowed to control every copying or use of their works.<sup>100</sup> Imposing certain limits on the scope of copyright protection helps advance other key development objectives of society. To advance progress in the realisation of the SDGs and foster even and sustainable development, copyright L&Es must be embraced as necessary and important tools, as L&Es promote creativity, innovation, access to knowledge and education and the formation of human capital. This paper showed how L&Es contribute to various SDGs, such as education, industrialization, health, gender equality, and others – both directly and indirectly. Accordingly, in national and international copyright laws, clusters of L&Es that are key to the achievement of the SDGs should be recognised. To do so, multilateral and regional institutions should be further cooperating on the basis of the need to expand L&Es. For instance, UNESCO and WHO should continue engaging with WIPO on issues of access to knowledge and education, and access to and use of health research publications respectively, with a focus on enhancing the use of L&Es (especially in developing countries).

In this paper, I have highlighted five clusters of L&Es that are, at a minimum, closely tied to the promotion of sustainable development in all countries and should be paid attention to in national and international copyright norm-setting. While the scope or diversity of exceptions may vary from country to country, depending on their level of development, every country should include exceptions in its copyright law that are linked to these clusters. Developing countries and LDCs should have even more copyright L&Es given that they have more barriers to overcome (both in terms of lack of access, lack of infrastructure and existing technological capacity). The identification of these clusters of L&Es could also be helpful in developing international consensus on a global minimum set of copyright L&Es, such as the discussions currently taking place at WIPO, that are access-enabling and development-engendering.

<sup>100</sup> See Jessica Litman, “Fetishizing Copies”, in *Copyright Law in an Age of Limitations and Exceptions*, Ruth L. Okediji, ed. (Cambridge University Press, 2017), pp. 107-131 (where she argues that the idea “that copyright owners should be able to control, or at least collect royalties from, all uses of their works” is “not grounded in either law or history” and that this makes it “imperative that we recognize readers’, listeners’, and viewers’ copyright liberties expressly, and protect them with explicit statutory provisions”).

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