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Copyright, Open Access and Translation

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Copyright; Developing countries; Fair dealing; International law; Open data; Translations

Over the last decade or so, there has been a global push towards free and open access in many areas of publicly funded research. One of the important features shared by the open access schemes adopted by national and international research organisations is the need to place their research results in a readily accessible format for end-users. The key goal here is to ensure that the end-users are able to make full use of the relevant research material. In order to make sure that research material is available in a readable and intelligible form to end-users, it is important that they are translated into the local languages of countries that are the focus of the research. The purpose of this article is to examine how copyright law impacts on the translation of research material generated by research organisations in the process of implementing open access schemes, in order to ensure that these materials are available in a readily accessible and intelligible format to end-users.

Introduction

Over time, the approach taken by public sector institutions to the research that they generate has fluctuated. For many years, public institutions such as universities and state based research organisations were largely ambivalent to the fate of their research. While research results were occasionally protected by intellectual property, adoption and uptake tended to be subservient to the goal of finalising research projects and publishing the results of that research. In the 1980s, under the influence of the economic rationalism, suddenly public sector agencies were not only expected to use intellectual property to protect their creative endeavours, they were also expected to commercialise that research. Over the last decade or so, there has been yet another change of approach, as institutions have become more and more concerned with timely, affordable and unfettered access to research. Facilitated by the growing sophistication of the internet that greatly enhanced our capacity to access and exchange information and by developments such as the adoption of the Budapest Open Access Initiative in 2002, there has been a global push towards free and open access in many areas of publicly funded research.

Many national organisations have adopted open access policies. For example, the Australian Research Council (2013), the National Health and Medical Research Council (2012), the US Office of Science and Technology (2013), and Research Councils UK (2013) have recently mandated open access to the research that they fund. Importantly, a number of leading international research organisations, which play an important role in norm and standard setting around the world, have also embraced open access. For example, in 2013 CGIAR[1]—which is the largest and most important public good agricultural research body in the world—adopted its Open Access and Data Management Policy.[2] The primary aim of the policy, which confirmed CGIAR's commitment to free and open access to research data and publications, is to promote the widespread dissemination of CGIAR's research and development activities, especially among the smallholder farming communities in developing countries. As the Preamble to the policy states:

> "CGIAR regards the results of its research and development activities as international public goods and is committed to their widespread dissemination and use to achieve the maximum impact to advantage the poor, especially smallholder farmers in developing countries. CGIAR considers Open Access ... to be an important practical application of this commitment as it enhances the visibility, accessibility and impact of its research and development activities."

The push towards open access of international public good research was given further impetus when the Bill & Melinda Gates Foundation, which is a major global funder of health and development research, introduced its Open Access Policy in 2015.[3] In order to promote the sharing and transparency of information, the policy aims to ensure that published research is promptly and broadly disseminated. To this end, the Open Access Policy aims to provide unrestricted access and re-use of all peer-reviewed published research funded, in whole or in part, by the foundation, including any underlying data sets. Specifically, the policy demands that all publications and underlying data shall be available *immediately* upon their publication, without any embargo period. To allow for researchers to prepare for this, the policy provides a transition period (until January 1, 2017) during which the foundation will allow publication in journals that provide

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[1] CGIAR was formerly known as the Consultative Group of International Agricultural Research.

[2] CGIAR Open Access and Data Management Policy (2013) (approved by the CGIAR Consortium Board, October 2, 2013). This implements and builds on art.6.1 of the IA Principles that provide that the "Consortium and the Centers shall promptly and broadly disseminate their research results, subject to confidentiality as may be associated with [certain] permitted restrictions, or subject to limited delays to seek IP Rights".

[3] Bill & Melinda Gates Foundation, *Open Access Policy* (2015), *http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy* [Accessed May 27, 2015].

up to a 12-month embargo period.[4] The policy also requires publications to be reusable without permission or fee.[5] Similar policies have also been adopted by other international institutions, such as the World Bank (2012) and UNESCO (2013).

While there are differences between the different schemes, particularly in terms of the material that is subject to the requirements of open access and also in relation to whether publishers are able to impose embargos on open access publications,[6] there are a number of features common to the open access policies, particularly those that focus on development-related issues. One of the features shared by the open access schemes is that they specify that the research material should be available in a readily accessible online format. For example, the Gates Foundation's Open Access Policy states that to ensure that publications are discoverable and accessible online, publications should be deposited in a specified repository or repositories with proper tagging of metadata.[7]

Another feature shared by the open access schemes is the requirement that the materials be placed in a format that ensures that they are readily accessible. While the means by which this is to be achieved varies,[8] a key goal is to ensure that end-users are able to make use of the relevant materials. Thus the Gates Foundation requires all publications to be published in a format that permits all "users of the publication to copy and redistribute the material in any medium or format and transform and build upon the material, including for any purpose (including commercial) without further permission or fees being required". Similar broad-ranging provisions exist in other open access policies.

Many factors will influence the relative success of the shift to unfettered and widespread dissemination of publicly funded research. One of these, which is the focus of this article, is the ability to translate research publications into different languages. While research scientists may not have adopted English as their *lingua franca*, research results are often written in a language that makes them inaccessible to many of the groups that they target.[9] It is here that the role of translation comes into play. In order to ensure that information is available in a readable and intelligible form to end-users, it is important that the research results are translated into local languages.[10] If user groups in developing countries such as smallholder farming communities, research scientists, health workers, public health organisations and policy-makers are to have meaningful access to information, translation is inevitable. The important role that translation plays in ensuring open and effective access to research is reflected in the CGIAR Open Access Policy, which encourages the CGIAR research centres to translate "key documents and other media into pertinent languages".[11]

In order to meet the goals of open access, the translations should be available free of charge. It is also important that the research results should be made available as soon as possible after they have been published in their original language. In areas of science where the rate of change is very rapid, it is essential that the material should be available as quickly as possible. In other cases, for example where the research results suggest a change in farming practice or a change in health practice, there may be less of a need for rapid translation. However, given that the one of the goals of the push towards open access is to enhance the effectiveness of science and in so doing improve public health, build food security and reduce poverty, it would seem that even in these situations that time is of the essence. It is also important that the translation should be accurate. While accuracy is always important, this is particularly the case with scientific and technical research.

Many factors will influence the ability to translate research in a timely and effective manner from the availability of translators with the requisite linguistic, technical and scientific expertise through to the capacity to select the documents to be translated. Another factor that has the potential to inhibit translations is the fact that copyright owners may limit or restrict the translation of copyright-protected works into local dialects and languages.

[4] Clause 4, Bill & Melinda Gates Foundation, *Open Access Policy* (2015), cl.4, *http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy* [Accessed May 27, 2015].

[5] Clause 2, Bill & Melinda Gates Foundation, *Open Access Policy* (2015), cl.2, *http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy* [Accessed May 27, 2015].

[6] Unlike many other open access policies, the Gates policy requires all publications to be available *immediately* upon their publication, without any embargo period (which is the period during which the publisher will require a subscription or the payment of a fee to gain access to the publication). The policy allows for a transition period of up to two years from the effective date of the policy (or until January 1, 2017). During the transition period, the foundation will allow publications in journals that provide up to a 12-month embargo period.

[7] Bill & Melinda Gates Foundation, *Open Access Policy* (2015), cl.1, *http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy* [Accessed May 27, 2015].

[8] For example, while the Gates Foundation specifies that all publications shall be published under the Creative Commons Attribution 4.0 Generic License (CC BY 4.0) or an equivalent licence (Bill & Melinda Gates Foundation, *Open Access Policy* (2015), cl.2, *http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy* [Accessed May 27, 2015]), the CGIAR policy is less prescriptive.

[9] These problems are compounded by the fact that a significant number of people around the world are not even literate in their own language. This is especially so seen in many parts of the developing world. For instance, India, which has the second-largest population in the world, had 287 million adults who lacked basic literacy skills in 2010. In Pakistan, this number was 50 million and in Bangladesh 44 million. See UNESCO, *Adult and Youth Literacy, 1990–2015: Analysis of Data for 41 Selected Countries* (UNESCO Institute for Statistics, 2012), p.6. Also see Susan Isiko Strba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Martinus Nijhoff 2012), p.1, where the author, quoting from the UNCTAD Statistical Profiles (2006) of Least Developed Countries (LDCs), states that the adult literacy rate for least LDCs is only 49.8% for Africa, 53.8% for Asia and the Middle East, and 55.5% for other LDCs. Meanwhile, the adult literacy rate in developing countries not being LDCs in general is 83.1%.

[10] Where a work has already been translated into the relevant language, the issue will relate to the right to reproduce the translated work.

[11] CGIAR Open Access and Data Management Policy (2013), art.4.1.7.

The potential impact of copyright on translations

Open access policies potentially apply to a range of different creations and outputs. These include journal articles, reports, books, chapters, data and databases, data collection and analysis tools videos, audio, images, computer software, web services and associated metadata. Many of these outputs will be protected in copyright law as literary works.[12]

One of the fundamental rights given to copyright owners is the right of translation. As art.8 of the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention) provides, authors or proprietors of original literary and artistic works have the exclusive right of making and authorising the translation of their works.[13] The right of translation provides copyright owners with the ability to limit or control translation into other languages. As a result, it has the potential to undermine the widespread dissemination of research results.

While the rights conferred on a copyright owner of a literary work are extensive, they are not absolute. As well as being limited temporally (which will be of little relevance in this context), there are a number of other important limitations placed upon the rights granted to copyright owners. This is because one of the notable features of the Berne Convention is that it allows Member States to limit copyright protection in certain specified situations. One question that has arisen is whether the general exceptions to the right of reproduction in the Berne Convention extend to the right of translation. This is a result of the fact that there are no express provisions in the Convention stating that the general exceptions apply to translation rights. As Ricketson said, this omission "imposes severe restrictions on persons wishing to use literary and dramatic works protected under the Convention where these works are in other languages".[14] While the omission in relation to translations may have been illogical since "the making of reproduction of works in their original language will be of little use to populations which do not speak or understand that language",[15] nonetheless it was a view that was supported by some, but not all, members of the Committee established to review the changes proposed at the Convention's Stockholm Revision in 1967.[16]

In many ways, the question of whether the general exceptions in the Berne Convention apply to translations was rendered redundant by the 1994 TRIPS Agreement insofar as it allows Member States to limit the exclusive rights given to copyright holders, including both reproduction and translation rights. Specifically, art.13 of TRIPS allows Member States to limit the copyright owner's exclusive rights on the condition that they are only allowed "in certain special cases", that that they do not conflict with the "normal exploitation of the work", and that they do not "unreasonably prejudice the legitimate interests of the right holder".

While the format and scope of the exceptions to the copyright owner's rights vary from country to country, all Member States have taken advantage of the flexibility in Berne and TRIPS to limit the scope of the copyright owner's rights. One of the best-known limitations is the fair dealing/fair use defence. For example, in the UK the 1988 Copyright, Designs and Patents Act sets out the types of dealings that are permitted in relation to copyright.[17] Similarly, in the US the 1976 Copyright Act allows for the "fair use" of copyright protected works for certain specified purposes.[18] The doctrines of fair dealing and fair use permit the use of copyright protected works, which would otherwise be construed as infringements, provided that the use is "fair". Similar laws have been adopted in many developing countries. For example, the Intellectual Property Act 2003 of Sri Lanka provides for fair use, which is the main exception for economic rights of the copyright owners protected under the Act.[19] While the Sri Lankan Act does not define what is meant by a fair use, it enumerates certain specific "acts of fair use".[20] It also provides for a set of criteria that the courts should adopt to determine fair use,[21] which resemble those in the US Copyright Act 1976. However, the US Act grants more discretion to the courts to determine fair use than the Sri Lankan Act.[22]

[12] Berne Convention for the Protection of Literary and Artistic Works, 1886 (as revised) art.2.

[13] Berne Convention art.8.

[14] S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd edn, Vol.I (Oxford: Oxford University Press, 2006), p.835.

[15] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2006), p.835.

[16] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2006), pp.837–838. See also *Records of the Intellectual Property Conference of Stockholm* (1967), Vol.II, para.205.

[17] These acts in the main, relate to making of temporary copies, research and private study, criticism, review and news reporting, incidental inclusion of copyright material, making a single accessible copy for personal use, intermediate copies and records etc. See Copyright, Designs and Patents Act 1988 Ch.3.

[18] Copyright, Designs and Patents Act 1988 s.107: "[T]he fair use of a copyrighted work … 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 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."

[19] See the Intellectual Property Act No.36 of 2003 of Sri Lanka.

[20] Intellectual Property Act No.36 of 2003 ss.11(3) and s12.

[21] See Intellectual Property Act No.36 of 2003 s.11(1) and (2).

[22] The factors that the courts should consider under s.107 of the US Copyright Act 1976 are not exhaustive, whereas the same factors that the courts should consider under s.11(2) of the Sri Lankan Intellectual Property Act No.36 of 2003 appear to be exhaustive. See D.M. Karunaratna, *An Introduction to the Law of Copyright and Related Rights in Sri Lanka* (Sarvodaya Vishva Lekha, 2006), p.80.

There is a great deal of uncertainty about whether the fair use and fair dealing defences would help to facilitate the translation of copyright-protected literary works. One of the reasons for this uncertainty is that the permitted acts

> "tend to be narrowly defined around particular concerns or interests. Defined as immunities or defences, they are only applicable once infringement has been established, and the onus will be on the party invoking such a defence to show that it applies".[23]

It is also not clear whether the defences would allow the translation of a whole work (as distinct to part of a work), and also whether a translated work could be mass reproduced (or limited to a single copy). Given that the specific acts of fair use enumerated in the copyright legislation do not expressly mention translation rights,[24] it may require judicial intervention to clarify the scope of the defence: a costly and often prohibitive process.

The upshot of this is that the fair dealing and fair use provisions are unlikely to provide much assistance in facilitating the translation of copyright-protected works in situations where the copyright owner will not agree to a translation or is imposing unreasonable demands.[25] The situation is the same with the other general exceptions permitted in the Berne Convention. In this situation, the main hope for allowing an unauthorised translation to take place are the special provisions for developing countries introduced into the Berne Convention at the Paris Conference in 1971.

The Berne Appendix for developing countries

The 1971 Paris Conference for the revision of the Berne Convention was a compromise between developed and developing countries, which involved amendments to both the Berne Convention and the Universal Copyright Convention.[26] This was because developing countries, who preferred to accede to the Universal Copyright Convention, advocated for the deletion of the Berne safeguard clause from the Convention. Despite this, certain developed countries were not willing to accept this proposal without raising the general level of protection in the Universal Copyright Convention. As a result, there were deliberations on both the Berne Convention and the Universal Copyright Convention.[27]

One of the main outcomes of the Paris Revision of Berne was the so-called Berne Appendix, which contains a special copyright regime for developing countries. Of particular importance is that it allows Member States either to introduce a compulsory licensing scheme for translations, or to amend their domestic law to ensure that translation rights lapse in the event that the rights are not exercised within a 10-year period. Before looking at these in more detail, it should be noted that the special provisions in the Berne Appendix are only available for developing countries.

Compulsory licences for translations

Article 1(1) of the Berne Appendix allows countries to replace the exclusive right of translation provided for in art.8 with a system of non-exclusive and non-transferable licences. A number of developing countries such as Colombia, India, Indonesia, Malaysia, Mexico and the Philippines[28] have taken advantage of this opportunity and introduced compulsory licensing schemes for translations. For example, the Colombian Law on Copyright 1982 provides for a compulsory licensing system in respect of translation of works into Spanish and the publication of those translations in Colombia.[29] Similarly, the Copyright Act 1957 of India (as amended) provides that:

> "Any person may apply to the Copyright Board for a compulsory license to produce and publish a translation of a literary or dramatic work in any language after a period of one, three, or seven years from the first publication of the work."[30]

The Berne Appendix requires Member States who introduce compulsory licence schemes to appoint (or establish) an administrative body to administer the scheme. This administrative body is tasked with the job of reviewing applications and deciding whether a licence to translate should be granted. A person who wishes to translate a work must establish that that they have requested, and been denied, authorisation by the owner of the right to make and publish the translation or to reproduce and publish the edition. Where the copyright owner cannot be found, they must show that they exercised due diligence to find the owner. The applicant is also required to send copies of the application for grant the licence by registered airmail to the publisher whose name appears on the work and to any designated national or international information centre.[31]

[23] Paul Edward Geller and Lionel Bently (eds), *International Copyright Law and Practice*, Vol.2 (Release No.25, LexisNexis, 2013), UK, p.117.
[24] See Intellectual Property Act No.36 of 2003 s.12. (Sri Lanka).
[25] It has been said that doctrine of fair use in the US is "the most troublesome in the whole law of copyright": Geller and Bently (eds), *International Copyright Law and Practice* (2013), USA, p.159.
[26] Peter K. Yu, "A Tale of Two Development Agendas" (2009) 35 *Ohio Northern University Law Review* 465, 481.
[27] S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer, 1987), pp.624–632; Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, Vol.2 (2006), pp.913–924.
[28] See Law on Copyright (No.23, of January 28, 1982) of Colombia; Copyright Act 1957 (as amended) of India; Law of the Republic of Indonesia No.19/2002 on Copyright; Copyright Act 1987 (Act 332) of Malaysia; Federal Law on Copyright of Mexico; Republic Act No.8293 of Philippines.
[29] Law on Copyright (No.23, of January 28, 1982), Ch.IV.
[30] Copyright Act 1957 of India s.32(1).
[31] Berne Appendix, Paris Act 1971 art.IV(1)(2).

One of the notable features of the compulsory licence scheme recognised under the Berne Appendix, which we will return to below, is that it is limited to "works published in printed or analogous forms of reproduction".[32] The scheme is also limited by the fact that a translation may only be granted under the Berne Appendix "for the purpose of teaching, scholarship or research".[33] In most cases, this would not be an issue for the translation of funded research. However, problems may arise where research is undertaken in a public-private partnership, or where a public good research institution allows the research results to be protected by intellectual property. In these cases, the commercial purpose would fall outside the scope of the Appendix. The Berne Appendix also provides that, as a general rule, compulsory licences should not be allowed to export a work: the translation must be consumed in the country in question.[34] Exportation is allowed, however, where a governmental or other public entity of a country which has granted a compulsory licence to make a translation into a language other than English, French or Spanish sends copies of a translation published under such a licence to another country.[35]

Another notable feature of the compulsory licence scheme relates to the question of when the translation is able to take place. In effect, the time period that a person must wait before they are able to translate a copyright work is made up of two parts: a general waiting period, which is followed by a shorter period of time that allows certain administrative tasks to be completed. The question of when a translation will be allowed turns on whether the language into which the original publication is to be translated is in general use in a developed country. In the case of translations into a language that is not in general use in one or more developed countries who are members of the Berne Convention, applicants are able to apply for a compulsory licence to translate *one year* from the date of the first publication of the original work.[36] Once an applicant has complied with the requisite administrative requirements, they must then wait for a further nine months to elapse before the licence to translate will come into effect. Given that Tamil is not in general use in any developed countries this would allow India, for example, to grant a licence to translate a work into Tamil one year and nine months after the original work was published. Where a translation has not been published in a language in general use in a country, an applicant is able to apply for a compulsory licence for translation *three years* after the date of the first publication of the original work.[37] However, they must wait for an additional six months before the licence comes into effect.[38]

The Berne Appendix requires Member States to ensure that the copyright owner receives just compensation that is consistent with standards of royalties normally operating on licences freely negotiated between persons in the two countries concerned.[39] They are also required to ensure that translations are "correct" or, where the licence is to reproduce a work that has already been translated, that the reproductions of the particular edition are accurate.[40]

Under the Berne Appendix, a licence to reproduce and publish a translated work cannot be granted where the translation has not been published by the owner of the right of translation or with his authorisation, or where the translation is not in a language in general use in the country in which the licence is applied for.[41] The effect of this is that "translations made under compulsory licenses cannot be the subject of a compulsory license for reproduction".[42] For instance, this means that India cannot allow a compulsory licence for reproduction of a work translated in Malaysia into Tamil (which is a language of general use in both countries) under a compulsory licence in India. For the translation to be available in India, an applicant would have to apply for a licence separately, which not only means going through the rigorous procedural requirements twice,[43] but also having to pay additional translations costs.

Lapse of translation rights

The second option available under the Berne Appendix allows Member States to make special rules that effectively mean that the translation rights lapse in the event that the right is not exercised within a 10-year period post-publication.[44] This option is open to all developing countries irrespective of whether they are existing or new members to the Berne Convention. This is on the condition that they have not availed themselves of the faculty provided for in respect of compulsory licensing.[45] If a developed country was already a member of the Berne Convention in 1971, they cannot make use of the reservation in the Paris text if they have not taken

[32] Berne Appendix art.II(1).

[33] Berne Appendix art.II(5). See Irwin A. Olian Jr, "International Copyright and the Needs of Developing Countries: The Awakening At Stockholm and Paris" (1974) 7(2) Cornell Int'l L.J. 81, 108.

[34] Berne Appendix art.IV(4)(a).

[35] Berne Appendix art.IV(4)(c).

[36] Berne Appendix art.II(3)(a).

[37] Berne Appendix art.II(2)(a).

[38] Berne Appendix art.II(4)(a).

[39] Berne Appendix art.IV(6)(a)(i) and (ii).

[40] Berne Appendix art.IV(6)(b).

[41] Berne Appendix art.III(5)(i) and (ii).

[42] Susan Strba, "Institutional and Normative Attempts for Access to Copyright for Education in Developing Countries", Paper for Doctoral Seminar (February 24, 2009), p.26.

[43] Strba, "Institutional and Normative Attempts for Access to Copyright for Education in Developing Countries" (February 24, 2009), p.26.

[44] Berne Convention 1886 as revised by the Paris Additional Act 1896 art.I(III).

[45] Berne Appendix art.V(1)(a).

the benefit of that reservation under the previous versions of the Berne Convention.[46] In contrast, a country which subsequently becomes a member to the Convention can make use of this reservation on the understanding that the reservation is only applicable to translations into languages in general use in that country.[47]

Problems with the Berne Appendix

At first glance, the provisions in the Berne Appendix may appear to provide an effective and equitable scheme to facilitate the translation of copyright protected works. While there are some positive aspects of the scheme, overall the Berne Appendix has been widely and justifiably criticised for failing to meet the needs and interests of the developing countries. As Ricketson said it, "is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix".[48]

One of the features of scientific research is that the research frequently spans a number of different countries, with different languages and different copyright laws. While there is a high degree of standardisation in copyright law between different countries, there is still a high degree of diversity. Given that the extent to which a copyright owner is able to control the translation of their works depends on the laws of individual countries, this means that it would be necessary to navigate the intricacies and idiosyncrasies of local laws. The complexity that this creates is compounded by the fact that many developing countries have not made use of the flexibility provided for in the Berne Appendix in their domestic copyright laws. While some countries have not ratified the Berne Appendix, in other cases the ratifications have either come very late or the relevant provisions are yet to be implemented into domestic law. For instance, although Sri Lanka ratified arts 1 to 21 of the 1971 Paris Act and the Berne Appendix in 2005, the initial ratification of the Paris Act excluded these provisions. To date, Sri Lanka has not implemented the provisions of the Appendix into its domestic copyright law.

The fact that the translation rights lapse 10 years after publication means that this option will, at best, be of limited use for most scientific publications. While there will be occasional exceptions, the time lapse between initial publication and permissible translation would render the translation of little value. While the time that needs to lapse before a compulsory licence is able to be granted is shorter—one or three years, plus the time needed to meet the administrative requirements—nonetheless there are a number of problems with the compulsory licensing scheme that limits its usefulness. Perhaps the most fundamental problem is that the scheme is limited to "works published in printed or analogous forms of reproduction". One of the consequences of this is that it is questionable whether the Appendix applies to works published online. As Peter Yu said:

> "Premised on the traditional printing technologies, the [A]ppendix [does] not allow less developed countries to take advantage of new online modes of delivery which might well be attractive to developing countries with large and widespread populations."[49]

If this interpretation of the Appendix is correct—which it seems to be—it completely undermines the relevance of the Berne Appendix to most open access policies, which require research to be published digitally online.

Another factor that inhibits the usefulness of the scheme arises because of the administrative burdens imposed on parties wishing to make use of the compulsorily licensing scheme.[50] As Okediji notes, the "transaction costs involved in fulfilling these requirements are not insignificant, and the waiting period by itself materially reduces ... the value of copyrighted material to consumers".[51] Another related problem with the Berne Appendix is that it does not address one of the most pressing needs of many developing countries, namely providing multiple access to copyright protected works for education purposes.[52] While this may not directly impact upon the open access schemes, insofar as it undermines scientific and technical literacy in the developing world, it is very important in terms of the uptake and impact that research is able to have in developing countries.

In many ways, the experience in relation to the compulsory licence recognised under the Berne Appendix is similar to many of the other compulsory licensing

[46] Berne Appendix art.30(2)(a).

[47] Berne Appendix art.30(2)(b).

[48] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, Vol.2 (2006), p.957. See also Eva Hemmungs Wirten, *Cosmopolitan Copyright: Law and Language in the Translation Zone* (Uppsala: 2011), p.66, where Wirten describes the framework of the Appendix as "extremely dense and complicated"; Alberto Cerda Silva, "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright", PIJIP Research Paper 8/2012 (2012), p.51, *http://digitalcommons.wcl.american.edu/research/30* [Accessed May 27, 2015], where Silva says that the "Appendix's system of compulsory licensing has proven to be inefficient"; Margaret Chon, "Intellectual Property 'from Below': Copyright and Capability for Education" (2007) 40 *University of California, Davis Law Review* 803, 835, where Chon states that the provisions have "proven to be unworkable and unfair throughout the thirty-five year existence"; Ruth L. Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Consideration for Developing Countries" (International Centre for Trade and Sustainable Development, 2006), p.29, *http://www.unctad.org/en/docs/iteipc200610_en.pdf* [Accessed May 27, 2015], where Okediji observes that the "Appendix has been a dismal failure owing to unduly complex and burdensome requirements associated with its use"; Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011), p.341, where Helfer and Austin state that the Berne Convention poses impediments to the "translation of textbooks from the world's dominant languages into minority languages".

[49] Yu, "A Tale of Two Development Agendas" (2009) 35 *Ohio Northern University Law Review* 465, 483.

[50] See, for instance, Silva, "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright", PIJIP Research Paper 8/2012 (2012), *http://digitalcommons.wcl.american.edu/research/3* [Accessed May 27, 2015]; Margaret Chon, "Intellectual Property 'from Below'" (2007) 40 *University of California, Davis Law Review* 803.

[51] Okediji, "The International Copyright System" (International Centre for Trade and Sustainable Development 2006), p.15, *http://www.unctad.org/en/docs/iteipc200610_en.pdf* [Accessed May 27, 2015].

[52] Okediji, "The International Copyright System" (2006), p.15, *http://www.unctad.org/en/docs/iteipc200610_en.pdf* [Accessed May 27, 2015].

schemes used in intellectual property law: they primarily operate to encourage parties to enter into private negotiations or, ideally, voluntary collective agreements. As Ricketson said, the Appendix "can be seen as an incentive to the authors and publishers in the developed countries to co-operate in the making of voluntary licensing arrangements".[53] In this context, the compulsory licences operate in "the background both as a reminder of the needs of developing countries and as a threat to be brought into operation if there is a reluctance to cooperate".[54] While these arguments might be applicable in other contexts, there is little to suggest that the compulsory licensing scheme in the Berne Appendix has had any impact in encouraging the development of voluntary licensing schemes. This is because the procedural requirements in the Berne Appendix shield copyright holders by discouraging the potential applicants for compulsory licences, given that the "rights holders know this so they do not have incentive to cooperate".[55] As authors and publishers in developed countries have not felt threatened by the existence of the Appendix, they have not been "coerced to cooperate" with developing countries to enter into voluntary licensing arrangements for translations.[56]

Conclusion

Translation of research into local languages is fundamental to the goal of ensuring widespread access to research. One of the problems that organisations will face in meeting the goal of open access arises because, where material is protected by copyright, the copyright owner has the ability to control whether or not and, if so, under what conditions that work may be translated into another language. The problems that this potentially creates are exacerbated by the fact that there is little that can be done to get around the translation rights. Neither the general defences found in national copyright laws, nor the options available under the Berne Appendix in relation to translations, provide any useful or effective assistance.

In this situation, if a research organisation wishes to translate copyright protected material in order to make it openly accessible, it would have to obtain prior authorisation from the respective copyright holder/s for the translation. In some situations the problems that this creates are exacerbated by the fact there is often a great deal of uncertainty about who owns copyright in the research, particularly where a number of authors from different institutions are involved. Going forward, it would be advisable for this question to be addressed at the outset of the funding process. In relation to works that have already been published, the question of whether the work will be able to be translated will depend on the terms of the initial research agreements (or contracts) and/or the conditions under which the authors of the work were engaged. In situations where this is unclear, the only option will be to negotiate with the relevant copyright owner to allow the work in question to be translated.

[53] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, Vol.2 (2006), p.958.
[54] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, Vol.2 (2006), p.958.
[55] Strba, "Institutional and Normative Attempts for Access to Copyright for Education in Developing Countries" (February 24, 2009), p.30.
[56] Strba, "Institutional and Normative Attempts for Access to Copyright for Education in Developing Countries" (February 24, 2009), p.30.