The language of western homogeneity: a rose by any other name is a potential lawsuit

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‘The limits of my language means the limits of my world’.

- Ludwig Wittgenstein (English translation of his German quote)

It has sometimes been stated that international legislation favours the developing nations that create it to the detriment of the developing nations who must abide by it. This paper shall pose this question to the issue of copyright law relating to the right to translate a literary work, as expressed in the Berne Convention and the TRIPS Agreement and applied in South Africa. In other words this paper shall ask: Does the right to make a translation of a literary work, as currently expressed in international instruments, work to the detriment of developing countries such as South Africa? The answer shall be a resounding ‘yes’. This is because, whilst developed countries are largely homogenous in culture and therefore language, developing countries have become cultural melting pots through centuries of migration and colonialization. The failure of such instruments to adequately cater for the developing world’s cultural (and linguistic) diversity shows a failure on the part of the international community to take the developmental goals expressed within local and international legislation seriously. It shall be shown that current international law does have the scope for change in such instruments, but whether or not this change shall be utilized remains unknown.

Keywords: *copyright, translations, culture, literary works, education, developing nations, language, South Africa*

1. Introduction: More than words

Whether it's a Neanderthal baby crying for its 'papa',[1] or a Roman Emperor looking to borrow an audience's ear, language has been at the centre of civilization for almost as long as mankind itself; it is the means by which we navigate within the boundaries of our world. Historically, these boundaries have expanded beyond geographic borders through both natural (migration) and unnatural (colonization) means. It is therefore logical that this should be most clearly seen when looking at developing countries, whose land is a shared cultural space occupied by many different dialects.[2] In contrast, developed countries are on the whole far more ethnically homogenous.[3] A typical example of a developing nation whose land is shared between many differing ethnicities is South Africa, which shall be the primary developing country of choice with which to illustrate the arguments of this paper. South Africa recognizes 11 official languages.[4] These range from Afrikaans, a unique dialect evolving from the combined language of the Dutch settlers who 'discovered' South Africa on 6 April 1652 and the English settlers who followed thereafter,[5] to Venda, imported through

[1] A Goslin, 'Family words came first for early humans', [2004] New Scientist <https://www.newscientist.com/article/dn6188-family-words-came-first-for-early-humans/> accessed 16 April 2015.
[2] AF Alesina et al, 'Fractionalization' (2002) Harvard Institute Research Working Paper No 1959.
[3] AF Alesina (n 2).
[4] These are (in alphabetical order): Afrikaans, English, Ndebele, Northern Sotho, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.
[5] B Donaldson, 'Language contact and linguistic change: The influence of English on Afrikaans' in R Mesthrie (ed), *Language and social history: Studies in South African sociolinguistics* (New Africa Books, Cape Town 1995)

the migration of the Venda people from the Congo and East African Rift.[6] Whilst this diversity is and ought to be celebrated, the question remains whether or not the international community unfairly favours a homogenous western approach to copyright law, particularly when looking at the right of translation. Put differently: Does international legislation protect the interest of developed nations at the expense of developing nation's interests? Through an analysis of intellectual property rights encapsulated in international copyright legislation such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (henceforth the 'TRIPS Agreement'),[7] and the Berne Convention for the Protection of Literary and Artistic Works (henceforth the 'Berne Convention'),[8] this question will be answered in the positive. The focus of this paper shall be on literary works for educational purposes, for ostensibly one of the aims of intellectual property rights in general is to encourage development and innovation,[9] and education is arguably the primary means by which this may be achieved.[10] It is however contentious whether or not copyright is actually capable at present of doing this for all nations, or only for the developed nations.

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[6] R Bailey, 'Sociolinguistic evidence of Nguni, Sotho, Tsonga and Venda origins' in R Mesthrie (ed), *Language and social history: Studies in South African sociolinguistics* (New Africa Books, Cape Town 1995).
[7] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994 33 ILM 1197.
[8] Berne Convention for the Protection of Literary and Artistic Works 1971 (amended 1979) 828 UNTS 221.
[9] World Intellectual Property Organization, 'Understanding copyright and related rights', [2013] <http://www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf> accessed 12 October 2013.
[10] Whilst there is a plethora of work on the interplay between language, education and development, the author recommends the following as pertinent examples: UNESCO World Report, 'Investing in cultural diversity and intercultural dialogue', [2009] UNESCO Publishing < http://unesdoc.unesco.org/images/0018/001852/185202e.pdf> accessed 29 August 2015; OY Lawal-Solarin, 'Copyright and education - A publisher's perspective from a developing world', [2005] A paper presented at the Information meeting on Education and Copyright in the Digital Age, November 2005, at the Headquarters of World Intellectual Property Organization <http://webcache.googleusercontent.com/search?q=cache:irc2hWGwMM0J:www.wipo.int/edocs/mdocs/copyright/en/educ_cr_im_05/educ_cr_im_05_www_53637.doc+&cd=2&hl=en&ct=clnk&gl=za> accessed 29 June 2015; RL Okediji, 'The international copyright system: Limitations, exceptions and public interest considerations for developing countries', [2006] UNCTAD-ICTSD Project on IPRs and Sustainable Development < http://unctad.org/en/docs/iteipc200610_en.pdf > accessed 19 September 2015; Intellectual Property Rights Commission, 'Integrating intellectual property rights and development policy', [2002] Report of the Commission on Intellectual Property Rights <http://www.iprcommission.org/papers/text/final_report/reportwebfinal.htm> accessed 11 April 2014; M Chon, 'Intellectual property from below: Copyright and capability for education' (2007) 40 UC Davis Law Review 803.

It must be stressed that the results of this undertaking are important for all countries with more than one officially recognized language, especially where one or more such language is an almost exclusively local dialect and/or the language of an ethnic minority. This encompasses a vast number of nations across the world. In Europe, the example of Serbia may be used as they recognize nine official languages, including the Slavic micro-language of Rusyn;[11] in the United Kingdom, since the Welsh Language Measure of 2011, Wales has granted official status to the locally-spoken Welsh dialect alongside English, which is the primary spoken language; in Asia, the example of Singapore is pertinent as it officially recognizes four languages, including the language of Tamil spoken by the minority Indian ethnic groups;[12] and in the Americas, Peru provides an example of officially recognizing the language of its historic colonizers alongside indigenous dialects dating back to the pre-colonial historic period of the Incan Empire,[13] whilst the Constitution of Bolivia officially recognizes a staggering thirty-six languages, many of which have ancient roots.[14] The preservation of culture through linguistics is therefore a global endeavour, and the arguments made forthwith are equally applicable to other multi-lingual countries. The fact that South Africa has been chosen as this article's case study is a purely practical rather than substantive matter, and in no way 'localizes' the findings.

2. Defining copyright: Till the law says stop

[11] In alphabetical order: Albanian, Bosnian, Bulgarian, Croatian, Hungarian, Romanian, Serbian and Slovak.
[12] In alphabetical order: English, Malay and Mandarin Chinese.
[13] In alphabetical order: Spanish, Quechua, Aymara and other aboriginal languages.
[14] In alphabetical order: Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chacobo, Chiman, Ese Ejja, Guaraní, Guarasuawe, Guarayu, Itonama, Leco, Machajuyai-Kallawaya, Machineri, Maropa, Mojeño-Trinitario, Mojeño-Ignaciano, Moré, Mosetén, Movima, Pacawara, Puquina, Quechua, Sirionó, Spanish, Tacana, Tapiete, Toromona, Uruchipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco.

First it is important to identify what is meant by 'copyright'. Copyright is the field of intellectual property law that 'protects the material expression of ideas apart from the physical embodiment of the work in which they are expressed'.[15] Copyright can be described as a 'bundle of rights' as it bestows the copyright owner with various economic rights, depending on the national copyright regime in place.[16] Copyright in South Africa is regulated by the South African Copyright Act (henceforth 'Copyright Act').[17] Section 6(f) of the Copyright Act vests the right to adapt literary works exclusively with the copyright owner. Section 1(a) defines 'adaptation' in relation to literary works as:

> (i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;
>
> (ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;
>
> (iii) *a translation of the work*; or
>
> (iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical [emphasis added].

[15] H Klopper et al, *Law of Intellectual Property in South Africa* (Lexis Nexis, Durban 2011) 145.
[16] H Klopper et al (n 15) 146.
[17] 98 of 1978.

Therefore, according to the Copyright Act, the right to make a translation of a work forms part of the right to make an 'adaptation' of said work,[18] which is a right that vests exclusively with the copyright owner.[19]

As the World Intellectual Property Organization has stated, there are two main reasons countries have intellectual property laws:

> One is to give statutory expression to the moral and economic rights of creators in their creations and to the rights of the public in accessing those creations. The second is to promote creativity, and the dissemination and application of its results, and to encourage fair trade, which would contribute to economic and social development.[20]

Copyright law on both a national and international scale ought to find validation in the aforementioned reasons, namely protecting the rights of the creators whilst also furthering economic and social development. However, in order to assess whether or not this is the case in regards to translations of copyright protected literary works, a thorough examination must be made of the international law instruments regulating such matters.

3. The Berne Convention: Words get in the way

[18] Copyright Act (n 17) s 1(1)(a)(iii).
[19] Copyright Act (n 17) s 6(f).
[20] World Intellectual Property Organization, 'Understanding copyright and related rights' (n 9).

The first international instrument to examine is the Berne Convention.[21] Whilst this Convention has had many implications for the international community regarding copyright, for the purposes of this paper it is important only to note what is said in the Berne Convention regarding the right of translation. According to Article 8,[22] 'authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works'. This provision is important because it means that part of the exclusive economic rights bestowed upon copyright owners of literary works includes the right to authorize translations of their works into a language other than the language which the original work was published in. Therefore, the default position is that authorization by the copyright owner is required in order to translate a work from its published language to another. This naturally has widespread implications for countries such as South Africa, where there are 11 official languages yet over 90% of print media is still published in English,[23] or Peru where 78% of the print media is dominated by the Spanish language media group, *Grupo El Comercio*.[24]

However, it appears that the Berne Convention itself recognizes the difficulties this default position may create for developing nations, and so makes alternative provisions available. According to Article 30(2)(b):

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[21] Berne Convention (n 8).
[22] Berne Convention (n 8).
[23] Kwesi Kwaa Prah, 'Challenges to the promotion of indigenous languages in South Africa', [2007] The Centre for Advanced Studies of African Society <http://www.casas.co.za/FileAssets/NewsCast/misc/file/204_CV_Challenges%20to%20the%20Promotion%20of%20Indidegous%20Languages%20in%20Sou_.pdf> accessed 13 October 2013.
[24] Freedom House, 'Peru', [2014] Freedom of the Press < https://freedomhouse.org/report/freedom-press/2014/peru>.

> Any country outside the Union may declare, in acceding to this Convention and subject to Article V2 of the Appendix, that it intends to substitute for Article 8 [. . .] the provisions of Article 5 of the Union Convention of 1886 [. . .] on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country.[25]

Further, according to Article II of the Appendix:

> Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.[26]

Interestingly, section 3(a) of the appendix states that 'in the case of translations into a language which is not in general use in one or more *developed* countries which are members of the Union, a period of one year shall be substituted for the period of three years referred to in paragraph (2)(a) [emphasis added]'.

[25] Berne Convention (n 8).
[26] Berne Convention (n 8).

In other words, developing countries are able to substitute the right of translation from being the exclusive right of the copyright owner to a system of compulsory non-exclusive and non-transferable licensing.

Whilst this might seem like the Berne Convention is facilitating development in developing nations through providing the said alternative, this is not necessarily so as the restrictions on the so-called 'appendix exception' are vast. One of these restrictions can be found in Article II(2)(a), which states that:

> If, *after the expiration of a period of three years*, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language *in general use* in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to make a translation of the work [emphasis added].[27]

Further strenuous demands are placed on the developing countries by way of Article IV(1),[28] which provides an additional restriction stating that a compulsory license may only be granted where the applicant has sought and been denied permission from the right holder, or after due diligence has been unable to find the right holder.

[27] Berne Convention (n 8).
[28] Berne Convention (n 8).

4. The problem with Berne: Talking loud and saying nothing

These various restrictions give rise to a multitude of problems that undermine the appendix exception's ostentatious aim of encouraging development in developing countries. First, Article II(2)(a) would create a major problem in respect of textbooks, which become obsolete in a short period of time. This provision would therefore require a certain sector of society to be years behind the rest in terms of reading materials, creating an unfair disadvantage between the groups of students, especially in certain areas where the content of the subject is continuously being developed and altered (eg the field of legal studies).[29] According to the Constitution of South Africa,[30] everyone has the right to basic education, including adult basic education,[31] and to further education which the state must, through reasonable measures, make progressively available and accessible.[32] This section of the Constitution is a local realization of various international human rights instruments dealing with the right to accessible education.[33] Such would naturally necessitate providing reading material that is neither inaccessible because of language barriers, nor obsolete, for as Kollapen J has said, 'it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books'.[34]

Another problem with the appendix exception is that it only permits compulsory licenses to be granted so as to translate a work into a 'language in general use' within the said country.

[29] RW Bradshaw, 'The compulsory license system of the Universal Copyright Convention' (1957) 6 1 Duke Bar Journal 23, 27.
[30] Constitution of the Republic of South Africa, 1996.
[31] Constitution of the Republic of South Africa (n 25) s 29(1)(a).
[32] Constitution of the Republic of South Africa (n 25) s 29(1)(b).
[33] Such as: Article 13 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the United Nations Declaration of Human Rights and Article 28 of the Convention on the Rights of the Child.
[34] *Section 27 and Others v Minister of Education and Another* [2012] 3 All SA 579 (GNP) [25].

As no definition is given to elaborate on the meaning of 'language in general use', it potentially creates an issue for cultural minorities in developing countries.[35] Publishing a textbook in English (spoken by 9.6% of South Africans) and translating it into Afrikaans (spoken by 13.5% of South Africans, making it the second most widely spoken language in the country) would be sufficient for Article II(2)(a) - and so a compulsory license would not be able to be granted - as Afrikaans is a language 'in general use' within South Africa.[36] The fact that South Africa recognizes nine other official languages would thus be largely irrelevant, as would the fact that most of the underprivileged children in South Africa are black (67%) and subsequently likely to have an African language as their mother tongue.[37] For example, it is arguable that translating a work from English into Ndebele, a black language spoken by 2.1% of South Africans (making it the language with the second smallest group of speakers in the country),[38] would not comply with the appendix exception because Ndebele is not spoken by the general South African population. The same would hold true for other ethnic minorities, such as the less than 1% of Bolivians who are Guarani speakers.[39] The answer to this situation would appear to be that the Berne Convention simply expects these speakers to either make do with the limited reading materials published in their language, or else be forced to learn an additional language that can be seen as being in

[35] AC Silva, 'Beyond the unrealistic solution for development provided by the appendix of the Berne Convention on Copyright', [2012] 4 1 PIJIP Research Paper Series <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1032&context=research> accessed 12 October 2013.
[36] Statistics South Africa, '2011 census in brief', [2011] SouthAfrica.info <http://www.southafrica.info/about/people/language.htm#.Ul_Fv3CBklk> accessed 12 October 2013.
[37] P Martin, 'Child poverty and inequality', [2012] PAN:Children <http://children.pan.org.za/sites/default/files/publicationdocuments/Child%20poverty%20and%20inequality%20-%20topical%20guide%2030082012.pdf> accessed 12 October 2013.
[38] Statistics South Africa (n 36).
[39] Thomas Perreault, 'Natural gas, indigenous mobilization and the Bolivian state', [2008] United Nations Research Institute for Social Development <http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/D96F71885FB60F74C1257512002F471E/$file/Perr-paper.pdf> accessed 13 February 2016.

general use. However, this is in direct conflict with constitutional obligations, such as the South African Constitution, which expressly states in section 29(2) that:

> Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity, practicability, and the need to redress the results of past racially discriminatory laws and practices.[40]

The right to receive information in the language of one's choice is further cemented in section 30,[41] which gives 'everyone the right to right to use the language and to participate in the cultural life of their choice'. Therefore, the fact that the appendix exception is limited to a language in general use makes it not only ambiguous, but potentially in conflict with constitutional obligations.

Further, it violates the cultural diversity and identity of the minority group, and encourages the erosion of its mother tongue in favour of more mainstream languages.[42] This can be seen in the example of Canichana, an officially recognized language of the overwhelmingly Spanish-speaking Bolivia. As of the 2001 census, although a mere 404 Bolivians identified as

[40] Constitution of the Republic of South Africa (n 30).
[41] Constitution of the Republic of South Africa (n 30).
[42] AC Silva (n 35).

'ethnically Canichana', the language has been declared extinct.[43] It has been said that 'any form of linguistic decline has to be taken as a sign of cultural impoverishment, and the disappearance of any language as an irreplaceable loss for the common cultural heritage of humankind'.[44]

Furthermore, it violates South Africa's international legal obligations. In 2009 the United Nations Educational, Scientific and Cultural Organization (henceforth 'UNESCO') published a World Report on Investing in Cultural Diversity and Intercultural Dialogue.[45] The report recommended that 'national language policies should be implemented with a view to safeguarding linguistic diversity and promoting multilingual competencies', as the report's findings recognized:

> [T]he dynamic nature of cultural diversity and its capacity to renew our approaches to sustainable development, the effective exercise of universally recognized human rights, social cohesion and democratic governance […]On questions as important as multilingualism, realizing the education for all goals, developing quality media and stimulating creativity in the service of development, new solutions are emerging that need to be explored in greater depth if the international community is to prove equal to its own ambitions.

[43] L Campbell and V Grondona (eds), The Indigenous Languages of South America: A Comprehensive Guide (De Gruyter Mouton, Germany 2012).
[44] UNESCO, 'World Report on Investing in Cultural Diversity and Intercultural Dialogue' (n 10).
[45] UNESCO World Report, 'Investing in cultural diversity and intercultural dialogue' (n 10).

In answer to the concerns raised by the UNESCO World Report on Investing in Cultural Diversity and Intercultural Dialogue, the creation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (henceforth 'CPPDCE') followed,[46] which South Africa ratified in December 2006. Article 6 states:

> 1. Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.
>
> 2. Such measures may include the following:
>
> > (a) regulatory measures aimed at protecting and promoting diversity of cultural expressions;
> >
> > (b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and

[46] Adopted on 20 October 2005, entered into force March 2007 2440 UNTS 311 (CPPDCE).

services, including provisions relating to the language used for such activities, goods and services.[47]

Article 7 states:

1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:

(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of […] various social groups, including persons belonging to minorities and indigenous peoples;

(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.[48]

Another shortfall of the appendix provision which has caused much controversy amongst academics has been whether or not the appendix exception is applicable to work in a digital

[47] CPPDCE (n 46)
[48] CPPDCE (n 46).

format.[49] Some academics, such as Ricketson, contend that by using the term 'printed or analogues form' the appendix has inherently limited its scope to exclude digital formats, as a plain definition of the said term can only mean the opposite of digital.[50] Therefore, 'the work must be available in a form in which it can be read', thereby excluding translations of works which are embodied in electronic form.[51] Similarly, Mihály Ficsor states that, whilst one might be led to think that digital formats are included in the appendix provision if one were only to take into account paragraphs 1 and 2 of Article III, this would be a mistake. This is because paragraph 7(a) 'makes it clear that this is not the case' as 'reproduction through digital transmissions might hardly be regarded as analogous to printing'.[52] On the other hand, academics such as Alberto Cerda Silva contend that focus should rather be placed on the intention of the drafters and the purpose of the appendix exception.[53] As the appendix exception was created in 1971, it is put forth that the drafters could not have meant to exclude digital formats as the rise of digital format in the modern day could not have been foreseen at the time of creating the appendix exception.[54] Looking at the scope of the appendix exception, the World Intellectual Property Organization's Guidelines express that regarding the appendix exception that 'the important thing is the purpose of the translation, namely teaching, scholarship or research'.[55] For these reasons, says Silva, whether the format is analogue or digital is irrelevant.[56] It is important to note that, although it has been argued by some that the appendix provision may include digital format, it is generally accepted that the

[49] AC Silva (n 35).
[50] S Ricketson and JC Ginsburg, *International copyright and neighbouring rights: The Berne Convention and beyond vol II*, 2nd ed (Oxford University Press, New York 2006) 930.
[51] S Ricketson and JC Ginsburg (n 50).
[52] M Ficsor, *The law of copyright and the internet: the 1996 WIPO treaties, their interpretation and implementation* (Oxford University Press, New York 2002) 278 – 279.
[53] AC Silva (n 35).
[54] AC Silva (n 35).
[55] World Intellectual Property Organization, 'Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)', [1978] WIPO Publication <ftp://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/GuideToTheBerneConventionForTheProtectionOfLiteraryAndArtisticWorksParisAct1971.pdf> accessed 12 October 2013.
[56] Alberto Cerda Silva (n 35).

appendix exception is unclear and ought to be amended to make this clear.[57] The fact that this ambiguity exists giving rise to conflicting academic camps is a serious problem for countries like South Africa, as the question of whether or not the appendix exception includes digital format will greatly effect the overall impact the provision will have on achieving its aim as large portions of society make use of distance education. According to the Department of Institutional Statistics and Analysis,[58] there were 293 437 students enrolled in 2010 at the University of South Africa, which is both the largest university in the whole of Africa and 'the largest open distance learning institution in Africa [as well as] the longest standing dedicated distance education university in the world'.[59] The overwhelming majority (nine in 10) students enrolled in 2010 were from South Africa.[60] Therefore, the practical value of the said appendix exception would greatly depend on clarity being given in favour of the appendix exception permitting digital format.

It is worthwhile noting that to date only Bangladesh, Cuba, Jordan, Mongolia, Oman, Philippines, Samoa, Sri Lanka, Sudan, Syria, Thailand, United Arabs Emirates, Uzbekistan, Vietnam, Yemen and Algeria have issued declarations to make use of the appendix exception.[61] The fact that only 16 of the 167 contracting parties to the Berne Convention have done so speaks volumes as to the perceived benefits the appendix exception offers developing nations. The further fact that only three of these countries have implemented the appendix

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[57] AC Silva (n 35).
[58] Department of Institutional Statistics and Analysis, 'An institutional profile on UNISA: UNISA facts and figures', [2012] HEMIS <http://heda.unisa.ac.za/filearchive/Facts%20&%20Figures/Unisa%20Facts%20&%20Figures%20HEMIS%202007%202011-high%20res.pdf?g=1&ot=12&oid=10117&usr=> accessed 12 October 2013.
[59] UNISA, 'About', [2015] <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=3> accessed 29 July 2015.
[60] UNISA (n 59).
[61] World Intellectual Property Organization, 'Notification on the Berne Convention', [2015] WIPO-Administered Treaties <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=N&treaty_id=15> accessed 12 October 2013.

exception into their domestic law by way of compulsory licensing, with the others having implemented limitations or exceptions of a different type, further speaks volumes.[62] Therefore, whilst the system of copyright bestowing the right of translation exclusively to the copyright owner is troublesome, it is highly questionable whether or not international law offers any viable alternative as it currently stands.

5. Scope for change: A little less conversation

It becomes pertinent to ask, if the appendix exception were to be reworked, taking into account the aforementioned problems identified, would it still meet international standards according to the TRIPS Agreement? In other words, is it possible for the Berne Convention appendix to be amended in such a way as to provide adequate protection of cultural minorities within developing countries, eg by omitting the words 'in general use'?

According to Gana,[63] the TRIPS Agreement has two main objectives, namely 'to secure the global economic rewards of an intellectual property grant', and to facilitate the enforcement of these rights as a means to accomplish the first objective. There are, however, various problems with the TRIPS Agreement regarding developing nations, primarily for the purposes of answering whether or not a reworked version of the appendix exception would be compliant with international law standards, the ambiguity regarding Article 13. Article 13 reads that 'members shall confine limitations or exceptions to exclusive rights to certain

[62] AC Silva (n 35).
[63] RL Gana, 'Prospects for developing countries under the TRIPS Agreement' (1996) 29 Vanderbilt Journal of Transnational Law 735, 759.

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'.[64] This so-called 'three step test' has been compartmentalized and analysed in detail by the Dispute Settlement Body of the World Trade Organization (WTO DSB). The WTO DSB serves as the judiciary for the purpose of interpreting treaties such as the TRIPS Agreement, and it is important to note that prior DSB decisions ('reports') that interpret a said provision do not strictly dictate future interpretations of that provision.[65] In other words, the outcomes of the WTO DSB are not binding, although for the purposes of this paper it is sufficient to base our interpretation of Article 13 of the TRIPS Agreement on the only WTO DSB report that has discussed the said Article, henceforth referred to as the 'United States' section 110(5) decision'.[66]

First, the WTO DSB identified that Article 13 clearly states limitations or exceptions are to be confined to 'certain special cases'. What was unclear was what these 'certain special cases' were. The WTO DSB defined 'certain' as being 'an exception or limitation in national legislation [that] must be clearly defined',[67] although each possible situation to which the limitation or exception may apply need not be explicitly stated,[68] and 'special' to mean that 'an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense'.[69] In other words, 'certain special cases' was taken to include national

[64] TRIPS Agreement (n 7).
[65] Dispute Settlement System Training Module, 'Legal effect of panel and appellate body reports and DSB recommendations and rulings', [2015] World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm> accessed 15 October 2013.
[66] Report of the Panel, 'United States – section 110(5) of the US Copyright Act', [2000] World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf> accessed 12 October 2013.
[67] Report of the Panel (n 66).
[68] Report of the Panel (n 66).
[69] Report of the Panel (n 66).

legislation that clearly defines exceptions or limitations which are narrow in scope both qualitatively and quantitatively.

Second, the WTO DSB had to identify the meaning of the phrase 'which do not conflict with a normal exploitation of the work'.[70] According to Baude et al,[71] one must take note that "both commercial and non-commercial uses may potentially conflict with the 'normal exploitation' of the work. In other words, exceptions for educational uses of a copyright work do not automatically pass the 'no conflict' step".[72] Further, the WTO DSB decided that this step requires allocating all potential sources of revenue to the right holder, and subjecting each and every exclusive right to a separate analysis.[73] In order to limit the severity of this (because it suggests that every use of a work that includes a right held by the copyright holder, exploited for commercial gain, would conflict with what is considered 'normal exploitation'), the WTO DSB stated that this step will only be satisfied when the use of the work 'enters into economic competition with the ways in which the right holders normally extract economic value from the right at stake and thereby deprive them of significant or tangible commercial gains'.[74] It covers not only forms of use that currently are able to generate an income, but also those that, in the future, may have the potential to do so, and in this way the test has been interpreted in a forward-looking manner.[75] One problem with this, as pointed out by Annette Kur and Marianne Levin, is that it makes the test a purely arithmetic one, void of any scope to allow for policy reasons to be considered.[76] As Koelman states, the fact that public interest is present in the first step in the sense of cases being

[70] Report of the Panel (n 66).
[71] W Baude et al, 'Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa' (2006) 7 African Journal of Information and Communication 82.
[72] W Baude (n 71) 92.
[73] A Kur and M Levin, *Intellectual property rights in a fair world trade system: proposals for reform of TRIPS* (Edward Elgar Publishing Limited, Massachusetts 2011) 230.
[74] A Kur and M Levin (n 73) 231.
[75] KJ Koelman, 'Fixing the three-step test' (2006) 28 8 European Intellectual Property Review 407, 409.
[76] A Kur and M Levin (n 73) 231.

'special' is of no consolation given that each step is to be assessed individually, all being of equal weight.[77] Another problem with this second step is that it does not afford the judges and the legislators the scope to, like in the third step, compensate copyright holders by means of equitable damages instead of conferring a right limiting usage.[78] When assessing Article 9(2) of the Berne Convention, Ricketson states that 'it therefore seems logical to conclude that the scope of the inquiry required under the second step of Article 9(2), does include consideration of non-economic normative considerations ie whether this particular kind of use is one that the copyright owner should control'.[79]

Third, the DSB had to identify what is meant by 'not unreasonably prejudice the legitimate interests of the right holder'. The court stated that legitimate interests includes, but is not limited to, economic interests.[80] Therefore, a legitimate interest can include an interest that is not necessarily of any economic value. In determining what degree of prejudiced would be unreasonable, the WTO DSB stated that 'if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner', such an exception or limitation would cause unreasonable prejudice for the purposes of Article 13 unless he has been equitably compensated.[81]

It is therefore clear that whether or not limitations and exceptions comply with international standards as expressed in Article 13 of the TRIPS Agreement is far from being a straightforward matter. However, it is at least arguable that a reworked expression of the

[77] KJ Koelman (n 75).
[78] KJ Koelman (n 75).
[79] S Ricketson, 'WIPO study on limitations and exceptions of copyright and related rights in the digital environment' [2003] WIPO Standing Committee on Copyright and Related Rights <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf> accessed 12 October 2013.
[80] Report of the Panel (n 66).
[81] Report of the Panel (n 66).

appendix exception would meet the standards of Article 13. Should the provision be reworked in such a manner, then its effect would be in line with its purpose and in compliance with international law standards. It would enable the appendix provision to provide meaningful assistance to the aim of assisting developing countries, and would be in compliance with constitutional provisions and international obligations.

6. South Africa's Draft Copyright Amendment Bill: Tell us where the good times are

Recently, South Africa published the Draft Copyright Amendment Bill.[82] What is of interest for the purposes of this paper are the provisions pertaining to translations, encapsulated in Schedule A:

> (1) Any person may, apply to the Intellectual Property Tribunal for a license to make a translation of the work into any of the languages including, Northern Sotho, Zulu, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa, Afrikaans or Ndebele, the translation in printed or analogous forms of reproduction (hereinafter referred to as "the license").
>
> (2) Any person may, apply to the Intellectual Property Tribunal for a license to translate copyrighted work, to make the work into a usable or in analogous forms of reproduction.

[82] South African Draft Copyright Amendment Bill GNR 646 GG 39028 of 27 July 2015.

(3) No license shall be granted until the expiration of the following applicable periods -

(a) within a period of one (1) week from the date of first publication of the original copyrighted work, where the application is for a license for translation into specified languages;

(b) three (3) months from the date of first publication of the original copyrighted work, where the application is for a license for translation into specified languages in general use or any other language in general use; and

(c) one (1) year from the date of first publication of the of the original copyrighted work where the application is for a license for translation into any language that is not stipulated in this Act or languages that are not generally used in the Republic as covered by subsection (1) above.

On a substantive note, it appears that this provision is intended to echo the appendix provision in the Berne Convention. However, this then leads one down the tenuous path elaborated upon in section 5 (‘The problem with Berne’) of this paper. Another problem is that Schedule A seems to create three categories of language: specified (or officially recognized) languages; languages in general use; and languages that are not in general use. It is submitted that this categorization of languages is unclear, and not in keeping with the wording of the Berne appendix.

7. Conclusion: Actions speak louder than words

Whilst it is admirable that South Africa is attempting to echo the appendix provision of the Berne Convention, the appendix provision is flawed in that it creates a conflict with both the local South African constitution as well as international obligations. The appendix provision favours the position of the homogenous west at the expense of the multicultural, multilingual developing world, and in this way stifles development. What makes this even more problematic is the fact that international law as it stands does have the potential to alter its current position. The question still remains: Will it?