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Is A New International Law On E-book ‘Lending’ Necessary To Satisfy The Requirements of International Human Rights Law?

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1 Preface

Librarians are some of the most dedicated professionals I have met, and libraries are almost always a haven of privacy and tranquillity. Now that I have two young toddlers, libraries are our favourite destinations, to hear a story, see a puppet show, or just dive into the hundreds of childrens' books on offer without spending any money at all. Libraries are institutions that we may take for granted in a democratic society, but lack of finances, expansive copyright protection, and bureaucratic burdens can threaten librarians' ability to provide information and culture to the public. For this reason, it has been meaningful to investigate the e-book lending crisis and explore avenues of legal reform that would benefit both authors and borrowers.

I would like to thank my husband for his support, and my two sons for their brilliance and humour. I would also like to thank my supervisor, Dr. Karol Nowak, for his insightful comments and recommendations.

Abbreviations

DRM	Digital Rights Management
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CESCR	Committee on Economic, Social and Cultural Rights
IPRs	Intellectual Property Rights
IP	Intellectual Property
L&Es	Limitations & Exceptions
SCCR	Standing Committee on Copyright and Related Rights
TRIPS	Agreement on Trade Related Intellectual Property
UDHR	Universal Declaration of Human Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation

2 Executive Summary

In the last few years there has been a huge growth in the e-book market, and many copyrighted works are published as e-books before the analogue versions are printed, if they are ever printed. In order to provide e-book lending services, libraries must sign copious amounts of license agreements with materials distributors. Due to restrictive terms in license agreements, legal exceptions to copyright are negated, and libraries are more limited in their ability to deal with the copyrighted work than ever before.

The restrictions on distribution and access to e-books in libraries affects an author's rights to their moral and material interests resulting from any scientific, literary, or artistic 'production' of which he or she is the author, because of restrictions on the dissemination of their work. Author's rights are protected under article 17 of the UDHR (the right to property), article 15 ICESCR, and under copyright law.

The practice of restrictive licenses also takes away from the enjoyment of the following human rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) : the right to education, the right of everyone to take part in cultural life, the right to share in scientific advancements and its benefits, and the freedom of expression.

Both international copyright law and human rights law aim to strike the right balance between the rights of individual users and the rights of authors, but neither legal regime is functioning optimally with respect to e-book lending. How do we reform copyright to make borrowing e-books from libraries as straightforward and economic as borrowing shelfbooks?

I argue that it is necessary for the creation of a new international rule to harmonize e-book lending practices in accordance with human rights'

requirements, because merely exploiting the flexibilities of copyright law does not achieve human rights realization. The new rule would include a contract override clause invalidating restrictive licensing terms that conflict with copyright L&Es. It would also include minimum mandatory copyright limitations and exceptions (L&Es) for libraries including a blanket exception to the exclusive right of reproduction of the copyrighted work and/or a rule that would make the doctrine of exhaustion applicable to the digital world. Harmonization, via soft law or treaty law, would persuade States to follow suite in their domestic legislation and court decisions.

It is also important to highlight the persistent mistake in the vocabulary used amongst the researchers of licenses: they lobby for 'e-book ownership' (the library would buy the e-book) to replace the license agreements. However copyright ownership must be discussed in terms of its component parts since the libraries cannot attain copyright ownership but instead, with shelfbooks, they rely on the right of distribution and the doctrine of exhaustion to fulfil its mandate. However, the doctrine of exhaustion and the right of distribution only apply to analogue versions, according to the Agreed Statement of the WCT. Ownership of the copyright in the content cannot transfer completely to the library, but some of the rights in the copyright bundle could transfer in exchange for reasonable remuneration.

The conclusion is that the new international rule on copyright L&Es would include a blanket exception to the right of reproduction, or expand the applicability of the right of distribution to the digital world, to enable the librarians to make a sufficient amount of non-commercial copies for the borrowers, and for preservation purposes. This rule would have to include a contract override clause to nullify any contractual term that undermined the legitimate exceptions to copyright that libraries depend upon to fulfil their function.

3 Introduction

The recent growth in the market for e-books and the fact that many copyrighted works are now digitized before ever going into print, makes it important for libraries to offer e-books[1]. In order to provide e-book lending services, libraries sign copious amounts of license agreements with materials distributors[2]. Due to restrictive terms in license agreements, libraries are unable to deal with the copyrighted work as they would shelf books. The consequences of misuse are severe : they can be sued for breach of contract, lose access to the work via a revocation of the license and end-users can be held criminally liable for breach of a license[3].

Under copyright law there is no such thing as 'lending' an e-book in the same way as shelfbooks are lent out to borrowers, because the library has to make a copy of the e-book each time a patron borrows it, and the act of making a copy interferes with the author's exclusive right of reproduction of the copyrighted work[4].

Many license agreements[5] contain terms that undermine copyright law's L&Es. Publishing companies justify the inclusion of arduous licensing terms because, they say, e-books are at an increased risk of piracy than shelf books, and piracy would ultimately affect sales[6]. However, regardless of the

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[1] *Ibid.*

[2] David O'Brien, Urs Gasser, John G. Palfrey Jr., 'E-books in libraries: a briefing document developed in preparation for a workshop on e-lending in libraries', [2012] Berkman Centre Research Publication No. 2012-15. Available at SSRN: <http://ssrn.com/abstract=2111396>

[3] K.R. Eschenfelder, T.I. Tsai, X. Zhu, B. Stewart, 'How Institutionalized Are Model License Use Terms? An Analysis of E-Journal License Use Rights Clauses from 2000 to 2009' [2013] 74:4 College & Research Libraries p.351

[4] Harald Muller, *E-books and Library/ Interlibrary loan,* World Library and Information Congress : 77th IFLA General Congress and Society, 25 September 2011, <http://conference.ifla.org/ifla77>, accessed 12 January 2014 p.1

[5] The legal terms 'license' and 'contract' are used interchangeably, because much of the academic literature uses both terms, and the distinction between the two terms is beyond the scope of this thesis.

[6] An analysis of the actual risk of piracy is beyond the scope of this thesis. The allegations that e-books are more susceptible to piracy are contested. , Is there a more serious the threat

risk of piracy, the current situation is deleterious to the human rights of end-users. The widespread use of restrictive licenses is unnecessarily expensive and complex for both libraries and users, and creates arbitrary hurdles to the realization of human rights.

Hence several legal commentaries have put forward the argument for a new rule to fix the lacuna in the regulation of e-book lending in domestic and international law. The lacuna in domestic laws is due to the fact that most jurisdictions have not yet created legislation that invalidates license terms that conflict with copyright L&Es[7]; put simply, there is no contract override clause in most States' domestic copyright law.

The recognized framework for States' obligations under international human rights law is the tripartite framework to respect, protect and fulfill the human rights described in the international human rights treaties.[8] The rights that are affected by the proliferation of license agreements are the following : the right to the moral and material interests of any production of which he/she is the author, the right to education, the right of everyone to take part in cultural life, the right to share in scientific advancements and its progress, and the freedom of expression.

Libraries are institutions that facilitate the universal and non-discriminatory enjoyment of these human rights, and, traditionally, copyright limitations and exceptions (L&Es) give libraries enough freedom to optimise the services available to their patrons[9].

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of piracy of digital works rather than analogue material? Just as it is possible to circumvent DRM technology on e-books by anyone with time and technical knowledge, it is possible for anyone with a shelfbook to take it to a copier and create a DRM free copy.

[7] Orit Fischman Afori, *op.cit.*

[8] Lea Shaver and Catarina Sganga, 'The Right to Take Part in Cultural Life : Copyright and Human Rights' [2009-10] 27:4 Wisconson International Law Review, p.652

[9] Orit Fischman Afori, 'The Battle Over Public E-libraries- Taking Stock and Moving Ahead', [2013] 44 IIC 392

International human rights law gives legal authority to the argument for enhanced user rights because the state parties to the human rights treaties have consented to be bound by the treaty, yet human rights law is often ignored by those advocating for a new instrument on exceptions and limitations for libraries. Shaver and Sganga discuss the ”strategic manoeuvre” of using a human rights framework to address modern copyright dilemmas:

> [b]y using the international human rights framework, free culture advocates can build cross-border alliances, [and] leverage the support of human rights organisations and institutions.[10]

The contents of an instrument on L&Es for libraries and archives is currently being debated in the Standing Committee on Copyright and Related Rights (SCCR)[11]. The minutes of the annual meetings show there are divergent opinions about the current situation, but unfortunately the States' human rights obligations are referred to sparsely in the debates.

In June 2010 the African Group of Member States submitted a draft Treaty on Exceptions and Limitations for the Disabled, Education and Research Institutions, Libraries and Archives Centres to the SCCR, which included ’a contract override clause', to be applied when contractual terms undermine the application of copyright limitations and exceptions (L&Es)[12]. This is a pressing issue for developing countries, but it is also an important issue for libraries in developed countries which provide access to culture and education across the socio-economic divide. Libraries in developed

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[10]Lea Shaver and Catarina Sganga, 'The Right to Take Part in Cultural Life : Copyright and Human Rights' [2009-10] 27 Wisconson International Law Review 4

[11] Standing Committee on Copyright and Related Rights 26th Committee, 'The Working Documents Containing Comments On and Textual Suggestions Towards an Appropriate International Legal Instrument (in whatever form) of Exceptions and Limitations for Libraries and Archives' [2013] <http://www.wipo.int/meetings/en/details.jsp?meeting_id=29944> accessed 12 January 2014

[12] SCCR/20/11 draft art. 14(a) as read in Philippa Davies, 'Access v Contract : Competing Freedoms in the Context of Copyright Limitations and Exceptions for Copyright' [2013] 35:7 European Intellectual Property Review p.406

countries are equally interested in reducing the bureaucratic and financial burden created by license agreements. A multilateral international instrument would greatly contribute to legal certainty for end users, and it would make the intellectual property *acquis* more balanced in terms of authors' and users' rights[13].

Chapter 1 describes the relationship between international human rights law and international copyright law. Helfer's and Austin's seminal contribution to this field is their proposed human rights framework to delimit the relationship between human rights law and international copyright law. It is the main theoretical tool to map the interaction between the two sets of norms.

Chapter 2 describes why, according to Harald Muller, the libraries' dealings with e-books are not actually well defined by the phrase 'lending of ebooks'. Additionally, I argue that the phrase 'ownership of e-books' which is commonly used to describe the ideal legal situation for libraries, is misleading in that it ignores the importance of the individual rights in the copyright bundle which do not equate with copyright ownership. I also discuss the contents of the license agreements typically used. The arguments for freedom of contract and the free market are presented, and I explain why these arguments are not in accord with the demands of human rights law.

Chapter 3 offers a deeper description of the international human rights laws relating to e-book lending, based on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant of Civil and Political Rights (ICCPR).

Chapter 4 challenges the assumptions of the classical 'law-and-economics school' theory of copyright policy, with a particular focus on the theory that copyright provides incentives to authors. An account of the 'historical

[13] P.B. Hugenholtz & Ruth L. Okediji. 'Contours of an International Instrument on Limitations and Exceptions' in *The Development Agenda: Global Intellectual Property and Developing Countries* Neil Netanel (ed.) (OUP 2008) p.474-7

rationales'[14] of copyright, and the modern development of copyright law's alignment with trade objectives, reveals the legal regime's capacity for change, particularly in response to new technologies. There are flexibilities within international copyright law, which state legislatures and courts can exploit to the advantage of authors and library patrons. This section of the thesis explores these flexibilities and asks whether their use is sufficient in fulfilling States' human rights obligations.

This paper shows that the current practice of license agreements erodes human rights enjoyment, and the international intellectual property *acquis* is incomplete in that it cannot achieve the requirements of international human rights law. A proposed solution to the problem is the creation of a new international rule on e-book lending. With its basis in human rights law, this rule would enumerate mandatory copyright L&Es for libraries, include a mandatory blanket exception to the right of reproduction, and it would also contain a contract override clause. The rule would enable libraries to fulfil their institutional role in the dissemination of education and culture, it would make authors' works more accessible, and provide end-users with legal certainty in their access to and use of information.

3.1 The Research Question

Does the use of license agreements by libraries for e-book lending services, coupled with the existing flexibilities within international copyright law, fulfill the human rights requirements for both authors and library patrons? If not, what would be the contents of a new international rule governing e-book lending?

[14] Philippa Davies. 'Access v Contract : Competing Freedoms in the Context of Copyright Limitations and Exceptions for Libraries', [2013] EIPR 35:7, pp.404-414

3.2 Method

In addition to using the international human rights and copyright treaties as authoritative legal sources, general comments are used for the interpretation of international law. General comments are non-binding interpretations of treaty law made by the United Nations human rights committees[15] and they are not legally binding because they do not involve the state parties to the treaties, nevertheless they assist state parties in fulfilling their reporting duties and the implementation of human rights law[16]. Further, treaty interpretation is done according to the principles laid out in the Vienna Convention on the Law of Treaties 1969.

I survey legal concepts in international law, and interpretations expounded by scholars in the field (see the bibliography for a complete list).

I review the findings of research papers on license agreements, for a picture of the current practices. License agreements vary from each other in their contents, and as the authors of the Berkman Institute report write, ”the dynamic flux of the industry can make it difficult to accurately capture a comprehensive snapshot of its current state”[17]. So I highlight general trends in the business models and licenses, without attempting to give a comprehensive account of the current situation.

This paper is chiefly about international law reform because the problem of e-book lending is a global one, and so I exclude an in-depth discussion of regional law. However, I have referred sparingly to regional law and domestic cases to illustrate several points in the argument.

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[15] Hans Morten Haugen, ’General Comment No.17 on Author’s Rights’, [2007] 10 The Journal of World Intellectual Property 53-69

[16] Philip Alston, ’General Comments of the UN Committee on Economic, Social and Cultural Rights, The New Thinking on Social and Economic Rights : Honoring Virginia Leary’ (2010) 104 American Journal of International Law Proceedings 5, *see also* Resolution 1985/17 [28 May 1985] and Resolution 1987/5 [26 May 1987]

[17] David O’Brien, Urs Gasser and John Palfrey, *op.cit.*, p.3

3.3 Theory

Since the World Trade Organization's adoption of the Agreement on Trade Related Intellectual Property Rights in 1994 there has been an ongoing debate as to how human rights law influences the global IP regime to create a more fair outcome for developing countries[18]. In response to this problem, the UN Sub-Commission on Human Rights and the UN Commissioner for Human Rights have asserted the primacy of human rights obligations over the IP regime[19]. In addition to soft law documents that support the primacy of human rights law, I use Helfer and Austin's framework for the interaction between human rights norms and IP norms, because this is the most advanced theoretical tool available for the analysis on the relationship between the two legal systems.[20]

This framework is a synthesis of the two legal systems' overlapping areas, which the ways in which international human rights obligations should impact domestic copyright law regimes. The framework emphasizes the core protection for authors' moral and material interests, which can be modified if empirical evidence shows that the expansion of authors' rights encroaches on the rights of individuals who use the copyrighted work. More specifically, the framework tells us that in certain situations the system of incentives should be modified and the authors' material rights restricted, to enhance access to culture, the right to the benefits of science and technology, freedom of expression, and the right to education.

I also present the arguments put forward by Anne Barron and Jonathan Aldred, who challenge the main assumptions of the 'law and economics' theory of copyright law. They both conclude their arguments with reference

[18] Plomer, A. 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science', (2013) 35:1 Human Rights Quarterly
[19] UN Sub-Commission on the Protection and Promotion of Human Rights Resolution 200/7, a 2001 report from the UN Commissioner for Human Rights, and the UN Sub-Commission on Human Rights Resolution 2001/21
[20] Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011), p.514

to a Habermasian framework, which promotes the preservation of a public sphere or 'lifeworld' (including education and culture) distinct from activities dictated by market principles.

Finally, the underlying rationale in this argument is the principle of fairness in international law, which supports policies made with the intention of narrowing the gap in the quality of life experienced by the rich and poor[21].

3.4 Delimitations

Because of time and resource constraints, I have chosen to narrow my focus and exclude the following aspects under the umbrella of human rights and copyright law.

The right to property under article 17 UDHR is dealt with sparsely because there is little material on the substance of the right especially since it was not included in the CCPR or the CESCR after disagreements during the drafting of the treaties[22].

I do not include a discussion of the theoretical or philosophical concepts of property rights.

I exclude a complete analysis of model license terms[23]. However, I will use some of the evidence gathered by major studies of license agreements to illustrate the points of the argument.

I exclude an analysis of digitisation projects of analogue books i.e. Google Books Case. The paper concerns copyrighted work that has been digitized by the rights holder, and therefore I am not looking with any depth at the

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[21] John Tasioulas, 'International Law and the Limits of Fairness' [2002] 13 EJIL 993-1023
[22] Asbjorn Eide and Gudmundur Alfredsson ,The Universal Declaration of Human Rights : A Common Standard of Achievement,, (1999) Kluwer Law International.
[23] *See* For a study of model license use terms K.R. Eschenfelder, T.I. Tsai, X. Zhu, and B. Stewart, 'How Institutionalized Are Model License Use Terms? An Analysis of E-Journal License Use Rights Clauses from 2000 to 2009' [2013] 74 College & Research Libraries 4

digitalization projects that involve orphan works, or the Google Books Project.

Although this discussion is framed within a wider discussion about copyright in the digital age I do not discuss the A2K movement in any detail or statistics about the threat of piracy[24].

I exclude an analysis of alternative policies, for example, levies to compensate copyright owners or mandatory collective administration.[25]

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[24] For data and arguments on on-line piracy *see* Andrew Rees, 'Enforcement Theater: The Enforcement Agenda and the Institutionalization of Enforcement Theatre in the Anti-Counterfeiting Trade Agreement' (2012) 35 Suffolk Transnational Law Review 3

[25] Giuseppe Mazziotti, *op.cit*., p.282

4 The Nexus between Human Rights Law and Intellectual Property Law

4.1 The effects of human rights law on borrowers' rights

International human rights are protected under customary international law, the Universal Declaration of Human Rights (UDHR)[26], the International Covenant on Civil and Political Rights (ICCPR)[27], and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[28]. The UDHR is not a treaty, and was not intended to be legally binding, although over time its contents may have become part of customary international law[29], but the international covenants on human rights are multilateral treaties adopted by the United Nations General Assembly and contain binding treaty obligations for the States that have ratified them[30].

The ICCPR and the ICESCR has 167 and 160 state parties respectively, and these States have agreed to be legally bound by the treaty's human rights' provisions[31]. Many of these states are also members of the World Trade Organisation and parties to the TRIPS Agreement, and they will have overlapping obligations under international law.

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[26] Universal Declaration of Human Rights, G.A. Res. 217A(111), at 71, U.N. GAOR, 3d Sess., 1st plen.mtg., U.N. Doc. A/810 (Dec.12, 1948)
[27] International Covenant on Civil and Political Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan.3, 1976) [hereinafter ICCPR].
[28] International Covenant on Economic and Social Rights, *adopted* Dec.16,1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICESCR].
[29] Bruno Simma and Philip Alston, 'Sources of Human Rights Law : Custom, Jus Cogens, and The General Principles' (1988-9) 12 Australian Yearbook of International Law p.84 and Philippa Davies, *op.cit.*, p.407.
[30] Bruno Simma and Philip Alston, *op.cit.,* p.84; *see* Graeme Austin and Laurence Helfer, *op.cit.*, p.8
[31] Lea Shaver and Catarina Sganga, *op.cit.*, p.639

State parties to the ICESCR and ICCPR are required to make reports to the standing committees, and they should include a review of the intellectual property laws which may affect the enjoyment of human rights[32].

International human rights law contains provisions for protecting the moral and material interests of authors, as found in article 15(1)(c) of the ICESCR. The substance of authors' rights is not well defined but an attempt has been made by Helfer and Austin to bring out the core protections, which I'll discuss below.

Other human rights protected under the ICESCR and ICCPR that could be affected by expansive copyright law and restrictive contracts include the right to education, the right to freedom of expression, the right to the enjoyment of the benefits of scientific progress and its applications, and the right to take part in cultural life[33].

Both international copyright law and human rights law place the public interest and individual users of copyrighted works at the centre of their historical legal rationales, although the development of modern copyright law has sidelined users' activities[34]. Copyright was originally linked to education, as the title of the Statute of Anne of 1709 is "An Act for the Encouragement of Learning", and copyright is said to promote learning via the stimulation of private markets in learning materials.[35] Despite the historical intended consequences of copyright law, many commentators argue that modern copyright policy has created overly expansive copyright protection at the expense of users' rights. Scholars in favour of enhanced

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[32] *Ibid.*
[33] *Ibid*. *See also* Article 13 International Covenant on Economic, Social and Cultural Rights 1966 and Article 28 of the Rights of the Child 1989; Article 19 ICCPR; Article 27(1) UDHR 1948
[34] Giuseppi Mazziotti, *op.cit.*
[35] Laurence Helfer and Graeme Austin, *op.cit.*, p.316 and Copyright Act 1709, 1710, 8 Ann., c. 19 (Eng.)

user rights refer to a 'regime of freedom'[36] which derives its legal authority and scope from international human rights law. According to the Preamble of the UDHR, central to the human rights legal regime is "the equal and inalienable rights of all members of the human family". The legal regime is centrally concerned with what is integral to the human experience, and the principles of non-discrimination and universality.

4.2 The Primacy of Human Rights Law Over Intellectual Property Law

The early part of the twenty-first century saw a flurry of activity surrounding the issue of the impact of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[37] on human rights enjoyment, and vice versa[38]. A 2001 report from the UN High Commissioner asserted the primacy of human rights obligations over other TRIPS obligations in international law[39]. Other soft law documents concerning the primacy of human rights over economic agreements include the Vienna Declaration and Programme of Action[40], and statements made by the Human Rights Commission, and the Committee on Economic and Social Rights (CESCR).[41]

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[36] Christophe Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' [2010] 12:3 Vanderbilt J. of Ent. And Tech. Law Rev. 515

[37] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

[38] Laurence Helfer and Graeme Austin, *op.cit,.see* Peter Wu, 'Reconceptualizing Intellectual Property Issues in a Human Rights Framework' (2006-7) 40 U.C. Davis Law Review 1039

[39] *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner*, U.N. ESCOR, 52nd Sess., U.N. Doc. E/CN.4/Sub.2/2001/13 (2001).

[40] Vienna Declaration and Programme of Action (adopted 25 June 1993).

[41] Graeme Austin and Laurence Helfer, *op.cit.*, p.70, see also *Intellectual Property and Human Rights adopted* 17 August 2000, Res.2000/7, U.N.OCHCHR, Sub-Comm'n on the Promotion and Protection of Hmn. Rts.,25th mtg. (2000); *Intellectual Property and Human Rights, adopted* 16 Aug. 2001, Res. 2001/21, U.N. OHCHR, Sub-Comm'n on Hum. Rts., 26th mtg., ¶ 11 (2001).

Pertaining to the overlapping areas of States' international obligations under TRIPS and the ICESCR, the Human Rights Commission explained that Member States' IP systems should incorporate the requirements of human rights law and strike the correct balance between the public interests and the rights of authors, so States have the additional obligation of reviewing their copyright laws to ensure compliace with human rights law:

> [o]ut of the 141 members of [the] WTO that have undertaken to implement the minimum standards of IP protection in the TRIPS Agreement, 111 have ratified [the] ICESCR. Members should therefore implement the minimum standards of the TRIPS Agreement bearing in mind both their human rights obligations as well as the flexibility inherent in the TRIPS Agreement, and recognizing that human rights are the first responsibility of Governments […] States, in implementing systems for intellectual property protection, are encouraged to consider the most appropriate mechanisms that will promote, on the one hand, the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications and, on the other hand, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. In this sense, the High Commissioner encourages States to monitor the implementation of the TRIPS Agreement to ensure that its minimum standards are achieving this balance between the interests of the general public and those of the authors.[42]

There is a raft of legal analysis on the theories of conflict and coexistence between intellectual property law and human rights law.[43] Importantly, the

[42] Human Rights Commission, *Report of the High Commissioner on the Imapct of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights,* U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27,2001) as read in Graeme Austin and Laurence Helfer, *op.cit.*, p.73

[43] Aurora Plomer, 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science'. [2013] 35:1 HRQ 150.

two spheres of international law share common objectives. For example, the Preambles to the TRIPS Agreement and the WIPO Copyright Treaty declare the aim to strike the correct balance between the public interest and copyright holders.[44]To maintain consistency and coherence in the application of international law, it is constructive to interpret the various laws as complementary:

> public international law maxims of treaty interpretation presume that two agreements relating to the same subject matter are compatible and seek to bolster that compatibility by interpreting the relevant provisions in light of other treaties, state practice, and the parties' tacit political understandings[45].

Audrey Chapman has elaborated on the meaning of a human rights approach to copyright law, with its emphasis on marginalised individuals and groups, and the States' obligation to protect its citizens from harmful acts by third parties:

> the right of the creator or the author are conditional on contributing to the common good and welfare of society [...] These considerations go well beyond a simple economic calculus often governing intellectual property law. A human-rights approach further establishes a requirement for the State to protect its citizens from the negative effects of intellectual property […] When making choices and decisions, it calls for particular sensitivity to the effect on those groups whose welfare tends to be absent from the calculus of decision-making about intellectual property : the poor, the disadvantaged, racial, ethnic and linguistic minorities, women, rural residents.[46]

[44] Graeme Austin and Laurence Helfer, *op.cit.*, p.73
[45] *Ibid.*, p.67
[46]Audrey R. Chapman, *Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c)),* 35 Copyright Bull. 4, 14-17, 28-29, 30 (2001) as read in Graeme Austin and Laurence Helfer , *op.cit.*, p.76

There are flexibilities in the copyright regime, but Helfer and Austin argue that merely exploiting these flexibilities does not go far enough in the realisation of human rights. Geiger, in supporting a human rights framework to address overly-expansive copyright protection, writes that ideally national copyright laws would strike the adequate balance between users and authors, however, in practice, there needs to be harmonization at the regional or international level.

> The difficulty here results from the fact that national legislatures are bound by an entire bundle of European or international regulations leaving them a rather small margin of freedom. In addition, there is often a certain lack of political courage among legislatures, as the question is sensitive and controversial. We realize that instead of taking any initiatives, the national legislative bodies prefer to remain quite passive.[47]

The overlapping areas of the two legal regimes has been called a ”dense policy space because formerly unrelated sets of principles, norms and rules increasingly overlap in incoherent and inconsistent ways.”[48] The perceived complexity of the two legal systems can mean that national legislatures are reluctant to pass new laws in the public interest, which is why international harmonization of copyright L&Es is necessary.

4.3 Helfer's and Austin's Human Rights Framework

Helfer's and Austin's seminal contribution to the field is a framework to delimit and map the nexus between the two legal domains. Their framework has no legal authority but helps to conceptualise the relationship between IP and human rights law. It is not a challenge to copyright law, but emphasizes

[47] Christophe Geiger, 'The Constitutional Dimension of Intellectual Property' in *Intellectual Property and Human Rights,* Torremans (ed). (Kluwer Law International 2008), pp.119-120

[48] Graeme Austin and Laurence Helfer, *op.cit.*, p. 64

a minimum core protection for authors, and explains that the system of incentives can be tailored to meet human rights requirements.

Their framework emphasizes the importance of the author's moral and material rights, and has a conservative approach to existing IPRs in that the state cannot arbitrarily interfere with them, as the framework demands an empirical test to be undertaken. Helfer's and Austin's approach would also be in line with the right to property under article 17 UDHR, which prohibits the State from arbitrarily expropriation without compensation[49].

The use of this framework would compel states, courts and international organisations to develop copyright law along a more harmonious pathway. Aurora Plomer reviews Helfer's work and concludes that the theoretical framework has practical outcomes that benefit both IPR holders and the users:

> Helfer's 'third way' explores the possibility that enhanced protection of IP rights, may help advance the realization of human rights. He cites the example of bilateral or multilateral license agreements cutting the price of an essential medicine for developing countries, but still protecting the right of patent holders by preventing distribution and access of discounted medicines in developed economies.[50]

4.3.1 The protective dimension of the human rights' framework

The framework has two parts, and the first part refers to the function of human rights law as *protective* of authors and intellectual property rights:

[49] A. Eide and Gudmundor Alfredsson, *op.cit.,* p.364
[50] Aurora Plomer, *op.cit.*, p.152

> The *protective* dimension requires states (1) to recognize and respect the rights of individuals and groups to enjoy a modicum of economic and moral benefit from their creative and innovative activities and (2) to refrain from bad faith and arbitrary interferences with intellectual property rights that the state itself has previously granted or recognized.[51]

According to Helfer's and Austin's framework, what is crucial for the realisation of authors' rights is for States to legislate to maintain ”a zone of personal autonomy in which individuals can achieve their creative potential, control their productive output and lead the independent intellectual lives that are essential requisites of any free society”[52]. Their proposed framework does not prescribe any particular method of meeting the material needs of the authors[53], although they do write that states should not arbitrarily interfere with existing IPRs.

Helfer's and Austin's interpretation of the effects of human rights law on IPRs suggests a heavy handed interference with the free market, as they describe authors' rights as demanding a 'modicum*'* of economic benefit, and later they refer to ”a modest economic exploitation”[54]. This is not necessarily contrary to the incentives rationale of copyright but neither is it a clear endorsement of the free market in copyrighted works.

Helfer and Austin refer to General Comment No. 17 of the CESCR which elaborates on the phrase ”adequate remuneration” as being the ”basic material interests which are necessary to enable authors to enjoy an adequate standard of living”[55].

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[51] Graeme Austin and Laurence Helfer, *op.cit.*, p.512
[52] *Ibid.*,p.514
[53] *Ibid*.
[54] *Ibid.* p.513
[55] *Ibid.* p.514

Returning to the case study and applying this framework, the e-book lending schemes should be reviewed with the material interests of the authors in mind including the less famous authors who could use libraries as a place to advertise and circulate their books to get a readership, because more famous authors and larger publishing firms will have other avenues of marketing[56]. A policy that considers authors' rights would seek to influence the economic reality for authors who are not represented by the big publishers, and so they, too, would receive adequate remuneration based on their activity as writers.

Comparing the international copyright rules and human rights law, Austin and Helfer point out that a human rights framework could use a "more stringent test for evaluating restrictions within the irreducible core of rights that establishes the zone of autonomy"[57], which could only be limited in cases where it was "strictly necessary for the promotion of the general welfare in a democratic society", using "the least restrictive measures […] when several types of limitations may be imposed"[58].

4.3.2 The restrictive dimension of the human rights' framework

> The restrictive dimension, which includes both a process component and a substantive standard, identifies the conditions under which the realization of a specific right or freedom requires (1) a diminution of intellectual property protection standards and enforcement measures, (2) a restructuring of incentives for private creativity and innovation, or (3) both.[59]

[56] *see* the American Library Association's campaign 'Authors for Library E-books' <http://www.ala.org/news/press-releases/2013/08/bestselling-author-cory-doctorow-supports-library-ebook-lending> accessed 12 January 2014; *see also* Cory Doctorow at <http://www.locusmag.com/Perspectives/2013/09/cory-doctorow-libraries-and-e-books> accessed 12 January 2014
[57] *Ibid* p.514
[58] *Ibid.* p.515
[59] *Ibid.* p.512

Overly expansive copyright protection would exceed the requirements of the author's 'zone of autonomy'and encroach on areas of public interest : access to culture and education, and the enjoyment of the benefits from progress in the fields of science & technology. However Austin and Helfer are careful to point out that expansive IPRs are often just one of many factors to detract from the enjoyment of economic and social rights. According to their framework, the State would have to make "a process inquiry that seeks to determine what role, if any, intellectual property protection actually plays in this regard" [60].

Helfer and Austin emphasize the importance of an empirical analysis to determine the significant causes of the denial of human rights. This requirement makes their framework a more practical tool than if they were to merely describe the normative influence of human rights on intellectual property law. Empirical tests could be "careful, objective, and context-specific empirical assessments […] (via) indicators, metrics, benchmarks, impact statements, and other measurement tools"[61].

A human rights led concern for the lowest socio-economic sections of society can necessitate copyright reform, however the extent of reform depends on the findings of empirical studies, because overly extensive copyright protection can be just one of the many factors that undermine the enjoyment of the human rights for a State's citizens[62].

According to this framework, in reviewing restrictive contracts and bearing in mind the States' obligations to protect citizens from harmful acts by third parties, a State or international body should ask : **Do these restrictive contracts affect human rights enjoyment, and if so, can we change the rules for e-book lending by employing the least restrictive measures so as to maintain a zone of autonomy for authors?**

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[60] *Ibid.* p.516
[61] *Ibid.* p.518
[62] *Ibid.* p.517

5 E-books & Libraries

5.1 Overview – Libraries in the Digital Age

E-books had their genesis in Project Gutenberg[63] in the 1970s, but since 2007, with the introduction of the Amazon Kindle and its user friendly hardware, the market in e-books has grown exponentially[64]. Oxford English Dictionary defines the e-book in the following way:

> A book-length publication consisting of text (and sometimes images) in digital form formatted to be read on the electronic screens of user devices such as e-readers, computers and mobile phones.[65]

In January 2012 the percentage of adults in the United States who owned tablet computers was 19 %[66]. According to the Association of American Publishers, the total net revenue from e-books in 2010 amounted to 863 million dollars, compared to 287 million dollars in 2009. With the rise in commercial demand for e-books, there should be a corresponding rise in the demand for e-book lending in public libraries.[67]

In order to offer e-book lending services, libraries are required to sign many license agreements, with varying terms and conditions. The European Commission reported on the extent of the problem facing university libraries :

> [a] typical European university is required to sign a hundred or more licenses governing the use of digital research material supplied by

[63] <www.gutenberg.org> accessed 12 Jan. 2014

[64] Matthew Chiarizio, *E-books, Licenses, and Public Libraries*, [2013] 66:2 Vanderbilt Law Review Vol p.624

[65] David O'Brien, Urs Palfrey and John R. Gesser *op.cit.*, p.4

[66] *Ibid*.

[67] <http://libraries.pewinternet.org/2012/12/27/e-book-reading-jumps-print-book-reading-declines/> accessed 12 Jan. 2014

> various publishers. Examining what each of these individual licenses permit with respect to e.g. access, printing, storage and copying is a cumbersome process [...] The licensing burden encountered by a typical European university should be reduced. The Commission will consult relevant stakeholders on best practices available to overcome the fragmented way by which universities acquire usage rights to scientific journals.[68]

Given the legal uncertainty facing libraries, Afori argues for the creation of new legislation at the international level, enacted by the United Nations Educational, Scientific and Cultural Organization, to govern the content of these licenses, and ”a focused rule that would invalidate restrictive contracts.”[69].

In the digital age, libraries are not an anachronism, but a vital tool in the broad dissemination of culture and information. In fact, librarians could be said to play a heightened role in the preservation of material, considering the ephemeral nature of digital works[70]. UNESCO, in its Public Library Manifesto, states that, ”the public library, the local gateway to knowledge, provides a basic condition to lifelong learning, independent decision making and cultural development of the individual and social groups.”[71] Public libraries can function as academic research centres, as well as catering for the general public[72].

The library is a tool for distributive justice, that enables access to knowledge and information for the poor and the marginalized[73]. Libraries depend on copyright L&Es to fulfil their mandate. According to a 2008 study by WIPO

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[68] COM (2009) 532 final as read in Harald Muller, *op.cit.*, p.6
[69] *Ibid.*
[70] *see* Kungliga Bibliotek’s web archive project called Kulturarw < http://etjanst.hb.se/bhs/ith/1-00/jm2.htm> accessed 12 January 2014
[71] *see* UNESCO Public Library Manifesto, <http://www.unesco.org/webworld/libraries/manifestos/libraman.html> accessed 12 January 2014
[72] Orit Fischman Afori,*op.cit.*, p.395
[73] *Ibid*. P.407

out of 149 countries that were members of WIPO, “128 of them [had] at least one statutory library exception … Twenty one countries have no library exception in their copyright law”[74].

However such exceptions are not mandatory in international law and are circumvented by private contracts[75]. According to the IFLA code of ethics[76], librarians are on the forefront of legal advocacy for better copyright L&Es to suit their function. For example, the American Libraries Association won a successful campaign to stop the proposed Uniform Computer Information Transactions Act (UNITA)[77].

Lobbying for the libraries, proponents demand that libraries be allowed to buy e-books at affordable prices, because it is only through ‘ownership’ of the digital content that libraries can exercise adequate control over the information, to ensure the right of free public access. Ownership of the copyright in the content cannot transfer completely to the library, but some of the rights in the copyright bundle could transfer in exchange for reasonable remuneration ie. there could be an blanket exception to the right of reproduction to enable the librarians to make non-commercial copies for the borrowers and for preseravation.

Proponents for legal reform in e-book lending also argue that the use of Digital Rights Management (DRM) technology must be proportional (to the extent that it provides reasonable renumeration to the author), for the protection of users’ rights[78].

Even though libraries are demanding a mandatory copyright exception to allow them to fulfil their mandate, there is resistance to change : the minutes

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[74] WIPO Standing Committee on Copyright and Related Rights, Seventeenth Session 2008, Study on Copyright Limitations and Exceptions For Libraries and ARchives prepared by Kenneth Crews

[75] *Ibid.* p.402

[76] http://www.ifla.org/news/ifla-code-of-ethics-for-librarians-and-other-information-workers-full-version accessed 12 Jan. 2014

[77] Orit Fischman Afori, *op.cit.,* p.400

[78] *Ibid.*

from the meetings in the SCCR reveal divergent attitudes[79]. Delegates from Japan argued that there is no need for a new rule regarding exceptions, because the existing treaties and the three step test are sufficient[80], while delegates from developing countries argue that a new binding rule is important for the sake of legal certainty[81]. Generally there is a divide then between developed and developing countries' governments in their opinion as to the acceptability of the current situation[82]; however libraries in developed countries are pressing for law reform to standardise their e-book lending services and maximise the benefits to borrowers, as evidenced from the activities of the IFLA and the American Libraries Association. This thesis will show that it is in the interests of developed countries participating in the SCCR to support a new international rule on copyright L&Es for libraries, and a contract override clause.

Many WIPO countries enact specific copyright L&Es to allow libraries to prepare copies for research, study, or preservation[83]. Afori writes that

> 27 countries have a general exception allowing library copying under some conditions; 74 countries have an exception for preparation of copies for research and study; 72 countries have an exception for preparation of copies for preservations.[84]

However, when it comes to e-book lending practices, these L&Es are often in direct conflict with the restrictive license terms; domestic courts could potentially use human rights law or existing copyright flexibilities to override the contracts if the matter came to court, but this result does not go far enough in achieving human rights law.

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[79] Philippa Davies, *op.cit.,*p.406
[80] Minutes of meeting, SCCR/16/3/Prov, para.75. *As read in* Philippa Davies, *op.cit*., p.406
[81] Philippa Davies, *op.cit*.,p.406
[82] *Ibid.*
[83] *Ibid*.p.401
[84] *Ibid.*

5.2 The transfer of property rights to enable distribution and access

Much of the literature on the subject of e-book lending uses the term 'ownership' loosely, but the use of this word is unhelpful without a description of the individual rights in the copyright bundle. Even in the case of shelfbooks, specific rights are transferred from the author to the publisher to the library but not the entire copyright in the material.

Without property rights and DRM, e-books would fall into the category of public goods, because if I am reading an e-book my use of it does not detract from anyone else's ability to read the book[85]. E-books are *sui generis* in that ownership of e-books almost always permanently resides with the copyright owner[86]. E-books are "almost never bought or sold […] e-books are almost universally licensed.".[87] The problem lies in the fact that the licenses do not give the libraries enough autonomy in dealing with the material - to preserve it, lend it to patrons and other libraries, and to make copies for education. This has the knock-on effect of reducing access to the e-books for the borrowers. Further, in some instances, e-books are not even available to the libraries in the first place, which is problematic for the rights of both authors and borrowers of the material[88].

> If the library doesn't own an eBook, the rights holder is able to withdraw the title whenever he wants or the file could be removed from a digital distribution database without reason. And if the

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[85] David O'Brien, Urs Gasser, John R. Palfrey, *op.cit.*, p.10, "The loan periods are typically managed by the distributor's proprietary software platform, or occasionally third-party software like Adobe Digital Editions, which enables the e-book files to be protected by …(DRM) technology. Together the software and the DRM allows the library and distributor to set the parameters of how the file can be used, on which devices it can be accessed, the number of pages that can be viewed, whether any portions of the e-book can be printed on paper, and for how long the patron will have access to the file."

[86] EU Commission. Green Paper Copyright in the Knowledge Economy p.8 available at < ec.europa.eu/ **in**ternal_market/ **copyright**/ docs/ **copyright-in**fso/ greenpaper_en.pd> p.1 , accessed 12 January 2014

[87] Matthew Chiarizio, *op.cit.*, p.627

[88] O'Brien D, Gasser U, Palfrey JG, *op.cit.*

original files are damaged, the library is not able to reproduce or shift the format in order to preserve access for library users.[89]

Copyright law has to be reformed to enable libraries to be able to deal with the material

5.3 The Distribution Right and the Doctrine of Exhaustion

Under copyright law, e-books are essentially different from shelf books, (the former are considered 'services' under European Union law) because the latter are tangible objects in analogue format[90]. The lending of shelfbooks is possible due to the library acquiring the distribution right when they have purchased the tangible copy of the book. Harald Muller writes that the description of 'lending' an e-book "does not reflect the legal realities"[91].

Traditionally, in the running of a library, shelfbooks get moved around from library to patron and back again without the authorization of the rights holder. Under copyright law these actions are referred to as 'distribution' and 'making available to the public', and the rights holder has exhausted her right to distribute the work after the first sale[92]. The principle of exhaustion is key to the libraries' ability to deal with the shelfbook, and it means that the copyright holder transfers the right of distribution to the buyer of the copyrighted work, when the sale occurred with the authorization of the original owner.[93]

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[89] *Ibid.*
[90] Harald Muller, *op.cit.*, p.4
[91] *Ibid.* p.1
[92] *Ibid.*
[93] *Ibid.*

This doctrine governs the lending of books, and also permits the second hand market in books. Crucially, under the doctrine of exhaustion, libraries are allowed to lend the books under their own terms[94].

Provisions providing for the right of distribution, and the doctrine of exhaustion are found in article 6 of the WCT (Adopted in Geneva December 20, 1996)[95].
According to the WCT Article 6:

> (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
> (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

Article 6(2) allows the State Parties to the WCT the freedom to enact legislation providing for the exhaustion of the right, usually at point of sale, and almost all countries have implemented the doctrine of exhaustion[96]. Contracting Parties can provide for national or regional exhaustion, either requiring the first sale to take place within the jurisdiction of the State, or apply international exhaustion, considering any first sale anywhere in the world sufficient for exhausting the right of distribution[97].

In the Agreed Statement of the WCT it says that Article 6, as a limitation on the exclusive rights of the copyright owner, only applies in dealings with

[94] Matthew Chiarizio, *op.cit.,* p. 620
[95] and Directive 2001/29/EC of 22 May 2001on the harmonisation of certain aspects of copyright and related rights in the information, Article 4.
[96] *Ibid.*
[97] P.B. Hugenholtz and Thomas Dreier, *Concise European Copyright Law* (Kluwer Law International 2006) p.99

tangible objects[98]. A footnote in the WCT states that the doctrine of exhaustion governs : ”fixed copies that can be put into circulation as tangible objects”[99]. As e-books are not tangible[100], they are outside the remit of the doctrine of exhaustion. The conclusion, is that any activity the library does with the e-book is subject to authorization by the rights holder[101].

Further, relating to the DRM/TPM on e-books, Article 11 WCT states that countries must legislate for anti-circumvention provisions:

> [c]ontracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

DRM also allows for the tweaking of technology to protect the market, and according to Article 11 WCT, the state parties must enact anti-circumenvention laws. For example, Harper Collins used DRM to delete e-book after one copy has been circulated 26 times, to emulate the wear and tear that an ordinary book would suffer, before it needed to be replaced[102].

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[98] *Ibid.* p.99
[99] *Ibid.*p.5
[100] The text of the European Union Directive recital 29 tells us that e-books are in fact services and therefore cannot become the object of lending: the question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the right holder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorization where the copyright or related right so provides.
[101] Harald Muller, *op.cit.*, p.5
[102] *Ibid.*

5.4 The Right of Reproduction of E-books

When libraries ’lend’ e-books to their patrons, they do not give the original work but a copy of the contents[103], and this production of new copies infringes the exclusive right of reproduction[104], which is provided for in Article 9 of the Berne Convention:

> [a]uthors of literary and artistic works protected under this Convention, shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

Libraries would need a blanket exception from the right of reproduction in order to enjoy the same control over an e-book as they do with a shelf book and to achieve legal certainty across jurisdictions[105][106].

5.5 Restrictive Contracts

The license agreements between the library and the materials provider governs e-book lending. There is strong potential for market failure[107] here because libraries will pay a price well above the market price in order to buy in the books for their patrons and fulfil their mandate, so the materials providers can easily exploit their powerful bargaining position, by charging

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[103] *Ibid*., p.4

[104] Matthew Chiarizio, *op.cit.*, p.626

[105] EU Commission. Green Paper Copyright in the Knowledge Economy p.8 available at < ec.europa.eu/ **in**ternal_market/ **copyright**/ docs/ **copyright-in**fso/ greenpaper_en.pd>

[106] The European Union has addressed the problem facing libraries in its Green Paper Copyright in the Knowledge Economy. The European InfoSoc Directive, Article 5(2)(c) states that: Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

> (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

The EU Commission Green Paper, Copyright in the Knowledge Economy, d phrase ’specific acts of reproduction’, which echoes the three step test, is not to be taken as a blanket exception to the right of reproduction. It is up to the national legislatures and judiciary to determine which acts are permissible i.e. preserving a copy, ’format shifting’ or how many copies can be made.

[107] Ori Fischman Afori, *op.cit.*

extortionate prices for recent releases of popular titles of e-books[108]. The situation is particularly acute for academic libraries, according to the Australian Report on Copyright and Contracts[109] and a 2010 report by the British Library, among other reports[110].

The terms of use in license agreements are decided on a piecemeal basis[111]. This creates widespread legal uncertainty for libraries and end-users, and can even lead to criminal proceedings against commonplace infringements. Regarding day-to-day commonplace infringements, researchers on license agreements write that,

> [o]ur data show that, in some instances, publishers use licenses to forbid activities that many end users would consider morally unproblematic. For example, our data show that ACS, OUP, and T&F licenses did not permit any external e-distribution, seemingly even for scholarly sharing. This suggests that a graduate student who e-mails a copy of an article to one colleague at a different institution violates the license [...] in some cases, end users could be held criminally liable for damages resulting from a license breach.[112]

Librarians want to both preserve digital material, facilitate access, and make copies or excerpts for research purposes, all of which they would be allowed to do with shelf books, because of statutory permitted uses or exceptions. In a British Library report made in 2010, 100 contracts were surveyed, and it was found that of these contracts 90% ”undermine the public interest exceptions in copyright law agreed by Parliament to foster education, learning and creativity”[113].

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[108] see Cory Doctorow <http://www.locusmag.com/Perspectives/2013/09/cory-doctorow-libraries-and-e-books/ > accessed 12 Jan. 2014 and O.Fischman Afori, *op.cit.*, p.405
[109] O. Fischman Afori, *op.cit.*, p.395
[110] *Ibid.*, p.404
[111] K.R. Eschenfelder, T.I. Tsai, X. Zhu, B. Stewart, *op.cit.*
[112] K.R. Eschenfelder, T.I. Tsai, X. Zhu, B. Stewart, *op.cit.,* p.351
[113] http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=564 accessed 12 Jan. 2014, as read in Orit Fischman Afori, *op.cit.*, p.405

Given the regular conflict between the terms of the license agreements and the established L&Es, Afori writes that,

> the clash between the phenomenon of restrictive contracts and the policy underlying intellectual property is therefore clear […] there are sound justifications for a focused rule that would invalidate restrictive contracts, at least in the context of public e-libraries[114].

The IFLA has issued the *Principles for Library E-lending* to guide libraries in their negotiations with materials providers. The general problem of licensing is described below:

> [t]he downside of licensing as it is applied nowadays is obvious: If the library doesn't own an eBook, the rights holder is able to withdraw the title whenever he wants or the file could be removed from a digital distribution database without reason. And if the original files are damaged, the library is not able to reproduce or shift the format in order to preserve access for library users. The library doesn't have the control over a well designed and professionally controlled information space any more. Companies, rights holders and commercial distributers are now able to decide who will have access to certain information.[115]

The IFLA presents the problem as one of ownership of the eBook itself, however, this is too unspecific, as copyright ownership stays with the author even after a shelfbook or e-book gets transferred (or sold) to the library.

What were once routine activities in libraries may now be prohibited under the license terms. An example of these routine behaviours is the interlibrary loan (ILL), defined as

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[114] Orit Fischman Afori, *op.cit.*, p.392

[115] http://www.ifla.org/publications/libraries-e-lending-and-the-future-of-public-access-to-digital-content accessed 12 Jan. 2014

> the practice of one library (the receiving library) placing a request on behalf of one of its users with another library (the fulfilling library) for materials that the requesting library does not possess or have immediately available.[116]

The ILL allows for libraries to be economically efficient, spreading the costs of access to information, by using other libraries' collections when they do not have the budget to add to their own collection[117]. In the study into whether model license agreements between 2000 and 2009, allowed for an interlibrary loan, it was found that "25.7 percent of mostly non-commercial 2006 licenses still prohibited ILL"[118].

The 2011 Consultation Report for the UK Government came to the conclusion that copyright exceptions should have primacy over any contractual term that purports to override them[119]. To this end they proposed changing the Copyright Act by adding an additional 'contract override clause', which would negate any such contractual term. Afori notes that only Ireland, Belgium and Portugal have adopted legislation outlawing restrictive contracts[120]. It is hoped that the new international rule would persuade more countries to adopt similar legislation.

There are problems associated with discrepancies between licensing agreements and the varying degrees of distribution and accessibility of e-books across jurisdictions. For example, due to differences across jurisdictions, an academic may email an e-book to a colleague in Ireland but she would be unable to do it when on sabbatical in France. A British author may be able to reach the American public via libraries but not the Norwegian public via libraries. An author who chooses one small publishing

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[116] K.R. Eschenfelder, T.I. Tsai, X. Zhu, B. Stewart, *op.cit.,*p.330
[117] Rachel A. Geist, 'A License to Read? The Effect of E-books on Publishers, Libraries and the First Sale Doctrine' (2012) 52 IDEA - Intellectual Property Law Review p.72
[118] K.R. Eschenfelder, T.I. Tsai, X. Zhu, B. Stewart, *op.cit.,* p.330
[119] Orit Fischman Afori, *op.cit.*
[120] *Ibid*., p.403-4, The Database Directive 1996 (Art. 8) and The Computer Software Directive 1991 Art. 5(2)

company will have less access to patrons than an author who is represented by one of the big six publishing companies. For many authors it is beneficial to reach the public via the library, they will increase their readership, and the knock-on effect is more sales[121].

According to the Berkman Institute, in the typical chain of agreements, there is the license and the sublicense[122]. In the license agreement between the publisher and the distributor the publisher grants the distributor with specific rights and the publisher dictates the terms of the subcontract between the distributor and the libraries.

The distributor then sublicenses the e-book to public libraries, in which are stated the terms of use of the copyrighted work[123]. This will include the terms initially set by the publisher, but may add more obligations by specifying which particular software must be used, ”and whether the e-book may be downloaded by patrons or viewed through an internet browser.”[124] In a study conducted by the Berkman Institute in 2012, the researchers looked at the license agreements set by the biggest publishing companies, it was found that Random House had the most generous licensing scheme, even though Random House had recently raised the cost of a license as much as 300 percent[125].

Under the terms of the typical license, libraries have more limited control over the lending material, because ”they do not ’hold’ a master copy of the book, but simply purchase a right to access it for a certain period of time under specific terms”[126]. With respect to printed material, libraries have the master copy of the book, although it is subject to wear and tare after being repeatedly lent out. Some publishers use digital rights management to mimic

[121] Cory Doctorow discusses authors and libraries at http://www.locusmag.com/Perspectives/2013/09/cory-doctorow-libraries-and-e-books/ accessed 12 Jan. 2014
[122] David O'Brien, Urs Gasser and John R. Palfrey, *op.cit.* p. 13
[123] Orit Fischman Afori, *op.cit.*, p.395
[124] David O'Brien, Urs Gasser and John R. Palfrey, *op.cit.* p. 13
[125] *Ibid.* p.9
[126] Orit Fischman Afori, *op.cit.*, p.395

print books with strange results – Harper and Collins only allows the e-book to circulate 26 times before the library must purchase a new license[127]. It is doubtful that this number of circulations reflects the reality of the printed counterparts' durability.

Afori writes that the terms of the license are set by the materials provider and the libraries have no ability to negotiate the terms, "the result is that the major publishers establish contractual conditions that far exceed the exclusivity recognized by copyright law."[128] In other words, these licenses go further than traditional copyright law would normally allow, by making the copyright protected work even less accessible[129].

So we are faced with a central contradiction, which is that digital technology is able to produce copies of literary works with less investment than the printed equivalent but publishers insist libraries pay for extortionate licensing fees[130].

5.6 The Free Market in E-books & Freedom of Contract

Publishers argue that cheaper and more widespread e-book lending could hurt the market, and lead to less royalties paid to authors.[131] There is also a concern by copyright holders that digital works are more vulnerable to unauthorized copying ('piracy') than their printed counterparts.

A new international rule codifying L&Es for libraries would affect a sizeable market. The briefing document prepared by the Berkman Centre for Institute and Society reports the following figures for the e-book market:

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[127] David O'Brien, Urs Gasser and John R. Palfrey, *op.cit.*, p.9. See also the author Cory Doctorow <http://www.locusmag.com/Perspectives/2013/09/cory-doctorow-libraries-and-e-books/> accessed 12 Jan. 2014
[128] Orit Fischman Afori, *op.cit.*, p.393
[129] 2011 Consultation Report, *op.cit.,* note 68, at 7.249
[130] Graeme Austin and Laurence Helfer,*op.cit.*, p.221
[131] David O'Brien, Urs Gasser and John R. Palfrey, *op.cit.*, p.8

> [A]ccording to George Coe, a president at Baker & Taylor, the publisher-to-library market across all formats and all libraries (e.g. private, public, government, academic, research, etc.) is approximately 1.9 billion (dollars); of this the market for public libraries is approximately 850 million (dollars), which Coe likens to the market for independent, non-chain bookstores."[132]

From the size of these figures we can easily understand the publishing industry's reluctance to expand the copyright L&Es to favour library patrons – the industry would lose a substantial market in the use of copyrighted works.

The restrictive contracts are drafted with the aim of protecting the market in e-books, and securing royalties for authors, by supposedly reducing the risks of piracy[133]. Josh Marwell, a vice president of Harper Collins, speculated that generous e-book lending practices will "undermine the emerging e-book eco-system, hurt the growing e-book channel, place additional pressure on physical bookstores, and in the end lead to a decrease in book sales and royalties paid to authors"[134].

Strong copyright protection is part of developed countries' economic policy; intellectual production and the knowledge economy is an important economic sector for countries without natural resources and high wages, and helps to maintain the competitiveness of the European economy[135].

There are scholars and politicians who will disagree with a further codification of L&Es; Afori pinpoints a concern about intervention in the

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[132] *Ibid.* p.7
[133] David O'Brien, Urs Gesser, and John F. Palfrey, *op.cit.*, p.9.
[134] *Ibid.* p.8
[135] Christophe Geiger, 'The Constitutional Dilemma of Intellectual Property', in *Intellectual Property and Human Rights*, Paul Torremans ed., (Kluwer Law International 2008) pp.101-2

free market as a ”political barrier that prevents the codification of such a comprehensive rule.”[136]

Indeed not all scholars share the view that intervention in freedom of contract is desirable. Matthew Chiarizio writes that, ”[t]he best solution is for the government to allow the actors – authors, publishers, distributors, libraries, and readers – a chance to find a solution within the existing legal framework”[137].

He supports this conclusion with evidence of the increasing popularity of lending e-books in libraries, and he highlights the persisting opportunities for piracy amongst patrons[138]. Chiarizio also writes about the potential pitfalls of other models of e-book lending, notably the administrative problems for the librarians in tracking the digital copies on loan and the resulting high costs[139].

However, Philippa Davies surveys the law of freedom of contract in four jurisdictions (Germany, France, United States and United Kingdom) and determines that courts and legislatures intervene in freedom of contract for public policy reasons such as ”promoting fairness in the marketplace, protecting weaker negotiating parties and stemming abuse of rights”[140].

Relying on the free market, contracts and DRM to strike the right balance between users and rights holders is problematic, indeed “technology is “blind” and thus cannot respect the balances set by the law, and may therefore potentially prevent perfectly legal uses.”[141]

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[136] Orit Fischman Afori, *op.cit.*, p.404
[137] Matthew Chiarizio, *op.cit.,* p.641
[138] *Ibid.* P.640
[139] *Ibid.* P.633
[140] Philippa Davies, *op.cit.,* p.412
[141] Christophe Geiger, ‘The Role of the Three Step Test in the Adaptation of Copyright Law to the Information Society’, (Jan.-Mar. 2007) UNESCO E-Copyright Bulletin*,* p.2

There are significant justifications for intervention in the market for educational materials. In the free market for electronic books and resources, libraries are not all equal. Developing countries' libraries, and those libraries with less funding within developed countries, are disadvantaged in the market place for electronic books and resources[142]. If we allow freedom of contract to govern without intervention then there will be entrenched inequalities in access to educational materials according to wealth and status.

The digitization of knowledge offers a boon to educational standards for developing countries, and poorer areas of developed countries. Learning materials can be extremely costly; the shift from shelf books to digital works signifies a potential cost reduction, particularly due to "insufficient storage and transport facilities and the absence of conservation practices for books"[143].

[142] Orit Fischman Afori, *op.cit.*, p. 410
[143] Dalindyebo Shabalala, *op.cit.,*p.252

6 The human rights law relating to public access to e-books in libraries

Human rights law regulates the relationship between the state and the individual in a number of ways. With respect to international human rights, States have the obligations to *respect, protect and fulfill* the rights with regard to their citizens[144].

To *respect* the rights, the States must not interfere with their enjoyment; this underlines the obligation to not arbitrarily deprive authors or publishers of their property rights[145].

States are obliged to protect against abuses by third parties. This is particularly pertinent to the threats posed by restrictive contracts because the state is obliged to *protect* the individual from the abuses of private companies, i.e. ”private harms that the state fails to prevent or punish – for example, restrictions on the ability to take part in cultural life that result from the use of digital rights management systems – would be as much of a violation as actions taken by the state itself”[146]. Omission to legislate to protect citizens from abuses of third parties is a violation of international human rights law[147].

To fulfil the rights, States must take action i.e. implement programs to meet the requirements of full enjoyment of the rights[148]. The legal principles of

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[144] Lea Shaver and Catarina Sganga, *op.cit.,*p.652
[145] Asbjorn Eide and Gudmundor Alfredsson, *op.cit.,* p.364
[146] Molly Beutz Land, 'Protecting Rights Online' [2009] 34 Yale Journal of International Law p.8
[147] *Ibid.*
[148] Lea Shaver and Catarina Sganga, *op.cit.*,p.652

non-discrimination and equal treatment, are important to all the human rights[149].

6.1 The rights of authors in international human rights law

Authors' rights are provided for in Article 27(2) UDHR and Article 15(1)(c) ICESCR. Authors have the right to the "moral and material interests resulting from any scientific, literary, or artistic 'production' of which he or she is the author"[150]. An important aspect of this right is that it protects writing as a professional activity, not necessarily protecting the copyright in books, and in practice it would protect authors who do not perform well in the commercial market for books.

The CESCR in *General Comment No.17* reminds us that human rights are inalienable, unlike IPRs that can be transferred[151]. *General Comment No.17* states that "human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights …are generally of a temporary nature, and can be revoked, licensed, or assigned to someone else."[152] This makes it very difficult to conceive of a system based on author's rights, because the industry – the publishing companies and distributers- functions because some of the rights in the copyright bundle are transferred from the author to the company. Presumably a new system that applied the requirements of the human rights of authors under the ICESCR, would have to make another system of financial incentives for the publishing companies and distributors other than a proprietary one.

The Committee also underlines the fact that IPRs and authors' rights under article 15(1) (c) are not equivalent[153], and that "[t]he Committee considers

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[149] ICESCR, *op.cit.,* article 2.2 and Audrey Chapman, *op.cit.,* p.13
[150] Austin and Helfer, *op.cit.*, p.171
[151] *General Comment No.17* para.1
[152] *Ibid.* Para. 1 and 2
[153] *Ibid.* Para. 3

that only the author, namely the creator, whether man or woman, individual or group of individuals […] can be beneficiary of the protection of article 15 paragraph 1(c). "[154]. According to General Comment No.17*,* this legal protection is not an industry right. Indeed a human rights paradigm would necessitate judicial review of restrictive contracts because when publishers refuse to permit e-book lending "the emphasis [is] on ensuring the profits and return on investment of the intermediaries rather than on meeting the needs of authors or creators or end-users"[155].

According to General Comment No.17, states are free to legislate for a higher protection for authors than is required under article 15, so long as the sphere of protection does not unjustifiably limit others' enjoyments of rights under the Covenant[156]. This respects the balance between individual users' rights and the rights of authors.

State parties have tripartite duties to respect, protect and fulfil human rights for their citizens:

> 30. States parties are under an obligation to *respect* the human right to benefit from the protection of the moral and material interests of authors […] States parties must abstain from unjustifiably interfering with the material interests of authors, which are necessary to enable those authors to enjoy an adequate standard of living.
> 31. Obligations to *protect* include the duty of States parties to ensure the effective protection of the moral and material interests of authors against infringement by third parties […] States parties must prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies, e.g. by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of any use made of their

[154] *General Comment No.17* para.7
[155] Dalindyebo Shabalala, *op.cit.*, p.252
[156] *General Comment No.17*. para.11

> productions and to remunerate them adequately. States parties must ensure that third parties adequately compensate authors for any unreasonable prejudice surrendered as a consequence of the unauthorized use of their productions.
> 34. The obligation to *fulfill* (provide) requires States parties to provide administrative, judicial or other appropriate remedies in order to enable authors to claim the moral and material interests resulting from the scientific, literary or artistic productions and to seek and obtain effective redress in cases of violation of these interests. States parties are also required to *fulfill* (facilitate) .. e.g. by taking financial and other positive measures which facilitate the formation of professional and other associations representing the moral and material interests of authors […] The obligation to *fulfill* (promote) requires States parties to ensure the right of authors of scientific, literary and artistic productions to take part in the conduct of public affairs […] and to consult these individuals or groups or their elected representatives prior to the adoption of any significant decisions affecting their rights under article 15(1)(c).

Austin and Helfer describe the author's human rights as relying on a "zone of personal autonomy in which individuals can achieve their creative potential, control their productive output, and lead the independent intellectual lives that are essential requisites of any free society"[157].

6.1.1 The material interests of authors

The authors' rights under article 15(1)(c) include "the ability to make a living from creative activities [but] General Comment No.17 does not specify the sources of funds that are relevant to securing authors' incomes"[158]. States are obliged to ensure that the material interests of authors are met via any effective system; this could be a system of collective

[157] Austin and Helfer, *op.cit.*, p.514
[158] *Ibid.,* p.202

management, levies, and profits from sales[159]. I think this could be widely construed to include an economic assessment of the role of dissemination via libraries and advancements in technology for the material advantage of authors.

A robust copyright enforcement system could certainly contribute to the material wealth of authors, although under article 15 ICESCR, there is no prescribed method of meeting the economic needs of authors[160]. Hence, the profits from exploitation of the ’reproduction right’, central to intellectual property instruments, is not necessary for the fulfillment of article 15 ICESCR.

These provisions are closely related to the rights to the opportunity to gain one’s living by work one freely chooses (Article 6 para 1), to adequate remuneration (article 7(a)) and the human right to an adequate standard of living (article 11 para 1) ICESCR[161].

6.1.2 The components of article 15 are interdependent

Human rights law recognizes the symbiotic relationship between authors and their readers. General Comment No.17 states that the authors’ rights are interrelated with the other rights under Article 15, and may be restricted for the sake of realizing these other rights. General Comment No.17 also states that authors’ rights cannot be ”isolated from the other rights recognized in the Covenant.”[162]

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[159] *Ibid.*
[160] *Ibid.,* p.173
[161] *Ibid.*
[162] *General Comment No. 17,* para.35

> The rights of authors and creators should facilitate rather than constrain cultural participation on the one side and broad access to the benefits of scientific progress on the other.[163]

Audrey Chapman studied the drafting history of Article 15, and concluded:

> The three provisions of Article 15 in the ICESCR were viewed by drafters as intrinsically interrelated to one another […] The rights of authors and creators are not just good in themselves but were understood as essential preconditions for cultural freedoms and participation and access to the benefits of scientific progress.[164]

6.1.3 Rights of authors under article 15 are too vague

In some respects human rights instruments are more vague than their intellectual property counterparts, and this vagueness could make courts reluctant to apply authors' rights, and legislatures may find it difficult to create laws based on the ICESCR provisions. Austin writes that:

> [t]he Human rights instruments refer to the "moral and material interests" of scientific, literary, or artistic "productions", without identifying either (1) the mechanisms by which productions are to be protected, or (2) the relationship between productions and the facts, ideas, products of nature, basic principles of science, and other materials in the public domain.[165]

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[163] Laurence Helfer and Graeme Austin, *op.cit.*,p.180

[164] Audrey Chapman. *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)©,* 35 Copyright Bull. 4, as read in Graeme Austin and Laurence Helfer p.177 However, Austin and Helfer question the use of drafting history as evidence to the interpretation of the law, because they write that it "privileges the original understanding of Articles 27 and 15" without giving due attention to the dynamism and evolutions in the law.

[165] Laurence Helfer and Graeme Austin, *op.cit.*, p.174

Human rights instruments do not offer sufficient legal definitions or the consequences of violations of the rights[166].

6.1.4 Permissable Limitations to the Rights of Authors

Like the right to property, the rights of authors are not absolute and the state can place limitations on the rights in a manner proportionate to the aims being pursued, so long as adequate compensation is provided[167]. Permissible limitations to authors' rights are described in paragraphs 22 to 24 of General Comment No.17.

Limitations ”must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society”[168]. They ”must therefore be proportionate, meaning that the least restrictive measures must be adopted”.[169] They ”require compensatory measures [...] such as payment of adequate compensation”.[170]

Hence the state legislature should pursue the aim of striking the correct balance between the public interest and the rights of authors and restrict the latter so long as it is proportionate to the aim and there is payment of adequate compensation.

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[166] *Ibid.*
[167] A. Eide & G. Alfredsson, *op.cit.,* p.364
[168] *General Comment No.17*, para.22
[169] *Ibid*., para.23
[170] *Ibid,* para.24

6.2 Right of Everyone to Take Part in Cultural Life

Article 27(1) UDHR states that: ”everyone has the right freely to participate in the cultural life of the community.” In addition to article 15 ICESCR, equal participation in culture is found in the following treaties: The International Convention on the Elimination of All forms of Racial Discrimination (CERD) article 5 e (vi), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) art. 13(c), and article 31, paragraph 2 of the Convention on the Rights of the Child[171].

State parties must make a report to the standing committee of the ICESCR stating the measures taken to achieve the realisation of the right to take part in cultural life. Shaver and Sganga argue that States should review their intellectual property law when States make their self-reports[172].

The library and its role of providing access to books and preserving books, is essential to the enjoyment of the right to participate in culture, as stated in ICESCR Article 15, and interpreted by the CESCR, in General Comment No.21[173]. The library is a vital tool in the state's obligation to achieve universal access and non-discrimination in participation in culture[174].

According to General Comment No.21 culture encompasses written literature[175], and culture is ”a living process, historical, dynamic and evolving, with a past, a present and a future […] an interactive process

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[171] For a list of international conventions that contain a clause about access to culture, see *General Comment No*. 21 para. 7
[172] Lea Shaver and Catarina Sganga, *op.cit.,* p.653
[173] U.N. Econ & Soc. Council (ECOSOC), *General Comment No.21: Right of Everyone to Take Part in Cultural Life (article 15 para 1(a) of the International Covenant of Economic, Social and Cultural Rights),* U.N. Doc. E/C.12/GC/21, (Nov.20, 2009) [hereinafter General Comment No.21]
[174] *General Comment No.21* para. 54(d).
[175] *General Comment No.21* para.13

whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity."[176]

The CESCR elaborates on the State obligations under Article 15 (1)(a) ICESCR: "it requires from the State […] positive action […] ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods."

As e-books are categorized as written literature, then States are obliged to make them accessible for the poorest in society, and that they can be preserved for future generations to enjoy if the print version is not available.

In General Comment No.21, para.16(a) the Committee mentions libraries as a significant institution in the realization of the right:

> 16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination:
>
> (a) *Availability* is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries.
>
> (b) *Accessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination. It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.

[176] *General Comment No.21* para.12

General Comment No.21 also emphasizes the link between the right to culture and education and technology, because ”everyone has the right to learn about forms of expression and dissemination through any technical medium of information or communication”[177].

6.3 Right to Share in Scientific Advancements and Its Benefits

The right to share in scientific advancements and its benefits is stated in article 27 UDHR and article 15 ICESCR. According to article 15(1)(b) para.2 ICESCR :

> [t]he Steps to be taken by the States Parties to the Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science.

The *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications*[178] elaborated on what a State must do to fulfill the right, including the obligation to ”promote the development and diffusion of science and technology in a manner consistent with fundamental human rights.”[179]

Applying the substance of this right to digital technology which allows for rapid dissemination of cultural works, the economic value of rapid dissemination should be enjoyed by both authors and the public. Digital technology can increase the opportunities available to both authors and

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[177] *General Comment No.21, op.cit.,* para.15(b).
[178] UNESCO, Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and Its Application, Venice, Italy, July 16-17, 2009, *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications, available at* http://shr.aaas.org/article 15/Reference_Materials/internationaldocuments.html [*Venice Statement*].
[179] *Ibid.* Para. 24.

users of copyrighted works, in terms of reaching a bigger audience, access to culture and education, and other material benefits.

State parties have a legal duty to take affirmative action,

> that is, specific investments in science and technology likely to benefit those at the bottom of the economical and social scale […] potential profits to investors and improvements in the standards of the affluent should count for much less than improving the status of the vulnerable and bringing them up to mainstream standards. In poor countries this commitment also means giving priority to the development, importation, and dissemination of simple and inexpensive technologies that can improve the life of the disadvantaged….[180]

Therefore Audrey Chapman sees a clear distributive justice goal in this right which would mean, in the specific example of e-book lending, that libraries ensure all citizens should enjoy digitized books and the benefits from the rapid dissemination of culture. Further states should create a system so authors can enjoy the economic benefits of increased dissemination through libraries and modern digital technology.

6.4 The Right to Education and the Provision of Learning Materials

In international law libraries are recognized as an important educational institution[181]. The right to education is found in Article 13 and 14 of the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 26(1)(2) of the UDHR states that:

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[180] Audrey R. Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications', [2009] 8 J. Hum. Rts. 1.
[181] General Comment No.13, *op.cit.,* para.6

> (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
>
> (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

The ICESCR elaborates further on the right to education:

> Article 13
>
> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity…."

The right is also found in the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[182] and in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[183], the UNESCO Convention against Discrimination in Education[184] and the Universal Convention on the Rights of the Child (UNCROC)[185]. Regional instruments include the African Charter on Human and People's Rights[186].

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[182] International Convention on the Elimination of All Forms of Racial Discrimination., art.5, Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969)

[183] Convention on the Elimination of All Forms of Discrimination against Women, art. 10, Dec. 18, 1979, 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981)

[184] Convention against Discrimination in Education, Dec. 14, 1960 429 U.N.T.S. 93 (*entered into force* May 22, 1962)

[185] Laurence Helfer and Graeme Austin, *op.cit.*, p.322

[186] African Charter on Human and People's Rights, art. 11, June 27, 1981, 21 I.L.M. 58

The provision of learning materials has also been discussed by the CESCR. General Comment No. 13 states that in order to function educational institutions will need ”teaching materials […] while some will also require facilities such as a library, computer facilities and information technology”[187].

General Comment No. 13 elaborates on the significance of the right, in that it enables the poor and marginalized to gain entry into a competitive market place for jobs and also potentially enjoy social mobility. A good education has been shown to have positive effects on health, mortality and morbidity[188]. Education is not merely instrumental (a means to an end) but a central ingredient in the human experience: ”education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of the human existence.”[189]

6.4.1 Provision of learning materials

Digitisation of educational materials are instrumental to the realization of human rights in developing countries. The Committee on the Rights of the Child has, in its Concluding Observations for countries ranging form the Dominican Republic to Ireland expressed grave concern that adequate up to date learning materials are too costly and unavailable or inaccessible to children[190]. Crucially, digitization of educational materials reduces costs for developing countries.

The Appendix to the Berne Convention[191] facilitates bulk access to copyrighted textbooks for developing countries via a compulsory license. It has been described as complex and arcane, and not an efficient tool for developing countries to access cheaper textbooks because it is underutilized

[187] *General Comment No. 13, op.cit.,* para. 6
[188] Laurence Helfer and Graeme Austin, *op.cit.*, p.321
[189] Comm. On Econ., Soc. & Cultural Rights, *General Comment No.13 : The Right to Education*, para. 1, U.N. Doc.E/C.12/1999/10 (Dec.8,1999) [*General Comment No.13*]
[190] Laurence Helfer and Graeme Austin, *op.cit.*, p.334
[191] 1971 Appendix to the Paris Act Revision of the Berne Convention [Berne Appendix].

as few countries have in fact issued the compulsory licenses pursuant to the Appendix[192]. Lack of compliance may be due to lengthy waiting times, and the owner must be notified prior to issuing the license[193]. It gives the priority to the copyright owner to supply the market first before the compulsory license kicks in:

> There is a three year waiting period from the date of first publication of the work before a translation license may be issued…For a reproduction license, the waiting time is generally five years after publication of a particular edition of a copyright-protected work […] This waiting period is reduced to three years for scientific works but extended to seven years for works of poetry, fiction, music and drama.[194]

6.5 Freedom of Expression

Freedom of expression is found in article 19 UDHR, article 19(2) of the ICCPR and article 10 of the European Convention of Human Rights (ECHR)[195]. Copyright can act as a restriction on freedom of expression, by limiting follow on uses of copyrighted work, but the relationship between copyright law and freedom of expression is not simply antagonistic. Copyright is also said to promote freedom of expression because of its system of economic incentives[196].

Freedom of expression applies to both the users and the creators of copyrighted work. Particularly relevant to access to e-books is Article 19(2):

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of

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[192] Laurence Helfer and Graeme Austin, *op.cit.*, p.339
[193] Laurence Helfer and Graeme Austin, *op.cit.,* p.340
[194] Laurence Helfer and Graeme Austin, *op.cit.*, p.339
[195] European Convention of Human Rights signed in Rome on 4 November 1950
[196] Graeme Austin, 'The Two Faces of Fair Use' [2012] 25 New Zealand Universities Law Review p.302

all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary : (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Graeme Austin discusses the foremost domestic court cases on the issue of freedom of expression and copyright, and found that judicial reasoning relies on the profit incentive rationale of copyright law.

> Copyright law celebrates the profit motive, recognising that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.[197]

However legal scholars and economists, like Anne Barron and Jonathan Aldred, cast doubt on the claim that the profit incentive is a valid rationale for copyright law, and if the profit incentive were shown to be erroneous then the balance between proprietary rights and the freedom of expression would have to be reassessed.

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[197] *Ibid.* and *Eldred v Ashcroft* 537 US 186 (2003) at 212

7 Copyright Law : are existing flexibilities sufficient to meet the requirements of human rights law?

7.1 Introduction

Intellectual property rights are part of the public international law of intellectual property, and the *acquis* refers to multinational treaties including the Berne Convention for the Protection of Literary and Artistic Works, the TRIPS Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT). Copyright is defined in the following way:

> [as] a legally enforceable property right that is vested in the first instance in the originator of certain categories of information good ('works') […] A copyright is thus in fact a bundle of discrete rights, each relating to a different act.[198]

The bundle of rights under the umbrella of copyright law are transferrable, and include the rights of reproduction, distribution, public communication and translation. Under the Berne Convention the duration of copyright lasts for 50 years from the author's death, however many countries have increased the duration to 70 years[199].

[198] Anne Barron, *op.cit.,* p.95
[199] Helfer and Austin, *op.cit.*, p.17

The adaptation of copyright law to digital works continues to be a source of legal and political debate[200]. Digital technologies allow for instantaneous copying, and have the potential to greatly enhance the dissemination of cultural works[201]. The way people create and use copyrighted works has transformed with the advent of new digital technology, and ”lower production costs make creators less dependent on the capital traditionally provided by producers”[202].

7.2 The 'Law and Economics' Approach to Copyright Law

The purpose of this sub-section is to present the key criticisms of the law-and-economics theory by two scholars in the field. If the law-and-economics theory of copyright were to be successfully challenged this make way for a human rights framework and a Habermasian framework to guide future developments in copyright law[203].

A brief economic explanation of intellectual property is provided for in General Comment n.17; it highlights the goals of providing incentives to create and disseminate work:

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[200] An example of the mutability of copyright law in favour of the public interest was the development in the legal treatment of orphan works- the millions of copyrighted texts that exist where the author is unknown. Orphan works halted digitization projects because these works could not be copied or made available to the public unless the author was found and so they were once a major challenge, because the libraries could not obtain the right holders' consent. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, Art. 6. Available at <http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm> accessed 12 Jan. 2014; *See also* Commission Staff Working Paper. Summary of the impact assessment on the cross-border online access to orphan works, Brussels, 24.5.2011, SEC(2011) 616 final.

[201] Giuseppe Mazziotti, *op.cit.* , p.235

[202] Dalindyebo Shabalala, *op.cit.,* p.253

[203] Anne Barron, 'Copyright Infringement, 'Free-riding' and the Lifeworld' in *Copyright and Piracy* Lionel Bently, Jennifer Davis and Jane C. Ginsburg, (eds.), (Cambridge 2010) p.98

> [intellectual property is] first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.

Copyright is designed to create and stimulate the market in intellectual works by assigning property rights to authors as an incentive and reward[204]. Modern copyright legislation gives copyright owners control over their works via digital rights management and legal protections of DRM technology, so owners can exploit the new markets created by new technologies[205]. This control should be balanced by adequate provisions for L&Es for without L&E provisions, DRM can have 'chilling effects' on creativity by preventing "follow-on uses of copyrighted works"[206].

Anne Barron describes the law and economics (L&E) theory of copyright:

> [I]nformation goods are often difficult and expensive to create; yet once produced, they tend towards the condition of public goods – they are non-rivalrous in consumption, and relatively non-excludable. In so far as they remain in that condition, they are easily re-used by others apart from their originators, and it is difficult if not impossible to enforce payment for acts of reuse. The immediate result is 'free-riding': obtaining of benefits from these goods by those who have not shared in the cost of producing them. The ultimate result is under-production, because the inability to enforce payment for the use of these goods acts as a disincentive to their production in the first place.[207]

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[204] Giuseppe Mazziotti, *op.cit.* , p.235
[205] Jane Ginsburg, 'Copyright and Control', [2001] Columbia Law Review p.1619
[206] Giuseppe Mazziotti, *op.cit.* p.279
[207] Anne Barron, *op.cit.,* p.94

The utilitarian rationale for copyright protection is that it acts as an incentive for authors to publish their works, and the regime must be balanced so as to optimise the production of works[208].

The law and economics approach to copyright has been refuted by scholars such as Anne Barron and Jonathan Aldred. Anne Barron argues that modern copyright policy has been solely shaped by the owners' interests, marginalising users' interests in the process[209]. Jonathan Aldred, an economist himself, writes about two erroneous assumptions of mainstream economic thinking. The first is the notion of copyright protection's role as an incentive for authors to publish:

> [T]he implicit presumption is that strong copyright protection increases the incentive to create, by increasing the financial return available to the creator…But there is now powerful evidence from recent research in behavioural economics (complementing earlier work by psychologists) that this assumption is often falsified.[210]

For academics the financial reward of publishing may be important but they are also publishing their research in the hope that it will be widely disseminated to enhance their reputation and to further the practical effects of their work.[211] Authors such as Landes and Posner share Aldred's perspective on why authors are motivated to write and publish:

> [m]any authors derive substantial benefits from publication that are over and beyond any royalties. This is true not only in terms of prestige and other nonpecuniary income but also pecuniary income in such forms as a higher salary for a professor who publishes than

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[208] *Ibid.,* p.98
[209] *Ibid.*
[210] Jonathan Aldred, 'Copyright and the Limits of the Law-and-Economics Analysis', in *Copyright and Piracy* Lionel Bently, Jennifer Davis and Jane C. Ginsburg, (eds.) (Cambridge University Press 2010) p.138
[211] Delindyebo Shabalala, *op.cit.*, p. 252

> for one who does not, or greater consulting income. Publishing is an effective method of self-advertisement and self-promotion.[212]

Aldred identifies a second flawed assumption in mainstream economic thinking, which is that individuals can and will move from occupation to occupation relatively easily depending on opportunities or depressions in the labour market[213]. This is a cynical view of human nature, and people's relation to their craft; Aldred summarises this argument: ”[s]o if the nature or extent of copyright protection is reduced, novelists will not switch from writing novels to textbooks, nor will they switch occupations and become hedge fund managers.”[214]

Anne Barron suggests an approach to copyright law which emphasizes a different set of priorities outside of the market because ”from the perspective made available by law and economics, the lifeworld is invisible except as an environment for economic activity.”[215]

'Lifeworld' refers to the work of the scholar Jurgen Habermas and it offers an alternative justification for the engine of cultural expression than that offered by law and economics theory. Barron and Aldred conclude their arguments with a description of a Habermasian framework which has

> the aim to protect a sphere of life (the lifeworld or the public sphere) from colonization by market values and practices […] Overbroad copyright regimes threaten the public sphere by privatizing expressions of ideas, knowledge or culture: these regimes effectively turn ideas into private property, subjecting them to market values and practices.[216]

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[212] *Ibid.* p.253
[213] Jonathan Aldred, *op.cit.*, p.138-9
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*

Aldred criticises the economic assumptions that endorse broad copyright regimes as ignoring the ’value’ of ideas, knowledge or culture beyond what is measured in monetary terms, and by willingness to pay. Beyond the Habermasian framework, Aldred argues for ’substantive value commitments’, and the use of ’other accounts of value’ than those offered by mainstream economics, which would, for example, include education and culture[217].

Austin and Helfer distinguish between the utilitarian justification (cost benefit analysis) of the intellectual property regime and a broader distributive justice aim of the human rights instruments and interpretations[218]. This latter distributive justice aim implies a duty on States to take immediate action to ensure the poor and marginalized get immediate access to the technology, and cultural expression. By contrast the ”benefits of the intellectual property system tend at best to be long-term and tenuous.”[219].

Even if a purely economic rationale for copyright protection were accepted, we would re-assess the precise economic situation in the digital world as opposed to the analogue counterpart:

> ”[t]he advent of digitisation has changed the economics of creativity, dissemination and copyright by:
>
> -reducing dramatically the cost of making perfect reproductions of a work
>
> -allowing these reproductions to be disseminated quickly, easily and cheaply and
>
> -making available technological tools and devices that make creativity much cheaper and easier than at any other time”[220]

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[217] *Ibid.* pp.143-4
[218] Laurence Helfer and Graeme Austin, *op.cit.,* p.237
[219] Audrey Chapman, *op.cit.*, p.29
[220] Giuseppe Mazzioti *op.cit.*

Proponents for enhanced user rights argue that some parts of the current regional and international copyright law are outdated, in that it does not belong to the digital world. Lawrence Lessig advocates for an overhaul of traditional copyright theory and policy:

> [f]or while it may be obvious that in the world before Internet, copies were the obvious trigger for copyright law, upon reflection, it should be obvious that in the world with the Internet, copies should not be the trigger for copyright law […] My claim is that the Internet should at least force us to rethink the conditions under which the law of copyright automatically applies, because it is clear that the current reach of copyright was never contemplated, much less chose, by the legislators who enacted copyright law[221].

Lessig's proposal would mean a shift in the emphasis of the proprietary right of the author away from the exclusive right of reproduction, so the copy would no longer be a 'trigger' for remuneration.

7.3 The TRIPS Agreement 1994 – global harmonization of strong minimum mandatory IPRs

International copyright law is characterized by strong mandatory minimum IPRs for all the States that ratified the TRIPS Agreement[222]. Harmonization is prioritized in order to "facilitate transborder trade […] by eliminating inconsistency and uncertainty"[223]. Despite the appearance of fairness in the Objectives of TRIPS, this legal regime has received widespread criticism as being too restrictive of individual States' sovereignty to legislate.

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[221] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* [Penguin 2004] p.140
[222] Graeme Austin and Laurence Helfer, *op.cit.*, p. 18- 25
[223] Bernt Hugenholtz and Ruth L. Okediji*, op.cit.,* p.476

However, because of lacunas in the law on copyright L&Es for libraries, we need to harmonize new copyright rules for the digital world, to benefit both authors and users.

Before the adoption of the TRIPS Agreement policy makers aimed to create a copyright to ”promote the public good through the provision of appropriately tailored private rights”[224]. The Objectives of TRIPS reiterates similar goals to ensure dissemination of technology and promote the interests of users:

> the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge[225].

Daniel Gervais offers a historical account of intellectual property policy in the late twentieth century:

> progressive alignment of trade and intellectual property policy started in the United States in the 1980s through successive amendments to section 301 of the Trade Act, which allowed the U.S. Administration to impose trade-based sanctions on countries which […] did not adequately protect intellectual property rights of the United States citizens and companies.[226].

Gervais goes on to explain that the TRIPS Agreement was the result of an effort by the United States, the European Commission and the Japanese Government to link trade and intellectual property[227]. Because of globalised

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[224] *Ibid*. p.175; *see also* Philippa Davies, *op.cit*., pp.402-5
[225] TRIPS, *op.cit.*, art.7
[226] Daniel J. Gervais 'Intellectual Property and Human Rights Learning to Live Together' in Torremans (ed.) *Intellectual Property and Human Rights* (Kluwer Law International 2008) p.8
[227] *Ibid.* p.7

trade policy, and in spite of existing flexibilities in international copyright law, domestic legislatures may be reluctant to press forward with copyright reform since ratifying the TRIPS Agreement:

> TRIPS requires members of the World Trade Organisation to strengthen national protections for intellectual property as a condition of participation in the trade regime. The detailed provisions of TRIPS, backed up by the threat of trade sanctions, have meant that states have far less discretion than previously in determining whether, and, if so, how, to implement intellectual property protections on the domestic level.[228]

This reticence to take domestic measures to create a balanced copyright regime means that any further copyright reform requires harmonisation at the international level via soft law or treaty law.

7.4 Exclusive Right of Reproduction in the Digital Environment

The Berne Convention for the Protection of Literary and Artistic Works and the WIPO Copyright Treaty contain terms providing for the exclusive rights of reproduction and distribution. The author's exclusive right to reproduction and the right to distribution is usually transferred to the publishing company via a contract or license agreement. However the exclusive right to reproduction is not transferred to the library via the license agreements, and e-books need to be copied every time they are given to a patron. In the case of ebooks, the right of distribution is not transferred to the library either, and this is why the treatment of ebooks deviates from the treatment of shelfbooks.

[228] Molly Beutz Land, 'Protecting Rights Online' (2009) 34 Yale Journal of International Law p.5

Article 9(1) of the Berne Convention provides for the ”exclusive right of authorizing the reproduction of […] works, in any manner or form”. According to the Agreed Statement of the WCT the exclusive right of reproduction applies to the digital environment:

> [t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

However, legal scholars have expressed doubt as to the suitability of the reproduction right in the digital environment, because uses that were legal are no longer possible. Mazziotti writes that

> the consequent extension of the copyright scope in the digital world effectively means that simple, non-transformative use such as reading, studying, quoting, private copying and lending are not permitted without the contractual consent of the copyright owners and without the availability of code bypassing digital locks.[229]

The international institutional arena is the optimum venue for copyright reform because domestic copyright law on e-book lending fails to provide legal certainty for users within their jurisdictions or users acting across jurisdictions. An example is the library practice of e-reserves, which *may be* permitted based on the open-ended U.S. doctrine of fair use, although this doctrine is criticised for being ”highly interpretable” and ”the law provides little explicit guidance about what can be put on e-reserves”[230]. The open-ended nature of domestic L&E laws, where litigation provides inconsistent

[229] Giuseppe Mazziotti, *op.cit.*, p.11
[230] K.R. Eschenfelder, T.I. Tsai, X. Zhu, B. Stewart, *op.cit.,* p.331, on e-reserves : ”by 2005 some noncommercial publisher standard licenses recognized e-reserves”.

applications of the law, are a pitfall for users who want to manipulate copyrighted works.

To bring the rules of e-book borrowing back in line with shelfbook borrowing, either the right of distribution can be transferred to the library at the point of sale according to the doctrine of exhaustion, and/or there can be a mandatory exception to the right of reproduction for libraries. These changes to the current situation dictated by the use of restrictive licenses would enable libraries to have the requisite control over the copyrighted work and eliminate uncertainty in the day to day lending of e-books. With these new rules, they could make as many non-commercial copies of the work as they deem necessary to fulfil their mandate.

7.5 Copyright Exceptions and Limitations

The public interest exceptions to copyright are stated in all copyright instruments, and reflects the 'rights-access balance' inherent in every copyright regime[231]. The rights-access balance is stated in the Preamble to the WCT:

> [r]ecognizing the need to maintain a balance between the rights of authors and the wider public interest, particularly education, research, and access to information.

The preamble is an interpretative tool for the rest of the WCT provisions, according to the rules of treaty interpretation laid down by the Vienna Convention of the Law of Treaties 1969.

Exceptions are described in terms of a specific dealing with the copyright protected work, that is permitted in law, and does not require the

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[231] P.B. Hugenholtz & Ruth L. Okediji. 'Contours of an International Instrument on Limitations and Exceptions' in *The Development Agenda: Global Intellectual Property and Developing Countries* Neil Netanel (ed.) (OUP 2008) p.474

authorisation of the copyright owner, but may require remuneration[232]. Exceptions are

> mechanisms of access [and] contribute to the dissemination of knowledge […] Appropriately designed L&Es may alleviate the needs of people around the world who still lack access to books and other educational materials and may also open up rapid advances in information and communication technologies that are fundamentally transforming the processes of production, dissemination, and storage of information.[233]

If a librarian breached the terms of a license agreement and the matter came before a court, the judiciary would determine whether the actions of the librarian fell within the provisions for specified exceptions to copyright, or the judge would apply the three step test[234].

It is useful to categorise the legal exceptions into three types:

> protection of only certain types of subject matter, permitted free uses such as making quotations from lawfully published works or illustrative use for teaching purposes, and permitted use requiring equitable remuneration.[235]

The Berne Convention Article 2(8) excludes from copyright ”news of the day or miscellaneous facts having the character of mere items of press information”. The Berne Convention contains the following uncompensated limitations: permitting public speeches (art. 2bis(2)), quotations (art. 10(1)), uses for teaching purposes (art. 10(2)), press usage (art. 10bis(1)), reporting

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[232] Orit Fischman Afori, *op.cit.*, p.401
[233] P.B. Hugenholtz & Ruth L. Okediji, *op.cit.*, p.474
[234] On the subject of e-books there is not much case law, but Matthew Chiarizio cites a US case where the judge noted that, ”[m]aking a back-up copy of an ebook, for personal noncommercial use would likely be upheld as a non-infringing fair use”. Matthew Chiarizio, *op.cit.*, p.626
[235] Philippa Davies, *op.cit.*, p.404

of current events (art. 10bis(2)), and ephemeral recordings by broadcasting organizations (art. 11bis(3)).

TRIPS 10(2) and WCT Article 5 exclude ”the data or material itself” from compilations of data. TRIPS 9(2) and WCT Article 2 draws the distinction between the idea and its expression, excluding the idea from protection. Okediji and Hugenholtz argue that the international copyright *acquis* is sparse in its L&E provisions, because at the drafting of the Berne Convention L&Es were considered to be a domestic welfare interest[236].

Under the current international framework state legislatures and courts have some latitude to enhance user rights. Legislation enacted according to article 10(2) of the Berne Convention may be instrumental in achieving the human right to education for developing countries[237]. Article 10(2) of the Berne Convention states that,

> [i]t shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

Pursuant to article 10(2) of the Berne Convention, domestic legislatures can enact library L&Es for teaching purposes.

As stated above, many countries do provide for exceptions for libraries, but in practice the statutory exceptions to copyright do not override conflicting contractual terms[238]. Further, perhaps contrary to their economic interests,

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236 P.B. Hugenholtz and Ruth Okediji, *op.cit.* ,p.475
237 Margaret Chon ‘Intellectual Property “from Below”: Copyright and Capability Capability for Education’ [2007] 40 U.C. Davis L. Rev. p.806
238 Orit Fischman Afori, *op.cit.*

developing states are creating technological protection measures according to their obligation under article 11, WIPO Copyright Treaty[239].

Under international copyright law there is 'wiggle room' for domestic legislatures to legislate for libraries. This 'wiggle room' is important because it proves that any new international instrument would still be compatible with the existing international copyright *aquis*[240]. Therefore the new law on e-book lending would not actually involve any radical overhaul of the law.

During international negotiations, the Standing Committee on Copyright and Related Rights session, convened in November 2012, the African Group, Ecuador and India argued for mandatory limitations and exceptions, that would override any contractual obligation[241]. The advantage of a new multilateral treaty on L&Es would be that after harmonization, individual countries would be more likely to codify a rule on L&Es that overrides restrictive contracts.

7.5.1 Flexibilities in Copyright Law : The Three Step Test & Article 10(2) of the Berne Convention

Unspecified L&Es to copyright work are subject to the three step test which is described in the following five instruments: the Berne Convention Article 9(2), TRIPS (Article 13), the WCT (Article 10) , the WPPT (Article 16), and InfoSoc Directive (Article 5.5). Article 9(2) of the Berne Convention applies to the right of reproduction only, while TRIPS article 13 applies to

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[239] Laurence Helfer and Graeme Austin, *op.cit*., p.343
[240] Bernt Hugenholtz and Ruth Okediji, *op.cit*., p.477
[241] *Ibid.* p.412; *see also* Working Document Containing Comments on and Textual Suggestions towards an Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitations for Libraries and Archives, SCCR/23/8, 8 August 2012 . Available at: <http://www.wipo.int/meetings/en/details.jsp?meeting_id=25024>, at para.1

exceptions to all rights in the copyright bundle[242].

> 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[243]

The three step test is applicable to digital uses of copyright works, according to the Agreed Statement in the WCT which states that

> the provisions of Article 10 permit Contracting Parties to 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. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

The three step test is used by courts and legislatures to determine what is a permissible exception; the facts must fall within the following criteria: it must be: 1) a special case; 2) not interfere with normal commercial exploitation; and 3) not unreasonably prejudice the legitimate interests of rights holders.

Geiger suggests that the three step test was originally designed to be flexible, ”in order so as to not restrict [the State's] freedom to adopt new exceptions in the future.”[244] Legal commentaries consider the intentions of the drafters in the Stockholm meeting of 1967 and the perceived importance of preserving cultural autonomy within member states. Okediji and Hugenholtz write that

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[242] Margaret Chon, *op.cit.,* p.843
[243] TRIPS Agreement, *op.cit.,* Article 13
[244] Christophe Geiger, Jonathan Griffiths and Reto M. Hilty, 'Towards a Balanced Interpretation of the Three Step Test in Copyright Law' (2008) 30 (12) E.I.P.R. p.491

> [a]s the drafting history of the Stockholm Revision of the Berne Convention reveals, art. 9.2 is more akin to a "grandfathering" clause, a purposefully vague reflection of a compromise among states of different copyright traditions, which confirms that the broad array of - frequently broadly worded - statutory limitations that existed at the national levels in 1967 is in conformity with BC minimum standards.[245]

To date the only analysis of the three step test at the international level was the WTO Panel decision on US Copyright Act : s.110(5)[246] and its reasoning has been widely criticised[247] for its interpretation of the three step test as "not intended to provide for exceptions or limitations except for those of a limited nature."[248] The WTO panel construed the second step of the test as critical, thus making the economic hurdle decisive.

Judges in domestic courts and the WTO Panel will apply this test to determine if an exception abides by international law, but the test has been criticised for limiting the judges' ability to consider the interests of users, and instead asks the judge to focus her attention on the economic harm done to the rightsholder[249]. In this way, the three step test functions so as prevent the creation of new exceptions[250], because the test excludes any forms of exploitation that have the potential of generating significant income. To conclude, this test is a slippery slope to abolishing many exemptions and uses in the public interest[251].

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[245] Bernt Hugenholtz and Ruth Okediji, *op.cit.*, p.483
[246] Kamiel J. Koelman, 'Fixing the Three Step Test,: The Three Step Test is at the Core of Copyright Law' [2006] 28(8) European Intellectual Property Review p.408
[247] Christophe Geiger, Jonathan Griffiths and Reto M. Hilty, *op.cit.,* p.490
[248] Kamiel J. Koelman, *op.cit., see also* WTO Panel, United States – Section 110(5) of the US Copyright Act (2000), available at <www.wto.org.> paras. 183, 189
[249] Kamiel J. Koelman, *op.cit.,*
[250] *Ibid.*
[251] *Ibid*.

The market in e-book lending in public libraries is sizeable, and for this reason it is likely courts would decide that new L&Es for libraries are in conflict with the second step: an exception for e-book lending by libraries would conflict with significant market interests. Although such a judicial decision would be contrary to human rights law, because without new mandatory exceptions for libraries, both authors and individual users are disadvantaged. Further, the problem of undermining the market in e-book lending could be solved by offering reasonable renumeration to the rights holder.

The test would be improved if each of the three steps were equal factors for the judge to weigh against each other[252]. Further, Koelman reasons that if reasonable remuneration was provided for the digital copies, then a library exception would pass this test. So if the libraries were able to guarantee reasonable remuneration to the rights' holders (presumably equivalent to the analogue book lending model) then the library L&E would be permissible.

The third provision, *unreasonable prejudice to legitimate interests of rights holders*, is the one that allows States and judges to carry out a proportionality test[253] and consider the public interest and users' needs and balance these against those of the author. Geiger finds it problematic that the test could stop at the second criterion, so as to make this test a purely economic calculation. He argues that the third step should be placed at the centre of a judicial examination, by reversing the steps of the test[254].

Margaret Chon argues that in order to achieve distributive justice under a development agenda, courts can and should apply a substantive equality principle when using the three step test, particularly in developing countries:

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[252] *Ibid.*
[253] Christophe Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' [2010] 12:3 Vanderbilt J. of Ent. And Tech. Law Rev, p.546
[254] *Ibid.* p.19

> [w]hile there is some uncertainty in developed countries over whether library exceptions pass the three-step tests of the Berne Convention and TRIPS, a dispute settlement panel should apply the substantive equality principle to such domestic library exceptions enacted pursuant to article 10(2) in developing countries.[255]

Pertaining to the three step test, and its application to library exceptions, Margaret Chon advises that the WTO dispute settlement panel ”should simultaneously construe Berne Convention article 9(2) […] and TRIPS article 13 […] to allow the broadest possible exceptions to promote access to educational materials for purposes of development.”[256]

While a substantive equality principle is to be welcomed according to a principle of fairness, the problem of restrictive contracts is so pervasive that there needs to be an immanent solution in the form of international law making. Further the problem of restrictive contracts extends to libraries in developed countries as well as developing countries. Hence, a comprehensive solution to restrictive contracts necessitates an international codification of copyright L&Es for libraries, with a contract override clause.

7.6 Conclusion

With the international harmonisation of copyright law, national legislatures have seen their freedom to legislate reduced[257]. Flexibilities exist under article 10(2) of the Berne Convention, and through the operation of the three step test. However, given the high probability of inconsistent domestic application of the three-step test, and the urgent situation for libraries and end-users, the drafting of a new instrument on L&Es for libraries is timely.

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[255] Laurence Helfer and Graeme Austin, *op.cit.*, p.345
[256] *Ibid.*
[257] Christophe Geiger, ‘The Role of the Three Step Test in the Adaptation of Copyright Law to the Information Society’, (Jan.-Mar. 2007) UNESCO E-Copyright Bulletin*,* p.2

8 Conclusion

In this thesis, I have argued for the creation of a new rule for libraries' e-lending practices, from a human rights perspective, because merely exploiting the flexibilities of copyright law does not achieve human rights realization. Under international human rights law States are required to intervene when third parties commit human rights abuses, and the system of license agreements used by publishers and materials providers amounts to an infringement of human rights.

Chapters 3 and 4 offered a background in legal theory, including legal commentaries and soft law instruments on the relationship between international human rights law and copyright law. Helfer's and Austin's seminal contribution to the field is a framework to delimit the nexus between the two legal regimes, and it highlights the importance of maintaining a zone of autonomy for authors, which protects their moral and material interests.

Bearing this framework in mind, the appropriate question to ask in reviewing e-book lending practices would be whether the use of restrictive contracts affects the operation of human rights law, and if so, how can the rules for e-book lending be changed by employing the least restrictive measures so as to maintain a zone of autonomy for authors?

Chapter 5 discussed the results of studies on license agreements and the evidence as to how the current situation is untenable. This chapter also showed how a functioning system of copyright L&Es in the digital era is necessary for libraries to fulfill their mandate. Restrictive contracts between the materials providers and libraries contain terms that override statutory copyright L&Es and this undermines human rights law pertaining to both authors and users. This is a clear example of the private sector harming the

rights of individuals, and the State is obliged to protect and prevent this harm from occurring[258].

Due to the rules of copyright law on e-books (the owner's exclusive right of reproduction and the inapplicability of the doctrine of exhaustion to digital material), libraries lack requisite control over e-books. To fulfill their mandate libraries need to preserve digital material, facilitate access and make non-commercial copies or excerpts for research purposes. According to States' international human rights obligations, states must take measures to enable libraries to carry out these activities. International and domestic law has to be reformed so libraries have broader rights over the copyrighted work, so they can handle the digital material in the same way as they traditionally deal with shelfbooks.

In spite of arguments about non-intervention with freedom of contract and the free market, the principle of fairness is the major justification for legislative intervention in e-book lending practices so people have access to culture regardless of their wealth or status.

Chapter 6 presented the human rights law pertaining to authors and individuals who are borrowers of copyrighted work from the libraries. With a persuasive force over and above other legal principles, human rights has authority and is legally binding on the nations that have ratified the ICESCR and the ICCPR. States have a duty to intervene when third parties undermine the human rights enjoyment of their citizens.

Authors' rights are provided for in article 15(1)(c) ICESCR, and the CESCR's General Comment No.17 is an interpretation of this article. States that have ratified the ICESCR must devise an effective system of meeting the economic needs of authors, although the precise details of this system are not defined in international human rights instruments. Therefore copyright law is not essential to fulfillling the human rights of authors, as

[258] Molly Beutz Land, *op.cit.,* p.8

other economic measures could be devised. The fact that restrictive contracts are a hurdle to the dissemination of cultural works mean that States have the obligation to intervene on behalf of the authors.

The operation of authors' rights should facilitate the enjoyment of the other rights of article 15 ICESCR : the rights to participate in culture and the right to share in and benefit from scientific progress. The right to education, protected in articles 13 and 14 of the ICESCR, applies to both authors and individual borrowers, and the obligations under articles 13 & 14 necessitate State provision of educational materials.

Digital technology can potentially reduce the costs of educational materials, and everyone can benefit from these cost reductions; under international human rights law the State must ensure that actions by third parties do not construct artificially high barriers to access to textbooks and other materials.

Freedom of expression, protected under article 19 ICCPR, is directly implicated by restrictions on access to e-books. While copyright's profit incentive is said to be the engine of freedom of expression, overly expansive proprietary rights and the use of restrictive contracts infringes on freedom of expression for both authors and users.

In Chapter 7 the law-and-economics theory of copyright was explained using legal commentaries by Anne Barron and Jonathan Aldred. These authors criticise mainstream economic theories that explain copyright's role as a financial incentive to publish works. If the 'incentives' paradigm is inapplicable in the digital environment, then the original rationale of copyright as an engine of freedom of expression would have to be revised.

Giuseppe Mazziotti and Lawrence Lessig are two of the foremost scholars advocating reform of copyright law's application to the digital environment. This call for copyright reform further supports the creation of a new rule on mandatory L&Es for libraries, and the adoption of a blanket exception to the

right of reproduction for libraries, which would allow them to make copies without infringing copyright.

The global harmonization of copyright law has established strong mandatory minimum IPRs and thereby restricted States' freedom to pursue copyright reform in favour of user rights. Although international copyright law does have 'wiggle room' to allow for increased user rights, these provisions and principles are insufficient.

Many countries have legislated for specific copyright L&Es for libraries, but in practice restrictive contracts override these statutory rules. Unspecified L&Es are subject to the three step test under TRIPS and the Berne Convention. The three step test has been widely criticized as being chiefly an economic test and too restrictive for domestic courts and legislatures to support users' rights.

In conclusion, given the deleterious situation for both authors' and users' human rights, there is an urgent need for a new rule on copyright L&Es for libraries, including both a blanket exception to the exclusive right of reproduction of copyrighted works in e-book format, and a contract override clause, which would automatically invalidate any license terms that purport to undermine established copyright L&Es.

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