Copyright for Education:
A Case Study of Palestine

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Declaration of Authorship and Sources

This thesis contains no material that has been extracted in whole or in part from a thesis that I have submitted towards the award of any other degree or diploma in any other tertiary institution.

No other person's work has been used without due acknowledgement in the main text of the thesis.

Rawan Al-Tamimi

Dedication

To '[t]he mother of all beginnings

And the mother of all ends

She was called Palestine

Her name later became Palestine

My lady….

Because you are my lady

*I have all of that which makes life worth living'**

To the one who heartened me saying: 'A journey of a thousand miles starts with a single step.' Who showed me how to be strong through the hardest times of life, my beloved mother, may your spirit rest in peace.

To the one who inspired me to have big dreams and follow them, who raised me to stand up for myself and others and never give up, my father.

**Mahmoud Darwish (A Palestinian Poet) On this Land*

Acknowledgements

Gratitude for the generosity and dedication of the *Australia Award* for a life-changing experience in all respects. An essential acknowledgement to Professor Hal Wooten, for initiating these scholarships in Palestine, and for your ongoing care and support for their purpose.

Appreciation to my best friend, my husband for having the courage and the vision to go through this journey. Thank you for your support, understanding, patience and unconditional love.

Love and thanks to my eternal cheerleaders, my kids, for being sensible and understanding. This journey would have been more complicated without you both. You are my sunshine.

Respect and appreciation to my supervisor Professor Brian Fitzgerald for all the inspiration, learning and genuine supervision you provided. Thank you for being a great role model for supervision and humanity.

Gratitude and respect to my supervisor, Dr John Gilchrist for all your comments, time and encouragement.

I am grateful to my siblings for their love, support and sincere care, which is sent over oceans and continents.

Very special gratitude goes to Zeina Al-Khalil and Mahmoud Jaffar for being a family for us in Australia and for their sincere support which made our lives easier. A special mention also should go to my friend Eliza Barwick, who helped in editing at one stage of my PhD study, and has been a real friend throughout these years. Thanks must go also to Kylie Pappalardo and Rami Olwan, who helped during the early stages of my thesis. My gratitude to Michaela Cosijin, a beautiful human being full of love and compassion.

Special acknowledgement should also go to Catherine Renshaw, Anne Cunningham and Jenny Sellier at the ACU for their positive attitudes and encouragement during and after the pre-submission seminar procedures. Also, thanks to Nicholas Murphy at DFAT for his continuous support.

I also aknowledge that my thesis was edited by Elite Editing, where editorial intervention was restricted to Standards D and E of the *Australian Standards for Editing Practice*.

Finally, praise be to God the Most Merciful who is the cause of all the blessings and all the goodness in my life.

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Abstract

Palestine is a poor and disrupted territory and education is vital to its future prosperity and wellbeing. Copyright—which regulates access to information—can at times have a negative effect on education; even more so in least developed countries like Palestine. The aim of this thesis is to explain how copyright and education can function more effectively in the Palestinian context to bring about transformational change and meaningful development.

To this end, the thesis (after explaining the Palestinian legal and social context) highlights the common ground between copyright and education and challenges them to work together, rather than against each other. It analyses copyright law in Palestine and how it might be reformed to provide better educational outcomes. Acknowledging that law reform is difficult to achieve, the thesis suggests that a more pragmatic and viable option is to employ strategic copyright management, or what is known as voluntary mechanisms (meaning the copyright owner agrees for various reasons to their material being shared through open access). In outlining this option the thesis provides a detailed roadmap for how Palestine can reap the rewards of voluntary mechanisms.

Thesis Structure

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PART I
COPYRIGHT AND EDUCATION: THE CONTEXT

Part I aims to introduce the subject matter of this thesis: copyright, education and Palestine. It seeks to highlight the link between copyright and education in the Palestinian context.

Chapter 1—Copyright and Education: Introduction

The first chapter introduces the subject matter of this thesis and highlights the increasing importance of copyright law reform and management for developing cost-effective, quality education. It also sets out the structure of the thesis argument, discusses the research methodology and delineates matters that are beyond the scope of this thesis.

Chapter 2—Copyright for Education in Palestine: The Landscape

Chapter 2 describes the unique background of the Palestinian political and legal situation that provides the landscape for discussion and reform. It also investigates the main challenges confronting the Palestinian education system and highlights the effect of copyright law on education in Palestine.

Chapter 1

Copyright and Education: Introduction

Objectives

1. Introduce the subject matter of this thesis.
2. Explain the significance of this thesis and its objectives.
3. Discuss the research methodology and delineate matters that are beyond the scope of this thesis.

1.1 Introduction

Palestine[1] is a poor and disrupted territory; education is vital to its future prosperity and wellbeing. Copyright—which regulates access to information—can at times have a negative effect on education; even more so in less developed countries like Palestine. My aim is to explain how copyright and education can work together more effectively in the Palestinian context to bring about transformational change and meaningful development.

To do this successfully I outline the problem and its context; critically analyse what needs to occur; and provide guidance on how this can be implemented on the ground in Palestine.

If there is to be transformational change understanding copyright from the angle of education must be better articulated within a Palestinian context. Copyright regulates 'information; the essence of freedom and

[1] References to the 'State of Palestine' are consistent with the vision expressed in Security Council Resolution 1397 (2002), which affirms a vision of a region where two States—Israel and Palestine—live side by side within secure and recognised borders; General Assembly Resolution 67/19 (2012), which upgrades Palestine to a non-member observer State in the United Nations (UN). The term 'Palestinian Territories' is in accordance with the relevant resolutions and decisions of the General Assembly and Security Council. References to the Occupied Palestinian Territory or Territories pertain to the Gaza Strip and the West Bank, including East Jerusalem. This thesis uses both terms, the Palestinian Territories and Palestine, to indicate the West Bank including East Jerusalem and the Gaza Strip.

enlightenment'.[2] However, attempts to reinvigorate copyright in Palestine over the last two decades have failed.[3] A lack of appreciation and understanding of copyright among policymakers is arguably the reason. The conventional thinking—that copyright is solely about protecting authors' rights, rather than being a policy tool to disseminate knowledge and preserve culture—makes reforming the law and adopting copyright policy that promotes education a remote prospect in Palestine.[4]

Knowledge is a theme common to both copyright and education. Copyright is a system created to encourage learning by granting authors exclusive statutory rights,[5] while education's vital role—in addition to other functions—is to disseminate knowledge. Thus, it might be sensibly concluded that copyright regulations should facilitate access to, use and reuse of copyrighted content for educational purposes, as these acts fall within the realm of 'encouraging learning'.

The dilemma of copyright and education is that, in the digital age, copyright has lost balance between copyright holders' rights and users' rights[6] to the degree that it may cease to deliver its intended rationale: that is, the public interest in knowledge dissemination.[7] Education is 'one of the clearest examples of strong public interest in limiting copyright protection'.[8] Using copyrighted content for the sake of learning in non-

[2] Ben Atkinson and Brian Fitzgerald, *A Short History of Copyright: The Genie of Information* (Springer, 2014) 4.

[3] There have been many attempts to legislate new copyright laws. The first copyright law draft was in 1998 and was influenced by other copyright laws applicable in neighbouring Arab countries; another law was drafted in 2000. Both drafts were considered by the Palestinian Legislative Council (PLC) and discussed by its specialised legal committees; however, neither draft was approved. Further, in 2006, copyright draft law was reviewed and modernised again in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) office in Ramallah but the draft was not even considered by the PLC as it ceased to function as the legislature of the Palestinian Authority (PA) in 2006 (following the 2006 election and the subsequent split between Hamas and Fatah, the main political parties); see Palestinian Ministry of Culture, http://www.moc.pna.ps/page.php?id=601; Rashad Tawam, *Copyright* (Ogarit Cultural Center, 2008) 16.

[4] As Palestine, like all least developed countries, is more likely to be an importer of copyrighted content rather than an exporter.

[5] *Statute of Anne*, 8 Ann. c. 21, subtitled 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned' ('*Statute of Anne*').

[6] Because of copyright expansion including copyright term, copyright subject matter and the scope of copyright exclusive rights.

[7] See Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press, 2004) 8, expressing his concerns about copyright imbalance of interests in favour of copyright holders, stating: 'The technology that preserved the balance of our history—between uses of our culture that were free and uses of our culture that were only upon permission—has been undone. The consequence is that we are less and less a free culture, more and more a permission culture'.

[8] Kevin Garnett, Gillian Davies and Gwilym Harbottle (eds), *Copinger and Skone James on Copyright* (16th ed, Sweet and Maxwell.2011) [9–96].

profit educational institutions should be a flexible issue. Nonetheless, the inability to use copyrighted content for educational purposes—where the public interest is clear—without licensing[9] arrangements provides a strong illustration of the copyright expansion in favour of copyright holders that has occurred in many jurisdictions.[10]

Significantly, educational institutions are expected to pay to use copyrighted materials when 'reasonable and efficient licences are offered by right holders'.[11] Oddly, in some jurisdictions, educational institutions are required to pay to use 'freely available' materials on the Internet or free-to-air television.[12]

For example, Universities Australia submitted that educational institutions should not have to pay to use free-to-air broadcasts:[13]

> No one but the education sector is paying to time-shift this content. The payments extracted from the education sector for educational use of this freely available content cannot in any way be said to be necessary to provide an incentive for the continued creation of the content.[14]

Education's significance for development is highlighted in the *International Bill of Rights*.[15] Development is the objective of education, where art 26(2) of the *Universal Declaration of Human Rights* (*UDHR*)[16] and

[9] See Jessica Litman, *Digital Copyright* (Prometheus Books, 2006) ch 8, where she argues that copyright holders in the digital age are pushing for making licensing the default rule by creating an atmosphere where licensing is the safe way to avoid the possibility of committing copyright infringement.
[10] For example, in Australia, statutory licensing is the main mechanism that allows educational institutions to be covered by a remuneration notice with the Copyright Agency to copy and communicate text, image and notated music; copy and communicate material from TV and radio; see Australian Copyright Council, *Education: Copyright Basics, Information Sheet* (December 2017). The Copyright Agency's agreement with the Commonwealth and the States for their copying includes allowances for only one available defence to infringement under the *Australian Copyright Act*—copying for a judicial proceeding and for professional legal device.
[11] Australian Law Reform Commission (ALRC), *Copyright and the Digital Economy*, Discussion Paper 79 (2013) 269, https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp79_whole_pdf_.pdf; ALRC, *Copyright and the Digital Economy*, Final Report (2013) 320, https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf.
[12] See ALRC, above n 11, 273. In Australia, educational institutions are required to pay for freely available materials under the statutory licence scheme.
[13] Ibid.
[14] Universities Australia, Submission 246, cited in ALRC, ibid.
[15] See Office of the United Nations High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 2 (Rev.1): The International Bill of Human Rights* (June 1996), http://www2.ohchr.org/english/.
[16] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').

art 13(1) of the *International Covenant on Economic, Cultural and Social Rights* (*ICECSR*)[17] expressly state that education 'shall be directed to the full development of the human personality'.[18]

For an education to lead to the real development of the human personality, it needs to be a quality one. Quality in the context of education comprises many elements.[19] One element that is affected by copyright regulations is the content of learning materials. Quality content should meet the basic learning needs of every person.[20] According to the *World Declaration on Education for All: Meeting Basic Learning Needs* (*EFA*),[21] these needs comprise both essential learning tools (literacy, oral expression, numeracy and problem solving) and basic learning content.[22] Basic learning content refers to:

> The knowledge, skills, values and attitudes required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions and to continue learning.[23]

Moreover, the scope of basic learning needs and how they should be met varies among countries and cultures and, inevitably, changes with the passage of time.[24] Further, the *EFA* submits that:

> [A]ll available instruments and channels of information, communications, and social action could be used to help convey essential knowledge and inform and educate people on social issues. In addition to the traditional means, libraries, television, radio and other media can be mobilized to realize their potential towards meeting basic education needs of all. [25]

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[17] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) 3 ('*ICESCR*'), available at: http://www.refworld.org/docid/3ae6b36c0.html [accessed 4 September 2016].
[18] *UDHR*, UN Doc A/810, art 26(2).
[19] Quality education includes: 'Learners who are healthy, well-nourished and ready to participate and learn, and supported in learning by their families and communities; Environments that are healthy, safe, protective and gender-sensitive, and provide adequate resources and facilities; Processes through which trained teachers use child-centred teaching approaches in well-managed classrooms and schools and skilful assessment to facilitate learning and reduce disparities; outcomes that encompass knowledge, skills and attitudes, and are linked to national goals for education and positive participation in society'; UNICEF, 'Defining Quality in Education' (Paper presented at the meeting of The International Working Group on Education, Florence, Italy, 14–16 June 2000) 4, https://www.unicef.org/education/files/QualityEducation.PDF.
[20] International Consultative Forum on Education for All, *World Declaration on Education for All: Meeting Basic Learning Needs* (UNESCO, 1990) art 1 ('*EFA*').
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid art 5 [4].

Copyright, which regulates the information that is the essence of knowledge, is currently controlling learning material content and inevitably defining the quality and adequacy of such material. Thus, it is essential for education that copyright law considers access to quality learning materials.

In fact, the essential features of the human right to education as defined by the Committee on Economic, Social and Cultural Rights (CESCR) are the most affected by copyright. These features are availability, accessibility, acceptability and adaptability.

Availability means that:

> [F]unctioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require teaching materials, while some will also require facilities such as a library, computer facilities, and information technology.[26]

The basic element of a functional educational institution is the availability of reading and teaching materials.[27] Accessibility means that 'educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party'.[28] Accessibility has three overlapping dimensions.[29] Economic accessibility[30] means that education has to be affordable to all. This dimension of accessibility is subject to the differential wording of art 13(2) about primary, secondary and higher education: whereas primary education shall be available and 'free to all'. State parties to the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*)[31] are required to introduce free secondary and higher education progressively.[32]

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[26] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, UN Doc E/C.12/1999/10 ('*General Comment No. 13*') [6(a)]

[27] Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (The Graduate Institute Publications, 2012) ('*International Copyright Law and Access to Education in Developing Countries*') 28.

[28] *General Comment No. 13*, above n 26, [6(b)].

[29] Ibid [6(b)].The first two dimensions are non-discrimination—education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds; and physical accessibility—education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme), ibid [6(b)].

[30] Ibid.

[31] *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) 993 UNTS 3.

[32] *General Comment No 13,* above n 26, [6(b)].

Acceptability means that:

> [T]he form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives.[33]

This dimension requires that the copyrighted materials be altered to make them relevant and culturally appropriate.

Adaptability means that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

Copyright as a Facilitator of the Essential Features of the Human Right to Education

Copyright should not negatively affect the availability of quality learning materials or hamper accessibility to these materials economically or technologically. Also, copyright should not prevent the ability to produce acceptable and adaptable learning materials that fit particular cultural and social contexts.

These features of the human right to education that are directly affected by copyright confirm contemporary trends in education that submit that a learning-based approach is better than a teaching-based approach.[34] A learning-based approach entails learning through engagement; engagement necessitates the availability of up-to date learning materials that are freely accessible and appropriate with respect to the social and cultural context.

[33] *ICESCR*, 993 UNTS 3, art 13, 3.

[34] Douglas Thomas and John Seely Brown, A New Culture of Learning: Cultivating the Imagination for a World of Constant Change (2011), 40. Thomas and Brown argue:

> 'For most of the twentieth century, our educational system has been built on the assumption that teaching is necessary for learning to occur. Accordingly, education has been seen as a process of transferring information from a higher authority (the teacher) down to the student. This model, however, just can't keep up with the rapid rate of change in the twenty-first century. It's time to shift our thinking from the old model of teaching to a new model of learning.' at 34.

Palestine is a nascent State classified as a least developed country (LDC),[35] with a weak economy and an education system that depends on students' tuition fees and donations to function.[36] In spite of the high rate[37] of enrolment, the quality of education is low.[38] Indeed, there is an access problem with copyrighted materials in light of the severe financial circumstances of the Palestinian educational institutions that currently exist. Thus, copyright licensing is not a financially viable option and is not likely to be so in the foreseeable future.

1.2 Subject Matter and Context

The subject of this thesis is the improvement of copyright law and policy (including copyright management) in support of cost-free quality education in Palestine.

The thesis addresses two related problems in the Palestinian context: the poor quality of education despite the high rate of enrolment,[39] and the glaring absence of copyright policies and management at the primary stakeholders' level in the education sector.

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[35] UN General Assembly, *Assistance to the Palestinian People*, GA Res 43/178, UNGAOR, 83rd plen mtg, UN Doc A/RES/43/178 (20 December 1988), http://www.un.org/documents/ga/res/43/a43r178.htm. Paragraph 9 of the resolution states 'the General Assembly decides to extend to the occupied Palestinian territory the same preferential treatment accorded the least developed countries, pending the elimination of the Israeli occupation and the assumption of full control by the Palestinian people over their national economy without external interference'.

[36] European Commission, *Higher Education in the Occupied Palestinian Territory* (2012) 5, http://eacea.ec.europa.eu/tempus/participating_countries/overview/oPt.pdf.

[37] Palestinian Central Bureau of Statistics (PCBS) 'Literacy Rate of Persons (15 Years and Over) in Palestine by Age Groups and Sex, 1995, 1997, 2000–2013' (2014); Ministry of Education and Higher Education 'Palestinian Higher Education Statistics 2010/2011' (2011), available at: http://www.mohe.gov.ps/Uploads/admin/Matweyeh2011.pdf.
The latest statistics show that 96.3% of the population of Palestine is literate: Ibid. Also from 1993 to 2011, the enrolment rate of students in higher education increased by 940%: Ministry of Education and Higher Education, above n 37.

[38] See United Nations Development Programme of Assistance to the Palestinian People, *The 2014 Palestine Human Development Report: Development for Empowerment* (2015) 63. Reporting that '[t]he status of education in Palestine shows a mixed picture. Although the population is one of the most literate in the world, the education system is in disrepair and failing, due largely to effects of the Israeli occupation: insufficient school infrastructure, lack of adequately trained teachers, and a lack of access to schooling in marginalized areas'.

[39] Ibid. 130. 'Literacy rates are the highest in the Arab world (particularly amongst women) and school enrolment is also high. …….. Unfortunately, the academic and vocational potential of the population is limited by the poor state of the education system.'

The thesis establishes a link between these two problems by arguing that the absence of copyright policy among the leading educational stakeholders in Palestine is one reason for the poor educational quality. In other words, adopting a practical copyright policy—a strategy that encompasses reforming the law and integrating copyright management—has the potential to support the quality of education in the country.

Copyright law and policy have the potential to support the quality of education in Palestine in two ways. First, legislative reform is required to secure the ability to access, use and reuse, and communicate and adapt copyright content for educational purposes. Nonetheless, using copyright content to ensure quality education raises the question of whether it is possible to do so without paying royalties. In light of copyright expansion, claiming cost-free and permission-free access, use and reuse of content for educational purposes might be a crime. In a world where copyright has become the default rule—as per the practice of copyright holders—this thesis argues that cost-free and permission-free access, use and reuse of copyright content for educational purposes should be permitted. This is because education is a development tool and a public interest, aims to disseminate knowledge and is a human right. In addition, the origin of copyright—Great Britain's *Copyright Act 1710*, also known as the *Statute of Anne*—has created exclusive copyright to incentivise authors to create new works to encourage learning. This thesis argues that education lies at the heart of the rationale for copyright; that is, the dissemination of knowledge. Therefore, using copyrighted content for educational purposes should be explicitly supported by copyright legislation as it fits squarely within the function of copyright as a knowledge disseminator. In the pursuit of cost-free and permission-free access, use and reuse of copyrighted content for educational purposes, this thesis investigates the concept of 'fair use', the scope of exclusive rights and the value of the 'public domain' in light of copyright paradigms. It does so in the context of the current international treaties on copyright. It analyses the effect of choosing one national standard over another. These standards are reflected in practice through the judiciaries of different jurisdictions, where similar cases have different outcomes in the field of using copyright for educational purposes.

The second way in which copyright law and policy might support improvements to Palestinian education is via the use of voluntary copyright mechanisms, namely Open Access (OA) to journal articles and Open Educational Resources (OER). These tools hold tremendous potential to secure not only access to up-to-date copyrighted content but also the ability to reuse the content and adapt it to fit local needs and culture.[40]

[40] This depends on the attached details of the granted licence. See chapter 6 and 7 of this thesis.

1.3 Significance and Objectives

The existing literature deals with copyright exceptions and limitations for educational purposes, with varying scope and focus. Some studies explain the application of copyright exceptions and limitations on educational uses and survey their application in different jurisdictions,[41] while others examine the efficiency of the available exceptions and limitations in a specific jurisdiction for education.[42] A third type focuses solely on the suitability of copyright exceptions and limitations for education in a digital environment.[43]

Some studies delve more deeply into copyright and education. Margret Chon[44] argues that the intellectual property (IP) system has failed to address the 'human development needs such as education' of developing countries and calls for a 'development from below approach' to address these needs through IP. Susan Štrba studies international copyright law and access to education in developing countries, in particular the possibility of facilitating bulk access to printed books for developing countries. She concludes that the Three-Step Test and the Appendix to the *Berne Convention for the Protection of Literary and Artistic Works* (*Paris Act*) (the *Berne Appendix*)[45] are not suitable to facilitate bulk access.[46]

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[41] See Daniel Seng, *Study on Copyright Limitations and Exceptions for Educational Activities, Standing Committee on Copyright and Related Rights, Thirty-third Session* (Geneva, 14–18 November 2016) ('Seng's WIPO Study'); Raquel Xalabarder, *Copyright Exceptions for Teaching Purposes in Europe*, Working Paper (Internet Interdisciplinary Institute, 2004); Ratnaria Wahid, 'The Fairness of "Stealing" Knowledge for Education' (2011) 6(2) *Journal of International Commercial Law & Technology* 86.

[42] Narayan Prasad and Pravesh Aggarwal, 'Facilitating Educational Needs in Digital Era: Adequacy of Fair Dealing Provisions of Indian Copyright Act in Question' (2015) 18(3–4) *Journal of World Intellectual Property* 150; Prashant Reddy T and Sumathi Chandrashekaran, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford University Press, 2017) ch 5, 115–152; Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' (2010) 3(2) *Law & Development Review 197*; Josphat Aymunda and Chudi C Nwabachili, 'Copyright Exceptions and the Use of Educational Materials in Universities in Kenya' (2015) 39, *Journal of Law, Policy & Globalization*, 104; Melissa Staudinger, 'A Textbook Version of the Doha Declaration: Editing the TRIPS Agreement to Establish Worldwide Education and Global Competition', (2015) 55 (2) *Intellectual Property Law Review* 319.

[43] Antonia Kakoura, *Copyright Limitations in Distance Learning Education: A Study of the European Legal Context* (Master Thesis, International Hellenic University, 2016); Maria Daphne Papadopoulou, 'Copyright Limitations and Exceptions in an E-Education Environment' (2010) 1(2) *European Journal of Law & Technology* http://ejlt.org/article/view/38/56.

[44] Margret Chon, 'Intellectual Property 'from Below': Copyright and Capability for Education' (2007) 40 *University of California Davis*, 2007 803.

[45] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 25 UST 1341, 828 UNTS. 221 (as revised in Paris, 24 July 1971) Appendix ('*Berne Appendix*').

[46] Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries*, above n 27; Susan Isiko Štrba, 'Institutional and Normative Considerations for Copyright and Access to Education in Developing Countries: Rethinking Incremental Solutions through Limitations and

This thesis aims to use copyright as a tool to facilitate the delivery of cost-free, quality learning materials for educational purposes in a Palestinian context. Addressing Palestine as a case study addresses two aspects of the present literature gap: the scarcity of studies on copyright in the current Palestinian context,[47] and the scarcity of texts addressing the nexus between copyright regulations and the quality of education in Palestine. Further, this thesis will be a convenient resource for other LDCs to leverage their copyright law and policy in support of cost-free, quality learning materials.

To achieve these aims, this thesis will investigate the problem and its context; provide a conceptual framework to undertand these issues; and explain how solutions can be implemented on the ground in Palestine. In doing so the thesis will fulfil one of the core objectives of my research, which is to build capacity and opportunity for my country.

Thesis Objectives

1. Understand the Palestinian context of copyright and education.
2. Establish the case for education in the realm of copyright.
3. Investigate the potential to maximise free quality education through reform of Palestinian copyright law.
4. Explore the possible challenges and opportunities in using voluntary copyright mechanisms to support free quality education in Palestine.
5. Propose a policy framework to enhance copyright for better education in Palestine through copyright voluntary mechanisms.

Exceptions' (2013) 3(2), *Queen Mary Journal of Intellectual Property* 96; Susan Isiko Štrba, 'A Model for Access to Educational Resources and Innovation in the Developing World' in Daniel Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2014) 287; Noha El-Labban, *Copyright: A Roadblock to Education in Developing Countries?* (Master Thesis, The American University in Cairo, 2014).

[47] Exceptions include Ihab Samaan, *A Historical View of Intellectual Property Right in the Palestinian Territories* (PhD Thesis, University of Georgia School of Law, 2003); Michael D Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (Oxford University Press, 2012).

1.4. Methodology

The thesis is primarily qualitative in its methodology. It analyzes the present copyright regime in Palestine in the light of technological development and the requirements of international obligations and in particular the limitations and demands of a least developed country. It is in part historiographical to understand the complexity of the influences which have led to the present copyright regime and the barriers to reform. To support analysis and argument, some comparative jurisdictional examples are used and to the extent available, some statistical data from various sources on Palestinian educational and social circumstances.

This choice was determined in the light of time, the Palestinian landscape and limited available sources. The collection and analysis of detailed data on the practices of each Palestinian educational institution was beyond the reasonable bounds of the research, given the scope and difficulties of so doing. Mostly the thesis examines existing knowledge from primary legal sources such as legislation, case law and international treaties. It also seeks assistance from secondary sources such as books, journal articles and reports.

The primary aim of the methodology is to find a solution to a particular problem, ie 'how can copyright law and policy improve access to free quality learning materials for educational purposes in Palestine?' Consequently the research seeks to develop a suitable framework where copyright is used to support and grow education.

1.5 Matters Beyond the Scope of This Thesis

The purpose of this thesis is to facilitate cost-free and permission-free learning materials for Palestinian education. Therefore, copyright exceptions and limitations that require seeking copyright holders' permission and paying them royalties are excluded from the scope of this thesis. This includes copyright licensing and compulsory licences. In contrast, this thesis focuses on legal mechanisms that enable cost-free and permission-free access, use and reuse of copyright content; namely, fair use, OA and OER.

The laws and developments discussed in this thesis are those that were available to me at 1 December 2017, but significant changes that have occurred after this date have been included where possible

1.6 Structure of the Thesis

This thesis consists of five parts and eight chapters as Diagram (1) below displays:

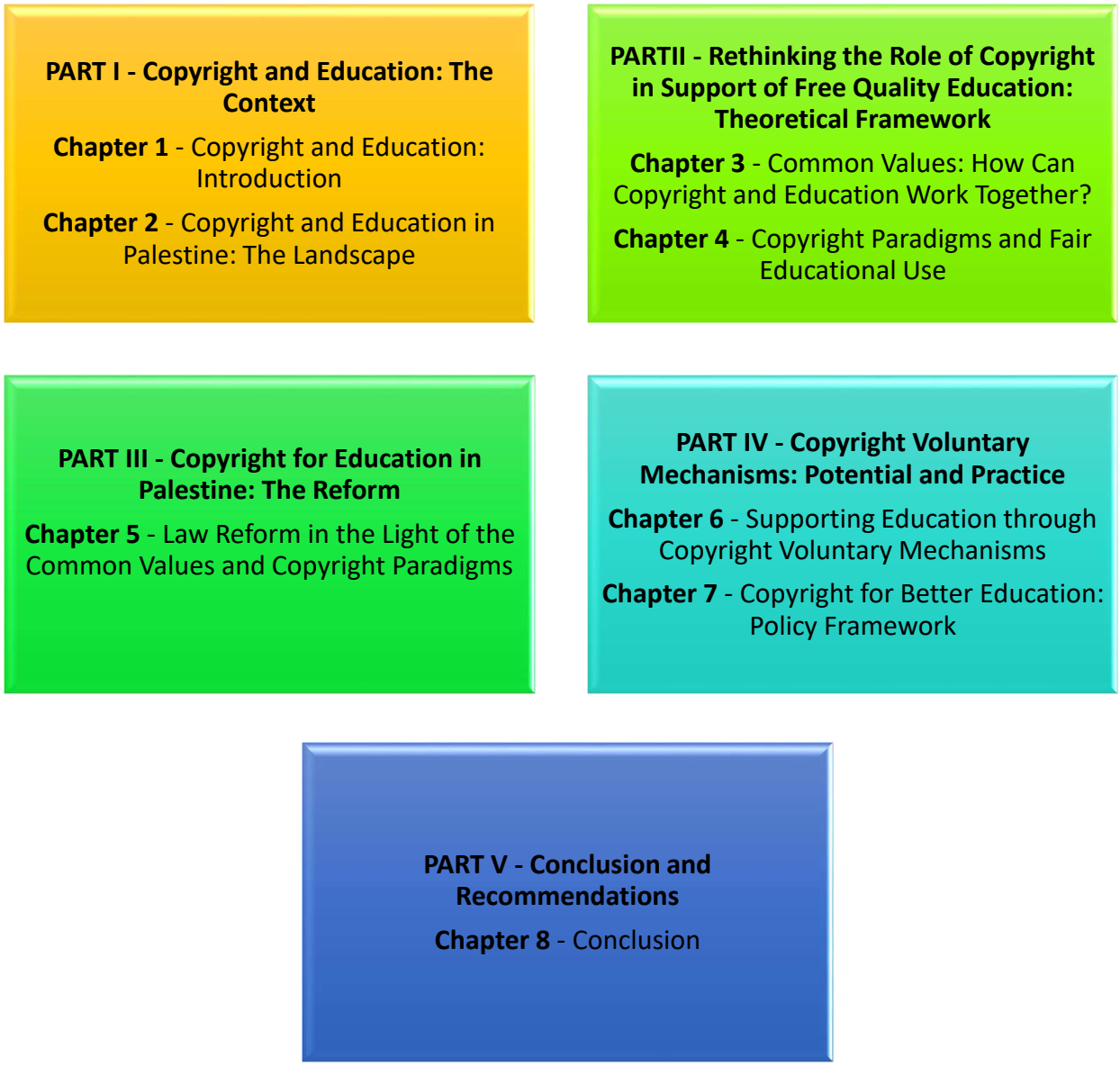

Diagram (1) The Thesis Structure

PART I - Copyright for Education: The Context

Part I aims to introduce the subject matter of this thesis: copyright, education and Palestine. It seeks to highlight the link between copyright and education within a Palestinian context. Part I develops a preliminary reference for this thesis.

Chapter 1—Copyright for Education: Introduction

The first chapter introduces the subject matter of this thesis and highlights the increasing importance of copyright law reform and management for developing cost-effective, quality education. It also sets out the structure of the thesis, discusses the research methodology and delineates matters that are beyond the scope of this argument.

Chapter 2—Copyright for Education in Palestine: The Landscape

Chapter 2 describes the Palestinian landscape in the light of the substantial background of the Palestinian political and legal situation. It also investigates the main challenges for the Palestinian education system. Further, it highlights the degree to which copyright regulations are integrated within the education system.

PART II – Rethinking the Role of Copyright in Support of Free, Quality Education: Theoretical Framework

This part provides the legal and theoretical foundation needed to develop a framework to use copyright in support of education; it establishes the basic structure necessary for analysis throughout this thesis.

Chapter 3—Common Values: How Can Copyright and Education Work together?

Chapter 3 establishes four common values that are shared by copyright and education that presume that copyright should support free, quality education in less privileged countries like Palestine. These shared values are accommodated as exceptions to copyright protection which may lead to prejudicing these values and education. This chapter argues for rethinking the role of copyright in supporting free, quality education on the basis of these values and it calls for strengthening the status of these values in the realm of copyright by exploring the potential to achieve this at a domestic level.

Chapter 4—Copyright Paradigms and Fair Educational Use

Chapter 4 is an attempt to create a better accommodation for education in the realm of copyright on the basis of common values. Thus, it demonstrates that there are two main paradigms: Paradigm I where public domain is the rule and copyright is the exception; and Paradigm II where copyright is the rule and permitted uses are the exception. The concept of fair use is crucial to these paradigms; while it is a right for the user

under Paradigm I it is only an exception under Paradigm II. Chapter 4 argues for Paradigm I, demonstrates its legitimacy under the *Berne Convention* and highlights Canadian case law as moving towards this paradigm.

PART III: Copyright for Education in Palestine: The Reform

Part III aims to outline reform proposals for the *Palestinian Copyright Act* in light of the copyright paradigms—a reformation that aims to appreciate and accommodate the common values under each paradigm.

Chapter 5—Copyright for Education in Palestine: Law Reform in the Light of Common Values and Copyright Paradigms

Chapter 5 seeks to embark on a reformation proposal for the *Palestinian Copyright Act* to make an act that is pro-education and pro-common values. To do so, Chapter 5 first gives a brief overview of the applicable law then it explores the implications of reform under copyright paradigms.

PART IV—Voluntary Mechanisms: The Potential and The Policy

Part IV seeks to plan a framework for pioneering copyright management in support of cost-free and permission-free, quality education in Palestine. It encompasses clear steps, processes and timelines for achieving full implementation of this framework.

Chapter 6—Copyright Voluntary Mechanisms in Support of Free Quality Education

Chapter 6 investigates voluntary mechanisms that allow the use of copyrighted material to advance free, quality education in Palestine. It focuses on OA with respect to peer-reviewed journal articles and OER. It puts forward the case for applying these mechanisms and highlights the challenges of implementing such arrangements within the Palestinian education system.

Chapter 7—Copyright for Better Education: Policy Framework

Chapter 7 seeks to outline a clear policy framework to create a copyright system that supports free, quality education. The structure provides steps towards untangling copyright in support of free, quality education. Some are immediate requirements, while others are suggested for later stages.

Chapter 8—Conclusion

Chapter 8 provides recommendations and concludes the thesis.

Chapter 2

Copyright and Education in Palestine: The Landscape

Objectives

1. Explain Palestine's political and legislative status.
2. Outline Palestine's legal obligations in the fields of copyright and education.
3. Overview the challenges faced by education in Palestine.
4. Highlight the low awareness of the significance of copyright in Palestine.

2.1 Introduction

Chapter 2 is a touchstone for the later chapters of the thesis. It sets the scene to better understand the particularities of the Palestinian context. To achieve the overarching objective of the thesis—that is, better copyright for better education in Palestine—the chapter explains three aspects: Palestine, its educational challenges and the current status of copyright law and policy.

Palestine's political and legislative status is explained in Sections 2.2 and 2.3. Palestine's legal obligations in the field of copyright and education are explored in Section 2.4 and the Palestinian education system's primary challenges are explained in Section 2.5. The state of copyright law and policy is then highlighted in Section 2.6.

2.2 The Political Status of Palestine

Regulating the field of copyright to support education in Palestine raises questions related to the ability to do so within the unique political status of this part of the world. Thus, this section explains the political situation regarding Palestine.

2.2.1 The Emergence of the Palestinian Authority

Historic Palestine was dissected into three territorial areas on 14 May 1948.[48] The Jewish Agency for Palestine unilaterally decided to declare a sovereign State in the most substantial part of these areas, ruled by a provisional government. That action resulted in the establishment of what is now known as the State of Israel. The second largest territory of Palestine was subsequently called the West Bank and the third, the Gaza Strip.

In June 1967 the West Bank and Gaza Strip were occupied by Israel. Immediately after the 1967 war, the Israeli Military Commander in the West Bank published Proclamation No. 2 concerning the assumption of Government by the Israeli Defense Forces. S 2 states that:

> All laws which were in force in the area on 7 June 1967, shall continue to be in force as far as they do not contradict this or any other proclamation or order made by me (the West Bank area Commander), or conflict with the changes arising by virtue of the occupation of the Israel Defense Forces of the area. [49]

Therefore, the Israeli Military Government assumed all legislative, executive and judicial powers and exercised these powers as a de facto sovereign of the West Bank and Gaza Strip, without any formal annexation of land.[50]

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[48] By the time the British left Palestine on 14 May 1948, 380,000 Palestinians had been forced from their homes by armed groups, following the *Declaration of Independence of the State of Israel* by David Ben-Gurion on 14 May 1948. By the end of 1949, Israel had expanded its territorial holdings to 78% of mandatory Palestine and Palestinians had suffered widespread displacement, lost their homes and large amounts of cultivated land—in what became known as the *Nakba* ('catastrophe'). In 1949 the West Bank and Gaza were outside Israeli control, to be left under the control of Jordan and Egypt. By 1950 the new United Nations Relief and Works Agency for Palestinian Refugees in the Middle East (UNRWA) had registered 914,221 refugees. Palestinian Academic Society for the Study of International Affairs, *Fragmenting Palestine—Formulas for the Partition since the British Mandate* (2013).
[49] Cited in Raja Shehadeh and Jonathan Kuttab, *The West Bank and the Rule of Law* (International Commission of Jurists and its West Bank Affiliate, Law in the Service of Man, 1980) 1.
[50] With the exception of Jerusalem, which has been formally annexed by Israel.

Later, the *Oslo Accords* agreed upon by the Palestine Liberation Organization (PLO) and Israel from 1993 to 1995 consist of *Oslo Accord I*, signed in Washington, DC in 1993 and *Oslo Accord II*, signed in Taba, Egypt in 1995. The accords were named after Norway's capital city, where secret negotiations took place between the PLO and Israel. The accords consist of these agreements: The *Declaration of Principles* signed in 1993 (*DOP*),[51] the *Agreement on the Gaza Strip and the Jericho Area* signed in 1994 (*Gaza–Jericho Agreement*)[52] and the *Interim Agreement on the West Bank and Gaza Strip* signed in 1995 (*Interim Agreement*).[53]

The *Oslo Accords* led to the formation of the Palestinian Authority (PA) and inspired efforts to build autonomous structures for Palestinian self-rule. The following subsections explain the PA and the current status of the *Oslo Accords*.

2.2 2 What is the Palestinian Authority?

The *DOP* states that 'The aim of the Israeli–Palestinian negotiations within the current Middle East peace process is … to establish a Palestinian Interim Self-Government Authority … for the Palestinian people in the West Bank and Gaza Strip leading to permanent settlement for a transitional period not exceeding five years.'[54] Accordingly, the *DOP* calls for a two-stage agreement for the political process: an interim period of five years followed by a permanent status settlement based on Security Council Resolution 242 and 338.[55] Thus, the PA is an interim self-government authority inaugurated under the *Gaza–Jericho Agreement.*[56]

[51] *Declaration of Principles on Interim Self-Government Arrangements*, PLO – Israel, (signed and entered into force 13 September 1993). ('*DOP'*).
[52] *Agreement on the Gaza Strip and the Jericho Area*, PLO – Israel, (signed and entered into force 4 May 1994) ('*Gaza-Jericho Agreement*').
[53] *The Israeli–Palestinian Interim Agreement on the West Bank and Gaza Strip*, PLO – Israel, (signed and entered into force 28 September 1995) ('*Interim Agreement*').
[54] *DOP* art I.
[55] Ibid; SC Res 242, UN SCOR, 1382nd mtg, UN DOC S/RES/242 (22 November 1967). This United Nations Security Council Resolution called for Israel to withdraw from territories occupied in 1967 in exchange for peace with its neighbours. The idea of 'land for peace' has since prevailed and formed the basis for future negotiations over the status of Palestine. See Palestinian Academic Society for the Study of International Affairs, above n 48; Resolution 338, adopted on 22 October 1973 by the United Nations Security Council, reiterates the importance of Resolution 242, and calls upon the sides to begin negotiations with the aim of achieving a just and durable peace.
[56] *Gaza–Jericho Agreement.*

The *Oslo Accords* and subsequent agreements[57] between the PLO and Israel have formed the framework upon which the constitutional basis and legal system of the PA were built.[58] The PA possesses limited executive, legislative and judicial powers. Art I(1) of the *Interim Agreement,*[59] entitled 'Transfer of Authority', stipulates that:

> Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli Military Government and its Civil Administration to the Council by this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.[60]

The PA's jurisdiction is limited in all aspects; territorial, functional and personal. The territorial jurisdiction[61] of the PA encompasses the Gaza Strip excluding settlements and the military installation area, and the West Bank excluding area C.[62] Functional authority extends to all powers and responsibilities transferred to the Council and covers area C, except for issues left for permanent status.[63] Israel still has the power to issue military orders unilaterally, since powers accorded to the Council are generic. In other words, Israel still has some functional powers within zones not transferred to the Council and retains all functional powers regarding Israelis who live in the West Bank and Gaza Strip.[64] Regarding the personal jurisdiction of the PA, Israelis who live in the West Bank and Gaza Strip are excluded from its jurisdiction.[65] Criminal jurisdiction over Israelis is always under Israeli authority; civil jurisdiction over Israelis is excluded from the Council's jurisdiction. Moreover, the agreement excludes all matters regarding foreign relations from the PA's jurisdiction, except some economic agreements.

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[57] These agreements are *Protocol Concerning the Redeployment in Hebron*. PLO – Israel (signed and entered into force January 1997); *Wye River Memorandum,* PLO-Israel (October 1998); *Sharm el-Sheikh Memorandum,* PLO – Israel (September 1999); *Agreement on Movement and Access,* PLO – Israel (November 2005).

[58] Yezid Sayigh and Khalil Shikaki, *Strengthening Palestinian Public Institutions. Independent Task Force Report* (1999) (sponsored by the Council on Foreign Relations) 17.

[59] *The Interim Agreement*.

[60] *Interim Agreement* art I (1).

[61] Territorial jurisdiction includes land, subsoil and territorial water; *Interim Agreement* art XVII (2)(a).

[62] According to *Interim Agreement* art XI, the Palestinian land occupied in 1967 was divided into three areas (A, B, C). The PA had complete territorial power over area A, which consisted of 18% of the land. It only had control over the civil administration in area B, which consisted of around 22% of the land, leaving security matters for Israel. Area C consisted of 60% of the land and was under the complete control of Israel.

[63] Issues left for final status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis and the powers and responsibilities not transferred to the Council. *Interim Agreement* art XVII (1).

[64] Asem Khalil, *Which Constitution for the Palestinian Legal System?* (PhD Thesis, Pontificia University, 2003) 48.

[65] *Interim Agreement* art XVII (2) (c).

The PA's autonomy under the *Oslo Accords* is neither that of an absolute Territorial Autonomy—as the PA does not control the entire area of the West Bank and Gaza Strip[66]—nor an absolute Personal Autonomy, as the PA's jurisdiction does not extend to all persons living in the West Bank and Gaza Strip.[67] Consequently, one of the objectives of the *Interim Agreement*[68] is 'to establish an autonomous authority enjoying functional but not territorial powers'.[69] The PA was established and functional jurisdiction transferred, while Israel has remained the source of all authority.[70] Further, the PA does not have powers in the sphere of foreign relations.[71] It is only authorised to conclude certain international economic agreements, agreements with donor countries, international development agreements and cultural, scientific and educational agreements.[72] The consequences of the *Oslo Accords* do not remove the fact that Palestinians remain overall subject to Israeli occupation.[73] Final status as designated in the *Interim Agreement* at the end of the five-year period from the transfer of authority to the PA has never been achieved.

Lack of progress on the peace process with Israel has led the PA's head to consider alternative pathways towards a Palestinian State, based on the strategy of obtaining more widespread international recognition of Palestinian statehood. To date, Palestine has succeeded in acquiring full membership as a *state* at the United Nations Educational, Scientific and Cultural Organization (UNESCO).[74] Further, on 29 November 2012, the United Nations General Assembly voted (138 to 9) to upgrade the status of Palestine at the United

[66] Settlements and military areas are excluded.
[67] Israelis who live in the West Bank and Gaza Strip are excluded from the PA's jurisdiction.
[68] *The Interim Agreement*.
[69] Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (Kluwer Law International, 1997) 14.
[70] Ibid.
[71] *Interim Agreement* art IX (5)(a) states: 'a. In accordance with the *DOP*, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions'.
[72] Ibid art IX(5)(b) states: 'the PLO may conduct negotiations and sign agreements with states or international organisations for the benefit of the Council in the following cases only: 1. economic agreements, as specifically provided in Annex V of this Agreement; 2. agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council ; 3. agreements for the purpose of implementing the regional development plans detailed in Annex IV of the *DOP* or in agreements entered into in the framework of the multilateral negotiations; and 4. cultural, scientific and educational agreements'.
[73]Nathalie Smuha, 'The International Law of Occupation in the Israeli–Palestinian Conflict' (2014) 50(4) *Jura Falconis Jg*, 927, 937.
[74] United Nations Educational Social and Cultural Organisation, 'General Conference admits Palestine as UNESCO Member State' (UNESCO Press, 31 October 2011).

Nations (UN) from that of 'permanent observer *entity*' to that of 'non-member *statehood*'.[75] Also, Palestine has observer status at the World Intellectual Property Organization (WIPO)[76] and maintains an interest in joining the World Trade Organization (WTO), seeking WTO observership.[77]

2.2.3 To What Extent Are the Oslo Accords Binding?

The Israel–PLO agreements are regarded by the two parties, and by the international community, as binding.[78] Since the agreements are not governed by the legal system of any State, the only other body of law that could govern them is international law.[79] International law governs the Israel–PLO interim agreements and, hence, they are treaties.[80]

Although the five-year period envisaged in the *DOP* has expired, and the *Oslo Accords* have been breached several times, the accords remain binding agreements under public international law. Under art (60) of the *Vienna Convention on the Law of Treaties* (the *Vienna Convention*),[81] a material breach does not bring a treaty to an end per se. It merely offers the innocent party the option of terminating the treaty. Neither of the parties has availed itself of this option.[82]

Thus, although the *Oslo Accords* might be 'politically dead; [they are] not legally dead'.[83] A party may claim material breach as a justification for avoiding obligations, but breach alone does not automatically void an international agreement.[84] Neither Israel nor the PA has taken the necessary steps to void the

[75] *Status of Palestine in the United Nations*, GA Res 67/19, UN GAOR, 67th sess, 44th plen mtg, Agenda Item 37, UN Doc A/RES/67/19 (4 December 2012).
[76] See World Intellectual Property Organisation, *Accredited Observers* http://www.wipo.int/export/sites/www/members/en/docs/observers.pdf.
[77] World Trade Organization (WTO) observership is part of the Palestinian strategy called 'Ending the Occupation, Establishing the State' cited in Hadil Hijazi and Hannes Schloemann, *The World Trade Organization, Why and How it Matters for Palestinian Business* (Palestinr Trade Center, 2013) 12.
[78] John Quigley, 'The Israeli–PLO Interim Agreements: Are They Treaties?' (1997) 30, *Cornell International Law Journal* 417, 470.
[79] Ibid.
[80] Ibid.
[81] United Nations, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) 331 ('*Vienna Convention*').
[82] Benjamin Rubin, 'Israel, Occupied Territories' on *Max Planck Encyclopedia of Public International Law* (2009) [32], available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301?prd=EPIL.
[83] Geoffrey R. Watson, 'The "Wall" Decisions in Legal and Political Context' (2005) 99(1) *American Journal of International Law* 6, 23.
[84] Brandon Hollinder, 'The Israeli Disengagement Plan: Unilateralism in the Face of Multilateral Agreements' (2005) 13(1) *Human Rights Brief* 17, 18.

agreement; therefore, it remains valid and applicable.[85] As some of the provisions are no longer relevant, the *Oslo Accords* should now be applied *mutatis mutandis.*[86]

Overall, the political situation in the Palestinian Territories is complicated. The PA is a self-government authority[87] with limited jurisdiction in all aspects.[88] Further, this section demonstrates that the *Oslo Accords* are binding agreements. As *Oslo Accords* remain in force, copyright and education fall under the legislative jurisdiction of the PA.

Section 2.3 seeks to explain the legislative status and processes.

2.3 The Legislative Situation in Palestine

With the inauguration of the Palestinian Legislative Council (PLC) after the elections on 20 January 1996 and the legislation of the *Modified Palestinian Basic Law* (the *Basic Law*),[89] the PLC became the official legislative jurisdiction legally.[90] However, the PLC ceased to operate in 2007, following the elections of 2006. When the Hamas Party won the elections, a political division occurred between the two main parties, Hamas and Fatah. This division affected the legislative process. Dual governmental and legislative systems are the fruit of this division.[91]

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[85] Ibid.

[86] Rubin, above n 82; see especially 'Separate opinion of Judge Elaraby' on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136. The binding status of the Oslo Accords were asserted by separate opinion of judge Elaraby describing *the 1993 Oslo Accord* as 'contractual and … legally binding on Israel' when finding the construction of the wall contrary to international law: at [2.4(c)].

[87] *DOP* art I.

[88] These aspects are territorial, functional and personal; see subsection 2.2.2.

[89] *The Modefied Palestinian Basic Law 2005 (The Palestinian Authority) ('The Palestinian Basic Law') The Palestinian Basic Law passed by the Palestinian Legislative Council in 1997, and ratified by President Yasser Arafat in 2002, amended in 2003 and 2005.*

[90] Art 47 of the *Palestinian Basic Law* states:

1. The Palestinian Legislative Council is the elected legislative authority.
2. The Legislative Council shall assume its legislative and oversight duties as prescribed in its Standing Orders, insofar as they do not contradict the provisions of this law.
3. The term of this Council shall be the interim period.

[91] Institute of Law, Birzeit University, *Legislative Status in the Palestinian Territory (2007–2012): Mechanisms, Consequences and Solutions* (2012) 115.

2.3.1 The Legislative Process Before 2007

When the PLC was fully operating before 2007, the legislative process[92] within the PLC passed through three stages: three readings of any draft law, deliberation and the signing of approved laws by the PA's president. The PLC began a legal reform to consolidate laws in the West Bank and Gaza Strip. The consolidation process aimed to update neglected laws in every field and, most significantly, to reflect the interests of Palestinian people and Palestinian identity.[93] However, it is essential to note that the legal reform process has been criticised for being chaotic, because of the absence of an overall policy. As laws are drafted 'it is unclear to what values they subscribe and what kind of system they are meant collectively to produce'.[94] Further, the legislative process has been affected by political circumstances. For example, once the PA took over its responsibilities after the *Oslo Accords*, it concentrated first on political laws and later, economic laws. Therefore, criteria for legislating laws have been affected by the requirements of each stage, which has led to the absence of overall legislative policy.[95]

This general legislative status before 2007 suggests that the legislative branch in Palestine suffers from many points of dysfunction and the absence of adequate policies. Thus, the Palestinian legislative branch is at an early stage of development.

3.3.2 The Legislative Process Since 2007

Currently, presidential decrees are the available legislative mechanism according to art 43 of the *Palestinian Basic Law*:[96]

> The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise, they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law. [97]

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[92] *Internal Regulation of the Palestinian Legislative Council* (2000) arts 65 -72.
[93] Almustakbal Foundation for Strategic and Policy Studies, *Developing a Palestinian Road Map for Legislative Reform in the Business Sector: Policy Options and Recommendation* (2006) 9.
[94] Sayigh and Shikaki, above n 58, 42.
[95] Mudar Qesses and Khalil Nakhleh (eds), *Reform in Palestine: Decolonization and Building the State*. (Arabic) (Institute of Law, Birzeit University, 2009) 108 – 113.
[96] *The Palestinian Basic Law*
[97] Ibid art 43.

The president of the National Authority has the right to issue presidential decrees. These decrees are classified under the exceptional legislation rather than the ordinary legislation, where the parliament has the power to legislate. Art 43 of the *Palestinian Basic Law* identifies three main conditions related to presidential decrees, the first two of which must exist to justify issuing these decrees: first, there are cases of necessity that cannot be delayed; second, the Legislative Council is not in session. The third condition applies after the issuance of these decrees and states they shall be presented to the Legislative Council in the first session convened after their issuance; otherwise, they will cease to have the power of law.

The second condition is currently satisfied as the Legislative Council has not been in session since 2007, and the third condition depends on the commencement of the Legislative Council. The first condition is controversial, as the *Palestinian Basic Law* did not explain the meaning of 'necessity'. This condition is deemed to be at the discretion of the president.[98] The *Palestinian Basic Law* did not specify any conditions other than that cases cannot be delayed.

The Palestinian experience in this matter does not identify the 'necessity' condition. While some of the issued decrees are justified on political or security bases, other decrees do not reflect that sense of necessity and urgency.[99]

Consequently, to change the copyright law under the current legislative status in Palestine, it must be decided by decision makers[100] that it is a 'matter of necessity' and an essential reflection of shared values that cannot be delayed. A brief review of the 150 decrees issued by the head of the PA since 2007 to the present time[101] makes it clear that many issued decrees do not relate to the political or security situation.[102] It can be argued that regulating the copyright field is a necessity, specifically with respect to its impact and potential to facilitate cost-free, quality education. Therefore, in a Palestinian context, it may be more persuasive to argue that reforming the copyright law has the potential to support the quality of education.

Section 2.4 explains the obligations of the PA in the fields of copyright and education.

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[98] See generally *Tariq Towqan, The Presidential Decrees in Accordance to the Necessity Cases* (Arabic) *(A Legal Study Presented to Miftah Organisation, 2008).*

[99] Ibid; see also Muwatin The Palestinian Institute for the Study of Democracy, *A Review of Decrees of Law Related to Economic Matters 2007 – 2014* (2015) (Arabic).

[100] The MOEHE and the Ministry of Culture are the main governmental bodies with the ability to create a positive atmosphere regarding the adoption of a comprehensive copyright policy that encompasses law reform and copyright management.

[101] See Al-muqtafi for the number of decree laws from 2007 to the present time. http://muqtafi.birzeit.edu.

[102] For example, the following decrees were enforced recently in 2016: Presidential Decree No (2) of (2016) regarding the Customs Department; Presidential Decree No (7) of 2016.

2.4. Palestine's Legal Obligations in the Fields of Copyright and Education

Palestine has commitments in both fields based on several legal sources. The following account identifies these sources and the attached legal obligations.

2.4.1 Legal Obligations in the Field of Copyright

Palestine is not a State party of any of the international copyright agreements or treaties.[103] Implementation of international copyright law in Palestine ceased with the Berlin Revision of the *Berne Convention*.[104] After that time, the *Berne Convention* was revised several times to adapt to changes that had arisen with new technologies. The *1971 Paris Act* is the last revision of the *Berne Convention.*[105] Further, the *Agreement on Trade-Related Aspects of Intellectual Property* (*TRIPS*) came into force in 1994,[106] linking trade with IP rights—including copyright. In addition, the *WIPO Copyright Treaty* (*WCT*)[107] and the *WIPO Performance and Phonograms Treaty* (*WPPT*)[108] came into force in 1996.

It is important to note that Palestine is legally able to be part of the international copyright system because of its full membership of UNESCO. *The Convention Establishing the World Intellectual Property*

[103] However, it is argued that the PA is bound to uphold *Agreement on Trade-Related Aspects of Intellectual Property Rights* standards because of bilateral agreements; see the discussion below in this subsection.
[104] *Berne Convention for the Protection of Literary and Artistic Works* opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) ('*Berne Convention'*) by virtue of the implementation of the *Imperial Copyright Act 1911* which was legislated to conform to the Berlin Revision of the *Berne Convention.*
[105] *The Paris Revesion to the Berne Convention* was amended on 28 September 1979.
[106] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, signed 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1C, 1869 UNT. 299, 33 entered into force 1 January 1995 ('*TRIPS*').
[107] *WIPO Copyright Treaty*, signed 20 December 1996 Treaty Doc. 105-17 entered into force 6 March 2002 ('*WCT*').
[108] *WIPO Performances and Phonograms Treaty*, 20 December 1996 Treaty Doc. 105-17 entered into force 20 May 2002 ('WPPT').

Organisation (the *WIPO Convention*)[109] declares that membership shall be open to any State that is a member of any of the specialised agencies of the UN.[110]

Annex III[111] of the *Interim Agreement,* entitled 'Protocol Concerning Civil Affairs', includes in its art (23) substantive provisions regarding the form and scope of IP rights protection in Palestine. Art (23) states that 'powers and responsibilities in the sphere of legal administration shall be transferred from the military government and its Civil Administration to the Palestinian side'. Paragraph 4 of this article is entitled 'Intellectual property rights' and stipulates:

> a. Intellectual property rights include, inter alia, patents, industrial designs, trademarks, copyright and related rights, geographical indications and undisclosed information.
>
> b. (1) Each side shall use its best efforts to adopt in its legislation standards of protection of intellectual property compatible with those in the GATT [General Agreement on Tariffs and Trade] Agreement on Trade-Related Aspects of Intellectual Property (hereinafter 'GATT–TRIPS').
>
> …
>
> c. Each side will recognize the copyright and related rights in original 'literary and artistic works', including, in particular, musical works, computer programs and audio and visual recordings, legally originating in the areas under the jurisdiction of the other side.
>
> g. Without prejudice to the provisions contained in Annex IV (Protocol concerning Legal Affairs), each side will extend its administrative and judicial protection to intellectual property right-holders of the other side. The purpose of this protection is to permit effective action against any act of infringement of intellectual property rights under this Agreement, including expeditious remedies to prevent infringements, and remedies which constitute a deterrent to future infringements.[112]

Two points can be raised about these provisions. First, intellectual property rights in general, and copyright and related rights in particular, fall within the legislative, judicial and administrative jurisdiction of the PA. Second, the PA is obliged to use 'its best effort' to adopt standards in its legislation that are compatible with *TRIPS.* Also, it is obliged to establish an adequate judicial and administrative system to effectively prevent infringements of IP rights.

One scholar argues that:

> the requirement to comply with the *TRIPS Agreement* in Palestine is not an academic question; it is more real and immediate than many realize and has already taken the shape of signed Palestinian

[109] *Convention Establishing the World Intellectual Property Organisation*, signed 14 July 1967 828 UNTS 3 entered into force 26 April 1970.
[110] Ibid art 5(2)(i).
[111] *Interim Agreement* annex III, 'Protocol Concerning Civil Affairs'.
[112] Ibid art 23(4)(a), 23(4)(b)(1), 23(4)(c), 23(4)(d).

commitments, a fact that few actually realise, despite the fact that Palestine is still not a member of the WTO and has not received anything in return for its concessions to the *TRIPS*.[113]

However, the express language under art 23(4)(b)(1) 'shall use its best efforts' to protect IP rights in a way that is compatible with *TRIPS* standards is loose language and implies that the protection is affected by the applicable social, cultural, economic and legal circumstances. In addition, the fact that the *Interim Agreement* requests the PA adopt *TRIPS* standards for the protection of IP rights in the Palestinian Territories does not imply that the PA has become officially committed to applying *TRIPS*. Therefore, it might be sensible to conclude that the PA may observe *TRIPS* standards when legislating in the field of IP. However, it is not obliged to adhere to standards that are against its interests as a nascent State.

Additionally, the PA has entered an association agreement with the European Union (EU), requiring the parties to 'grant and ensure the adequate and effective protection of intellectual, industrial and commercial property rights by the highest international standards'.[114] It is worth noting that the PA enjoys the benefit of the Free Trade Agreement (FTA) signed between the United States (US) and Israel.[115] The US extended its FTA with Israel to the PA in 1996.[116] However, this FTA has little to say about IP.[117]

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[113] Samaan, above n 47, 64.

[114] *Euro–Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, and the Palestine Liberation Organization (PLO) for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part*, 1997 OJ L No 187/3, art 33.

[115] The *US–Israel Free Trade Agreement*, signed 22 April 1958 25 ILM 653 entered into force 19 August 1985.

[116] The United States (US) extended *the US–Israel Free Trade Agreement*, with Israel to include the West Bank and Gaza Strip by issuing a presidential proclamation in 1996, see Proclamation 6955, 13 November 1996, To Provide Duty-Free Treatment to Products of the West Bank and Gaza Strip and Qualifying Industrial Zones, https://www.gpo.gov/fdsys/pkg/FR-1996-11-18/pdf/96-29613.pdf. The Palestinian side issued a ministerial decision accepting reciprocity as indicated at the official website of the Palestinian Ministry of National Economy, http://www.mne.gov.ps/agreements.aspx?lng=2&tabindex=100&m=0.

[117] Michael Birnhack and Amir Khoury, 'The Emergence and Development of Intellectual Property Law in the Middle East' in Rochelle Dreyfuss and Justine Pila (eds)**,** *The Oxford Handbook of Intellectual Property Law* (2018) 386. A one-paragraph statement reaffirmed the two countries' obligations under bilateral and multilateral agreements. See art 14 of *the US–Israel Free Trade Agreement*, which states: 'The Parties reaffirm their obligations under bilateral and multilateral agreements relating to intellectual property rights, including industrial property rights, in effect between the Parties. Accordingly, nationals and companies of each Party shall continue to be accorded national and most favoured nation treatment with respect to obtaining, maintaining and enforcing patents of invention, with respect to obtaining and enforcing copyrights, and with respect to rights in trademarks, service marks, tradenames, trade labels, and industrial property of all kinds'. The reference to bilateral agreements in art 14 is designed to acknowledge commitments made by the US and Israel under the 1948 *Treaty of Friendship, Commerce and Navigation*. This treaty addresses the issue of national treatment in the area of intellectual property rights, including, for example, patents, trademarks and copyright. The obligations under the *FTA* reaffirm the bilateral and multilateral commitments undertaken in the area of intellectual property rights prior to

Moreover, as a result of the *Paris Protocol Agreement on Economic Relations* (1994)[118] between the PLO and Israel, and because Israel is a member of the WTO, the Palestinian economy is de facto committed to most of the WTO obligations. One scholar stipulates that:

> [t]he Palestinian economy, by its association with the Israeli trade regime, had to bear all the costs of trade liberalisation inherent in the WTO membership, while having access to few of the benefits of liberalisation and WTO accession.[119]

Consequently, it is argued that these commitments under the previous instruments above have put Palestine in a disadvantaged position where it has to uphold *TRIPS* standards while not enjoying the benefits of being a Member State.[120]

Further, a legal obligation for the PA to put copyright law and policy into effect stems indirectly from the text of art (4) of the *Palestinian Higher Education Law*,[121] which states that one of the aims of the higher education is to '[e]ncourage the authorship, translation and scientific research movement as well as support the continued education programmes which are provided by the Palestinian higher education institutions'.[122] The same article also stipulates that higher education should strengthen 'the scientific cooperation frameworks with the scientific and international bodies'[123] and 'support and develop the higher education institutions and scientific research centers'.[124] A modern and effective copyright and management system is crucial to achieve these aims.

Consequently, the PA can legislate in the field of copyright and related rights and can adopt suitable policy to manage copyright. Palestine is not party to any of the international copyright treaties, thus it does not have direct commitments in this field. However, it may observe *TRIPS* standards to 'its best effort' to fulfil its obligations towards IP under the *Interim Agreement* and other bilateral agreements. Further, it is noted that Palestine may incur a burden from the international IP system because of the occupation and integrated economy. Importantly, there is an indirect obligation towards legislating and managing copyright to encourage authorship and scientific cooperation that stems from the *Palestinian Higher Education Law*.

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the negotiation of the Free Trade Agreement. See *Free Trade Agreement*, 'Questions and Replies' (27 August 1986) https://docs.wto.org/gattdocs/q/GG/L6199/6019.PDF.

[118] The *Paris Protocol Agreement on Economic Relations* (1994) between the PLO and Israel.

[119] Hiba Husseini, 'Challenges and Reforms in the Palestinian Authority' (2003) 26 *Fordham International Law Journal* 500, 527.

[120] Hijazi and Schloemann, above n 77, 12.

[121] *Higher Education Law No. 11 of 2 November 1998, Palestine Gazette* No. 27 (8 December 1998) 28 ('*Higher Education Law*').

[122] Ibid art (4)(1).

[123] Ibid art (4)(4).

[124] Ibid.

2.4.2 Legal Obligations in the Field of Education

The PA has the power to regulate and administer the education sector in the West Bank and Gaza Strip, including schools, teachers and higher education. It also has the power to regulate and administer all cultural and educational activities and programmes.[125]

The *Palestinian Basic Law* obliges Palestine to guarantee the right to education for every citizen.[126] Primary education is compulsory[127] and free[128] at public institutions.[129] Further, the PA is obliged to 'strive to upgrade the education system'.[130] The independence of universities, institutes of higher education and scientific research centres is guaranteed by the *Palestinian Basic Law*.[131]

Palestine guarantees the right to higher education for all by law.[132]Also, it holds the obligation to 'ensure that people with disabilities' benefit from 'equal opportunities for enrolment in pedagogic and educational institutions and the universities within the framework of the curricula applicable in these institutions'.[133] Significantly, people with disabilities have the right to 'adequate curricula, educational and pedagogic

[125] *Interim Agreement*, annex III, art (9) entitled 'Education and Culture' states that '[p]owers and responsibilities in the sphere of Education and Culture in the West Bank and the Gaza Strip will be transferred from the military government and its Civil Administration to the Palestinian side. This sphere includes, inter alia, responsibility for schools, teachers, higher education, special education and private, public, non-governmental and other cultural and educational activities, institutions and programmes and all movable and immovable education property'.
[126] *The Palestinian Basic Law* art 24(1).
[127] Ibid.
[128] Free education means free of charge to the child, parents and guardians to ensure the availability of education; it also encompasses free of direct or indirect fees. See CESCR, *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, UN Doc E/1992/23 [7].
[129] *The Palestinian Basic Law* art 24(1). Mutaz M Qafisheh, 'The Human Rights Obligations of the State of Palestine: The Case of International Covenant on Economic, Social and Cultural Rights' in Mutaz Qafisheh (ed), *Palestine Membership in the United Nations: Legal and Practical Implications* (Cambridge Scholars Publishing, 2013) 225. Although the Palestininan Basic Law states that primary education is free this may not be the reality in Palestine, as Qafisheh notes that 'there are certain contradictions between the [*Palestinian Basic Law*] and the situation on the ground; while the *Basic Law*, like international standards, requires that primary education to be free, schools do charge students. The last point is adduced, for instance, from the Council of Ministers Decision No. 80 of 25 July 2006 on the *Reduction of Fees at Governmental Schools, and Council of Ministers* and Decision No. 96 of 10 September 2007 on the *Exemption of the Students of Poor Families and Whose Father Unemployed from School Fees*. Such decisions show, by implication, that students who do not belong to these categories should pay fees.'
[130] *The Palestinian Basic Law* art 24(2).
[131] Ibid art 24(3).
[132] *Higher Education Law* arts 2, 28.
[133] *The Law of the Rights of People with Disabilities* (The Palestinian Authority) *No. 4 (1999)* art (10)(3)(a).

means and proper facilities'.[134] Palestinians with disabilities have the right to be provided with education that is suitable for their needs.[135]

The value of education in Palestine is significant. This is reflected by expressed legal obligations under the *Basic Law*, the legislation of the *Palestinian Higher Education Law* and a number of Ministerial Council decisions, regulations and presidential decrees in the field of education[136]—unlike the situation with regard to copyright. Nonetheless, it is important to note that although the *Palestinian Basic Law* mandates free primary education, primary education is not free in Palestine.

2.4.3 Human Rights Obligations in the Fields of Copyright and Education

Palestine is a State party at the *ICESCR* since 2014.[137] All human rights impose three obligations on State parties: to respect, protect and fulfil. The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.[138] As a State party to the *ICESCR*, Palestine has these obligations towards the right to education as embodied in arts 13 and 14 of the covenant. It also has the same obligations towards authors' moral and material interests as embodied in art 15(1)(c) and the right to culture as embodied in art 15(1)(a).

Regarding the right to education, the obligation to *respect* requires State parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to *protect* requires State parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to *fulfil* (*facilitate*) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, State parties have an obligation to *fulfil* (*provide*) the right to education. As a general rule, State parties are obliged to *fulfil (provide)* a specific right in the covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.

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[134] Ibid art 10(3)(c).
[135] Ibid art 10(3)(d): 'education of all types and levels to the disabled according to their needs'.
[136] Qafisheh, above n 128, 225.
[137] United Nations High Commissioner for Human Rights, 'Press Briefing Notes on Palestine' (2 May 2014). According to the press briefing notes, on 2 April 2014, the State of Palestine deposited with the Secretary-General its instruments of accession to the *ICESC* .... and that *ICESCR* came into force on 2 July 2014; thereby 'the State of Palestine will be formally bound by [this treaty] under international law'.
[138] *General Comment No. 13*, UN Doc E/C.12/1999/10, [46].

Similarly, the State parties have the same obligations towards authors' rights in their moral and material interests.[139] The obligation to *respect* requires State parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to *protect* requires State parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfil* requires State parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of art 15,[140] para 1(c).[141]

Significantly, respecting, protecting and fulfilling the State party's obligations towards all human rights are governed by the following principles:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[142]

Palestine has an *immediate* duty to provide compulsory and free primary education.[143] This immediate obligation is covered by art 14, which requires:

> each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all.[144]

Also, Palestine is obliged to *progressively* introduce free higher education.[145] Progressive introduction of free education means 'that while States must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education'.[146] The

[139] As stated in *ICESCR*, 993 UNTS 3, art 15(1)(c).
[140] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, [5] ('*Vienna Declaration*').
[141] CESCR, *General Comment No. 17: 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 (Art. 15, Para. 1(c) of the Covenant)*, 12 January 2006, UN Doc E/C.12/GC/17 [28].
[142] *Vienna Declaration*, above n 140, [5].
[143] *ICESCR* art 13(2)(a); *General Comment No. 13*, [50].
[144] *General Comment No. 11*, [1].
[145] *ICESCR* art 13(2)(c).
[146] *General Comment No. 13* [14].

purpose of this progressive introduction of free higher education is to make this level of education 'equally accessible to all, by capacity, and by every appropriate means'.[147]

Overall, Palestine has obligations to respect, protect and fulfil the human right to education, and the human authors' rights in their moral and material interests. Obligations towards these rights are governed by the principles of indivisibility, interdependence and interrelationship. No human right is inferior to another. In practice, this means that Palestine should have an effective copyright law and policy to protect and fulfil the moral and material interests of human authors. It also means that protecting copyright should not negatively affect the right to education, in particular access to up-to-date, quality learning materials as an essential component of the right to education.[148]

2.5 Education in Palestine: Setting the Scene

To appreciate the essentiality of copyright for education in Palestine, it is important to understand the problems of Palestinian education. This section identifies the main challenges faced by education in Palestine after highlighting a brief background to education in Palestine and identifying the main stakeholders in the field.

2.5.1 A Brief Background

The Ministry of Education and Higher Education (MOEHE) was formed in 1994 after the creation of the PA. The ministry is responsible for the development of Palestinian education at all levels.[149] It aims to promote both quality of the learning experience and human resources in the educational sector.[150]

Palestinian higher education emerged under the Israeli occupation as a result of local efforts and national initiatives.[151] One distinguishing aspect of Palestinian higher education institutions (PS HEIs) is the concept

[147] *ICESCR* art 13(2)I.
[148] According to the CESCR, the right to education has four essential features that should exist in all levels and forms of education: availability, accessibility, acceptability and adaptability. *General Comment No. 13* [6], see section 1.1 of this thesis.
[149] MOEHE, https://www.mohe.pna.ps/moeh/moehcreation (Arabic).
[150] Ibid. The MOEHE is responsible for 1.1 million students, more than 50,000 teachers, and almost 2,000 schools.
[151] Ibid.

of 'public universities', which are neither government nor private universities.[152] They are non-profit institutions.[153]

2.5.2 Main Stakeholders

The MOEHE has several commissions and councils. It is important to identify these bodies and their functions to know how they can support education via copyright. These bodies were established and operate as follows.

- The Higher Education Council was established in the late 1970s to supervise PS HEIs and support their cooperation to achieve their aims. The council functions under the supervision of the MOEHE. One of the functions of the council is to pass public policy for higher education in Palestine.154
- The Accreditation and Quality Assurance Commission (AQAC) has the primary aim of promoting the quality of higher education in Palestine: in particular, assessing the academic programmes of PS HEIs; accrediting these programmes; and promoting a system to guarantee and maintain quality at PS HEIs.155
- The Commission for Developing Teaching Profession was established in 2009 on the basis of strategic recommendations to support teachers' training and preparation, in response to the national plan to promote education in 2008–2012.[156] The primary aim of this commission is to promote the teaching profession via a comprehensive system and standards for teaching in educational institutions; in particular, through developing the quality of teaching.[157]
- The Palestinian Curriculum Development Centre is responsible for setting and developing the curriculum to be adopted by the MOEHE for primary and secondary education.[158]

[152] Ibid.
[153] Ibid.
[154] Higher Education Council, MOEHE, http://www.moeh.pna.ps//Councils-and-Commissions/Higher-Education-Council, (Arabic).
[155] Accreditation and Quality Assurance Commission (AQAC), MOEHE, http://www.moeh.pna.ps//Councils-and-Commissions/Accreditation-and-Quality-Assurance-Commission. (Arabic).
[156] Commission for Developing Teaching Profession, MOEHE, http://www.moeh.pna.ps//Councils-and-Commissions/Commission-for-Developing-Teaching-Profession. (Arabic).
[157] Ibid.
[158] The Curriculum Development Centre, MOEHE, http://www.moeh.pna.ps//Councils-and-Commissions/Palestinian-Curriculum-Development-Center (Arabic).

None of these bodies has nominated copyright as an essential component of advancing education. This implies a lack of awareness of the strong link between copyright policy and quality education among the main stakeholders.

2.5.3 The Main Challenges in Palestinian Education

This subsection highlights some of the challenges of education in Palestine that may be relieved by copyright reform and policy.

2.5.3.1. Lack of Financial Resources

Insufficient funding is a major ongoing concern, and is having a serious negative effect on the quality and relevance of higher education in Palestine. Between 60 and 80% of the operating budget of universities is covered by tuition fees,[159] but since there is no regularity or consistency in their payment, university budgets suffer yearly deficits.[160]

The financial crises facing Palestinian higher education are no secret.[161] The dedicated budget for the MOEHE in 2016 was only 0.3% of the 2016 General Budget.[162] Palestinian universities depend for their funding on aid and tuition fees that students pay.[163] The employees of universities complained that their salaries are too low and undertook successful strike action to create pressure to increase their salaries. Universities increased their tuition fees to compensate for the increase in employee salaries. This led to students holding many strikes to protest tuition fee increases.[164]

[159] European Commission, above n 36, 4–6. All Palestinian higher education institutions, except those under UN supervision, impose tuition fees, although with the assistance of various philanthropic organisations.
[160] European Commission, above n 36, 3.
[161] See Palestine Economic Policy Research Institute (MAS), *The Financial Crisis of the Palestinian Universities* (Round Table 9) (2011), http://www.palestineeconomy.ps/files/server/20151705133404-1.pdf; The Palestinian Center for Policy and Strategic Studies (MASARAT), *The Crisis of Higher Education in the West Bank and Gaza Strip* (2016).
[162] Ibid 3.
[163] Ibid.
[164] The financial crisis of the Palestinian universities is a current one; arguably, it began with the second *Intifada* (in 1999) and persists to the present time. Local Palestinian newspapers and news websites are full of reports discussing this issue.

The MOEHE[165] funds universities to compensate for shortages in university budgets after collecting tuition fees. For example, if a university collected around 80% of its costs from students' fees, the government is supposed to cover the remaining 20%. In reality, some students at PS HEIs do not pay their tuition fees, and the government does not provide universities with sufficient financial support.[166]

The lack of financial resources has affected different aspects of education in the country. For example, schools are overcrowded, some schools have a two-shift system and others are housed in unsuitable buildings. There is an absence of modern school facilities (space, library books, maps, models, reference materials, science tools) and of modern teaching and learning aids, and teachers' motivation is low because of their low salary and the absence of incentives.[167]

Low salaries have also led staff members to take up extra work, which has a negative effect on the quality of teaching and the amount and quality of research carried out. The professional development of staff members is restricted because of the absence of regular fellowship and scholarship programmes to upgrade their qualifications and teaching skills.[168]

Overall, from an economic perspective, Palestine is classified as a LDC.[169] The economy is fragile and, when people are poor, knowledge goods are an unaffordable luxury.[170] This is why it is important to have a serious discussion about copyright and fair use in Palestine. The economic situation in Palestine means there is an intimate connection between copyright and access to knowledge in general, and in the context of education in particular.

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[165] European Commission, above n 36, 3.The MOEHE allocated government support to the public universities through the Ministry of Finance.
[166] European Commission, above n 36, 3.
[167] Elena Pacetti, 'Improving the Quality of Education in Palestine through e-learning and ICT: The Bottom-up Approach for a Sustainable Pedagogy' (Paper presented at Conference Knowledge Construction in E-learning Context: CSCL, ODL, ICT and SNA in education, Cesena, Italy, 1-2 September 2008) 2.
[168] European Commission, above n 36, 4.
[169] *Assistance to the Palestinian People*, UN Doc A/RES/43/178. Paragraph 9 of the resolution states 'the General Assembly decides to extend to the occupied Palestinian territory the same preferential treatment accorded the least developed countries, pending the elimination of the Israeli occupation and the assumption of full control by the Palestinian people over their national economy without external interference'.
[170] The average per capita in Palestine in 2015 was US $1,307. Recent data show that two-thirds of Palestinians are affected by food insecurity, with 33% food-insecure, 21% marginally secure and 13% vulnerable to insecurity, see Office of the United Nations Special Coordinator for the Middle East Peace Process (2016). In 2016, 1.1 million people (21% of the population) in the West Bank and 1.3 million people (73% of the population) in Gaza needed some form of humanitarian assistance, see *Report on UNCTAD Assistance to the Palestinian People : Developments in the Economy of the Occupied Palestinian Territory* (1 September 2016) 2.

2.5.3.2 Neglected Scientific Research

This financial crisis also badly affects scientific research within universities. It is argued that one of the reasons for Palestine's weak performance in scientific research is lack of information and content due to the unavailability of current scientific journals.[171]

Scientific research is not a priority for the national and the international funders of higher education because of the lack of financial resources. Another reason for the low quality of scientific research within Palestinian universities is that the main priority of these universities is to limit 'immigration abroad and support the students' steadfastness,'[172] by focusing on teaching.[173]

Importantly, Palestinian universities do not offer PhD degrees.[174] This reflects that the first basic function of PS HEIs is teaching; scientific research is marginal. Students who study for a bachelor degree do not need to conduct research and the same applies to the majority of master programmes. Therefore, research in most cases is limited to the teaching faculty and administration academics.[175]

The following factors are identified by the MOEHE as reasons for low-quality scientific research activities:[176]

> Absence of laws on intellectual property; heavy teaching loads, thus reducing time allocated for research; inadequate financial support from the government and private institutions for scientific research; absence of national policy for scientific research; weak infrastructure; weak relations between industry and research; very few accredited scientific journals; and lack of incentives.

2.5.3.3 Lack of Quality Learning Materials

There is an access problem regarding copyrighted works in Palestine. The average Palestinian would not have the ability to acquire an original copy of intellectual work, whether in its material or digital form. Inability to access original copyrighted works is evidenced by the phenomenon of photocopying to

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[171] MASARAT, above n 161, 4.
[172] MOEHE, *Mid-term Strategy for Higher Education Sector (2010, 2011–2012)*, (2010) 9. https://www.mohe.pna.ps/Resources/Docs/StrategyEn.pdf.
[173] Ibid.
[174] With the exception, see Birzeit University, Doctrate in Social Sciences, http://www.birzeit.edu/en/admissions/doctorate. Birzeit University recently started to offer a PhD program in Social Sciences. The mission of this program as Birzeit Univeristy websites states: 'One of the main objectives of this academic program is to foster a generation of scientists and researchers in social sciences and researchers in social sciences, which is able to produce new knowledge about the Arab world and Palestine from an Arab and Palestinian perspective.'
[175] MOEHE, *Mid-term Strategy for Higher Education Sector (2010, 2011–2012)*, above n 172, 6.
[176] Ibid 17.

overcome the prohibitive price of textbooks, which is part of the daily life of a university student, even occurring within university buildings and facilities. According to the Palestinian Central Bureau of Statistics (PCBS), in 2014 only 3 in 10 (32.6%) Palestinians over 10 years old were reading books.[177] Only 2.9% of individuals had a membership at a public library[178] and 2.0% belonged to social clubs.[179] Over one-third (35.5%) of individuals have practised scientific and technological activities within university frameworks;[180] 10.9% practise playwright and drama and 6.1% sing and play music.[181] In addition, according to a PCBS expenditure survey,[182] more than one-third (34.5%) of the monthly expenditure of an average[183] Palestinian family is on food.[184] Further, the percentage of Palestinians living in poverty was 25.8% in 2011.[185]

University curricula are usually established according to faculty guidelines. Each faculty defines course descriptions for each subject based on the accreditation requirements given by the AQAC. PS HEIs professors have the freedom to build curricula based on these guidelines.[186]

There are no regulations set by the MOEHE to define teaching strategies. PS HEIs refer to the teaching methods professors need to utilise only in general terms. PS HEIs lecturers and professors have the freedom to define and use their own pedagogies and strategies. It is worth stressing that a professor is also responsible for defining the curricula and the reference materials based on the course outline. Teaching materials such as books and audio-visual materials are commonly used in the teaching process, but they are not provided to students free of charge. Nevertheless, students are expected to refer to those materials when preparing for exams.[187]

Journal subscriptions are often too expensive even for well-established universities in developed countries. For example, Cornell University cancelled its journal subscriptions with Elsevier, the world's leading

[177] PCBS, 'The Demography of Palestinians living in Palestine' (2016) (Arabic) ('PCBS, 2016') 36.
[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] These statistics are based on the results of an expenditure and consumption survey of Palestinian families conducted by the PCBS in the period 15 January 2011–14 January 2012. PCBS 2016, ibid 29.
[183] The average size of a Palestinian family is 6.0 individuals—5.7 in the West Bank and 6.6 in the Gaza Strip.
[184]PCBS, 2016, above n 177, 29.
[185] Ibid 30. Specifically, the same reference states that poverty percentage is 17.8% in the West Bank, 38.8% in the Gaza Strip; the extreme poverty percentage is 12.9% (7.8% in the West Bank and 21.1% in Gaza Strip).
[186] European Commission, above n 36, 16.
[187] Ibid.

publisher on scientific, medical and legal issues.[188] Further, Harvard University reduced the number of scientific journals it purchased from Elsevier, from 131 to 35[189] because the publishers' practice of 'bundling'[190] journals strained the library's budget.[191] The circumstances are far more dire for a LDC like Palestine, given the humble budget of Palestinian universities and their limited financial resources.

Policymakers in Palestine should not ignore the integral relationship between the economic cost of accessing knowledge and copyright regulations. Access can be supported through legal mechanisms that enrich exceptions and limitations in Palestinian copyright law. Also, established voluntary initiatives in the wider world such as OER, OA and Creative Commons (CC) provide further capability to access educational resources and facilitate wider access to information.[192]

2.5.3.4 Lack of Relevance

The unemployment rate among recently graduated Palestinian students exceeds 75%. This very high rate is mainly a result of universities teaching and presenting courses without taking into consideration real market needs. Graduates do not meet the labour market requirements with their newly acquired skills.[193]

2.6 Copyright in Palestine: Setting the Scene

While the education sector is active in Palestine and is regulated and developed extensively since the creation of the PA, copyright is totally neglected, even in the field of education. This section aims to provide a brief historical background about copyright in the country. Further, it highlights the main challenge regarding copyright in Palestine, which is a low awareness of copyright and its significance.

[188] Štrba, above n 27, 29.
[189] Ibid.
[190] Bundling refers to the practice in which a large number of journals is classified into a single subscription. To buy one set of journals, a library subscriber has no alternative but to acquire other journals without the possibility of ending the subscription. Ibid.
[191] Harvard University, 'Libraries Take a Stand: Journals Present Rising Costs to Libraries—and to Scholarship' (5 February 2004) *Harvard Gazette Archives*. Cited in ibid.
[192] As explained in chapters 6 and 7 of this thesis.
[193] European Commission, above n 35, 17.

2.6.1 A Brief Historical Background

The statutory basis of copyright protection in the Palestinian Territories (the West Bank and Gaza Strip) has remained virtually unchanged since the period of the British Mandate of Palestine.[194] The *Copyright Ordinance 1924* (the *1924 Ordinance*),[195] which extended the *Imperial Copyright Act 1911* (the *1911 Act*) to Palestine, is a relevant and applicable law in both territories. Israeli military legislation regarding IP has been extremely sparse and relegated mainly to procedural matters. Therefore, the *1911 Act* in Palestine 'has survived the British–Jordanian–Israeli–Palestinian rule and is probably the last stronghold of the Imperial Act'.[196]

Later, almost half a century after the mandate, legislating a new or modified copyright law in the Palestinian Territories became possible because of the establishment of the PA. However, this possibility has been challenged by several political and legislative obstacles.[197]

2.6.2 Copyright in Palestine: Low Awareness

One major aspect of copyright in Palestine is lack of awareness and low appreciation of the significance of copyright for development in general and for education in particular. The following subsections reflect the degree of copyright disrepair in Palestine.

2.6.2.1 An Outdated Law and Ineffective Copyright System

The system of copyright is barely functional in Palestine because of legal, judicial and structural issues. This is not only because the law is outdated and cannot effectively operate within the current digital environment, it is also because the judicial system is lacking resources sufficient to implement copyright

[194] The Mandate for Palestine (1924–1948). This was based on a decision of the Council of the League of Nations on 24 July 1922; however the mandate was not operative until the Council approved it on 29 September 1923.
[195] *Imperial Copyright Act 1911* (Extension to Palestine) Order 1924, 114 OG 643 (21 March 1924).
[196] Birnhack and Khoury, above n 117, 16.
[197] See Section 2.3.

law properly.[198] The applicable copyright law is rarely discussed in official documents: since the creation of the PA in 1994 only a few copyright infringement cases have been reported in the courts.[199]

The Palestinian Ministry of Culture has been the official governmental institution administering copyright, through its Copyright Unit, since 1998. Currently, the unit's main role is to spread awareness about the concept and significance of copyright among different groups in the community: the judicial branch, lawyers, Customs Department, universities and schools. Further, the Copyright Unit participates in the drafting and discussion of proposals for new copyright law. Consequently, there have been many attempts to legislate new copyright law. The first copyright law draft was presented in 1998, influenced by other copyright laws applicable in neighbouring Arab countries,[200] and another law was drafted in 2000.[201] The PLC considered both drafts and discussed them in its specialised legal committees; however neither draft was approved. Further, in 2006, draft copyright law was reviewed and modernised again in cooperation with the UNESCO office in Ramallah, Palestine. This draft was not even considered by the PLC as it ceased to function as the legislature of the PA in 2006.[202]

2.6.2.2 Low Appreciation for Authship

It is reported[203] that different sectors of the Palestinian community express dissatisfaction with the current copyright system as a whole, as it fails to protect their intellectual works. Some academic scholars proclaim that 'they refrain from publishing their works due to the absence of adequate copyright protection'.[204] Similarly, Palestinian artists complain that 'their works are continuously duplicated and commercialised without their permission or any compensation'.[205] Consequently, these artists 'lose the economic gain from their artistic works'.[206] Thus, it is difficult for them to depend on their artistic works as a means for their livelihood.[207]

[198] Taghreed Sa'adeh, 'The Protection of Intellectual Property and the Freedom of expression in Palestine' (Palestinian Center for Development and Media Freedoms, 2015) 36–37.
[199] The Public Prosecution of Palestine has presented to the Magistrate Court four copyright infringement cases. Ibid.
[200] Tawam, above n 3, 16; Palestinian Ministry of Culture, above n 3.
[201] Tawam, ibid; Palestinian Ministry of Culture, above n 3.
[202] Following the 2006 election and the subsequent split of Hamas and Fatah—the main political parties.
[203] Sa'adeh, above n 198, 38.
[204] Ibid.
[205] Ibid 39.
[206] Ibid
[207] Ibid.

Further, plagiarism has become common practice among students within Palestinian educational institutions.[208] This crime is committed publicly via known and established service offices, where working papers, study and research papers are produced for a price.[209] This phenomenon also affects Palestinian authors,[210] as they hesitate to publish their original works of literature. Further, it affects the fairness and quality of the educational process in Palestine where original thought, creativity and critical thinking are not valued and where original, hard work is equal to plagiarised work.

The rules of law, justice and incentive are all legitimate and powerful reasons to make urgent the matter of operating an effective copyright system in Palestine—a copyright system that is legal, judicial and regulatory. An adequate copyright system in Palestine is a local need; in other words, there are sectors of the Palestinian community that want this system to exist so they can enjoy the fruit of their intellectual work. However, an adequate copyright system should not only protect the economic rights of copyright holders, it should also serve the public interest and create a balance between the private interests of authors and the public and community at large. Thus, copyright regulation needs to consider the specifics of the local economic situation.

2.6.2.4 Absence of a Role for Copyright in Education

In addition to the local need to protect Palestinian authorship, copyright has the potential to assist education through soothing some of the challenges that face education in Palestine.[211] The MOEHE's declared vision has the objective of advancing knowledge and education to achieve development in all fields.[212] However, the influence of copyright law and policy is overlooked. The potential for effective copyright policy to overcome the challenges facing education in Palestine is not realised. Copyright policy at the governmental level is absent. At the institutional level, some universities are in an early stage of setting up repositories with an unclear or ineffective copyright policy.[213] Unleashing the potential of copyright to leverage education in Palestine is the central purpose of this thesis.

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[208] Ibid.
[209] Ibid. See also, Al-Quds Open University, 'Stores to Sell Scientific Research' (Arabic) 24 May 2015, http://www.qou.edu/viewDetails.do?id=7213 [accessed 3 March 2017]; Finder, *Plagiarism: The Academic Crime*, Report (Arabic) 6 August 2015, http://finder.ps/ar/reports-written/1427.html [accessed 3 March 2017].
[210] Sa'adeh, above n 198, 39.
[211] Mainly through copyright reform and the implementation of OA and OER as explained in Chapters, 5, 6 and 7.
[212] See Ministry of Education and Higher Education, 'Vision', https://www.mohe.pna.ps/.
[213] See 'FADA' Birzeit University Open Access Repository https://fada.birzeit.edu/.

2.7 Concluding Remarks

This chapter has described the landscape of copyright and education in a Palestinian context; in particular concluding the following.

The PA is an interim self-government authority with limited jurisdiction in all aspects. Regulating (administering and legislating) copyright and education falls within the jurisdiction of the PA.

As the PLC is not in session since 2007, presidential decrees are the only available legislative mechanism to operate in cases of necessity. Considering the large number of issued presidential decrees since 2007 and exploring the nature of these decrees reveals that 'cases of necessity' are not limited to political and security cases. Therefore, it can be argued that reforming copyright law is a matter of necessity and an essential reflection of shared value that cannot be delayed.

Palestine has legal obligations in the field of copyright and education. These obligations stem from the *Oslo Accords*, the *Palestinian Basic Law* and other domestic laws. It must be noted that Palestine is not formally a State party to any of the international copyright agreements and treaties. It only has the obligation to '[use] its best effort' to protect IP rights in a way compatible with *TRIPS*. Thus, the PA may observe *TRIPS* standards when legislating in the field of IP. However, it is not obliged to uphold standards that are against its interests as a nascent State.

Significantly, a legal obligation for the PA to put copyright law and policy into effect stems indirectly from the text of art (4) of the *Palestinian Higher Education Law*. It is noted that education is a well-regulated sector compared with copyright. As noted, the *Palestinian Basic Law* guarantees the right to education; further, the *Palestinian Higher Education Law* was one of the first legislated laws since the creation of the PA.

As a State party at the *ICESCR*, Palestine holds the obligation to respect, protect and fulfil the human right to education and the authors' human right to their moral and material interests in their intellectual works. These obligations towards these rights are governed by the human rights framework that should be considered when legislating copyright law.

The challenges facing the Palestinian education system range from the lack of financial resources, the weak status of scientific research and the low quality of learning materials, to the lack of relevance and high unemployment of graduates; necessitating the adoption and integration of copyright policies to mitigate these challenges. However, copyright is a neglected branch of law and policy. This status is reflected in the failure to reform outdated laws, the low appreciation of authorship and the outrageous absence of copyright

policies among the main stakeholders despite the undeniable fact that copyright is the law that governs knowledge, which is the substance of any education system.

This chapter has set the scene in a Palestinian context. The next chapter aims to understand the theory behind advocating using copyright to support cost-free and permission-free education.

PART II
RETHINKING THE ROLE OF COPYRIGHT IN SUPPORT OF FREE, QUALITY EDUCATION: THEORETICAL FRAMEWORK

This part of the thesis provides the legal and theoretical foundations needed to develop a framework to use copyright in support of education; it establishes the basic structure necessary for analysis throughout this thesis.

Chapter 3—Common Values: How Can Copyright and Education Work Together?

Chapter 3 establishes four common values that are shared by copyright and education, which presume that copyright should support free, quality education in less privileged countries like Palestine. These shared values are accommodated as exceptions to copyright protection that may lead to prejudicing these values and education. This chapter argues for rethinking the role of copyright in supporting free, quality education on the basis of these values and calls for strengthening of the status of these values in the realm of copyright by exploring the potential to do this at a domestic level.

Chapter 4—Copyright Paradigms and Fair Educational Use

Chapter 4 is an attempt to create a better accommodation for education in the realm of copyright on the basis of common values. Thus, it demonstrates that there are two main paradigms: Paradigm I where public domain is the rule and copyright is the exception; Paradigm II where copyright is the rule and permitted uses are the exception. The concept of fair use is crucial to these paradigms: while it is a right for the user under Paradigm I it is only an exception under Paradigm II. Chapter 4 argues for Paradigm I, demonstrates its legitimacy under the *Berne Convention* and highlights Canadian case law as moving towards this paradigm.

Chapter 3

Common Values: How Can Copyright and Education Work Together?

Objectives

1. Demonstrate common values that justify copyright facilitating free, quality education in less privileged countries.
2. Explore the accommodation of education under international copyright law.
3. Investigate the potential to articulate a pro-education copyright system.

3.1 Introduction

The previous chapter provided background for understanding the Palestinian context. Clearly, the Palestinian education system has many challenges stemming from its political, economic and legal circumstances. Nonetheless, education is one of the sectors that the PA sees as important for promotion and attention. Building on this desire for betterment in Palestine and the need for capacity building in this area, this thesis argues that the difficulties facing the education system in Palestine can be alleviated by the adoption of a copyright policy that supports access to free quality copyright content.

For this purpose, this chapter argues that copyright should support free, quality education in less privileged countries on the basis of shared common values between copyright and education. This chapter highlights four common values—knowledge dissemination; public interest; development; and human rights—and shows how they underpin both copyright and education, which means that there should not be a conflict in using copyright to advance education (Section 3.2). However, copyright is accused of precluding access to

knowledge in general and to educational materials in particular, rather than promoting it.[214] Therefore, this chapter explores how international copyright law accommodates education (Section 3.3). Later, the chapter explores the potential for achieving a more supportive copyright policy for education in less privileged countries (Section 3.4).

3.2 Copyright and Education: Common Values

Four common values underpin copyright and education: knowledge dissemination; development; the public interest; and the human rights framework. The sharing of these four values provides a strong argument for education to be facilitated by copyright; in particular by enabling free use and reuse of knowledge goods and copyright materials for educational purposes—significantly in the context of poor countries where education systems are not able to pay for accessing, using and reusing copyright for educational purposes.

3.2.1 Knowledge Dissemination as the Ultimate Purpose of Copyright

Seeing knowledge dissemination as the ultimate purpose of copyright law and intellectual development emphasises the instrumental nature of this worldwide system. Different theories justify the existence and the granting of exclusive rights over knowledge goods. Social contract theory and utilitarian theory are two sides of the one coin; that is, the overarching objective of copyright is using the IP system as an instrument to disseminate knowledge to advance social welfare and public interest.

The genesis of copyright clearly demonstrates that knowledge dissemination is the reason for creating copyright exclusive rights. This is evident from the long title of the first copyright statute, the *Statute of Anne*: *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Producers of Such Copies during the Times therein mentioned*.[215] Historically, the fact that copyright laws

[214] See Lea Shaver, 'Copyright and Inequality' (2014) 92(1) *Washington University Law Review* 117, which discusses copyright inequality and its effect on access to books, and opportunities to read and write. It asserts that copyright does not consider the variation of language, class and culture by creating a cost barrier and a language barrier.
[215] *Statute of Anne.*

were made throughout the Enlightenment in Europe reflects the value placed on learning and education.[216] This period of the history of Europe had a strong influence on legislating copyright law at that time. [217]As the 'Enlightened societies were especially mindful of encouraging the creation and diffusion of "useful knowledge"'.[218] In fact, one need only reflect on the preamble to the *Statute of Anne* itself, which refers to the 'encouragement of learned men to compose and write useful books' to recognise that the term 'useful' had an important meaning at the time. Books will not be useful without dissemination.[219] The *Statute of Anne* is considered anti-monopoly law. The United Kingdom (UK), at the time of legislating the *Statute of Anne*, was considered highly developed in the eighteenth and nineteenth centuries, and was a book-exporting nation; nonetheless, it was mindful about protecting learning and the dissemination of knowledge.[220]

In addition, the history of the U.S. experience as a developing country[221] in legislating its own copyright law demonstrates the knowledge dissemination function of copyright as the end purpose of legislation, as per the *U.S. Constitution* empowering U.S. Congress 'to promote the progress of science and useful arts by securing for a limited times to authors and inventors the exclusive right to their writings and discoveries'.[222] Thus, the U.S. Congress's mandate was to promote the diffusion of knowledge by giving exclusive rights to authors for the limited time necessary to achieve that overarching policy goal. Confirming this public policy orientation of the constitutional clause, President George Washington observed in a speech to both Houses of Congress, 'there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is, in every country, the surest basis of public happiness'.[223] These statements are evidence that copyright law's actual end goal is to promote learning and creativity.[224]

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[216] Myra Tawfik, 'History in the Balance: Copyright and Access to Knowledge' in Michael Geist (ed), *From Radical Extremism to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 69, 72.
[217] Ibid.
[218] Ibid 73.
[219] Ibid.
[220] Ibid.
[221] In the nineteenth century.
[222] *The US Constitution* art 1, s 8, cl 8.
[223] Speech to both Houses of Congress delivered on 8 January 1790. See J Sparks (ed), *The Writings of George Washington*, vol. XII (American Stationers' Company, 1837) 9. Cited in Tawfik, above n 216, 77, 79. Tawfik stipulates that the first US Act, modelled on the *Statute of Anne* aimed to enable free circulation of the works of foreign authors by limiting the copyright protection to the US citizens. This is because at that time 'copyright law was understood as an agent to advance the country's socio-political goals by rejecting any restrictions on book circulation that would inhibit the ability of Americans to access the latest knowledge and ideas.'
[224] *Fogerty v Fantasy, Inc*. (1994) 510 US 517.

The US Supreme Court has confirmed knowledge dissemination as an ultimate function many times. In *Feist Publications, Inc. v Rural Telephone Service Co., Inc.*, the Court claimed:

> [t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts'. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.[225]

Fogerty v Fantasy, Inc.[226] asserts that '[t]he immediate effect of our copyright law is to secure a fair return for an "author's" creative labor'. 'But', it continues, 'the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good'.[227] Suggesting that the primary purpose of copyright is to advance public welfare and further see reward to the author as 'a secondary consideration' adopted by many earlier Supreme Court cases. For example, in *Fox Film Corp. v Doyal*,[228] Chief Justice Hughes said:

> [The] sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.[229]

In *U.S. v Paramount Pictures, Inc*.,[230] the *Court* clearly pointed out, '[the] copyright law, like the patent statutes, makes reward to the owner a secondary consideration'. This statement was repeated by the *Court* in *Mazer v Stein*.[231]

While the origin of copyright states that 'encouraging learning' is the rationale for the *statute*, this cause has been prejudiced by the progress of time.[232]

Ruth Okediji proclaims that:

> The concept of the public interest in international IP regulation is focused unduly on just one aspect of the public interest, namely securing the optimal provision of knowledge goods by granting exclusive rights to authors and inventors. The other aspect of the public interest consists of mechanisms to ensure that the public has optimal access to the rich store of knowledge products. Such access is important for facilitating the dissemination of knowledge, thus generating social welfare gains, and for the benefit of downstream creators who rely on the availability of a robust

[225] *Feist Publications, Inc. v Rural Telephone Service Co., Inc*. (1991) 499 U.S. 340, 350.
[226] *Fogerty v Fantasy, Inc*. (1994) 510 US 517
[227] *Fogerty v Fantasy, Inc*. (1994) 510 US 517.
[228] *Fox Film Corp. v Doyal* (1932) 286 US 123.
[229] Ibid.
[230] *U.S. v Paramount Pictures, Inc*. (1948) 334 US 131.
[231] *Mazer v Stein* (1954) 347 US 201; Sampsung Xiaoxiang Shi, *The Place of Creativity in Copyright Law* (QUT Digital Repository, 2008) 12–14 http://eprints.qut.edu.au/
[232] See Subsection 3.3.1 (describing the expansion of copyright protection).

> public domain from which to draw resources for productive ends. Put simply, access to knowledge goods is a core component of dynamic welfare.[233]

The purpose of copyright is to incentivise authorship by granting exclusive rights for a limited time for the purpose of knowledge dissemination. Thus, the ultimate aim of the whole system is disseminating knowledge. The exclusive rights granted to authors are a means to this end.

On the other hand, knowledge dissemination is essential for education to reach its purpose. Dr Martin Luther King Jr explained the purpose of education as follows:

> Education must enable one to sift and weigh evidence, to discern the true from the false, the real from the unreal, and the facts from the fiction.[234]

No education system can achieve this purpose without adequate access to knowledge. Thus, one may say that knowledge dissemination is both a tool and a purpose for any successful education.

3.2.2 Copyright, Education and the Public Interest

Public interest has long played a vital role in the development of copyright law. This is clearly reflected in Alexander's study,[235] which concluded that no aspect of copyright doctrine in the nineteenth century was safe from public interest claims.

Public interest was and is used to support different interests. Sometimes it is used to support copyright protection; other times, to support users of the copyright. For example, in the name of the public interest, greater protection for dramatic authors was vested to benefit the theatre-going public and enhance the quality of dramatic literature in general.[236] On the other hand, the public interest argument may be used against the authors' interests, for example Lords Brougham and St Leonards explicitly rejected the claims

[233] Ruth L Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, Issue Paper No. 15 (International Centre for Trade and Sustainable Development, 2006) ix.
[234] Martin Luther King Jr., 'The Purpose Of Education' (Morehouse College Student Paper, The Maroon Tiger, 1947).1,1.
[235] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, 2010). Alexander analyses the value of the public interest in the history of copyright (since the passage of the *Statute of Anne*—the *Imperial Copyright Act 2011*).
[236] Ronan Deazly, 'Copyright Law and the Public Interest in the Nineteenth Century by Isabella Alexander' (2011) 74(3) The Modern Law Review 499, 500.

of copyright protection for foreign authors in *Jeffreys* v *Boosey*[237] preferring instead to prioritise the interests of British manufacturers and the reading public at large.[238]

The public interest as a concept is broad and can be used as grounds for different claims in the interest of both copyright holders and copyright users.

In a wider context, the meaning of 'public interest' is often used as a consideration to be balanced against private interests or in contradiction to the notion of individual interests. In one case, the Supreme Court of Victoria said:

> The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.[239]

In another case, the Federal Court of Australia said:

> The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances …..[240]

This wider context of 'public interest' is consistent with the interests of the users of copyright material and the dissemination role of copyright Further, education is nominated as 'one of the clearest examples of strong public interest in limiting copyright protection.'[241]

3.2.3 Copyright, Education and Development

Another strong justification that reinforces the case for education in the realm of copyright is 'development'. After briefly explaining the concept of development and its significance, this subsection highlights the links between education, copyright and development.

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[237] *Jeffreys* v. *Boosey* (1854) 4 HLC 815
[238] Ibid.
[239] *Director of Public Prosecutions v Smith* [1991] 1 VR 63 75.
[240] *McKinnonv Secretary, Department of Treasury* [2005]145 FCR 70 [245].
[241] Kevin Garnett, Gillian Davies and Gwilym Harbottle (eds), *Copinger and Skone James on Copyright* (16th ed, Sweet and Maxwell.2011) [9–96].

3.2.3.1 The Meaning of Development

Development is another reason why copyright should support cost-free and permission-free use and reuse of knowledge goods for educational purposes. Development as a concept is concerned with 'enhancing the lives we lead and the freedom we enjoy'.[242] Therefore, development cannot be defined by the level of economic growth as this is only one element in the development process.[243] Sen establishes a link between development and freedom, and defines 'development' as a means and an end at the same time. Sen stresses the value of considering development as the expansion of human freedom. He indicates five types of freedoms essential for development: 'political freedoms, economic facilities, social opportunities, transparency guarantees and protective security'.[244] Martha Nussbaum states that the concept of development overarches all life aspects; in this vein, she nominates 'adequate education' as one important element in cultivating development.[245] She reinforces Sen's definition of development as freedom.[246] 'Social development' conveys the significance of social empowerment and abandons the idea that 'financial support' is the only tool for the development.[247] The World Summit for Social Development identified three key aims of social development: 'fighting poverty, full employment, and social integration'. On the other hand, 'economic development' refers to 'changes that affect a local economy's capacity to create wealth for local residents' or 'the ability of the economy to generate growth.[248]

[242] Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) 14.
[243] Bertil Tungodden, *A Balanced View of Development as Freedom* (Michelsen Institute Development Studies and Human Rights, 2001) 14, http://www.cmi.no/publications/file/953-a-balanced-view-of-development-as-freedom.
[244] Ingrid Robeyns, 'An Unworkable Idea or a Promising Alternative? Sen's Capability Approach Re-examined', Discussion Paper (Center for Economic Studies, 2000) 8.
[245] Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011) 33–34.
[246] Ibid, '*Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain'.
[247] Rami Olwan, *Intellectual Property and Development* (PhD Thesis, Queensland University of Technology, 2011) 7.
[248] United Nations, *World Summit for Social Development 1995*, http://www.un.org/esa/socdev/wssd/text-version/.

Significantly, development is a human right. According to the *Declaration on the Right to Development* (1986):[249]

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[250]

Peter Drahos asserts:

> [T]here is considerable tension between intellectual property rights and the right to development. The argument has a particular bite in the context of information, since information once in existence can be made available at zero or little cost. The recognition of a right to development might be the basis on which to argue that states should co-operate in lowering levels of intellectual property protection in some areas, or at least not advance those levels. However, it is important to note that there is no necessary conflict between the right of development and intellectual property. If it turns out to be empirically true that intellectual property rights contribute to economic development, there is no conflict.[251]

3.2.3.2 The Link between Education and Development

Education is labelled as one component of the concept of development by the World Bank.[252] The strong connection between development and education is clearly reflected in art 26(2) of the *UDHR*,[253] which states that 'education shall be directed to the full development of the human personality'.[254] Further, the *Convention on the Rights of the Child* (*CRC*)[255] refers to education in the context of 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'.[256] Education is expressly highlighted as critical to development programmes and to the realisation of sustainable

[249] United Nations General Assembly, *Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st Sess, Supp No 53, UN Doc. A/41/53, (1986) ('*Declaration on the Right to Development*').
[250] Ibid art 1.1.
[251] Peter Drahos, 'Intellectual Property and Human Rights' (1999) 3 *Intellectual Property Quarterly* 249, 258 ('Intellectual Property and Human Right').
[252] The World Bank, 'Learning to Realize Education's Promis' World Development Report (2018). The Report indicates: 'In the language of Amartya Sen's capability approach, education increases both an individual's assets and his or her ability to transform them into well-being—or what has been called the individual's "beings and doings" and "capabilities."Education can have corresponding salutary effects on communities and societies.' 38. Futher the Report nominates education as a 'a powerful tool to raising incomes': 38. It also states that education 'builds human capital': 41. Most importantly, education improves individual freedoms: 38.
[253] *UDHR* art 26(2).
[254] Ibid.
[255] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, 28 ILM 1456 entered into force 2 September 1990 ('*CRC*').
[256] *CRC* art 29(1)(a).

development.[257] The recent *2030 Agenda for Sustainable Development*[258] puts quality education as one of its goals.[259] Paragraph 25 of this agenda states:

> We commit to providing *inclusive and equitable quality education at all levels*—early childhood, primary, secondary, tertiary, technical and vocational training. All people, irrespective of sex, age, race or ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long learning opportunities that help them to acquire the knowledge and skills needed to exploit opportunities and to participate fully in society. We will strive to provide children and youth with a nurturing environment for the full realization of their rights and capabilities, helping our countries to reap the demographic dividend, including through safe schools and cohesive communities and families.[260]

In *General Comment No. 13*,[261] the CESCR characterises education as 'the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty'.[262] Further:

> Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly education is recognized as one of the best financial investments States can make.[263]

Therefore, the right to education is an empowerment right, as it straddles different categories of human rights.[264]

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[257] See for example, World Bank, *World Development Report 2007: Development and the Next Generation*;.*Johannesburg Plan of Implementation*, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002, UN Doc A/CONF.199/20.
[258] UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 21 October 2015, UN Doc A/RES/70/1. On 1 January 2016, the world officially began implementing a transformative plan of action based on 17 Sustainable Development Goals to address urgent global challenges over the next 15 years. This agenda represents a road map for people and the planet that will build on the success of the Millennium Development Goals and ensure sustainable social and economic progress worldwide. It seeks not only to eradicate extreme poverty, but also to integrate and balance the three dimensions of sustainable development—economic, social and environmental—in a comprehensive global vision.
[259] Goal 4 of *The 2030 Agenda for Sustainable Development*: 'Quality Education: ensure inclusive and equitable education and promote lifelong learning'. Target one of this goal is: by 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and Goal 4-effective learning outcomes, see http://www.un.org/sustainabledevelopment/education/.
[260] UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 21 October 2015, UN Doc A/RES/70/1, 25.
[261] *General Comment No. 13*, above n 26.
[262] Ibid [1].
[263] Ibid.
[264] In *General Comment No. 11*, the UN Committee on Economic, Social and Cultural Rights noted: '[The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect the right to education epitomizes the

There is a positive relationship between education and development. Copyright law regulates access to quality learning content which is core for quality education and development. Next subsection explores the link between copyright and development.

3.2.3.3 The Link between Copyright and Development

While the link between education and development is clear, the link between copyright and development is a controversial one. In the context of the developing countries and LDCs, 'development' is a key argument constantly invoked as a rationale for legislating and implementing copyright law and IP systems in general. The IP literature is packed with arguments around the effect of IP on development.[265]

The preamble to *TRIPS* reflects a presumed relationship between development goals and IP protection by recognising that 'the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology'.[266] However, there is less agreement and strategic planning for precisely how IP might deliver on these promises. Development is the grounds used to persuade developing countries and LDCs to have IP laws in general;[267] where IP is viewed as a magic wand for 'encouraging new inventions and technologies, increasing production, promoting investment, enabling technological transfer and supporting the availability of essential medicines'.[268] However, IP may not benefit developing countries and LDCs because of the low human and technical capacity of these countries.[269] Poor people are not able to benefit from an IP system—

indivisibility and interdependence of all human rights'; see *General Comment No. 11,* UN Doc E/1992/23, [2].

[265] There have been few empirical studies that can help us understand the effect of adopting an intellectual property system on foreign direct investment; technology transfer; local innovation; research and development; and economic growth in developing countries. The empirical literature confirms the complexity of the issues found in the theoretical literature, and it is not obvious if the adoption of a strong IP system would actually lead to economic development. A study of the effects of a strong IP system in one specific developing country must not be generalised to all developing countries because each country differs in terms of its technical capacities, as well as inequalities of income and wealth; see Olwan, above n 247.

[266] *TRIPS.Agreement*.

[267] See Margret Chon, 'Intellectual Property 'from Below': Copyright and Capability for Education' above n 44.

[268] Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy* (2002) 1, http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf

[269] Ruth L Okediji, 'History Lessons for the WIPO Development Agenda' in Neil Netanel (ed) *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford University Press, 2009) ('History Lessons for the WIPO Development Agenda') 137, 143. Okediji states that 'the WIPO Development Agenda came to fix and inform the unclear relation between IP and development in the context of developing and least developed countries'.

patents or copyright—because they are less likely to be able to create IP or afford to utilise it. IP demolishes imitation as a way for learning and development, thereby expanding rather than minimising the digital divide and the development gap between the developed world and the least developed one.[270]

Attempts to conceptualise the effects of IP on development vary. For example, Julie Cohen argues for a 'capabilities approach to development',[271] while Margret Chon demands the adoption of an 'IP from below'[272] approach to IP and development in recognition of the fact that IP systems do not stimulate development in developing countries and LDCs because basic development needs (i.e., food, education, health care) are not met. Madhavi Sunder advances a 'cultural approach to IP and development', contending that developing countries and LDCs need IP systems that create 'cultural diversity'.[273] Other scholars submit that a human rights-based approach is the ideal approach in the context of IP and development. Further, the conformity of an IP system to the social, economic and cultural context is supported by many scholars. Sir Hugh Laddie proclaims that an IP system can be development oriented.[274] Daniel J Gervais expresses a similar idea in stating that IP rights protection is essential for economic growth, but is poor in itself to ensure growth. He emphasises that 'each country needs a comprehensive knowledge optimization strategy to successfully exploit IP to maximize its economic growth in areas that are information and IP intensive'.[275] Professor Brian Fitzgerald and Rami Olwan suggest that developing countries should structure their IP laws in a way that is 'pro-development'; that is, IP laws should fit within the context of each country. Importantly, balance of the conflicting interests is key for this development.[276] Most likely, in the context of LDCs, the public interest is heavily represented in favour of the users rather than the IP owners. Therefore, exceptions and limitations to IP holders' exclusive rights have considerable significance

[270] CIPR, above n 269, 1.
[271] Julie Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 *University California Davis Law* 1151.
[272] Margaret Chon, 'Intellectual Property and the Development Divide' (2006) 27 *Cordozo Law Review* 2821
[273] Madhavi Sunder, 'Cultural Dissent' (Research Paper No 113, University of California, Davis, Legal studies, 2002)
[274] Sir Hugh Laddie, Forward to the Commission on Intellectual Property. Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002). ''For too long IPRs have been regarded as food for the rich countries and poison for poor countries…. [I]t is not as simple as that. Poor countries may find them useful provided they are accommodated to suit local palates.'
[275] Daniel.J Gervais, 'Intellectual Property, Trade and Development: The State Of Play' (2005) 74 *Fordham L. Rev* 505, 20.
[276] Rami Olwan and Brian Fitzgerald, 'Intellectual Property and Development - a Road Map for Developing Countries in the 21st Century' (2012) 3.
http://www.olwan.org/attachments/433_IP%20and%20Development%20A%20Road%20Map%20for%20Developing%20Countries.pdf

in the LDCs context, as these exceptions and limitations are an essential part of achieving balance between private and public rights.

This controversial relationship between IP and development led to the adoption of the *WIPO Development Agenda*,[277] which is regarded as a shift from the concentrating of IP rights and is considered a turning point in WIPO's life; that is, WIPO's primary function is to advance and harmonise IP rights.[278] 'The WIPO Development Agenda is widely regarded as an important milestone in the framework of an organisation that historically has viewed development as an inevitable, rather than directed, incidence of IP regulation'.[279] The Agenda reflects the need for global IP reform within a framework that, at a minimum, requires an historic shift from an institutional emphasis on rote extensions of IP laws in developing countries to evaluations of how IP might actually bring about development gains in the majority of WIPO Member States. Ruth Okediji proclaims that 'the Development Agenda has, at a minimum, occasioned reexamination of the unsettled relationship between IP protection and development goals'.[280]

Consequently, the Agenda highlights the need for and significance of directing IP in general and copyright in particular to achieve development, viewing IP as a policy tool to achieve development. WIPO notes:

> IP for Development is an emphatic articulation of the notion that IP is not an end in itself but rather is a tool that could power countries' growth and development. WIPO, as the lead United Nations agency mandated to promote the protection of intellectual property through cooperation among states and in collaboration with other international organizations, is committed to ensuring that all countries are able to benefit from the use of IP for economic, social and cultural development.[281]

The *WIPO Development Agenda* provides further strong supportive evidence from an organisation that is known for its role as a guardian for IP exclusive rights.[282] Palestine and other LDCs should not miss the

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[277] The *World Intellectual Property Organisation, The WIPO Development Agenda* (2007) ('*WIPO Development Agenda*').
[278] Okediji, 'History Lessons for the WIPO Development Agenda', above n 269, 143.
[279] Ibid 141.
[280] Ibid. Also see Jeremy De Beer (ed), *Implementing WIPO Development Agenda* (Centre for International Governance Innovation and Wilfrid Laurier University Press, 2009).
[281] WIPO, *Intellectual Property for Development, Agreement between the United Nations and the World Intellectual Property Organization* (27 September 1974). WIPO is responsible 'for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries to accelerate economic, social and cultural development'. As WIPO has been a specialised agency of the UN since 1974, it must contribute to the UN's overall development mandate.
[282] See Carolyn Deere, 'Reforming Governance to Advance the WIPO Development Agenda' in Jeremy De Beer (ed) *Implementing WIPO's Development Agenda* (Centre for International Governance Innovation and Wilfrid Laurier University Press, 2009) ch 4. Deere describes the long-standing internal culture of WIPO as a guardian for IP protection and highlights reformation for WIPO's governance to effectively apply the *WIPO Development Agenda*.

opportunity to use the approach adopted by WIPO to support education as a tool to achieve development through copyright.[283]

3.2.4. Copyright, Education and the Human Rights Framework

Human rights are the basic rights and freedoms that accrue to people because they are 'members of the human family'. The *UDHR* makes it clear that human rights of all kinds—economic, political, civil, cultural and social—are of equal validity and importance. This fact has been reaffirmed repeatedly by the international community; for example, in the 1986 *Declaration on the Right of Developmen*t,[284] the *Vienna Declaration*[285] and the *CRC*.

'Inherent dignity of the human person'[286] is the source of these rights and all human rights; therefore, these rights accrue to every member of the human family.[287] They are inalienable; they cannot be transferred or waived, or taken away by anyone[288] and are universal by belonging to every human being everywhere without distinction on any grounds.[289]

The protection of authors' moral and material interests resulting from their intellectual works stems from both art 27(2) of the *UDHR*, stating that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' and art 15(1)(c) of the *ICESCR*, which recognises the right of every one '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

[283] See Subsection 3.3.3 for further discussion of the *WIPO Development Agenda* and its potential for the LDCs.
[284] *Declaration on the Right to Development*, above n 249.
[285] *Vienna Declaration*, above n 140.
[286] *UDHR* Preamble.
[287] UN General Assembly, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 ('*ICCPR*'), Preamble; *ICESCR* Preamble.
[288] See *UDHR* Preamble; *ICCPR* Preamble; *ICESCR*, 993 UNTS 3.
[289] See *UDHR*, UN Doc A/810, Preamble; *ICCPR* Preamble; *ICESCR*; *Vienna Declaration*, above n 140 [1].

Copyright and the moral and material interests of authors are not fundamentally similar.[290] The subject matter of protection under art 27(2) of the *UDHR* and art 15(1)(c) of the *ICESCR* is the human author[291] and scientific, literary and artistic works connected to their human author. These articles guarantee to authors the protection of their moral[292] and material interests[293] to protect the 'personal link'[294] between them and their intellectual creations.[295] It is noteworthy that most of the provisions of the *UDHR* and the *ICESCR* are general, such as the ones on the right to life or freedom of expression, since they apply to all individuals without distinction of any kind.[296] In contrast, arts 27(2) and 15(1)(c) single out authors as a specific group worthy of special attention. Art 27(2) of the *UDHR* and art 15(1)(c) of the *ICESCR* entitle authors to the protection of moral and material interests, but both are silent about the specific content of these interests, the duration of their protection and their relationships with one another other and with authors' rights in international copyright law.

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[290] Saleh Al-Sharieh, *A Roadmap for Assimilating Authors' and Users' Human Rights into International Copyright Law* (LL.D.Thesis, University of Ottawa, 2014) 54 (Al-Sharieh Thesis). Stating that 'The drafting history of authors' moral and material interests in the *UDHR* and the *ICESCR*—and their interpretation by the CESCR—prove that the copyright and its international regime have influenced the articulation and content of authors' moral and material interests in international human rights law. Nonetheless, those interests and copyright are not essentially the same'.

[291] See *General Comment No. 17*, above n 141, [1], [2]; moral and material interests accrue to authors by virtue of their inherent dignity as human beings, and therefore they are fundamental, universal and inalienable. The author can be an individual or group of individuals, but cannot be a legal person.

[292] *General Comment No. 17*, ibid, [12] [13]; the protection of the moral interests aims 'to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations'. According to the CESCR, moral interests entitle an author to be 'recognized as the creator of the intellectual work and to object to its distortion or derogatory modification'.

[293] Al-Sharieh Thesis, above n 290, 76; *General Comment No. 17*, ibid, [10]. The protection of authors 'material interests does not need to last for the entire lifespan of the author, and that its fulfilment can take any form including "one-time payments" or an "exclusive right," allowing authors to exploit their intellectual works for a limited period of time. The main requirement for the protection of authors' material interests is that the protection be "effective," in that it is capable of "enabling authors to enjoy an adequate standard of living"': Ibid.

[294] *General Comment No. 17*, above n 141, [2]. General comments are 'a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty, whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance'. Philip Alston, 'The Historical Origins of "General Comments" in Human Rights Law' in L Boisson de Chazournes and V Gowland (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff, 2001) 763, 764. There is disagreement on the legal weight of general comments, which Professor Philip Alston summarises as follows: [There are views] that seek to portray them as authoritative interpretations of the relevant treaty norms, through others that see them as a de facto equivalent of advisory opinions which are to be treated with seriousness but no more, to highly critical approaches that classify them as broad, unsystematic statements which are not always well founded, and are not deserving of being accorded any particular weight in legal settings': Alston,764.

[295] See *General Comment No. 17*, above n 141,

[296] Al-Sharieh Thesis, above n 290, 63.

However, it is well established that the protection of authors' material interests in international human rights is limited by a long list of other individuals' human rights and is vulnerable to the lack of financial resources of the State or economic disturbances in the knowledge market. [297]

Being interdependent and indivisible are fundamental characteristics of human rights in a holistic international human rights regime[298] that is 'an indivisible structure in which the value of each right is significantly augmented by the presence of many others'.[299] Accordingly, authors' moral and material interests are associated with many human rights, the clearest of which are the human right to freedom of expression enshrined in art 19 of the *UDHR* and art 19 of the *International Covenant on Civil and Political Rights*[300] and the human right to property enshrined in art 23 of the *UDHR*.[301] Each of these human rights can lend support to authors' exclusive rights over their intellectual works.[302]

Like authors, users of intellectual works have a special provision in the *UDHR* and *ICESCR* addressing their interests in intellectual works. Art 27(1) of the *UDHR* provides that '[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'.[303] Art 15(1) of the *ICESCR* provides similar protection by recognising everyone's human right:

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[297] See *General Comment No. 17*, above n 141, [11] [22].

[298] The UN has frequently emphasised the interdependence and indivisibility of all international human rights, see *Declaration on the Right to Development*, art 6(2). 'All human rights and fundamental freedoms are indivisible and interdependent' (art 6(2)), and 'the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms' (Preamble); *Vienna Declaration*, above n 140, [5]: '[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'

[299] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2nd ed, 2003) 27. Cited in Al-Sharieh Thesis, above n 290, 86.

[300] *ICCPR*, 999 UNTS 171.

[301] Drahos, 'Intellectual Property and Human Right', above n 251, 256, asserts that 'the absence of the general right to property from the *International Covenant on Civil and Political Rights* "weakens the claim that it is part of customary international law". He also argues that situating property right in the fundamental human rights category would contradict with the right of sovereign states to regulate property rights to adjust them to economic and social circumstances, which is recognised under private international and public international law. Yet this is precisely not the way in which we think about fundamental human rights norms that prohibit genocide, torture and slavery, norms that at least some scholars argue are part of customary international law. States cannot adjust these norms to suit their convenience. In the case of property, however, not only is it convenient for states to adjust property norms, but it seems vital to the development of their economies that they have the power to do so'. He also proclaims that 'the right to property in the current information age has produced a "property paradox", where this right contradicts with other rights, which became positive rights instead of negative with the advent of the digital era. The expansion of human rights is another factor that intensifies the "property paradox"'.

[302] See *General Comment No. 17*, above n ,[35], where the CESCR explains that authors' moral and material interests 'cannot be isolated from the other rights recognized in the *ICESCR'*.

[303] *UDHR* art 27(1).

a. [t]o take part in cultural life;
b. [t]o enjoy the benefits of scientific progress and its applications.[304]

In both articles the main object of protection is 'culture', a broad concept that encompasses arts and other intellectual works such as books, software, paintings and music. Culture does not have a unified meaning,[305] but intellectual works explicitly or by implication will always fall within one of its countless definitions.[306] In General Comment No. 21[307] the CESCR explains that 'culture' within the meaning of art 15(1)(a) encompasses a wide category of intellectual works:

> [C]ulture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.[308]

It is noted that this definition of culture is 'both source and format-neutral'.[309] An intellectual work is part of culture whether it is oral, written or visual; whether it is digital or in print; and whether it is produced by a natural or legal person, individual or group of individuals, community or machine.[310] The protected subject matter in art 15(1)(a) of the *ICESCR* is wider than the object of protection under art 15(1)(c).[311] Accordingly, authors' moral and material interests, when protected through an exclusive right system, may

[304] *ICESCR* art 15(1)(a)–(b). Al-Sharieh, above n 289,111 notes 'although article 15(1) of the *ICESCR* overlooks referring to the enjoyment of art, this omission does not make its object of protection narrower than the object of protection under article 27(1) of the *UDHR'*.
[305] See Tzen Wong, Molly Torsen and Claudia Fernandini, 'Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law' in Tzen Wong and Graham Dutfield (eds), *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge University Press, 2010) 280.
[306] For a comprehensive review of the definitions of culture see Alfred Kroeber and Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Kraus Reprint, 1978).
[307] UN Committee on Economic, Social and Cultural Rights, *General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 43rd Sess, UN Doc E/C.12/GC/21 (21 December 2009).
[308] Ibid [13].
[309] Al-Sharieh, above n 289, 113.
[310] Intellectual works also fall under the definition of 'cultural content' and 'cultural expressions' under the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 art 4(2) defines cultural content as 'the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities', and art 4(3) defines cultural expressions as 'those expressions that result from the creativity of individuals, groups and societies, and that have cultural content'.
[311] Al-Sharieh Thesis, above n 290, 113.

enclose some but not all of culture. This should alleviate some of the concerns that the protection of authors' moral and material interests may intrude on users' rights in culture, arts and science.[312]

Importantly, users' rights in culture, art and science are supported by the right to education as recognised in art 13(1) of the *ICESCR*, which states:

> 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, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.[313]

The human right to education has four main features[314] that are directly related to copyright regulations: availability of reading and teaching materials; accessibility to quality learning materials; acceptability of the form and substance of education, including curricula and teaching methods, which have to be acceptable (e.g. relevant, culturally appropriate and of good quality); and adaptability, which requires altering and changing copyright materials to be relevant and culturally appropriate: Thus, '[t]he critical problem of the potential conflicts arises from the fact that the educational materials, in which authors may have a material interest, are critical to the realisation of the right to education.'[315]

Users' rights in culture, arts and science—comprising the rights to access, use and share intellectual works—are a critical aspect of the human right to education.[316] For example, education will not be available when students lack access to intellectual works such as books, journals or computer programs, nor will it be accessible when these educational materials are unaffordable or their communication electronically in the course of distance learning is prohibited. The human right to education will not achieve acceptability or adaptability when intellectual works are not available in the relevant language of the students or in a format accessible by students with special needs. *The Convention on the Rights of the Child* (*CRC)* explicitly requires that educational and vocational information, material and guidance be available and accessible by

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[312] Ibid. In contrast, see CESCR, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, Background Paper submitted by Maria Green, International Anti-Poverty, Law Center, UNESCO, 24th Sess, UN Doc E/C.12/2000/15, (2000) 1 arguing that the *UDHR* and *ICESCR* 'appear to set up an unresolved tension between the provisions protecting access to advancement on the one hand and those protecting individual creators' rights on the other'[2].
[313] *ICESCR* art 13(1).
[314] *General Comment No. 13*, above n 26, [6].
[315] See Sharon F Foster, 'The Conflict between the Human Right to Education and Copyright' in Paul Tottemans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2008) 287, 288.
[316] Al-Sharieh Thesis, above n 290, 137–138.

children.[317] Books, journals, computer programs, art and other teaching materials, along with the means of their communication such as the Internet, radio or television form the main channels of information and knowledge necessary for a good quality learning environment.[318] Therefore, '[c]lose contact with contemporary technological and scientific knowledge should be possible at every level of education'.[319]

3.2.4.1. International Human Rights and Copyright Laws

Governments have obligations under international human rights and copyright laws. These include obligations towards the right to education, users' rights in art, science and culture and authors' rights with regard to their intellectual works. The fulfilment of these obligations is governed by the international human rights framework. However, governments are obliged under international copyright law to protect mainly authors' rights; users' rights and education are only treated as exceptions to the exclusive rights of copyright holders. Two matters arise in this context. First, does international copyright law conflict with international human rights law? Second, in case of conflict, which law takes priority?

The first matter is discussed by Resolution 2000/7,[320] which declares that an apparent conflict exists between IP and human rights:

> [international intellectual property law, as embodied in TRIPS], does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination.[321]

Given this incompatibility, the UN Sub-Commission on the Promotion and Protection of Human Rights reminded governments of **'**the primacy of human rights obligations over economic policies and agreements'.[322] The substance of Resolution 2000/7 is a joint statement by the Habitat International

[317] *CRC* arts 17, 28(1)(c).
[318] Committee on the Rights of the Child, *CRC General Comment No. 1: The Aims of Education*, 17 April 2001, UN Doc CRC/GC/2001/1, annex IX, (2001) [22]; *EFA*, above n 20; see also Committee on the Rights of the Child, *General comment No. 16: On State Obligations Regarding the Impact of the Business Sector on Children's Rights* (15 March 2013, Advance Unedited Version) (recommending the allocation of budgets for supporting the 'production and dissemination of children's books, magazines, and papers; [and] various formal and non-formal artistic expressions for children' [58(d)]. Al-Sharieh Thesis, above n 290,137.
[319]*EFA* art VIII (2); see also UNESCO, *A Human Rights-Based Approach to Education for All* (2007) 56 (stressing that the supply of books and equipment is a 'fundamental prerequisite of education'.
[320] OHCHR (Sub-Commission), *Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7* (17 August 2000) UN Doc E/CN.4/Sub.2/RES/2000/7 (Resolution 2000/7).
[321] Ibid [2].
[322] Ibid [3].

Coalition and the Lutheran World Federation,[323] which urges the Sub-Commission to 'take concrete actions on TRIP[S]',[324] whereby the Sub-Commission 'must reassert the primacy of human rights obligations over the commercial and profit-driven motives upon which agreements such as TRIP[S] are based'.[325]

Scholars argue that international IP protection generally conflicts with the human right to development;[326] the strong patent protection over genetically modified crops could undermine the human right to food;[327] international patent protection hinders access to medicine and thus is injurious to the human right to health;[328] international copyright and patent laws overlook the human rights of indigenous people over their

[323] David Weissbrodt and Kell Schoff, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7' (2003) 5 *Minnesota Intellectual Property Review* 1, 26.

[324] OHCHR (Sub-Commission), 'The Realization of Economic, Social and Cultural Rights: Joint Written Statement Submitted by Habitat International Coalition and the Lutheran World Federation, non-governmental organisations in special consultative status' (28 July 2000) UN Doc E/CN.4/Sub.2/2000/NGO/14, 6.

[325] Ibid.

[326] See CIPR, *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy* (2002) 6; Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Developments' in WIPO and OHCHR (eds), *Intellectual Property and Human Rights: Panel Discussion to Commemorate the 50th Anniversary of the UDHR* (WIPO, 1999). Drahos notes 'considerable tension between intellectual property rights and the right to development': Ibid, 27. The Report notes the additional costs that IP protection imposes on developing countries 'at the expense of the essential prerequisites of life for poor people: CIPR, above n 326, 6.

[327] See, e.g., Peter Straub, 'Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries' (2006) 29 Hastings International and Comparative law Review 187; See also Michael Blakeney, *Intellectual Property Rights and Food Security* (Centre for Agriculture and Bioscience International, 2009) 15 (noting the presence of a tension between IP and the right to food); Annette Kur, *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 285 (arguing that patenting of genetically modified crops could make developing countries more dependent on imported seeds, a situation implying some tension between international patent law and the human right to self-determination).

[328] See, e.g., UN Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (31 March 2009) UN Doc A/HRC/11/12 [94] (concluding that the effect of *TRIPS* and bilateralism on medicine availability and pricing has complicated States' task to respect, protect and fulfil the human right to health); Philippe Cullet, 'Patents and Medicines: The Relationship between TRIPS and the Human Right to Health' (2003) 79(1) *International Affairs* 139, 160 (concluding that possible conflicts exist between drug patenting and the human right to health and that this conflict ought to be resolved in favour of the human right to health).

traditional knowledge;[329] and copyright law is in conflict with the human right to freedom of expression[330] and the human right to education.[331]

A second view of the relationship between international human rights and international IP law focuses on the 'degree of compatibility' between the two regimes[332]. According to the High Commissioner of Human Rights, this compatibility is ascribed to the similarity of the balance that both systems pursue between private interests in protecting intellectual works and the public interest in providing access to those works.[333] In particular, in the context of copyright, this balance means giving authors exclusive rights over their intellectual works while simultaneously creating a set of exceptions and limitations that enable the public to access those works.[334] For example, copyright exceptions and limitations under international copyright law, such as the quotation exception and the expression–idea dichotomy, challenge the claim that a conflict exists between copyright and freedom of expression.[335] Similarly, in international patent and trademark law,

[329] See, e.g., Peter Drahos, 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Biocollecting Society the Answer?' (2000) 22(6) *European Intellectual Property Review* 245, 247; James T Gathii, 'Rights, Patents, Markets and the Global Aids Pandemic' (2002) 14 *Florida Journal of International Law* 261, 319; Manuela Cameiro da Cunha, 'International Bodies and Traditional Knowledge' in Sophia Twarog and Promila Kapoor (eds), *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (UN Publications, 2004) 91.

[330] See, e.g., P Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe' in Rochelle C Dreyfuss, Diane L Zimmerman and Harry First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, 2001) 343; UNHRC, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (16 May 2011) UN DOC A/HRC/17/27, [78] (concluding that disconnecting users from accessing the Internet on grounds of IP law violations is not a justified restriction on freedom of expression).

[331] See, e.g., International Symposium on the Information Society, Human Dignity and Human Rights, 'Statement on Human Rights, Human Dignity and the Information Society' (2005) 18 *Revue Québécoise de droit International* 221, [26] (stating that international IP law 'should not prevail over the right to education and knowledge').

[332] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, UN ESCOR, 52nd sess, UN Doc E/CN.4/Sub.2/2001/13 (27 June 2001) para 12.

[333] Ibid, para 11. See also Estelle Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating' in Paul LC Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2008) 134 (arguing that IP rights and human rights 'coexist', 'coincide' and 'cooperate').

[334] Daniel J Gervais, 'Intellectual Property and Human Rights: Learning to Live Together' in Paul LC Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2008) 3.

[335] Derclaye, above n 333.

exceptions and limitations to exclusive rights give rise to the claim that the two regimes are compliant with international human rights law.[336]

The suggestion that IP law and human rights are compatible assumes that the principle of balance in international copyright law is clear, and imports it to manage the tension between authors' and users' human rights.[337] However:

> [G]iven the plethora of meanings of the term balance in international copyright law, this perspective overestimates the maturity of the principle of balance in international copyright law and therefore also overestimates its possible role in international human rights law.[338]

Authors' moral and material interests are supported by the general right to property, which is not a fundamental human right. Fundamental human rights are 'human rights of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement'.[339]

In summary, human rights are guarantees for all humans to live with dignity. The principles of indivisibility and interdependence rule the framework. The States are obliged to respect, protect and fulfil all human rights. Some human rights obligations should be fulfilled immediately; and some progressively. There are core obligations for the human rights that must be met by States but determining core obligations is a national task.

Under international human rights law, all human rights coexists. There is no hierarchy between rights and no right is absolute. This means the right to education and authors' rights are equal; although the situation may not be the same under the international copyright system, where education is only an exception to the exclusive rights of copyright holders.

Further, the complexion of the human rights framework imposes the inevitability of considering authors' rights with users' rights by virtue of the *ICESCR*, which regulates both the 'moral and material interests of the authors in their intellectual works' and the 'user's rights in art, science, and culture' under the same

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[336] Hans M Haugen, *The Right to Food and the TRIPS Agreement: With a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution* (Koninklijke Brill, 2007) 376; Lisa P Ramsey, 'Free Speech and International Obligations to Protect Trademarks' (2010) 35 *Yale Journal of International Law* 405, 415; Kristen Osenga, 'Get the Balance Right: Squaring Access with Patent Protection' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 309, 320–321.
[337] Saleh Al-Sharieh, 'Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law' (2016) 32(82) *Utrecht Journal of International and European Law* 5, 8.
[338] Ibid.
[339] Henry G Schermers, 'The International Protection of the Right of Property', in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, 1988) 565.

article; that is, art (15). Moreover, because of this complexion, users' rights in art, science and culture are supported by the right to education embodied in art (3) of the same covenant and vice versa.

A legitimate way to eliminate the contradiction between copyright law and the right to education is to recognise the rights created through the enactment of IP laws as instrumental rights. These rights should serve the interests and needs that citizens identify through the language of human rights. Following this interpretation, 'human rights would guide the development of intellectual property rights' and intellectual property rights 'would be pressed into service on behalf of human rights'.[340]

The above analysis of the relationship between copyright, the human right to education and the human rights framework in general, legitimates and strengthens the case for education in the realm of copyright. It also emphasises that the instrumental role of copyright law in achieving and fulfilling the human right to education and other human rights might be prejudiced by the enforcement of international copyright law.

Dissemination of knowledge, public interest, development and human rights are values that are shared between copyright and education. These mutual values reflect that education's function and aims fit squarely within the function and aims of copyright. A conclusion is that accommodating education stems from the very nature of copyright; that is, copyright is not an end in itself, rather it is a tool to achieve greater values. Thus, a sensible expectation is that education is well valued and appreciated by copyright. However, the value of education may not have its desirable status under the copyright structure as Section 3.3 of this chapter demonstrates.

Section 3.2 recognises the shared values between copyright and education. It also recognises the vital role of copyright in knowledge dissemination, public interest, development and achieving the human right to education and other human rights; a role that is in danger of being eroded by extension of copyright. Such an extension threatens the abovementioned values. Section 3.3 demonstrates how the capacity of copyright to achieve these values is being undermined.

[340] Drahos, 'Intellectual Property and Human Right', above n 251, 260.

3.3 How Does Copyright Accommodate Education?

The structure of international copyright law maximises the tendency to prejudice education and, thus, the shared common values of knowledge dissemination, public interest, development and human dignity that form a rationale for the human right to education. This structure has negative effects on domestic copyright laws.[341] International copyright law and IP law in general is built on the basis of mandatory exclusive rights for copyright holders and non-mandatory exceptions that favour copyright protection of knowledge goods over access to these goods.[342] This articulation led to copyright being misinterpreted as a system for the protection of copyright holders' interests; thereby devaluing users' interests in access to knowledge goods. Further, this structure places the common values in danger of being easily prejudiced by accommodating them mainly under the label of exceptions.

This section explains how the common values that underlie education and copyright are being negatively influenced by a structure that encourages the expansion of copyright holders' exclusive rights and the treatment of education—and all the common values—unfairly.

3.3.1 Mandatory Copyright Protection

Copyright protection is in continuous expansion; international copyright law has passed through four periods;[343] first, the territorial period in which copyright did not extend beyond the territory of the State, an example being the copyright system that existed in Great Britain by way of the *Statute of Anne*; second, the international period marked by the commencement of the *Berne Convention*, which sought to establish an international regime for the protection of authors' rights; third, the global period marked by treating IP as a trade issue in *TRIPS*, establishing minimum universal standards in all areas of IP to be enforced through the WTO enforcement mechanism; fourth, the post-*TRIPS* period marked by the advent of *TRIPS*-plus

[341] Susan Isiko Štrba, 'Institutional and Normative Considerations for Copyright and Access to Education in Developing Countries: Rethinking Incremental Solutions through Limitations and Exceptions' (2013) 3 *Queen Mary Journal of Intellectual Property* 96, 97: 'The problem of copyright and access to education in developing countries lies primarily in the nature of international legal instruments and the international intellectual property (IP) system as a whole. As is well known, the international IP system does not equally stress the protection of IP and access to proprietary goods'.
[342] Ibid.
[343] See Drahos, 'Intellectual Property and Human Right', above n 251, 351–357.

treaties, such as the *WCT*, *WPPT* and the *Anti-Counterfeiting Trade Agreement*. The latter period has also experienced the rise of bilateral and regional FTAs between developed countries and LDCs containing *TRIPS*-plus norms.[344]

In addition, as a result of digitisation and new communication technologies, copyright holders assert increasing rights over knowledge goods, often seeking and receiving in the domestic and international spheres unprecedented levels of control over these otherwise public goods.[345] In effect, while the digital era has created remarkable opportunities for greater access to information and knowledge goods by developing countries and consumers generally, it has also spurred new forms of private rights—negotiated multilaterally—to effectuate absolute control over access, use and distribution of information and knowledge.[346] Information-processing industries have responded to this by pressing for—and achieving—unprecedented extensions of IP rights to gain more control over the use and exchange of information across the globe including the wider use of criminal penalties.[347]

As a reaction to and evidence for the expansion of the copyright protection that affects our daily lives in the current digital age, the Access to Knowledge (A2K) movement emerged as a 'conceptual critique of the narrative that legitimates the dramatic expansion in intellectual property rights'.[348]

The expansion of copyright protection is a natural outcome in an imperfect world where rights need be enforced to be respected. Copyright holders have the power to enforce their rights and even to expand them in the light of a structure that places all other interests—including education—into the category of non-mandatory exceptions.

3.3.2 Non-Mandatory Copyright Exceptions and Limitations

Copyright views all other interests that are not the interests of copyright holders as exceptions to the rule. Thus, it accommodates education and the shared common values through exceptions. Exceptions are not equal to rights. Therefore, copyright users' interests including their interests in a good education are inferior

[344] See Drahos, 'Intellectual Property and Human Right', above n 251, 351–357; Peter Drahos, 'BITS and BIPs: Bilateralism in Intellectual Property' (2001) 4(6) *Journal of World Intellectual Property* 791, 93A; the *TRIPS-Plus Agreement* is an agreement that '(a) requires a Member to implement a more extensive standard; or (b) which eliminates an option for a Member under a TRIPS standard'.
[345] Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment', above n 233, x.
[346] Ibid.
[347] Gaëlle Krikorian and Amy Kapczynski.(eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, 2010) 18.
[348] Ibid.

to copyright holders' exclusive rights. Legally, they are exceptions to infringement, meaning they are infringement of copyright as a rule; however they might be articulated as exceptions for public interest reasons. Exceptions at their best cannot beat rights. This terminology of rights versus exceptions has led to copyright inequity through interpreting rights as broadly as possible, because they are rights, while interpreting exceptions narrowly, because they are exceptions.

3.3.2.1 Article 10(2) of the Berne Convention

The available accommodations for education in the *Berne Convention*[349] include an exception to copyright owners' exclusive rights by giving signatory countries the discretion to create uncompensated exceptions and limitations. Art 10(2) of the *Berne Convention* provides:

> It 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.[350]

Art 10(2) is the only article that includes an explicit exception for education.[351] This article leaves it to national law to determine the exempted use of works for teaching purposes,[352] within the limits of art

[349] See also *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome*, 26 October 1961 ('*Rome Convention*'). The *Rome Convention* deals with the rights of performers, phonogram producers and broadcasting organisations, which are compendiously set out in art 15. Its provisions regarding private use (art 15(1)(a)) and teaching and scientific research (art 15(1)(d)) mirror equivalent limitations and exceptions in the *Berne Convention*. In addition, art 15(2) provides Member States with an alternative set of allowable 'limitations', to be of the 'same kind' as that provided for copyright works, with regard to the protection of performers, producers and broadcasting organisations. Arts 9(1) and 14(6) of *TRIPS* (1994). Integrated permissible limitations and exceptions pertaining to educational activities permitted under the *Berne Convention* and the *Rome Convention*; Art 1(2) of *WCT* provides that 'nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the *Berne Convention for the Protection of Literary and Artistic Works*'. A similar provison is found in art 1(1); thus neither treaty detracts from applying the exceptions and limitation described for education under the *Berne Convention* and the *Rome Convention*.

[350] *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act), opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

[351] Raquel Xalabarder, 'On-line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in Paul Torremans (ed) *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, 2007) 378 ('*Copyright Law Handbook*'). This provision does not apply to the utilisation of works for teaching in adult education courses because 'teaching' under this article meant to include teaching at all levels of educational institutions where the result of teaching must lead to an official degree. Papadopoulou, above n 43, 6: 'teaching available to the general public which does not lead to an official degree is excluded'.

[352] World Intellectual Property Organization, Records *of the Intellectual Property Conference of Stockholm 11–14 June 1967* (WIPO, 1971) 1148: 'teaching' as a purpose is explained by the Main Committee I's Report of the Stockholm Conference, where 'The wish was expressed that it should be made clear in this Report that the word "teaching" was to include teaching at all levels—in educational institutions and

10(2).[353] Utilisation of works for teaching purposes is left to the discretion of member countries; thus this provision is not mandatory[354] and discretion is limited by the purpose and fair practice. It is important to understand for the context of this research that this provision is a controversial one from many aspects.

First, the type of *utilization* of the work under art 10(2) is controversial: Ricketson and Ginsburg assert that the utilisation is limited to publications, broadcasts and sound and visual recordings, which implies that works that are transmitted by way of 'communication to the public by wire' fall outside art 10(2).[355] On this basis they argue that 'on-demand transmissions' such as works streamed via the Internet fall outside the range of works that can be utilised under art 10(2), even as an extended form of 'broadcasting'.[356] According to this view, online instruction is a form of 'making available' works for teaching purposes,[357] which as an exception, must satisfy the criteria set out in the Three-Step Test. In contrast, Professor Xalabarder explains that art 10(2) is an 'open, flexible and technology-neutral exception'.[358] For instance, commentators have generally accepted that permissible teaching utilisations under art 10(2) encompass not only the making of broadcasts but also performances of broadcasts in schoolrooms or lecture theatres.[359] Professor Xalabarder argues that the term 'utilization' is sufficiently neutral to cover not only reproductions but also communications to the public.[360] On this basis there is no reason to exclude 'distance learning', correspondence courses, 'teaching on demand' or even 'podcasting' where Web-based courses take the place of face-to-face instruction.[361] It is important to note, however, that some countries do in fact limit the scope of this *Berne Convention* exception: for example, the US enacted domestic legislation that narrows the limitation significantly.[362]

Second, the meaning of 'fair practice' is not clear. To investigate what is fair practice as embodied in art 10(2) we need to examine the discussion surrounding art 10(1) where the term 'fair practice' is mentioned

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universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded'.

[353] Xalabarder, *Copyright Law Handbook,* above n 351.

[354] Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (SCCR/9/7) (WIPO, 2003) 14.

[355] Ibid 15.

[356] Sam Ricketson and Jane Ginsburg, I*nternational Copyright and Neighbouring Rights: The Berne Convention (*2nd ed, Oxford University Press, 2006) 794. ('Ricketson and Ginsburg 2006').

[357] Pursuant to art 8, *WCT*.

[358] *Copyright Law Handbook*, above n 351, 379.

[359] Ricketson and Ginsburg 2006, above n 356, 794.

[360] Professor Xalabarder builds her interpretation on the Stockholm Conference delegates' intention to broaden the permissible utilisations with the expression 'publications, broadcasts and sound and visual recordings', and that these categories were not intended to exhaust the full range of permissible utilisations.

[361] Seng's WIPO Study, above n 41, 12.

[362] See, *The Technology, Education, and Copyright Harmonization (TEACH) Act*, 17 USC. s 110(2) (2000).

in the context of quoting. In this context, the Main Committee I at the Stockholm Conference stated that whether a use for quotation purposes was compatible with fair practice 'can only be accepted after an objective appreciation'.[363] The *Berne Convention* and all subsequent international copyright treaties give no definitive interpretation of this expression; thus, Ricketson and Ginsberg suggest that it involves consideration of the criteria for the Three-Step Test as set out in art 9(2); namely, that such utilisation for teaching (i) does not conflict with a normal exploitation of the work and (ii) does not unreasonably prejudice the legitimate interests of the author.[364]

It is a controversial matter whether the 'fairness' of utilising the work for teaching purposes by way of illustration as articulated under the independent exception of art 10(2) should be assessed on the basis of the Three-Step Test. It has been argued that it should not.[365] The Three-Step Test in the *Berne Convention* was created in 1967 to provide for general exceptions to the reproduction rights of authors, but only in areas where the *Berne Convention* does not have a separate (or a particular) standard for an exception. The specifically enumerated exceptions are not subject to the Three-Step Test and are extremely important in providing for a balance between right holders and consumers of copyrighted works.[366]

3.3.2.2 The Three-Step Test

To add to this complexity, the Three-Step Test incorporated into *TRIPS* is argued to be a stricter version of the original Three-Step Test articulated in the *Berne Convention*. The *TRIPS* Three-Step Test is criticised for limiting the use of exceptions. Susan Štrba asserts that:

> [U]nder the *Berne Convention* it is permissible for countries to allow limitations and exceptions, while under the *TRIPS*, if such limitations or exceptions are allowed there is an obligation to limit them.[367]

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[363] World Intellectual Property Organization, Records *of the Intellectual Property Conference of Stockholm 11–14 June 1967* (WIPO, 1971) 117.

[364] Ricketson and Ginsburg 2006, above n 356, 786, 793; Ricketson, above n 354, 15; see also, Štrba, *International Copyright Law and Access to Education in Developing Countries*, above n 27, 49. Štrba supports that 'fair practice' of art 10(2) of the *Berne Convention* should be assessed under the Three-Step Test on the basis that art 13 of *TRIPS* applies to all exceptions in copyright law and that this the Three-Step Test is more specific in defining the limits of illustration than is art 10 of the *Berne Convention*.

[365] Knowledge Ecology International, *What Does the Three-Step Test NOT Apply to, under the Berne Convention and the TRIPS Agreement?* Marrakesh Note 6 (21 June 2013) 1, https://www.keionline.org/wp-content/uploads/Provisionsnotsubjecttothreesteptest.pdf.

[366] Ibid 1–2.

[367] Štrba, *International Copyright Law and Access to Education in Developing Countries*, above n 27, 63. *TRIPS* provides that '[m]embers shall confine [limit] limitations or exceptions, before they are even subjected to the three-step test'; Alberto Cerda Silva, *Beyond the Unrealistic Solution for Development*

The test arguably disallows extensive use of copyrighted works with regard to education without paying royalties.[368]

3.3.2.3 The Berne Appendix

The Appendix to the *Berne Convention*[369] is further evidence for both the urgent need for copyright to facilitate access to learning materials that is compatible with the social, cultural and economic context of the developing countries, and the ongoing failure to meet these needs.[370] The *Berne Appendix*'s system of compulsory licensing has been confirmed to be useless.[371] The *Berne Appendix* has failed to meet the needs of developing countries.[372] One commentator concludes that '[a] compromise is urgently required in the

Provided by the Appendix of the Berne Convention on Copyright, PIJIP Research Paper No. 2012-08 (American University Washington College of Law, 2012) 5, asserting that copyright exceptions 'are severely limited by the so-called *Berne* three-step test'.

[368] See Panel Report, United States—s 110(5) of the US *Copyright Act*, document WT/DS160/R (15 June 2000), available at http://www.wto.org/english/news_e/news00_e/1234da.pdf. Deciding that this section infringes the *Berne* Three-Step Test when it releases restaurants and other businesses that play music for the public from paying royalties to the original artists under specific conditions.

[369] *Berne Appendix*, above n 45. See, Okediji, 'The International Copyright System: Limitations, Exceptions', above n 233. Okediji explains that the *Berne Appendix* includes a complex set of provisions directed at facilitating bulk access to certain types of protected works in developing nations. The Appendix allows these nations to adopt a compulsory licensing scheme that limits copyright owners' controls over reproduction and translation rights in these works, the *Berne Appendix* does not cover broadcasting and communication rights, which are of particular importance in the education context.

[370] Silva, above n 367, 5 stating that 'The high prices of works published overseas hamper the implementation of public policies for the extensive use of copyrighted works to promote educational, cultural, and technical development. Public purchases and voluntary licensing have not met those needs because the fees charged are unreasonable in the context of limited economic resources in developing countries'; also see generally, Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan, 2002) 74–79 (describing current challenges and limitations that developing countries face in accessing works in compliance with international instruments on copyright).

[371] Okediji concludes that the *Berne Appendix* has been 'a dismal failure owing to unduly complex and burdensome requirements associated with its use' above n 233, 29. Sam Ricketson and Ginsburg 2006, above n 356, 957 state that 'it is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix'; Seng's WIPO Study, above n 41, 12 noted that 'What are less used are the provisions for compulsory licenses for translations and reproductions (77 provisions from 37 member states), which are used by developing countries to make works available and accessible for educational purposes. The status and current utility of many of these provisions is also called into doubt because many member states have allowed their Berne Appendix Article I declarations to lapse' 3.

[372] Silva, above n 367, 51.The *Berne Appendix* creates legal uncertainty about its application to the online environment and falls short of providing solutions that effectively meet development needs, particularly those of cultural and linguistic minorities: 'The circumstances in which states may issue such licenses are quite confined and highly complex. The *Appendix* provides for three-year waiting period from the date of first publication of the work before a translation license may be issued. A license to translate may only be granted if the work has not been published in a language in general use in the country by, or under the

international copyright law to allow less developed countries and communities to participate in the global global progress of culture, science, and technology.'.[373]

In summary, Section 3.3 has briefly demonstrated the available accommodations for education in international copyright law. The purpose of this demonstration was to examine how the values shared by education and copyright are being satisfied. Non-mandatory, uncertain, narrow and ineffective exceptions are the available accommodations for education under international copyright law. Article 10(2) is a non-mandatory exception because it places no obligation on Member States to apply it in their national laws. It is uncertain what kind of utilisation this article applies to and it is controversial whether or not 'fair practice' of the utilisation should be subject to the Three-Step Test. Further, the Three-Step Test as articulated under *TRIPS* is criticised for being very narrow in the sense that it imposes a further layer of limitation on limitations and thus provides extra copyright protection. In addition, the *Berne Appendix* has proven its impracticality for meeting the needs of developing countries in using copyright content for educational purposes. However, international copyright law includes gaps providing hope that we can bring copyright and education together.

3.3.3. The Hope: Bringing Copyright and Education Together

The interpretation of arts 7 and 8 of *TRIPS*, the *WIPO Development Agenda* and copyright voluntary mechanisms offer hope for bringing copyright and education together.

3.3.3.1. Articles 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property

Arts 7 and 8 refer to the objectives and principles of the treaty regime respectively:

> Article 7—Objectives
>
> 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 and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.
>
> Article 8—Principles

authority of, the owner of the translation right. The Appendix appears to preclude the issuing of a license if a translation into the language had been published within the three-year period anywhere in the world'.

[373]Silva, above n 367, 52.

> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Arguably, the inclusion of these articles in Part I of *TRIPS*, 'General Provisions and Basic Principles', recognises that they are structural provisions that affect all other areas of the agreement.[374] Significantly, this interpretation complies with the General Rule of Interpretation codified in art 31.1 of the *Vienna Convention*, which states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.[375] Moreover, the WTO members have reinforced the role of arts 7 and 8 as objectives and principles through the *Doha Declaration on TRIPS and Public Health*.[376]

Consequently, in interpreting the exceptions in the agreement and their relationship with the rights granted, all the terms within art 7 can work to guide the interpreter on how to achieve the correct balance of rights and obligations: 'The exceptions to the Agreement are the instruments through which the objectives contained within art 7 are realized'.[377]

Alison Slade states that:

> Articles 7 and 8, taken together, recognises a pivotal legal principle—that of national regulatory autonomy. This includes, but goes beyond, deference to national policy choices in several key areas, to recognising that the 'Objectives' and 'Principles' express a state-centric method of

[374] Graeme B Dinwoodie and Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press, 2012) 109–111; see also Susy Frankel, 'Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes' (2009) 12(4) *Journal of International Economic Law* 1023, 1037 explaining that arts 7 and 8 'overarch the object and purpose of individual standards of protection in the other parts of the *TRIPS Agreement'*; Carlos M Correa, *Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007) 93 stating that arts 7 and 8 'are to be systematically applied in the implementation and interpretation of the *Agreement'*.

[375] *Vienna Convention*

[376] DOHA World Trade Organisation Ministrial, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN (01)/DEC/2, 4th sess. Adopted 14 November 2001.

[377] Sisule F Musungu, 'The TRIPS Agreement and Public Health' in Carlos M Correa and Abdulqawi A Yusuf (eds) *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International, 2nd ed, 2008) 434; Alison Slade, 'The Objectives and Principles of the WTO TRIPS Agreement: A Detailed Anatomy' (2016) 53(3) *Osgoode Hall Law Journal* 948, 972.

> calibration that must guide the general application of TRIPS and any other agreement within which they are incorporated.[378]

Art 7 articulates the objectives of the IP system that have up to this point been implicit within both national and international systems. Their express inclusion within *TRIPS* therefore provides significant insight into the intentions of the drafters of the agreement. As recognised by Pedro Roffe:

> In litigation concerning intellectual property rights, courts commonly seek the underlying objectives of the national legislator, asking the purpose behind establishing a particular right. Article 7 makes clear that TRIPS negotiators did not intend to abandon a balanced perspective on the role of intellectual property rights in society.[379]

Similarly, Peter K Yu states that although *TRIPS* is criticised for its 'super-size-fits-all' approach, the agreement contains flexibilities to enable development and safeguard the public interest. He argues that arts 7 and 8 provide explicit and important objectives and principles that play important roles in the interpretation and implementation of the agreement. However, this basically depends on the effectiveness of use of the advantages of these two articles by the WTO Member States.[380] Peter K Yu articulates five benefits of arts 7 and 8:

> (1) as a guiding light for interpretation and implementation; (2) as a shield against aggressive demands for increased intellectual property protection; (3) as a sword to challenge provisions that overprotect intellectual property rights or tolerate their abuse; (4) as a bridge to connect the TRIPS regime with other intellectual property or related international regimes; and (5) as a seed for the development of future international intellectual property norms.[381]

In this sense, arts 7 and 8 of *TRIPS* might constitute a solution providing fairer copyright law and practice. In the context of this thesis, arts 7 and 8 constitute a strong legal base to bring copyright and education together and allow them to interact with each other to serve their common values. As Peter K Yu explains, these articles can be used as a bridge to reconcile copyright with other norms and regimes (namely the human rights framework). Further, they are the basis to practice a national autonomy to serve the national interests, as Slade proclaims. More importantly, they establish a strong argument to develop new norms for the international and national levels of copyright.

[378] Slade above n 376, 948, Abstract.
[379] Pedro Roffe, *Resource Book on TRIPS and Development* (Cambridge University Press, 2005) 126.
[380] Peter K Yu, 'The Objectives and Principles of the TRIPs Agreement' (2009) 46 *Houston Law Review* 797.
[381] Ibid Abstract.

Despite the significance of these articles and their dominant position in the text of *TRIPS*, they are always pushed into the background and have never been used in the context of legal reasoning by the WTO Dispute Settlement Body. This reflects a discrepancy and illogical attitude.[382]

Overall, arts 7 and 8 hold the hope for a fair copyright for fair education and treatment of all the common values. However, they await genuine application. The importance of these articles is further highlighted by their integration into the *WIPO Development Agenda*.

3.3.3.2 The Implementation of the World Intellectual Property Organisation Development Agenda

The *WIPO Development Agenda* has been praised as a turning point in the life of WIPO. It is described as 'a response to the under development agenda that dominated global IP law throughout the twentieth century'[383] and it has been said that it rejects the idea that one model of IP fits all contexts.[384] Further, Ruth Okediji emphasises that this agenda 'must be understood and implemented as a transformative instrument calling for innovative reform in an environment energized by the promise of technology-enabled human development that could benefit disparate regions around the world'.[385] She also proclaims that the agenda is a charter that supplements the *WIPO Convention*, shifting it from merely protecting IP to integrating IP into advancement and securing welfare.[386] Nonetheless, for the *WIPO Development Agenda* to reflect this significance it must be implemented at both international and national levels.

The last recommendation of the agenda designates 'societal interests' and 'development-oriented concerns' as overarching approaches for the enforcement of IP.[387] This recommendation states:

> To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "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 and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the *TRIPS Agreement*.[388]

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[382] Slade, above n 376, Abstract.
[383] De Beer, above n 280, 11.
[384] Ibid 12, where it is stated that the *WIPO Development Agenda* 'rejects a one-size, especially a supersize, model of global IP law'.
[385] Okediji, History Lessons for the WIPO Development Agenda above n 269, 162.
[386] Ibid.
[387] *The WIPO Development Agenda*, Recommendation No. 45
[388] Ibid. Further, Recommendation No. 13 concerning WIPO's technical assistance activities is particularly relevant. It reads:

The implementation of the *WIPO Development Agenda* at national and governmental levels might be more flexible than implementation at an international level.[389] Applying the spirit of the Agenda by adapting IP to the social, cultural and economic context may lead to development.

In summary, the *WIPO Development Agenda* provides another avenue of hope for bringing copyright and education together if it is taken seriously on the national level to translate its vision into reality. Another immediate and uncomplicated pathway for supporting education via copyright is through copyright voluntary mechanisms.

3.3.4 Copyright Voluntary Mechanisms

Another effective and suitable way to bring copyright and education closer together is through the deployment of new Internet ready approaches to copyright management. These mechanisms are seen in projects such as CC,[390] free and open source software (FOSS),[391] OA and OER. These ways of managing copyright are helpful in assisting development in less developed countries by improving the exchange of

> WIPO's legislative assistance shall be, inter alia, development –oriented and demand-driven, taking into consideration the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.

[389] See Pedro Paranagua, 'Strategies to Implement WIPO's Development Agenda: A Brazilian Perspective and Beyond' in Jeremey De Beer (ed), *Implementing WIPO Development Agenda* (Centre for International Governance Innovation and Wilfrid Laurier University Press, 2009) ch 11 (arguing for focusing on national grassroots strategies for implementing the *WIPO Development Agenda* by engaging non-governmental organisations and the intergovernmental organisations.)

[390]See Chunyan Wang, 'Creative Commons Licence: An Alternative Solution to Copyright in the New Media Arena' in Brian Fitzgerald and Fuping Gao Damien O'Brien Sampsung Xiaoxiang Shi (eds) *Copyright law, digital content and the Internet in the Asia-Pacific* (Sydney University Press, 2008) 305, 305. 'Creative Commons is a global non-profit organisation that provides free tools, including Creative Commons licenses and software, to enable authors, researchers, artists and educators to easily mark their creative works with the specific intellectual property rights they wish their creative works to carry. The mission of CC is to build a system of balanced intellectual property rights by advocating a 'some rights reserved' alternative to the traditional 'all rights reserved' system.' See Chs 6 and 7 for the legal mechanism undelines CC and their practice to benefit education in Palestine.

[391]See UNESCO, Free and Open Software, https://en.unesco.org/foss 'The Free and Open Source Software model provides interesting tools and processes with which women and men can create, exchange, share and exploit software and knowledge efficiently and effectively. FOSS can play an important role as a practical instrument for development as its free and open aspirations make it a natural component of development efforts in the context of the Millennium Development Goals**.';** Richard Stallman, FLOSS and FOSS on GNU Operating System (Sponsored by Free Software Foundation) https://www.gnu.org/philosophy/floss-and-foss.en.html.

information can create powerful social and economic networks. Which in turn provides the basis for major advances in development.

3.4. Concluding Remarks

Going forward we must ask—how can copyright and education work together? This chapter posited that the values common to copyright and education should bring them closer together; therefore no complications should arise between the two systems as they both pursue knowledge dissemination, public interest and development. Further, they coexist as human rights under the human rights framework. Nonetheless, copyright does not adequately accommodate education and the mutual common values. This is mainly because of the structure of the international copyright system, which is dominated by authors' interests and the granting of statutory exclusive rights while accommodating the interests of the other party (the copyright user) only as exceptions.

In this context, this chapter investigated whether there is any hope of achieving fair copyright for fair education. It found that the *Berne Appendix*, arts 7 and 8 of *TRIPS* and the *WIPO Development Agenda* provide some hope but they need to be given greater prominence and impact. Another innovative and legal approach that promises to overcome the conflict between copyright and education is copyright voluntary mechanisms, which depend on permission in advance given by copyright holders to use their content and is a reflection of the practice of many rights holders to strengthen the dissemination of their material. These mechanisms are particularly effective in our networked digital age.

Chapter 4

Copyright Paradigms and Fair Educational Use

Objectives

1. Define copyright paradigms and their approach towards the interpretation of fair use.
2. Explore the legitimacy of copyright Paradigm I.
3. Investigate attempts to practice Paradigm I.

4.1 Introduction

Attempts to reconcile copyright with the common values have fallen short of doing so. Scholars who are critical of the expansion of copyright at the expense of users' rights are struggling to find models, frameworks or tools to make the situation fairer.[392] This chapter proposes that all of these thoughts can be

[392] These attempts vary from the *Berne Appendix*, the WIPO Development Agenda, and encouraging the less developed countries to use Articles 7 and 8 of the *TRIPS Agreement*. Further, at a conceptual level, scholars have made many attempts to make copyright fairer. For example Margret Chon, 'Intellectual Property and the Developmnet Divide' (2006) 27 *Cardozo Law Review* 2821. Chon suggests to undertake a substantive equality principle towards intellectual property rights; Pamela Samueslon and Jessica D. Litman, co-authors 'The Copyright Principles Project: Directions for Reform' (2010) 25 Berkeley Technology Law Journal 1175. Samueslon and Litman outlined principles to govern the copyright reform to adapt to the new challenges of the digital world; Similarly, Gervais, Daniel J., Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations (2008).5 *University of Ottawa Law & Technology Journal* Nos. 1, 2. Gervais developed a principled conceptualization for copyright limitations and exceptions at the international level to achieve balance between copyright protection and other rights namely the right to education, the right to development, and the right to the freedom of expression. The Australian Law Reform Commission argued for abandoning fair dealing provision and legislating a flexible exception. The Israeli legislator replaced the fair dealing provision with an innovated fair use provision; Lydia Pallas Loren, Fair Use: An Affirmative Defense? (2015) 90 *Washington Law Review* 685, 711. Loren argues for viewing fair use as a defence not an affirmative defence in an attempt to make copyright fairer. On the other hand, other scholars have suggested to undertake a users' rights approach towards conceptualising and understanding copyright and fair use. For example see Niva Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User-Rights Approach' in *Copyright Law in an Age of Exceptions and Limitations* Ruth Okediji (ed) (Cambridge University Press, 2017) 132;

united by seeing copyright as being understood through two paradigms and it argues for a better framework for understanding user rights and fair uses through the lens of copyright paradigms.

The aims of this chapter are to define copyright in terms of two paradigms (Section 4.2); explore the legitimacy of Paradigm I -which sees fair use as a right not an exception - under international copyright law (Section 4.3); investigate attempts to implement copyright Paradigm I, focusing on Canada because of its leading role in setting the cornerstone for user's right, which is a core concept under copyright Paradigm I (Section 4.4).

4.2 Copyright Paradigms

These paradigms are best described in the words of Professor Brian Fitzgerald:

> There are two copyright paradigms, the first paradigm can be represented by two circles. The largest circle we could label the public domain or free use while the second a smaller circle inside the larger one we could label copyright. In this paradigm copyright is seen as an exception to our freedom to engage with culture with information and with knowledge. The larger circle may be called the public domain. In this space information is free to use unless copyright specifically applies to it. Copyright is the exception not the rule. The second paradigm can be represented by a large circle which we could label copyright and within that large circle is a smaller circle which we could label exceptions. In this paradigm everything is copyright unless there is an exception.[393]

Under Paradigm I for copyright, every use is permitted unless it is specifically prohibited (i.e., every use is a non-infringing use by default), while under Paradigm II, every use constitutes an infringement of copyright unless there is an exception. This can be visualised as in Diagram (2).

[393] Brian Fitzgerald, *Copyright Paradigms* (Working Paper, Unpublished, 2017).

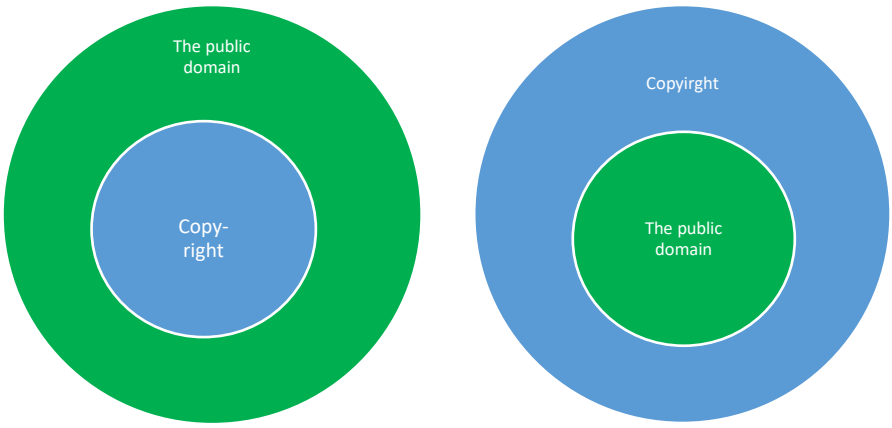

Diagram (2) Copyright Paradigms

To be precise, the concept of copyright, the scope of the exclusive rights, the nature of fair use and the concept of public domain are crucial elements for these paradigms as highlighted in Table (1). The concept of fair use is core to defining the main aspects of each paradigm. Fair use under Paradigm I is a positive fundamental right for copyright users; whereas it is only a privilege or an exception to the rule of copyright under Paradigm II.[394]

Table (1) Essential Concepts and Paradigms

The notion	Under Paradigm I	Under Paradigm II
Fair use	Positive right	Exception
Copyright	A utilitarian tool	A property right
The default rule	The use is fair by default	The use is an infringement by default
The scope of the exclusive rights	Limited	Unlimited
Public domain	The origin	The exception

[394] See generally, Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User-Rights Approach' in *Copyright Law in an Age of Exceptions and Limitations* Ruth Okediji (ed) (Cambridge University Press, 2017) 132.

4.2.1 Fair Use: Right or Privilege?

Fair use is a controversial doctrine because it is a general rule.[395] Thus, 'not surprisingly, copyright owners tend to give the fair use doctrine a narrow reading, while users naturally take a broader view'.[396] An erroneous adaptation of the legal concept of 'fair use' created copyright paradigms. The history of early British cases shows that the use of copyright was considered fair when it was real and productive. In that era, the default rule—one may argue—was that use of copyright was permitted unless it was an infringement.

The nature of fair use/dealing doctrine determines copyright paradigms; that is, if the fair use/dealing is viewed as a positive right, this automatically limits the exclusive rights of copyright holders, because it constitutes a fundamental right for users that cannot be waived by copyright exclusive rights. This will expand the public domain and affect the infringement test.[397] However, if fair use is merely an exception, copyright exclusive rights will continue to expand, the public domain is largely prejudiced and infringement of copyright is prima facie.

This subsection delves into the real nature of fair use/dealing through a brief review of early British case law from the mid-eighteenth to early nineteenth centuries (4.2.1.1.) and then will explore the shift to Paradigm II (4.2.1.2).

4.2.1.1. The Genesis of Copyright Paradigm I and the Nature of Fair Use

The origin of fair use is traced back to the 1740, as William Patry explains:

> [T]he basic foundations and rationale [of fair use] were established remarkably early. In the century from 1740 to 1839, English judges developed a relatively cohesive set of principles governing the use of a first author's work by a subsequent author without the former's consent.[398]

'Fair abridgement" was the term used in early British case law. For example, in *Gyles v Wilcox* in 1740, the court developed the principle that an abridgment of a first author's work would not be an infringement if it

[395] 'Fair use is the most frequently mentioned (but least understood) limitation on the rights granted to copyright holders', L. Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press, 1991) 2.
[396] Ibid 3.
[397] As explained below.
[398] William F. Patry, *fair use privilege in copyright law* (Bureau of National Affairs, 1985) 3.

were 'real and fair' and if it involved 'invention, learning, and judgement'.[399] Therefore, in *Tonson v Walker*,[400] the defendant was found guilty of copyright infringement as no engagement in a productive use was found. Fair abridgement was confirmed by later cases. *Dodsley v Kinnersly*[401] considered whether the defendant's copy would prejudice the market for the original. *Macklin v Richardson*[402] found it important that the defendant's work should not supersede the original. In all these cases, the use of the copyright work was limited to making abridgements of the original works; the court had to decide whether this use of 'abridgement' was fair, meaning it was productive and real. In other words, as Patterson explains, '…since the abridged work was a "new" work that did not infringe the copyright. In jurisprudential terms, an abridgement was not seen as a use of the copyright, but as a use of the work'.[403]

However, *Cary v Kearsley*[404] articulated the concept of fair 'use' no matter what the use was (whether it was abridgement or other uses of the copyright works).[405] This case concerned the defendant copying the plaintiff's work, *The Book of Roads*, an itinerary that the plaintiff had composed by taking surveys of various roads. As evidence of infringement, the plaintiff pointed to various errors in his work that had appeared verbatim in the defendant's work. Lord Ellenborough did not consider that proof of errors transmitted into the defendant's work amounted to proof of infringement, stating that the defendant was authorised to make extracts of another's work in his own and that 'mistaking the names and descriptions, and taking such detached parts, was only using an erroneous dictionary'.[406] Rather, His Honour considered that where the defendant's work contained additional observations or corrections of mistakes, this was likely to be evidence that the work was not an infringing copy. He said, '[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science'.[407] Lord Ellenborough further observed:

> That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question

[399] *Gyles v Wilcox* (1740) 2 Atl. 141, 143 (No. 130).
[400] *Tonson v Walker* (1752) 3 Swans. (App.) 672.
[401] *Dodsley v Kinnersly* (1761) Amb. 403 (No. 212); 27 ER 270.
[402] *Macklin v Richardson* (1770) Amb. 694 (No. 341); 27 ER 451.
[403] See L. Ray Patterson, Understanding Fair Use (1992) 55(2) *Law and Contemporary Problems* 249, 257.
[404] *Cary v. Kearsley* (1803) 4 Esp. 168.
[405] Patry, above n 498, 10. Patry asserted 'we find here the origin of fair use as opposed to fair abridgement.'
[406] *Cary v. Kearsley* (1803) 4 Esp. 168, 169.
[407] *Cary v. Kearsley* (1803) 4 Esp. 168, 170.

> will be, was the matter so taken used fairly with that view, and without what I may term the animus furandi?[408]

Therefore, the fairness of the use in early British cases was determined by focusing on the transformative and productive use undertaken by users of copyright works, not on the inherent property rights of the copyright holders,[409] thereby taking a utilitarian copyright approach not a natural law approach. Infringement of copyright was determined by concentrating on what was added to the original work rather than what was taken from it.[410] Obviously, Paradigm I was dominant in that era. The use of copyright was viewed as a right rather than an infringement that needs an exception to validate it.

4.2.1.2. The Genesis of Copyright Paradigm II and the Nature of Fair Use

The US case of *Folsom v Marsh* [411] was the turning point that established Paradigm II when Justice Story undertook a natural law approach[412] and announced the elements to articulate fair use. This decision implicitly announced that all content is copyright and every use of it is an infringement.[413] The initial question became: 'what is taken of the copyright work?', not 'what is added?' Thus, infringement became the default and fair use merely a defence in the face of the alleged infringement. This paradigm alteration is duly described by Professor Paterson:

> Fair use is the right to make a limited use of another's copyright, but prior to creation of fair use doctrine, others had what was effectively an unlimited right to use another's work in a different form. A second author, for example, could abridge (or translate) the first author's work and thereby obtain his or her own copyright. For a second author to reap what he or she had not sown was deemed to be unfair, and courts limited the right to do so by the fair use doctrine. The doctrine, a

[408] Ibid.
[409] See John Tehranian, *Infringement Nation: Copyright 2.0 and you* (Oxford University Press, 2011). In the seminal case of *Burnett v Chetwood*, Lord Mansfield reasoned 'a translation might not be the same with the reprinting [of] the original, on account that the translator has bestowed his care and pains upon it'. Ultimately this observation prevailed and became the law. Proceeding from the premise that translations were formidable intellectual enterprises, English courts held their transformative quality transcended the original work and granted a tremendous benefit to the public. As a result, translations were not copyright infringements.
[410] Kylie Pappalardo and Brian Fitzgerald, 'Copyright, Fair Use and the Australian Constitution' in Brian Fitzgerald and John Gilchrist (eds) *Copyright Perspectives: Past, Present and Prospect* (Springer, 2015) 125, 128 – 139.
[411] *Folsom v Marsh* (1841)9 F. Cas. 342
[412] See L. Ray Patterson, Understanding Fair Use (1992) 55(2) *Law and Contemporary Problems* 249, 252.
[413] Ibid, 249.

> right of limited use supplanting a doctrine of unlimited use, enlarged the rights of the copyright owner.[414]

He further adds that by adopting this view of 'limited use', the natural law theory becomes the source of fair use while copyright is a positive law that is created by legislators to incentivise creativity (the utilitarian theory); this very point is the cause of the dilemma and has confused policymakers, according to Patterson.[415] Further, Patterson and Lindberg explain that the use of a copyright work prior to *Folsom v Marsh*[416] was not deemed to be a use of copyright; rather it was a use of the work.[417] Therefore, they assert that the use was not an infringement by default. However, under the *Folsom* articulation of fair use, any 'use' becomes a use of copyright and therefore it automatically falls within the scope of exclusive rights; hence it is an infringement.[418] In this vein, it is argued that in the twentieth century, copyright was transformed from a monopoly for competitive market place purposes only ('monopoly for the market') to a monopoly for the work per se or for all purposes ('monopoly of the work').[419]

Patterson and Lindberg assert that 'the proper statement of fair use as a rule is this: *One may make a use of the copyright of a work to the extent that such use does not unduly harm the copyright owner*'.[420] Benjamin

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[414] Ibid
[415] Ibid.
[416] *Folsom v Marsh* (1841)9 F. Cas. 342
[417] For an analysis of the work–copyright dichotomy, see Patterson and Lindberg, above n 395, 66–68, 70. In a nutshell, Patterson and Lindberg explain that the distinction between the copyright and the work requires an understanding of the difference between the use of the copyright and the use of the work. While using the copyright may infringe it, using the work on the other hand does not. Moreover, using the copyright always encompasses using the work; however, using the work does not necessarily mean using the copyright. Consequently, fair use as a doctrine functions to validate uses that would be infringements otherwise; in particular, when a person uses the copyright not a work. This means that if the use is of the work, use is always permitted as it is not a use of the copyright and hence it does not need the fair use doctrine to justify the use. The use of the 'work' is not subject to fair use restraints. The question now is, when is the use considered a use of the 'copyright' and when is it a use of the 'work'? Two issues should be established when distinguishing between a use of a 'work' and a use of 'copyright'. First, the use that matters is when the user may wish to exercise the same 'exclusive' right of the copyright owner: 'that is, when there is a concurrent right'. Second, a distinction must be drawn between a mere user and a competitor. A user—that is not a competitor—who may wish to exercise the same 'exclusive' right of the copyright owner; their use is a use of the 'work' not the copyright; whereas if the use is by a 'competitor' it is likely to be a use of the copyright. One clear example of a use that is a use of a work not a use of a copyright is 'personal use'. Building on this argument, Patterson and Lindberg assert that: 'the proper statement of fair use as a rule is this'.
[418] Patterson, 257.
[419] L. Ray Patterson and Craig Joyce, 'Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations (1988–89)' 36 *University of California Los Angeles Law Review* 719, 798.
[420] Paterson and Lindberg, above n 395, 198.

Kaplan supports this by asserting that it is 'fundamental that "use" is not the same thing as infringement'.[421] In other words, not every use of the copyrighted work is an infringement of the copyright.

4.3 Moving Towards Copyright Paradigm I

Paradigm I of copyright, where fair use is a user's right rather than an exception, is not only a theory. Canada[422] has played a leading role in explicitly undertaking a user rights approach when the Supreme Court of Canada stated unanimously in *CCH Canadian Ltd v Law Society of Upper Canada* (*CCH*),[423] and reaffirmed in subsequent judgments, [424]that exceptions to copyright infringement are 'more properly understood as an integral part of the *Copyright Act* than simply a defence and are users' rights'.[425]

In *CCH*, the Supreme Court of Canada applied a '*purposive analysis*' to interpret the scope of fair dealing and other exceptions to copyright infringement.[426] The *Court's* interpretation of exceptions as 'users' rights underscores the purpose given to exceptions as an essential vehicle 'to maintain the proper balance between the rights of a copyright owner and users' interests'.[427] Depending on the purpose of copyright exceptions the *Court* called for a broad interpretation of exceptions to copyright infringement.[428] 'Given the copyright-holder-centric focus of international copyright conventions and national laws, a broad interpretation of exceptions may be necessary to attain that balance'.[429]

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[421] Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967) 57.
[422] See Michael Geist, 'Copyright Users' Rights in Canada Hits Ten: The Tenth Anniversary of the CCH Decision' (4 March 2014), *Michael Geist* (blog), online: www.michaelgeist.ca/2014/03/cch-anniversary/
[423] *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCC 339 ('*CCH*').
[424] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326 ('(*SOCAN v. Bell'*); *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] 2 SCR 345 ('*Alberta v. Access Copyright*').
[425] In *CCH* 364 [48]. The Supreme Court of Canada explicitly stated that: 'The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively'. Pascale Chapdelaine, *Copyright User Rights: Contracts and Erosion of Property* (Oxford University Press, 2017) ('*Copyright User Rights*') 45. Chapdelaine notes that 'The Supreme Court's qualification of exceptions to copyright infringement contrasts with courts in other jurisdictions, including the US and France, that have held that exceptions to copyright infringement are defences that cannot form the basis of a legal claim, while having incidentally and occasionally referred to fair use or other exception as a "user right", with no further development of the issue'.
[426] Chapdelaine, *Copyright User Rights*, above n 425, 45.
[427] *CCH* 364 [48].
[428] Chapdelaine, *Copyright User Rights*, above n 425, 45.
[429] Ibid.

Overall, Pascale proclaims that developments in Canadian jurisprudence have the potential to broaden the nature and scope of exceptions to copyright infringement on new grounds.[430] Further, characterising exceptions to copyright infringement as 'users' rights' has led to the development of a new rule of interpretation that calls for a broader application of exceptions and greater attention to the interest of copyright users within the larger framework of copyright'.[431] This approach has led to interpretation of the fair dealing provision broadly in favour of students and educational institutions, as demonstrated later in Section 4.4. Nonetheless, Cahpdelaine rightfully observes:

> The legal nature of exceptions to copyright infringement remains uncertain. Given the current state of the law, exceptions may be no more than privileges and defences to copyright infringement that impose no positive obligations on copyright holders to allow users to exercise those exceptions. … User rights cannot rest on such unstable foundations.[432]

Another instance of attempts to take a user's right approach towards interpreting exceptions is the landmark decision of the Delhi High Court in the *University of Oxford v. Rameshwari*[433] where leading academic publishers sued the Delhi university and a photocopy shop (Rameshwari) for creating course packs for students of the university from books published by those publishers.[434] The case was whether making course packs falls within the scope of s 52(1)(i) of the *Indian Copyright Act*.[435] The Delhi High Court held that this provision is broad enough to cover acts of photocopying and creation of course packs by Delhi University

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[430] Ibid 47.
[431] Ibid 48.
[432] Ibid 56.
[433] *The Chancellor, Masters and Scholars of the University of Oxford and ORS v. Rameshwari Photocopy Services and ANR.* (2016) CS(OS) No.2439/2012, 1 ('*Oxford v. Rameshwari*').
[434] *Oxford v. Rameshwari* [1]. The publishers (plaintiffs) are Oxford University Press; Cambridge University Press United Kingdom; Cambridge University Press India Pvt. Ltd; Taylor and Francis Group United Kingdom and Taylor and Francis Books India Pvt. Ltd.
[435] *The Indian Copyright Act (1957),* s 52(1)(i) which constitutes, the reproduction of any work i) by a teacher or a pupil in the course of instruction; or ii) as part of the questions to be answered in an exam; or ii) in answers to such questions, not to be infringement of copyright. *Oxford v. Rameshwari* discussed the meaning of 'in the course of instruiction' under section 52(1)(i) and whether it allows reproduction of coursepacks. The plaintiffs contended that this term must be limited to lectures and tutorials, where the teacher is directly interacting with the pupils and in doing so, is using the copyright work. The *Court* did not accept this contention and held that the legislature specifically chose to use the word instruction rather than lecture, and therefore, the interpretation of the term 'instruction' cannot be limited to that of a lecture. The *Court* held 'Section 52(1)(i) supra would include reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues i.e. during the entire academic session for which the pupil is under the tutelage of the teacher and that imparting and receiving of instruction is not limited to personal interface between teacher and pupil but is a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that the pupil stands instructed in what he/she has approached the teacher to learn.': Ibid [72].

for their students and that this exception is not limited to photocopying in the classroom. The *Court* explicitly stated that copyright is not a 'divine' right[436] and that paying royalties to the Indian Reprographic Rights Organisation is not justified because the use of copyright is covered by the exception.[437] Further, the *Court* declined to draw a distinction between the university and its agent (the photocopy shop) or any other photocopiers for that matter, inside or outside the university.[438]

The Delhi High Court of India does not characterise exceptions as a user's right in the same way as the Supreme Court of Canada; however, it is obvious that the Delhi High Court does not view copyright as a natural right; rather as an instrumental right. The Delhi High Court also interprets the exception *purposively*, which means it adequately applies the exception without undue restrictions. Further, the *Court* stated that Rameshwari (the photocopy shop) was not a competitor of the plaintiffs, as it was only making compilations of small portions of prescribed textbooks for students.[439] If Rameshwari was not permitted to do so, the consequence would not be that the students would buy the textbooks. Instead, it would be that the students would have to resort to sitting in the library and copying out the pages by hand.[440] This is particularly likely as education at Delhi University is heavily subsidised to enable students from low-income families to also attend the university. Therefore, the *Court* stated that it was unfair to expect students to eschew the comfort provided by modern technology and to regress to the studying practices of an ancient era. Additionally, the *Court* held that 'No law can be interpreted so as to result in any regression of the evolvement of the human being for the better.'[441]

A user's right approach to fair use presumes that:

> [I]ncentives to authors are only one means of promoting creativity, while other, equally important mechanisms focus on securing adequate access rights for users. In other words, the rights of authors

[436] *Oxford v. Rameshwari* [80]. 'Copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.'
[437] *Oxford v. Rameshwari* [23].
[438] *Oxford v. Rameshwari* [86].
[439] *Oxford v. Rameshwari* [82].
[440] *Oxford v. Rameshwari* [87]. The *Court* explained 'The students can never be expected to buy all the books, different portions whereof are prescribed as suggested reading and can never be said to be the potential customers of the plaintiffs. If the facility of photocopying were to be not available, they would instead of sitting in the comforts of their respective homes and reading from the photocopies would be spending long hours in the library and making notes thereof. When modern technology is available for comfort, it would be unfair to say that the students should not avail thereof and continue to study as in ancient era.'
[441] *Oxford v. Rameshwari* [87].

> (for incentives or just reward) and the rights of users to use creative works (e.g., read, learn, disseminate, reuse, and transform) are different mechanisms for promoting copyright goals.[442]

4.4 The Legitimacy of Paradigm I

Arguably, following Paradigm I does not breach international copyright law on the basis of the national legislative discretion allowed by the *Berne Convention*. The *Berne Convention* only requires minimum standards of exclusive rights; however:

> [I]n practice the Convention provides little guidance as to how the standards apply to specific works or in different factual circumstances. As a result, governments have enjoyed considerable freedom to define the precise scope of the *Berne Convention's* minimum rights.[443]

The shape and scope of the exclusive rights is left to the legislative discretion of the Member States.[444]

Governments are permitted to impose 'exceptions to and limitations on' minimum rights. Ricketson states that these limitations and exceptions permit Member States to accord 'immunity from infringement proceedings for particular kinds of use' of copyrighted works.[445] Art 9(2) of the *Berne Convention* states

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[442] Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User-Rights Approach' in *Copyright Law in an Age of Exceptions and Limitations* Ruth Okediji (ed) (Cambridge University Press, 2017) 132, 150.
[443] Laurence R Helfer, 'Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy' (1998) 39(2) *Harvard International Law Journal*, 357, 370; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, (Kluwer, 1987) 374 (discussing the scope of the reproduction right): ibid 433 (discussing the line between public and private for purposes of the public performance right); ibid 917 ('[T]he scope of some of the rights protected leaves considerable scope for the adoption of conflicting interpretations by member countries, for example those of broadcasting and cable distribution'); Jerome H Reichman, Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection (1989) 22 *Vanderbilt Journal of Transnational* Law 747, 779. '[Berne] prescribe[s] no detailed standards concerning … the effective scope of protection (as distinct from the bundle of rights a state must confer'; David Vaver, 'The National Treatment Requirements of the Berne and Universal Copyright Conventions [Part 1]' (1986) 17 *International Review of Industrial Property and Copyright Law (now International Review of Industrial Property and Competition Law)* 577, 586. 'Apart from the provisions imposing minimum standards of protection that all states must extend, the precise nature of the works protected and the rights granted are by and large left to a state's legislative discretion'.
[444] Fitzgerald, 'Copyright Paradigms', above n 393.
[445] Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, above n 443, 374, 478.

that Member States must apply the Three-Step Test as articulated in art 9(2) of the convention when legislating exceptions and limitations to copyright.[446] Art 9(2) stipulates:

> It shall be a matter for Legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[447]

Art 9 is criticised for being'vague',[448] the *Convention's* preparatory work sheds little light on its meaning.[449] As a result, national legislatures and courts have enjoyed broad discretion to determine which cases are 'special', what exploitation is 'normal' and whether 'unreasonable prejudice' has resulted from a particular use.[450] With that discretion has come a wide divergence of approaches among domestic legal systems,[451] which allows states to give effect to their own unique balance between authors' rights and competing legal, and cultural values.[452] This argument is further supported by 'the fact that these exclusive rights can only be enforced (in court) through some type of infringement test which is not mentioned or prescribed in the *Berne Convention*'.[453]

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[446] Art 13 of *TRIPS* applies the same test to all exclusive rights, not only the reproduction right as in the *Berne Convention*.
[447] *Berne Convention*, art 9(2).
[448] Peter Burger, 'The Berne Convention: Its History and Its Key Role in the Future' (1988) 3 *Journal of Law.and Technology.* 1, 61.
[449] Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, above n 443, 483–84.
[450] See Wilhelm Nordemann et al, *International Copyright and Neighboring Rights Law: Commentary with Special Emphasis on the European Community* (VCH Publishers, 1990), 17. Stating that 'it is predominantly the case that the *Berne Convention* leaves 'to domestic law to enact general limitations or limitations covering certain cases or the details of execution'; also explaining that normal exploitation 'will be a matter for national legislation, and ultimately national tribunals, to determine' at 483; Further noting that art 9(2) 'leaves a considerable area of discretion to national legislation … [T]his means that there will be divergences between national laws on these matters…' at 487; Stephen M Stewart, *International Copyright and Neighbouring Rights* (2nd ed. Butterworths, 1989) 80.'[E]ach member country has to decide what the legitimate interest of the authors are, whether the prejudice of these interests … is reasonable or unreasonable, and what amounts to a normal exploitation of the work which must be safeguarded'.
[451]Ibid, 487.
[452] Chapdelaine, *Copyright User Rights*, above n 425, 42. Chapdelaine states that 'given the nature of the three-step test and the wide divergence on its interpretation, its ability to effectively clarify uncertainties in the scope of exceptions to copyright infringement that might arise in domestic law is likely limited. It is noteworthy that the Supreme Court of Canada, which often resorts to international treaties to interpret Canadian laws, did not refer to the three-step test when interpreting the scope of fair dealing on a few occasions.'
[453] Fitzgerald, 'Copyright Paradigms', above n 394; Rickeston and Ginsburg (2006) above n 356, [11.26]. Copyright infringement is left to member states' discretion. Ricketson proclaims that the *Berne Convention* '1. does not dictate the standard for finding infringement. 2. It does not instruct Member States as to whether there is a threshold of substantiality that the defendant's copying must cross before it

The preceding paragraphs highlight how the *Berne Convention* gives national legislatures and courts broad discretion in filling out the detail of rights and exceptions. Pursuant to this approach we can say Paradigm I is legitimate under the *Berne Convention* as the scope of the exclusive rights and the test for infringement are not prescribed at the convention level; rather they are left to national discretion. Paradigm I defines exclusive rights and the infringement test in a way that sees fair use as non-infringing rather than as an exception; which seems to be in line with the approach of the *Berne Convention* to allow national discretion on these topics.

4.5 Concluding Remarks

Chapter 4 introduced copyright paradigms and established the genesis of each paradigm. Examination of early British case law shows that Paradigm I was dominant over 100 years ago. Under this framework 'use' was a positive 'non-infringing' right when it was fair. *Folsom v Marsh* 'flipped the paradigm' to Paradigm II, which sees 'use' as an exception to infringement of exclusive rights when it is fair. Highlighting the differences between the paradigms shows how the conceptualisation, articulation and enforcement of fair use is crucial to understanding vital notions and elements such as the concept of copyright, the scope of the exclusive rights, the infringement test and the concept of public domain.

Fair use under copyright Paradigm I is a right and copyright is a utilitarian tool rather than a natural property right. This leads to significant limitations on the scope of copyright exclusive rights and safeguarding the public domain. Further, Paradigm I liberates the infringement test from the pressure exercised under Paradigm II and allows a fairer implementation of this test, as Chapter 5 next explains. In contrast, fair use under Paradigm II is an exception because copyright is a natural property right. Consequently, the scope of copyright exclusive rights is expanded and the public domain is prejudiced. Further, the infringement test is negatively influenced by this paradigm, as Chapter 5 explains.

This chapter has demonstrated an incomplete approach towards copyright Paradigm I. Canada, which has the pride to bravely announce that fair use is a user's right has made significant inroads with respect to

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can be held liable. 3. Nor does it indicate, if member state imposes such a threshold. 4. Whether any substantiality encompasses qualitative as well as quantitative substantiality. 5. Nor it does tell member states whether "non-literal similarities", such as close tracking of a play's plot without copying its dialogue, also come within the concept. As a result a Member State has no obligation to protect a foreign Berne author who complains that a local defendant has copied the ideas her work discloses.' at ibid.

copyright Paradigm I. However, it is yet to conceptualise a right that does not require application of the Three-Step Test. Thus Canada, despite announcing its user's rights approach, is still in a Paradigm II circle.

This thesis, through this chapter, argues for copyright Paradigm I and stresses the significance of conceptualising copyright under Paradigm I for LDCs and of them arguing for better accommodation of values common to copyright and education, which is vital for them to flourish.

Thus, this thesis argues that fair use is a right under Paradigm I, which means that it must not be viewed as taking advantage of someone else's work. Rather, fair use is an integral part of the copyright concept. Copyright as a body is not able to function properly without this vital component; that is, fair use. If we are to imagine 'copyright' as a living creature, fair use is the blood—it is in every cell of this body.

This perspective conforms to the fact that copyright law is a policy law; indeed, the ultimate aim of this policy is not granting property rights in cultural goods. The ultimate aim is the dissemination of knowledge and enrichment of the public domain.

The judiciary should bear this statement in mind: fair use as a *right* is an actual limitation on exercising the exclusive rights of copyright holders. Therefore, the upcoming Chapter 5 argues for copyright reform in Palestine on the basis of copyright Paradigm I. It further lays out a reformation proposal under Paradigm II as a backup.

PART III
COPYRIGHT FOR EDUCATION IN PALESTINE: THE REFORM

Part III aims to outline reform proposals for the *Palestinian Copyright Act* in light of the copyright paradigms—a reformation that aims to appreciate and accommodate the common values under each paradigm.

Chapter 5—Copyright for Education in Palestine: Law Reform in Light of the Common Values and Copyright Paradigms

Chapter 5 seeks to propose a reformation approach for the *Palestinian Copyright Act* to make it a pro-education and pro-common values Act. To that end, Chapter 5 first provides a brief overview of the applicable law and then explores the implications of reform under the different copyright paradigms.

Chapter 5

Copyright for Education in Palestine: Law Reform in Light of the Common Values and Copyright Paradigms

Objectives

1. Provide an overview of copyright law in Palestine.
2. Propose a reform plan under copyright Paradigm I.
3. Propose a reform plan under copyright Paradigm II.

5.1. Introduction

Despite their complex circumstances the Palestinian Territories are real and living, and one cannot ignore that they are populated by around 5 million humans[454] with creative and thoughtful minds. Creativity knows no boundaries; thus, a shortage of political stability should not prevent the regulation of a field that directly interacts with education, culture and society as a whole; that is, copyright.[455]

As Chapter 2 of this thesis has shown, Palestine is a nascent State, working on building its capacity in all fields and relying on unstable, impermanent sources to function. In a knowledge economy quality education

[454] According to the PCBS, the estimated population in the Palestinian Territories in 2016 was 4,816,503, http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/gover_e.htm.

[455] Occupation is a burden. It is an obstacle towards any development within the territories and is a fact that cannot be ignored when discussing a cultural and commercial issue like copyright. Luckily, IP rights have fallen with the legislative and judicial jurisdiction of the PA. The ability to regulate the copyright field under the *Interim Agreement* should be taken seriously, and the significance of copyright in improving the lives of the Palestinians should never be underestimated. See *The Interim Agreement* art 23(4)(a), 23(4)(b)(1), 23(4)(c), 23(4)(d).

is key; copyright is the law that regulates access to knowledge for educational and other purposes. Thus, copyright law provisions in a particular country have the potential to enable or disable the scope of access, use and reuse of the content of knowledge goods for education. In the Palestinian context, Chapter 2 also established that there is an urgent need to enable the maximum possibility offered under copyright law to access, use and reuse cost-free and permission-free content.

Chapter 3 established four common core values shared between copyright and education and concluded that three of these (knowledge dissemination, public interest and development) are highlighted and provoked as a justification for copyright. The fourth value, human rights, is absent from copyright history and literature; however, the expansion of copyright protection has prevented the fulfilment of the human right to education and other human rights. Chapter 3 asserted that these common values, which should shape and inform copyright law, are accommodated in that law via exceptions. To better accommodate these values, Chapter 4 demonstrated two paradigms for copyright: Paradigm I appreciates and respects the common values by considering fair use as a right; whereas Paradigm II may prejudice the common values by viewing fair use as an exception.

This chapter aims to propose a reform plan that appreciates the common values. It lays out two options for reform to create pro-common values copyright law for better copyright for better education. The preferred option for reform is to adhere to copyright Paradigm I. The second option is to follow copyright Paradigm II.

To achieve its aim, this chapter first provides a background to the applicable copyright legislation in Palestine (Section 5.2). It then discusses reform under Paradigms I and II (Section 5.3). Finally, in addition to the proposed reformation under each paradigm, matters of special significance for free, quality education are addressed in Section 5.4.

5.2. *The Palestinian Copyright Act*

The Palestinian Copyright Act is composed of two instruments of primary legislation. The substantive principles were laid down in the *Copyright Act 1911*[456] which was extended to Palestine in 1924 and supplemented by the *Copyright Ordinance 1924*.

[456] *An Act to amend and consolidate the Law relating to Copyright*, Geo.6 5(1911) c.46. Repealed in the United Kingdom on 5 November 1956.

The applicable copyright law in the West Bank and Gaza consists entirely of legislation from the period of the British Mandate because neither Jordan, Egypt nor Israel made any changes to the original mandated copyright regime. The *1911 Act* was modified only slightly by the British High Commissioner in formulating the *1924 Ordinance*.[457]

The *1911 Act*, which once applied to a number of British dominions,[458] set the general structure of copyright and defined the subject matter of copyright law (every original literary, dramatic, musical and artistic work);[459] the scope of legal protection (the sole right of the owner to produce, reproduce or publish a translation of the work, to perform or deliver it in public);[460] some defences (fair dealing,[461] reuse by the author,[462] publicly located sculptures,[463] educational use,[464] news reporting);[465] the duration of copyright (life of the author plus 50 years);[466] rules of ownership;[467] civil remedies;[468] importation of copies,[469] and some special provisions for certain works (joint works, [470] posthumous works, [471] government publications,[472] mechanical instruments,[473] political speeches,[474] photographs,[475] foreign works).[476] The act did not protect moral rights.[477]

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[457] The aim of this ordinance is 'to make provision for the application of the *Copyright Act 1911* in Palestine', providing that this act should be read as modified by said ordinance. However, the modifications to the *1911 Act* were minor and resulted mainly from the fact that this act has been enforced in a country other than the United Kingdom. Samaan, above n 47, 31.

[458] For example, the *1911 Act* was adapted to circumstances and enacted by the then self-governing dominions of Australia (*Copyright Act 1912*); the Union of South Africa (*Patents, Designs, Trade Marks and Copyright Act 1916*); New Zealand (*New Zealand Copyright Act 1913*, certified April 1914); Canada (*Copyright Act of Canada 1923*, certified 1923); and India, whose act came into force on 30 October 1912.

[459] *1911 Act*, art 1(1).

[460] Ibid art 1(2).

[461] Ibid art 2(1)(i).

[462] Ibid art 2(1)(ii).

[463] Ibid art 2(1)(iii).

[464] Ibid art 2(1)(iv).

[465] Ibid art 2(1)(v).

[466] Ibid art 3.

[467] Ibid art 5.

[468] Ibid art 6.

[469] Ibid art 14.

[470] Ibid art 16.

[471] Ibid art 17.

[472] Ibid art 18.

[473] Ibid art 19.

[474] Ibid art 20.

[475] Ibid art 21.

[476] Ibid art 23.

[477] Moral rights were only incorporated in Israeli law in 1981. Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* above n 47, 101.

The *1911 Act* was intended for British domestic application and for application or adoption in various British dominions. The act is 'clearly drafted, it is relatively exhaustive in scope and detail, and its substance is balanced and reasonable'.[478] When it came into force in the UK on 1 July 1912, it was the first act to bring provisions on copyright into a single piece of legislation, by revising and repealing earlier acts and conventions[479] in the UK.[480] Further, the act's provisions complied with the *Berne Convention* (Berlin Revision)[481] as it stood at the time this act came into force. It was one of the most modern copyright laws at that time**.** Therefore, the present *Palestinian Copyright Act*, which consists of the *1911 Act* along with the *1924 Ordinance*, is a satisfactory basis on which to build reform.

Further, the *Palestinian Copyright Act* provisions had to comply with the *Berne Convention* (Berlin Revision).[482] As a result, the *1911 Act* had to change the terms of copyright protection to include the period coinciding with the life of the author plus 50 years after the author's death; architecture being protected by copyright; the integration of the principle of the absence of formalities; and the incorporation of translation rights into copyright exclusive rights.[483] Further, the *1911 Act* extended copyright protection to performing and lecturing rights by defining copyright as ' the sole right to … perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public'.[484] Copyright was also expressed in the *1911 Act* to cover 'records, perforated rolls and other contrivances by means of which sounds may be mechanically

[478] See Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing, 2013).
[479] These acts/conventions were: *Licensing Act 1662*; *Statute of Anne; International Copyright Act 1886*; and the *Berne Convention 1886.*
[480] Intellectual Property Office of the United Kingdom, http://www.ipo.gov.uk/types/copy/c-about/c-history.htm.
[481] The 1886 text of the *Berne Convention* has been revised several times to take into account the fundamental changes in the means of creation, use and dissemination of literary and artistic works that have taken place over the years, mostly resulting from technological development. The first major revision took place in Berlin in 1908, followed by the Rome Revision in 1928, the Brussels Revision in 1948, the Stockholm Revision in 1967 and the Paris Revision in 1971, document prepared by the International Bureau of WIPO, *International Protection of Copyright and Related Rights*, http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/international_protection.pdf.
[482] The 1886 text of the *Berne Convention* has been revised several times to take into account the fundamental changes in the means of creation, use and dissemination of literary and artistic works that have taken place over the years, mostly resulting from technological development. The first major revision took place in Berlin in 1908, followed by the Rome Revision in 1928, the Brussels Revision in 1948, the Stockholm Revision in 1967 and the Paris Revision in 1971. Document prepared by the International Bureau of WIPO, *International Protection of Copyright and Related Rights*, http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/international_protection.pdf.
[483] Ricketson and Ginsburg, *International Copyright 92–102*, cited in Alexander, above n 235, 266.
[484] *1911 Act* art 1(2); Alexander, above n 235, 273.

reproduced'.[485] Cinematographic works were included and protected as dramatic works[486] leading to the creation of 'neighbouring rights'.[487]

It is reasonable to conclude that the *1911 Act* was one of the most modern copyright laws at that time**.** Therefore, the present *Palestinian Copyright Act*, which consists of the *1911 Act* along with the *1924 Ordinance*, is a satisfactory basis from which to commence reform.

Implementation of international copyright law in Palestine ceased with the Berlin Revision to the *Berne Convention*. Palestine is not bound to comply with the specific details of copyright protection at an international level.[488] However, surveying the development of copyright protection at the international level is useful to provide an understanding of where the *Palestinian Copyright Act* stands at the present time. For example, the *Palestinian Copyright Act* does not provide protection for some exclusive rights such as the right to undertake cinematographic adaptation and reproduction of works; right to distribute works thus adapted and reproduced;[489] broadcasting right;[490] and public recitation right.[491] Further, the rental right is not protected under the current *Palestinian Copyright Act*,[492]nor are the rights to communicate to the public;[493] make available fixed performances;[494] and make available phonograms.[495] Also not covered are the distribution right of authors[496] and the distribution rights of performers and phonograms producers.[497] These are the main exclusive rights not covered in Palestine that that are now protected at the international level and under the national legislation of Member States. Whether Palestine should or should not protect these rights is an important question to be addressed in future research. The extension of copyright protection to these rights, which entails the expansion of the scope of the statutory rights granted to the copyright holders, is a significant matter that needs to be carefully articulated in the light of any reformation of the law. However, this matter is not within the scope of this thesis.

[485] Art 19(1).
[486] Arts 1, 35(1).
[487] Alexander, above n 235, 274.
[488] See Chapter 2, Subsection 2.4.1.
[489] *Berne Convention* art 14.
[490] *Berne Convention* art 11*bis*.
[491] *Berne Convention* art 11*ter.*
[492] Rental right is to be protected under *TRIPS* art 11; *WCT* art 7; and *WPPT* arts 9, 13.
[493] *WCT* art 8.
[494] *WPPT* art 10.
[495] *WPPT* art 14.
[496] *WCT* art 6(1).
[497] *WPPT* arts 8, 12.

The proposed reformation for copyright in Palestine in support of free, quality education primarily involves judicial interpretation under copyright Paradigm I. However, proposed reformation under copyright Paradigm II entails altering the fair dealing provision and adding other provisions that do not exist in the current legislation. Reformation under copyright Paradigm II should be undertaken along with a balanced unrestricted judicial interpretation of the copyright exceptions and limitation and a user rights approach.

5.3 Copyright for Education in Palestine: Reform Proposals

There are two potential legal models for Palestine to be considered by the Palestinian legislature and judiciary for the sake of better copyright for better education in the country. The purpose of this section is to demonstrate how to achieve the best from each copyright paradigm. To this end, Palestine may employ Paradigm I in its copyright where fair use is a right (Subsection 5.3.1). Alternatively, Palestine may employ copyright Paradigm II along with steps to be considered to soften the implications of dealing with fair use as an exception (Subsection 5.3.2).

Diagram (3) is designed to assist in understanding the reform options in light of the copyright paradigms.

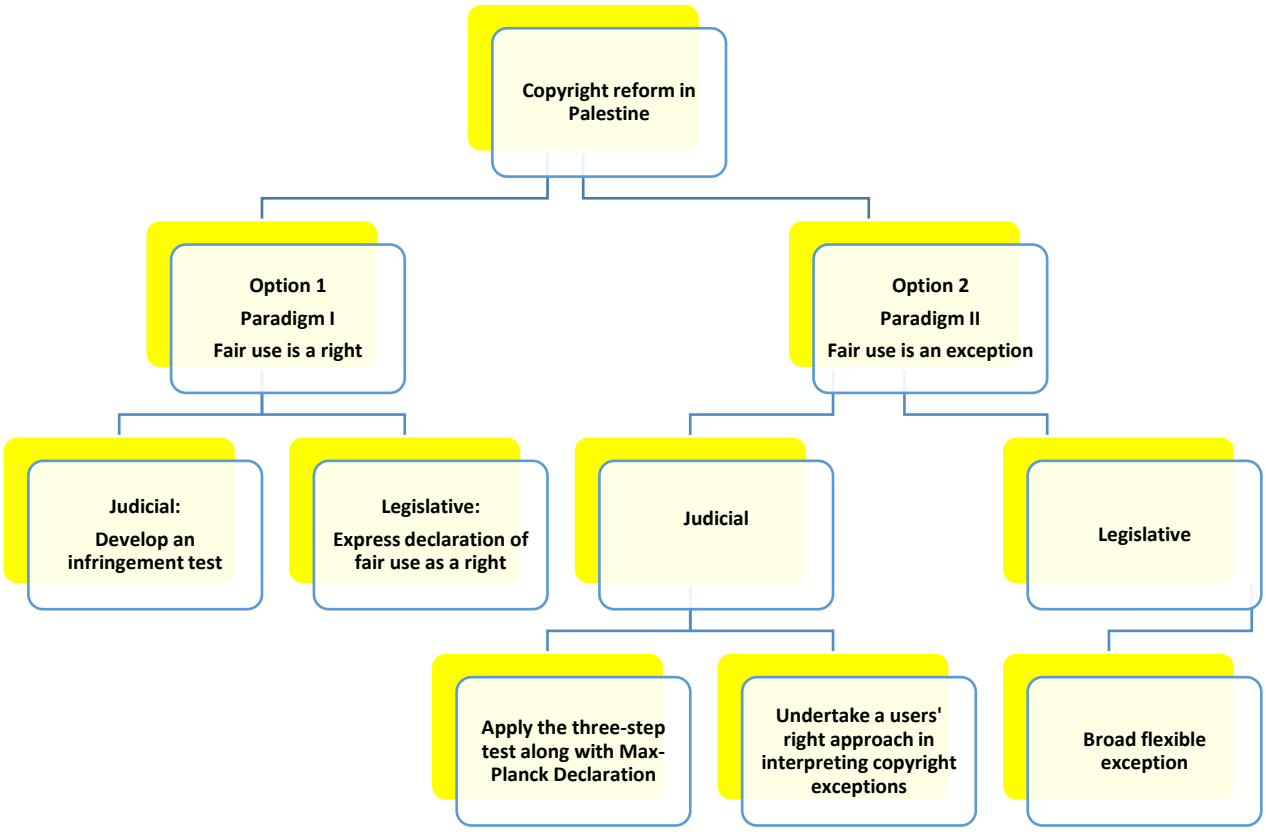

Diagram (3) Copyright Reform in Palestine in Light of the Copyright Paradigms

5.3.1 Adopting Copyright Paradigm I

Adopting Paradigm I for copyright in Palestine may not necessitate changing the law as this paradigm relies more on the judicial interpretation and understanding of the concept of the paradigm. Thus, the heavy work will be done by the judiciary. Therefore, this reform option necessitates that the Palestinian judiciary is aware of copyright paradigms and the implications of following one paradigm over another. Also, it should learn the value of Paradigm I for the social, cultural and economic development in the Palestinian context.

As explained in Chapter 4, Paradigm I for copyright is where every use of copyright content is *permitted* by default because it may constitute a *right*; unlike Paradigm II for copyright where the use is an *infringement* by default and thus needs an *exception*. This distinction means that the adoption of Paradigm I requires dealing with the 'use' of copyright as a presumed right in the first instance, not as an infringement.

Consequently, the application of the Three-Step Test is not required because it is a mechanism articulated by various international copyright instruments to create exceptions to infringement.

For the sake of clarity, it is important to note that an infringement test is needed under both paradigms. However, the particularities of the infringement test applied depend on which paradigm is being followed. For example, the focus of the test under Paradigm I is the scope of the exclusive rights, while the infringement test under Paradigm II focuses on the scope of the exception.

The difference in the infringement tests under Paradigm I and Paradigm II is crucial for the purpose of this thesis, which is promoting better copyright for better education. The way the infringement test is approached has an effect on facilitation of use for educational purposes and on the common values.

5.3.1.1 The Infringement Test under Paradigm I

Article 2 (1) of the *1911 Act* provides—with regard to all works—that the copyright therein:

> [S]hall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this *Act* conferred on the owner of the copyright.

Notably, the *Act* does not specify steps to determine infringement nor does the *Berne Convention.*[498] Further, the scope of this 'sole right' is not specified under the act nor under the *Berne Convention*. Consequently, the aim of this subsection is to articulate an infringement test that complies with copyright Paradigm I. The operation of copyright Paradigm I and the accompanying infringement test should put copyright on track to honour the common values and in particular education, and not to unduly interpret copyright as a property right; rather, as a policy tool to observe the common values.

The judiciary in different jurisdictions have developed their own tests to examine whether copyright infringement has occurred. For the purposes of the thesis, this subsection focuses on the Australian infringement test as articulated by the Australian judiciary.[499]

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[498] As established in Chapter 4.

[499] See *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited* [2010] FCA 29 at [32]-[35] where Justice Jacobson stated the test as follows: 'The principles upon which this case turns were succinctly stated by Gibbs CJ in *S. W. Hart* at 472. His Honour observed that the notion of reproduction for the purpose of copyright law involves two elements: the first being resemblance to, and actual use of, the copyright work; and the second being a causal connection between the copyright work and the infringing work.'Ibid [32]; 'His Honour explained the element of resemblance by quoting the words of Willmer LJ in *Francis Day & Hunter* at 614, namely that what is required is: a sufficient degree of objective similarity between the two works.' Ibid [33]; 'Gibbs CJ also explained the second element by quoting from the same passage

As this test functions under the influence of copyright Paradigm II, the probability of detecting an infringement is maximised. This maximisation of the possibility of infringement is caused by the addition of layers of restriction, which increases the likelihood that the use is an infringement. The first layer considers that any use is an infringement by default; the second layer considers that the use should fall within the scope of an articulated *exception*; the third layer considers that an exception should comply with the Three-Step Test; the fourth layer considers that the infringement test operates under the restrictive effect of all the previous layers. Employing the infringement test under this pressure means that many uses will fall outside the scope of the exception because it is presumably an infringement and is assessed to qualify as an exception under the limitations of the umbrella of the Three-Step Test. Diagram (4) below visualises the the layers of influence created as per copyright Paradigm II

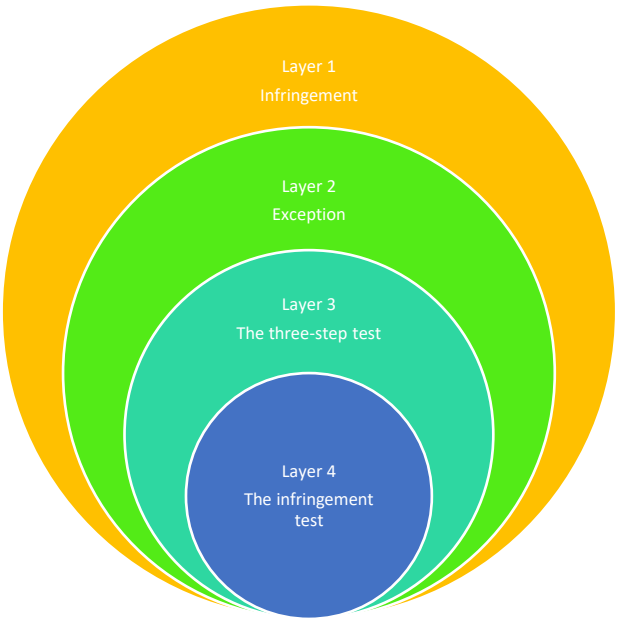

Diagram (4) Layers of Influence: The Infringement Test and Copyright Paradigm II

Copyright Paradigm I does not require all these layers to detect infringement, simply because 'use' is presumed to be a right when it is fair. Consequently, the first layer of influence is the default rule, that copyright use is a right; the second layer operates and conducts the infringement test on the sole basis of its

in *Francis Day & Hunter* in which Willmer LJ stated the requirement as: some causal connection between the plaintiffs' and the defendants' work.' Ibid [34]; 'If these two elements are satisfied in the particular case, the question then arises as to whether the "infringer" has copied a substantial part of the copyright work. Gibbs CJ explained this requirement by quoting the words of Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 ("*Ladbroke v William Hill*") at 276, in particular:
.... the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken.' Ibid [35].

elements. Diagram (5) below visualises the layers of influence on the infringmnet test as per copyright Paradigm I.

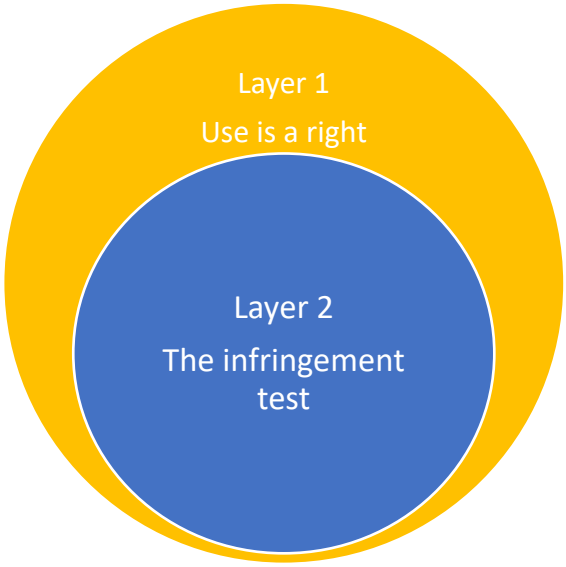

Diagram (5) Layers of Influence: The Infringement Test and Copyright Paradigm I

The court, when conducting an infringement test, will approach the *use* as a *right*—this constitutes the first layer of the test. The second layer of the test examines the use against specific elements to determine whether the use falls within the scope of the exclusive rights. Further, under Paradigm I, infringement is not a prima facie case and the burden of proof that the use is not a user's right because it is not fair rests on the plaintiff—the copyright holder.[500]

[500] See Lydia Pallas Loren, Fair Use: An Affirmative Defense? (2015) 90 *Washington Law Review* 685, 711. Loren states that 'there is an important difference between treating fair use as addressing the appropriate scope of a copyright owner's rights and the propriety or impropriety of a defendant's use of copyrighted expression, and requiring the defendant bear the burden of proof concerning important factors that inform a careful case-by-case evaluation of the unlawfulness of defendant's conduct'. She further adds that when the courts approach fair use as only a defence not an affirmative defence 'the pleading requirement would fall away, … And with the plaintiff bearing the burden of proving *infringement*, which would encompass proof that the use was not fair, when the evidence was in equipoise, when the question of fair use was a close one, the plaintiff's prima facie case would fall'. Also, Loren explains 'the difference between treating fair use as a defense and treating it as an affirmative defense is significant. Not only does that label "affirmative defense" trigger a pleading obligation, but it also has an important consequence when it comes to the burden of proof. A defense is simply a "reason why the plaintiff … has no valid case"': Ibid 690. Overall, Loren is arguing for the plaintiff to bear the burden of proving that the use is not *fair* which is an attempt to move towards Pradigm I, but this argument is still tied to Paradigm II as she talks in terms of defences /exceptions rather than rights. Paradigm I takes this further and argues for shifting the burden onto the plaintiff to prove that the use is not fair on the basis that fair use is the *right* of the user.

We have established that the infringement test is to be articulated by the national judiciary and that there are no rules for this test specified under the *1911 Act* or the *Berne Convention*. Thus, the Palestinian judiciary needs to develop an infringement test for the purpose of determining whether the use is fair, and hence is a right, or is not fair and hence is not a right for the user. This thesis proposes an infringement test suitable for Paradigm I (see the box below).

The Infringement Test under Paradigm I

The court should ask the following questions:

- Is there an objective similarity between the first work and the second work?
- Is there a causal connection between the two works?
- Is there a substantial part of the first work used in the second work?
- Is the use non-productive or non-transformative?

Table (2) highlights how the proposed infringement test for Paradigm I distinguishes it from Paradigm II. The table shows the elements that are necessary for proving infringement under both paradigms and highlights that under Paradigm II, the fourth element—that the use is non-productive—is not required as this is considered in Paradigm II under the notion of exceptions. This is the point at which there is a clear distinction between the paradigms. In this sense, the fourth element of the infringement test for Paradigm II shows how the two paradigms are fundamentally different.

Table (2) Differences between Infringement Tests under the Two Copyright Paradigms

The infringement test elements	Copyright Paradigm I	Copyright Paradigm II
Objective similarities	Yes	Yes
Causal connection	Yes	Yes
Substantial part	Yes	Yes
Non-productive use	Yes	No—considered in whether use is an exception.

Another level of reform under copyright Paradigm I entails legislative reform to expressly nominate fair use as a users' right. This will ensure the judiciary's interpretation is informed by copyright Paradigm I.

If the use turns out to be unfair under the infringement test of Paradigm I, it is then not a users' right because it falls within the scope of the exclusive rights of the copyright holders. At this point, this use should be assessed as an exception under the Three-Step Test as in Paradigm II. In that sense, Paradigm I is superior to Paradigm II. Paradigm I has priority in applications where use is first assessed as a *right*. If it turns out not to be the right of the user because it is unfair it should then be assessed as an *exception* under copyright Paradigm II, as Subsection 5.3.2 demonstrates.

5.3.2 Employing Copyright Paradigm II

Under Paradigm II the use of copyright is presumably an infringement and thus it needs an exception to exclude it from the rule of copyright. On this basis, it is in the users' interest to interpret these exceptions broadly. This subsection seeks to maximise the potential for enabling the use of copyright without the need to pay royalties or to obtain permission for using copyright for educational purposes in particular. As copyright use is an exception under Paradigm II the Three-Step Test as articulated in international copyright law is to be applied. Therefore, a first layer of reform for securing knowledge dissemination, public interest, development and the human right to education and other human rights is to interpret the Three-Step Test broadly using the Max Planck declaration for a balanced interpretation of the Three-Step Test as a guide.[501] A second layer of reform is to legislate for a broad flexible exception specifying education as fair purpose. A third layer of reform is to legislate specific exceptions for educational uses.

5.3.2.1 The Application of the Three-step test in the Palestinian National Context

Palestinian copyright legislation that applies the *1911 Act* via the *1924 Ordinance* does not have the Three-Step Test embodied within it because it was brought into being before this test was created.[502]

The '*Declaration, A Balanced Interpretation of the Three-step Test in Copyright Law*' [503]was initiated on the basis that the test is 'already an effective means in preventing the excessive application of limitations

[501] See generally Christophe Geiger , Reto Hilty, Jonathan Griffiths, and Uma Suthersanenet., Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law (2010) 1 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 119[1]. ('Max-Planck Declaration').
[502] The *1911 Act* conforms to the Berlin Revision of the *Berne Convention*; the Three-Step Test was introduced to the *Berne Convention* in the Stockholm Revision.
[503] *Max-Planck Declaration*, above n 501.

and exceptions'; however, there is no guarantee that this test will not be interpreted narrowly in favour of copyright holders.[504] The declaration also stipulates:

> [T]he fact that third party interests are not explicitly mentioned in the three-step test as applied in copyright law does not detract from the necessity of taking such interests into account. Rather, it indicates an omission that must be addressed by the judiciary … When correctly applied, the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies. No single step is to be prioritized. As a result, the Test does not undermine the necessary balancing of interests between different classes of right holders or between right holders and the larger general public. Any contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment. The present formulation of the Three-Step Test does not preclude this understanding. However, this approach has often been overlooked in decided cases.[505]

Further, the declaration proclaims that the test does not aim to 'constrain the freedom or discretion of regional and domestic legislators to permit or prohibit particular limitations and exceptions'.[506] It also recognises that national legislators and judiciaries have been 'wrongly influenced by the strict interpretation of the test'.[507] Significantly, the declaration adopts a 'purposive interpretation' of exceptions and limitations.[508]

Legitimate interests derived from human rights and fundamental freedoms, and the public interest in scientific progress and cultural, social or economic development, should be considered and respected when interpreting the test.[509] The Palestinian legislature and judiciary should consider a flexible, balanced interpretation of the Three-Step Test as articulated by the declaration and apply these principles when legislating exceptions at the national level. Moreover, the Palestinian judiciary should have these principles in mind when interpreting the legislative provisions.

[504] Ibid [1].
[505] Ibid [2].
[506] Ibid [3].
[507] Ibid [4].
[508] Ibid. Stating that: 'The Three-Step Test does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purposes'.
[509] Ibid [5].

5.3.2.2 Broad General Exception

A broad general provision is one way to articulate exceptions to copyright in national legislation. This provision is articulated on the basis of the Three-Step Test, which is embodied within international copyright law instruments.[510] Different jurisdictions apply this test through fair use or fair dealing provisions which usually include criteria upon which the fairness of the use can be assessed and if warranted, allowed.

The Palestinian Copyright Act provides for fair dealing provision of any work for the purpose of private study, research, criticism and review.[511] The Palestinian fair dealing provision - art (2)(1)(i) – is legislated under an Article entitled 'infringemnt of copyright' and reads:

> Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this *Act* conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright: (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.

It is constantly argued that the fair use structure is more flexible than fair dealing. Under the fair use style provision, any use might be qualified to be 'fair', while under the fair dealing style provision the use should fit within one of the enumerated purposes mentioned in the provision, thus excluding other uses to be qualified as fair on the basis that they do not fit under one of the designated purposes.[512]

Further, fair use applies standards, not rules. Law that incorporates principles or standards is generally more flexible and adaptive than are prescriptive rules. Fair use can therefore be applied to new technologies and new uses without having to wait for consideration by the legislature.[513] Reflecting this standard–rule

[510] *Berne Convention* art 9(2), *TRIPS Agreement* art 13, *WCT* art 10, *WPPT* art 16.
[511] *The 1911 Copyright Act* section 2(1)(i)
[512] ALRC, above n 11, 88–89. Most of the fair use provisions around the world list the same four fairness factors. In addition, fair use provisions set out illustrative examples: broad types or categories of use or purposes that may be fair, but a particular use does not have to fall into one of these categories to be fair. This is one of the key benefits of fair use. Unlike the fair dealing provisions, fair use is not limited to a set of prescribed purposes. Further, just because a use falls into one of the categories of illustrative purpose does not mean that such a use will necessarily be fair, it does not even create a presumption that the use is fair. In every case, the fairness factors must be 'explored, and the results weighed together, in light of the purposes of copyright'.
[513] ALRC, above n 11, 89.

dichotomy, the US fair use doctrine authorises courts to modify the scope of copyright's statutory protection 'when, on occasion, it would stifle the very creativity which that law is designed to foster'.[514]

Replacing a fair dealing provision by a fair use one is a matter that has been investigated in the UK. The Hargreaves Review investigated the benefits of a fair use exception and how these benefits might be achieved.[515] The review concluded that there would be 'considerable difficulties' in introducing a fair use exception into the UK. However, it also concluded that fair use should be achieved by means other than directly changing the law.[516]

A hint of the value of fair use came via Google's contribution to an investigation into copyright in the UK:

> Fair use is regularly referred to as the key tool by which the U.S. fosters innovation ... no country in the world can compete with the U.S. for the most innovative search technologies, social networks, video and music hosting platform[s], and for the sheer generation of the most jobs and wealth in the Internet domain. If one is looking for evidence of how innovation succeeds, the best way is to look at those places where innovation has succeeded.[517]

Similarly, Professor Hargreaves explains that fair use 'has proven the backbone of a healthy Internet-economy ecosystem in the US, partly by putting rights holders and innovators on an equal footing'.[518]

Israel[519] abandoned the fair dealing provision, which was the same provision applicable in Palestine by virtue of the *1911 Act* and the *1924 Ordinance*, by legislating a fair use provision in its *Copyright Act*

[514] *Campbell v Acuff-Rose Music Inc*., 510 US 569, 577 (1994) (quoting *Stewart v Abend*, 495 US 207, 236 (1990)) (establishing that 'transformative' uses of copyrighted material should often be excused from a finding of infringement as 'fair use').
[515] Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (An Independent Report) (2011) 101.
[516] See ALRC, above n 11, 90.
[517] Google Submission to the Independent Review of Intellectual Property and Growth (March 2011) http://www.ipo.gov.uk/ipreview-c4e-subgoogle.pdf
[518] Ian Hargreaves and Bernt Hugenholtz, *Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework*, 13 Lisbon Council Policy Brief (2013) 4, http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html.
[519] Considering the Israeli experience is a matter of a particular significance for Palestine because of sharing the same copyright heritage; that is the application of the *1911 Act* through the *Copyright Ordinance 1924.* Israel legislated and enforced new legislation only in 2007.

2007.[520] A fair use provision is now embodied in s 19 of the Israeli *Copyright Act 2007* under the title of 'Permitted Uses'.[521] s 19 of the 2007 act provides the following:

> (a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
>
> (b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:
>
> (1) The purpose and character of the use;
>
> (2) The character of the work used;
>
> (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
>
> (4) The impact of the use on the value of the work and its potential market.
>
> (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.[522]

The Israeli fair use provision is an open-ended exception. It replaced 'newspaper summary' with 'journalistic reporting'; it also added new purposes such as 'quotations' and 'instruction and examination by an educational institution'; another addition that is innovative is providing the Israeli Minister of Justice a role in determining further conditions for fair use.[523] Such role may take place by issuing regulations prescribing the circumstances under which the use of a copyrighted work can be fair, but no regulations have yet been issued.[524]

Arguably, the Israeli fair use model is more flexible than the US fair use provision because the first factor (the purpose of the use) omits any reference to the *commercial* or non-commercial nature of the use.[525]

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[520] *Copyright Act 2007*, 5768-2007, 2007 LSI 34 (Isr.). Niva Elkin – Koren, Orit Fischman Afori, Ronit Haramati- Alpern and Amira Dotan, Fair Use Best Practices for Higher Education Institutions: The Israeli Experience (2010)(Forthcoming) *Journal of the Copyright Society of the USA*) 13. https://ssrn.com/abstract=1648408. Israel was the third country to legislate a fair use provision; the second country was the Philippines, see *Intellectual Property Code of the Philippines*, Republic Act No. 8293, s 185, enacted 6 June 1997, effective 1 January 1998. The first country to have a fair use provision was the US.

[521] Under ch D.

[522] *Copyright Act 2007*.

[523] Lior Zemer, 'Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use' (2010–2011). 60 *Depaul Law Review* 1051, 1078.

[524] Niva Elkin-Koren, 'The New Frontiers of User Rights'. (2016) 32 (1) *American University Intellectual Law Review* 1, 22.

[525] Štrba, above n 27, 115.

Therefore the Israeli fair use provision contains a mixture of the US fair use and the Canadian 'new standard of fair dealing'.[526]

Further, it is important to know that the legislation of fair use in Israel was gradually introduced by the judiciary, which began the shift from fair dealing to fair use more than a decade before the legislation.[527] The judiciary played a major role in transplanting fair use as a doctrine in Israel.[528] The fair dealing provision as embodied in the *1911 Act* was interpreted liberally by the Israeli courts to efficiently respond to today's copyright challenges.[529] Israeli courts realised the rigidity of the abovementioned fair dealing provision, in the 1993 *Geva* case,[530] which was the first step towards adopting fair use.[531,532]

Based on the flexibility offered by the fair use provision, this thesis argues for a switch from the rigid fair dealing provision applicable in Palestine to an open-ended fair use provision in line with the Israeli model of fair use, specifying education as a legitimate purpose under the title of users' rights (see the box below).

However, practice has demonstrated that the approach undertaken by the court in interpreting a fair use/dealing provision has a decisive influence on the level of flexibility offered by the provision, whether it is fair use or fair dealing. The next subsection demonstrates the effect of the user rights approach taken

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[526] Ibid.

[527] Michael Birnhack, Judicial Snapshots and Fair Use Theory (2015) *Queen Mary Journal of Intellectual Property* 264, 264.

[528] The court tried to play around with the fair dealing provision and make it more flexible; the resulting fairness test as articulated by the Israeli court was a mixed one. It consisted of a two-stage test. Stage one of the test is that the purpose of the use should fit within the fair dealing provision as legislated in the *1911 Act*. Then, the fairness of the use is assessed on the basis of the four-factor US fair use test. This mixed test was developed and applied in the *Geva case.* Zemer, above n 523, 1076. This test was applied by the Israeli Supreme Court in *Mifal Hapais v The Roy Export Establishment Co*., CA 8393/96 *Mifal Hapais v The Roy Export Est. Co*. 54(1) IsrSC 577, 587 [2000] (Isr.), *Eisenman v Qimron* (the *Dead Sea Scrolls Case*) CA 2790, 2811/93 and *Eisenman v Qimron* 54(3) IsrSC 817 [2000] (Isr.).

[529] Zemer, 'above n 523, 1075.

[530] *PLA 2687/92 Geva v Walt Disney Co*. 48(1) IsrSC 251 [1993] (Isr.) ('*Geva case*').

[531] The *Geva case* marks the first step made by the Israeli judiciary towards fair use; the Supreme Court borrowed the four-factor fair use test from s 107 of the *US Copyright Act of 1976*. The *Geva case* concerned a dispute between Walt Disney, the owner of the Donald Duck character, and one of the most famous cartoonists in Israel, the late Dudu Geva. The latter used Donald Duck's image in his story 'Mobi Duck' published in his book entitled *The Duck's Book.* The issue before the court was whether this use constituted fair dealing. The Israeli judiciary, through this case, 'applied the method of judicial transplantation by inviting a foreign standard into local law'. The *Court* literary applied 'standards of fairness' that do not have a statutory basis. See Zemer, above n 523, 1076.

[532] See Michael Birnhack, Mandatory Copyright: From Pre-Palestine to Israel, 1910–2007 in Umma Suthersanen and Y Gendreau, *A Shifting Empire: 100 Years of the Copyright Act 1911* (Hart Publishing, 2013); Meera Nair, *Canada and Israel: Fairness of Use*, PIJIP Research Paper No. 2012-04 (American University Washington College of Law, 2012); Niva Koren and Orit Afori, Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use (2015) *Cardozo Arts and Entertainment*, 2015 1–45.

by the Canadian judiciary on the flexibility of Canadian fair dealing compared with the flexibility of the US fair use in one type of case; that is, the fairness of creating course packs for educational purposes.[533]

Proposed Fair Use Provision for Palestine

Chapter x: Users' Rights

Section x:

(a) Fair use of a work is *not* an *infringement* for purposes such as private study, research, criticism, review, journalistic reporting, quotation, or *instruction and examination by an educational institution.*

(b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:

(1) The purpose and character of the use '

(2) The character of the work used'

(3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

(4) The impact of the use on the value of the work and its potential market.

(c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.

5.3.2.3 User Rights Approach

Canada applies 'fair dealing', which was first introduced via its 1921 *Copyright Act*, duplicating s 2(1)(i) of the UK's *1911 Act*. The fair dealing provision in Canada was amended by Bill C-11, which introduced new permissible purposes: education, parody and satire. s.29 states that 'Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright'.[534] Before amending the

[533] For instance, the Israeli judiciary has interpreted the fair dealing provision as embodied in the *1911 Act* in a flexible way before legislating a fair use provision in 2007.
[534] *Copyright Act of Canada*. *Copyright Modernization Act,* 2012. In addition to s 29, s 29.1 (Criticism or review**)** and s 29.2 (News reporting**).**

Canadian fair dealing provision and adding 'education' as one of the permissible purposes, the Supreme Court of Canada undertook a user rights approach to interpreting fair dealing for the purpose of private study. The user's rights pproach undertaken by the *Court* maximised the flexibility of the Canadian fair dealing provision in comparasion with the US fair use provision.

Fair dealing requires a two-stage analysis: first, whether the intended use qualifies as one of the permitted purposes and second, whether the use itself meets the fairness criteria; fair use requires only the second-stage analysis as there are no statutory limitations on permitted purposes.[535]

The purpose *of the* dealing

The Supreme Court of Canada considers the *ultimate* purpose of the dealing. The *Court* in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [536] rejected the plaintiffs' argument that the fact that the copying of the copyright works was performed by (or under the instruction of) the teacher makes the use unfair because the activity was not undertaken by the student for the purpose of 'private study'. The plaintiffs argued that the copying should have been performed by the students themselves to be considered a use for 'private study' and hence 'fair'. The Court disagreed with this strict interpretation of the fair dealing provision and stated:

> [Teachers] have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of 'instruction'; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.[537]

Further, the *CCH* case indicated that 'research done for commercial reasons may be less fair than research done for non-commercial purposes'[538] and the *Court* in *SOCAN v Bell Canada* [539] ruled that even if the use was for a commercial purpose it might be fair if there are 'reasonable safeguards' in place to ensure that

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[535] Michael Geist, Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use in Michael Geist (ed) *The Copyright Pentalogy how the Supreme Court of Canada shook the Foundations of Canadian Copyright law* (University of Ottawa Press, 2013) 157,158.
[536] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] 2 SCR 345 ('*Alberta v. Access Copyright*').
[537] *Alberta v. Access Copyright* 360 – 361 [23]..
[538] *CCH* 366 [54].
[539] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* [2012] 2 SCR 326. .Previewing of music and whether that activity constitutes 'fair dealing' within the scope of the research exception.

the works are actually being used for research.[540] This point of interpretation opens the door to not considering educational use unfair because it is facilitated by a commercial copy shop as long as the ultimate user is the student.

The character *of the* dealing

The Court in *CCH* indicated that it is likely that the use is fair when a single copy of the work is used for a legitimate purpose. In contrast, it is unlikely to be fair if multiple copies of the work are being widely distributed.[541] In addition, it is more likely that the use is fair if the copy of the work is destroyed after it is used for its specific intended purpose.[542] The Court provided a good example of how this factor was applied in *SOCAN v Bell*:

> SOCAN's argument was based on the fact that consumers accessed, on average, 10 times the number of previews as full-length musical works. However, no copy existed after the preview was heard. The previews were streamed, not downloaded. Users did not receive a permanent copy, and once the preview was heard, the file was automatically deleted from the user's computer. The fact that each file was automatically deleted meant that copies could not be duplicated or further disseminated by users.[543]

Extrapolating this to the field of educational use, multiple copies digitally distributed to students via a secure website—providing that these copies cannot be downloaded and are automatically destroyed after a specific period of time, such as at the end of term or the year—is fair dealing for the purpose of research or private study.

The amount *of the* dealing

The *Court* in both *SOCAN v. Bell* and *Alberta v. Access Copyright* confirmed that the amount of the dealing refers to the individual copy, not the aggregate amount being copied.[544]Michael Geist stresses that '[t]his is very significant in an educational context as it means the total amount being copied by a teacher, school,

[540] *SOCAN v Bell* 340 [36].
[541] *CCH* 367 [54].
[542] *CCH* ibid.
[543] *SOCAN v Bell* 340 [38].
[544]*SOCAN v Bell* 328. 'The "amount of the dealing" factor should not be assessed on the basis of the aggregate number of previews that are streamed by consumers. This factor should be assessed by looking at the proportion of the preview in relation to the whole work, not the aggregate amount of music heard through previews. Streaming a preview of several seconds is a modest amount when compared to the whole work.' *Aberta v. Access Copyright* 363 [29].

school board or all educational institutions is irrelevant for the purposes of analysis of the amount of the dealing.'[545]In *SOCAN v. Bell*, the *Court* stated:

> There is no doubt that the aggregate quantity of music heard through previews is significant, but SOCAN's argument conflicts with the Court's statement in *CCH* that 'amount' means the 'quantity of the work taken' (para. 56). Since fair dealing is a 'user's' right, the 'amount of the dealing' factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. The appropriate measure under this factor is therefore, as the board noted, the proportion of the excerpt used in relation to the whole work. That, it seems to me, is consistent with the Court's approach in *CCH*, where it considered the Great Library's dealings by looking at its practices as they related to specific works requested by individual patrons, not at the total number of patrons or pages requested. The 'amount of the dealing' factor should therefore be assessed by looking at how each dealing occurs on an individual level, not on the aggregate use.[546]

This interpretation of the *Court* in the *SOCAN v. Bell* case allows educational institutions to take multiple copies of the work for educational purposes without being concerned about the number of copies as long as only one copy is given to each individual student.

Alternative to the dealing

According to the *Court* in *CCH*, alternatives to the dealing factor may affect the likelihood of fairness; for example the availability of a non-copyrighted equivalent of the work that could have been used instead of the copyright work.

Significantly, the *Court* in *CCH* stated that the availability of a licence is not relevant to deciding whether a dealing has been fair, stating:

> The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.[547]

Further, the *Court* stated in the *Alberta v. Access Copyright* that buying books for all students is not a realistic alternative to fair dealing copying. However, copying short excerpts is reasonable to achieve the ultimate purpose of the students' research and private study.[548]

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[545] Michael Geist, Supreme Court of Canada Speaks: How to Assess Fair Dealing for Education (22 August 2012) Michael Geist Blog. http://www.michaelgeist.ca/2012/08/scc-on-fair-dealing/
[546] *SOCAN v. Bell* 341 [41].
[547] *CCH* 373 – 374 [67]
[548] *Alberta v. Access Copyright* 363 [32].

Effect of the dealing *on the* work

The *Court* in *CCH* emphasised that the effect of the dealing on the work is an important factor, but it is not the most important factor:

> Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. Actual evidence of economic harm is required as an evidence of negative effect of the use on the market.

The *Court* in *CCH* found:

> Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation.[549]

The nature *of the* work

The *Court* in *CCH* described the nature of the work in the following manner:

> The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.

Educational uses are likely to fare well with respect to this issue as use within education suggests a work whose dissemination is important. The Court's analysis in *SOCAN v. Bell*, which showed that musical works for purchase meet this standard, is a good example:

> *SOCAN* does not dispute the desirability of the sale and dissemination of musical works, but argues that since these works are easily purchased and disseminated without the use of previews, previews are of no additional benefit to promoting further dissemination. But the fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and identify a work he or she wants to buy, the work will not be disseminated[550].

The users' rights approach undertaken by the Canadian Supreme Court made the Canadian fair dealing provision flexible and created balance by safeguarding users' rights and making sure that these rights are

[549] *CCH* 374 [72].
[550] *SOCAN v. Bell* 343 [47]

not unduly prejudiced. The users' rights approach offers a better accommodation for education and all the common values. It does this by articulating a more balanced approach to interpreting copyright—mainly by articulating fair dealing/use as *not* mere a defence.[551] In light of the above discussion, Table (3) displays the positive influence of the users' rights approach on the interpretation of fair dealing/use elements that are significant for educational use. A balanced interpretation of these elements in light of the users' rights approach articulated by the Supreme Court of Canada safeguards against fair educational uses being considered unfair under a non-users' rights approach.

Table (3) Fair Dealing in the Light of a Users' Rights Approach

The Element	The Interpretation
The purpose of the dealing/use	The *ultimate* purpose of the dealing.
The amount of the dealing	The amount of the dealing refers to the individual copy, not the aggregate amount being copied.
Alternatives to the dealing	The availability of a licence is not relevant to deciding whether a dealing has been fair.
Effect of the dealing on the work factor	An important factor, but not the most important factor.

In the US, education as a purpose—according to s 107—qualifies the use as fair: this section[552] twice refers explicitly to education. The preamble includes, for illustrative purposes, 'teaching (including multiple

[551] CCH 364 [48]

[552] The *US Copyright Act* in its s 107 entitled 'Limitations of exclusive rights: fair use', reads as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

copies for classroom use), scholarship, or research'.[553] Further, the first of the four fairness factors in the US provision is the 'purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes'.[554] Nonetheless, the question is: To what extent is educational use appreciated as a fair use in the courts? How have US courts interpreted and applied the four factors for and against educational use.

Fair use for educational purposes is an ongoing legal issue before the courts in the US. *Basic Books, Inc. v Kinko's Graphics Corp* (*Kinko*)[555] was the first case to discuss whether course packs for educational use are fair use. A Southern District of New York court found that Kinko's copy shop had violated the copyright statute by creating and selling course packs without permission from the publishing houses that held the copyrights. After the *Kinko* case, copy shops around the country began to obtain permission for the reproduction of their course packs.[556]

In *Princeton University Press, Macmillan, Inc. and St. Martin's Press, Inc. v Michigan Document Services, Inc. and James M. Smith* (*Princeton University Press*), the publisher plaintiffs brought a copyright infringement action[557] against the defendants, Michigan Document Services (MDS) and James M Smith for duplicating copyrighted material without paying royalties or permission fees. The US District Court of Michigan entered judgment in favour of the publishers and the defendants appealed. After a three-judge panel reversed the District Court's holding, a rehearing *en banc* was granted.[558] The Court of Appeals for the Sixth Circuit held that the copy shop's preparation of course packs was not fair use. MDS is a commercial copy shop that reproduced segments of copyrighted works of scholarship, bound the copies into 'course packs' and sold them to college students at the University of Michigan.[559] Course packs have allowed professors to narrowly tailor their courses by compiling selected readings.[560] MDS did not request

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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[553] The *US Copyright Act* s 107.

[554] The *US Copyright Act* s 107.

[555] *Basic Books, Inc. v Kinko's Graphics Corp*., 758 F. Supp. 1522 (SDNY 1991).

[556] Diane Ouchi, 'Princeton University Press v Michigan Document Services, Inc. 99 F.3d 1381, 7' (1997) 376 *DePaul Journal of Art, Technology & Intellectual Property Law* 3.

[557] The publishers alleged copyright infringement of six works that were excerpted without permission. The books and amount copied were as follows: Nancy J Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of FDR* (95 pages, 30% of book); Walter Lippmann, *Public Opinion* (45 pages, 18% of book); Robert E Layne, *Political Ideology: Why the American Common Man Believes What He Does* (78 pages, 16% of book); Roger Brown, *Social*. *Princeton University Press, Macmillan, Inc. and St. Martin's Press, Inc. v Michigan Document Services, Inc. and James M. Smith*, 99 F.3d 1381 (6th Cir. 1996) 1384–1385 ('*Princeton University Press*').

[558] *Princeton University Press*.

[559] Ibid 1383.

[560] Ibid 1384.

permission from the copyright owners or pay the necessary royalties.[561] Although each of the publishers had departments for permission requests and the response time was a maximum of four weeks, MDS and Smith never attempted to obtain permission from the plaintiffs.[562]

The main issue before the Court of Appeals was whether 'fair use' doctrine obviated the need to obtain permission from the copyright holders.[563] In considering this, the *Court* decided that the most important factor is the effect of the use upon the potential market for, or value of, the copyright.[564] Accordingly, the *Court* first decided that the challenged use was a commercial use because the duplication was performed by a for-profit organisation that was trying to maintain an edge over the competition by not paying the fees.[565] The Sixth Circuit followed the Supreme Court test used in *Harper and Row v Nation Enters* to find market harm,[566] holding that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted material.[567] If copy shops across the nation refused to obtain permission and pay royalties, the publishers' incomes would decrease and the potential value of the copyrighted works of scholarship published would be diminished.[568]

Regarding the purpose of the use, the defendants argued that if the copying had been done by the professors themselves, the use would have adhered to the fair use doctrine.[569] The Court declined to address this issue, refusing to allow a for-profit defendant to stand in the shoes of a non-profit consumer.[570] The second factor, the nature of the copyrighted work, was not disputed because the defendants conceded that the excerpts contained creative material.[571] The Court concluded that the third factor, which involved an assessment of the amount and substantiality of the copied work, did not support a finding of fair use.[572] The fact that the

[561] Ibid.
[562] Ibid.
[563] Ibid 1383.
[564] Ibid 1385. See *Harper and Row Publishers, Inc. v Nation Enters*, 471 US 539.
[565] *Princeton University Press*, 1386. The burden of proof as to market harm rests with the copyright holder if the challenged use is of a non-commercial nature. On the other hand, the burden of proof is on the defendant if the use is a commercial one. *Princeton University Press*, 1385–86.
[566] Ibid 1387.
[567] Ibid. The fact that the plaintiffs' income from permission fees was close to $500,000 was a convincing one for the court.
[568] Ibid.
[569] Ibid 1389.
[570] Ibid (citing HR Rep. No. 1476, 94th Cong., at 74 (1976), USCCAN.5659, 5687–88) (The Court's decision was influenced by a House Judiciary Committee report stating that a non-profit organisation cannot, through contractual relations with a commercial organisation, authorise a commercial group to carry out the reproduction and distribution of copyrighted works that would be exempt if done by the non-profit organisation itself).
[571] Ibid.
[572] Ibid.

professors chose the excerpts was convincing evidence of the value of the material.[573] To determine the amount and substantiality of the amount copied, the Court looked to the legislative history of the US *Copyright Act of 1976*.[574]

There were dissenting opinions from three judges. The first dissenting judge concluded that there was no economic harm to the publishers that outweighed the benefits provided by MDS.[575] MDS's copying promoted scholarship and higher education.[576] This first dissenting opinion suggested that the majority's strict reading of the fair use doctrine would hinder scholastic progress throughout the nation's universities because of the additional delays and costs that ultimately would be handed down to the students.[577]

The second dissenting judge concluded that the plain language of the statute allowed copying by copy shops under the fair use doctrine.[578] This dissenting judge disagreed with the majority's ultimate conclusion and found the copy shop course packs to be a fair use[579] and with the majority on three sub-issues central to their conclusion.[580] First, the judge concluded that the loss of permission fees did not have an obvious market effect.[581] Second, the permission fees were not an important incentive to authors to create new works.[582] Unlike the majority, the dissenter explained that authors were driven by personal and professional reasons such as making a contribution and enhancing their professional reputation, rather than monetary incentives.[583] Third, the dissenting judge explained that the Court should not have relied on legislative history, specifically the *Classroom Guidelines*,[584] in determining the issue of classroom use because legislative history is inappropriate and irrelevant except to clarify an ambiguity in a statute.[585]

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[573] Ibid.
[574] Ibid 1390, 1391 (During the negotiations of the act, a committee produced the *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals*, commonly referred to as the *Classroom Guidelines*. The *Classroom Guidelines* provide a general idea of the type of educational copying Congress had in mind. They clearly establish that unauthorised copying to create 'anthologies, compilations, or collective works' is prohibited. The Court concluded that although the changes in technology and teaching practices since the passage of the *US Copyright Act* in 1976 may not have been anticipated by Congress, only Congress has the authority to change the law) see Kenneth D Crews, 'The Law of Fair Use and The Illusion of Fair Use Guidelines' (2001) 62 *Ohio State Law Journal*, http://www.arl.org/storage/documents/publications/fair-use-code-crews.pdf
[575] *Princeton University Press*, 1392.
[576] Ibid 1393
[577] Ibid 1393–94.
[578] Ibid 1394.
[579] Ibid 1397.
[580] Ibid.
[581] Ibid.
[582] Ibid 1410.
[583] Ibid.
[584] See above n 574.
[585] Ibid 1398, 1411.

The dissenting judge rightfully argued:

> It is also wrong to measure the amount of economic harm to the publishers by loss of a presumed license fee—a criterion that assumes that the publishers have the right to collect such fees in all cases where the user copies any portion of published works.[586]

The dissenting judge further stated:

> The publishers have no right to such a license fee. Simply because the publishers have managed to make licensing fees a significant source of income from copy shops and other users of their works does not make the income from the licensing a factor on which we must rely in our analysis. If the publishers have no right to the fee in many of the instances in which they are collecting it, we should not validate that practice by now using the income derived from it to justify further imposition of fees. Our job is simply to determine whether the use here falls within the Section(s) 107 exception for 'multiple copies for classroom use'. If it does, the publisher cannot look to us to force the copy shop to pay a fee for the copying.[587]

The US fair use model is widely viewed as the most flexible limitation on copyright holders' rights. Education is mentioned twice in the preamble of s 107 and the plain language of the provision allows multiple copies for the classroom. Further, the US fair use provision has the reputation of being open-ended, as the purposes and the four factors stated in the provision are only examples, not a complete list. However, ironically in the context of education, the judiciary has been interpreting the flexible statute doctrine in a rigid way when it comes to educational use. The court on many occasions has announced that the impact on the market of the use is the most important factor. Moreover, the court interprets this factor in a broad way, suggesting that the existence of licensing is evidence that the use is unlikely to be fair. With regard to the purpose of education, the court again interprets the doctrine narrowly, and focuses on the person who is undertaking the copying for educational purposes. Hence, a student is unable to seek a service from a copy shop where they are paying only for the service, papers and ink, because even if the copying is fair educational use in the first place, the fact that a copy shop service facilitates this makes the use to be unfair. This is an unnecessary restriction on the use of copyright for educational purposes.[588] When it comes to the amount and substantiality of the used work, the court focuses on the fact that the chosen excerpts are likely to be substantial, considering the fact that professors choose the most important materials.

Overall, an interesting conclusion to be drawn from this subsection is that a fair use provision is ineffective in supporting a cost-free and permission-free education if it is read and interpreted narrowly—that is, to serve the natural property rights of copyright holders. However, fair dealing provisions are more likely to

[586] Ibid 85.
[587] Ibid 86.
[588] Further, it can be argued that this attitude contradicts the law, which normally recognises the law of agency that recognises that a person may act through an agent.

serve cost-free and permission-free education if they are interpreted in accordance with the real rationale of copyright, which is the dissemination of knowledge and promoting science to serve the public interest.

The US fair use provision has failed to support cost-free and permission-free educational use for several reasons: its consideration of 'impact on the market' as the most important factor and broad interpretation of this issue, thus expanding the exclusive rights of copyright holders; the commercial–non-commercial dichotomy of the purpose of the use; and the very narrow interpretation of the amount and substantiality of the use. Substantiality of work used for educational purposes is assessed on the basis that professors choosing a specific excerpt is sufficient evidence of substantiality. Generally, one reason that educational course packs are unlikely to be assessed as fair use in the US is the narrow interpretation of its fair use provision, relative to the Canadian approach.

In Canada, a user rights approach is taken to make copyright law fairer for the user in all types of uses and in educational use in particular. In Canada, the commerciality of the use does not affect its purpose—which is educational, in our context—as long as there are safeguards to guarantee that the use is for education. The amount of the used work is assessed based on the number of individual copies, not on the whole amount copied by the educational institution for its students. There must be actual evidence linking the use of the work for educational purposes to a negative effect on the market. The availability of licences does not affect the fairness of the use. It is clear that taking a user rights approach prevents fair educational use being treated as unfair.

5.4 The Proposed Reformation and Specific Educational Uses

The reformation outlined above maximises the likelihood of educational use being cost free and permission free when it is fair. This will overcome one of the major obstacles to the availability of quality learning materials by avoiding undue restriction when assessing the fairness of a specific educational use. The proposed reformation attempts to prevent such a result by conceptualising fair use as a right under Paradigm I or by legislating for a broad flexible exception subject to a balanced interpretation of the Three-Step Test complemented by a user rights approach. Having established this, this section now demonstrates the efficiency of this reformation in preventing the undue restriction that emanates from a narrow interpretation of the concepts of copyright and fair use.

National copyright laws tends to legislate for specific exceptions for educational purposes.[589] These specific exceptions vary in scope in many aspects: first, the act of exploitation (reproduction, performance, communicating to the public, making available online, translation); second, the format or means (analogue or digital); third, who may benefit and carry on the designated exploitation (public institutions, not-for-profit, or for-profit, teachers, students); fourth, the nature of the work subject to exploitation (all works or some specified works) and the extent of the use allowed; and fifth, the allowed purposes (teaching, examination, study).[590] Specific exceptions for uncompensated educational uses are most likely to address uses that are fair. Nonetheless, the scope of these exceptions is inevitably narrower than the general exception, and narrowest when conceptualising educational use as a right when it is fair under Paradigm II of copyright. Therefore, it is submitted that specific uncompensated exceptions for educational purposes are not necessary under the proposed reformation.

Lawrence Liang submits that policymakers who are interested in supporting (digital or analogue) education via copyright should bear in mind that education is 'a process involving communication between students, between the student and the teacher, and between teachers'.[591] Policymakers should also accept that education as a purpose is not limited to the classroom, or even institutional boundaries.[592] Significantly, a purposive interpretation of educational use makes focusing on who is using copyright for education insignificant as long as it is for the purpose of education. Thus, there is no need to distinguish between the teacher and the student as a user of copyright for education to decide the fairness of the educational use.[593]

The following subsection shows that the proposed reform is flexible enough to cover educational uses that are essential for supporting free, quality education except where fair use itself is overridden by other laws, such as with the issue of circumvention Technological Protection Measures (TPMs) for the purpose of educational use.

[589] These exceptions vary with regard to the uses allowed: some are subject to remuneration for the copyright holders while others are allowed freely because of its fairness. A discussion on compensated exceptions is outside the scope of this thesis as it does not serve its objectives.
[590] See Raquel Xalabarder, *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucus, Central Asia and Israe*l, Standing Committee on Copyright and Related Rights, 19th Session (Geneva, 14–18 December 2009).
[591] Liang, above n 42, 222.
[592] Ibid.
[593] See *Alberta v. Access Copyright*, above n 536.

5.4.1 Online Education

Palestinian policymakers, legislator and judiciary who are keen to achieve the most favourable copyright for free and quality education in the country should value the instant and continuous interaction between copyright and facilitating distance education and digital online education. Distance learning can be defined as a mode of education where students are separated from their instructors in time and space.[594] There are different types of distance learning.[595] Effective distance learning entails reproducing and communicating copyright materials to students. Without such content the purpose of distance learning is undermined.

Inevitably, educational uses in the digital environment entail reproduction rights and communication to the public rights (making available rights).[596] Educational uses in the digital environment are most likely to be well accommodated under the proposed reformation by ensuring that uses that are fair are not excluded.

Under copyright Paradigm I, conceptualising the use of copyright as a right when it is fair—by conducting the infringement test discussed above to assess if the use falls within the scope of any exclusive right—removes the need to distinguish between the digital and analogue environment. This is because the right of using copyright is evolving and is reflected by the context itself; just like copyright holders' exclusive rights are continuously developed and adapted to this environment. Indeed one of the strengths of copyright Paradigm I is that use is a positive limitation on any exclusive right, whether in a digital environment or an analogue one.

Under the reformation proposed with respect to copyright Paradigm II, a broad, flexible fair use accompanied by a balanced interpretation of the Three-Step Test and a user rights approach is a

[594] *Report on Copyright and Digital Distance Education* (ID: CSD1866), US Copyright Office, May 1999, a report to the Register of Copyrights, available at http://www.copyright.gov/reports/de_rprt.pdf.
[595] Kakoura, above n 43, 10–12; these types are: distance learning as a complementary tool for students enrolled in face-to-face courses—education by an eLearning platform; a stand-alone distance education course offered by a single university; distance learning in Massive Open Online Course or distance learning provided by virtual universities.
[596] Online instruction is a form of making works available for teaching purposes, pursuant to art 8 of the *WCT* and thus must satisfy the criteria set out in the Three-Step Test, if one needs to use it under the exceptions provision. Art 8 of *WCT* reads as follows: 'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the *Berne Convention*, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them'.; Seng's WIPO Study, above n 41, 4. Seng states that 'online distance learning will invariably engage in some form of reproduction of the source works that are being communicated, by virtue of the fact that the electronic medium is involved, provisions that enable online distance learning will also have to take this issue into consideration').

comprehensive formula to encompass all types of uses for educational purposes. This means that in the fair use realm all copyright exclusive rights are covered without the need to distinguish between the analogue and digital environment. A potential consequence is that legislating specific exceptions for online education is worthless in the light of a broad, flexible fair use provision.[597] Specific exceptions—which accommodate educational uses without paying royalties or seeking copyright holders' permission—are doing so because the uses specified in these specific exceptions are fair. Specific exceptions are needed when the general provision of fair use/dealing fails to accommodate this fairness because of its narrow interpretation, as in the US, or its rigidity with respect to fair dealing. For example, the US created its *Technology, Education, and Copyright Harmonization Act 2002 (TEACH)* to better accommodate distance education.[598] However, this act is criticised as being restrictive, which has led to suggestions for relying first and foremost on the fair use doctrine, even in the distance education context.[599] Further, the *Australian Copyright Act 1968* has specific exceptions to accommodate education in both analogue and online environments because Australian fair dealing is not flexible enough to accommodate fairness of educational use in an online environment.[600]

Notably, undertaking a users' rights approach will ensure that distributing copies digitally to students via a secured website—providing that these copies cannot be downloaded and are automatically destroyed after a specific period of time (e.g., the end of term or the year)—is considered fair.[601] Other educational uses in the digital environment may entail paying royalties via compulsory licensing, to be fair. However, the purpose of this thesis is to prevent excessive copyright protection that prejudices the boundaries of fair use.

[597] As developed in the proposed reformation under copyright Paradigm II, that is: broad flexible fair use, balanced interpretation of the Three-Step Test along with a user rights approach.
[598] The *TEACH Act* permits the transmission of a broad range of works to any location, subject to some quantitative restrictions and permits performances and displays for educational purposes in the digital environment that are only allowed in the analogue environment in the US fair use provision.
[599] See GK Harper, *The TEACH Act Finally Becomes Law* (2002), available at: http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm.
[600] *Australian Copyright Act 1968*. The Australian act broadly defines 'educational institutions' and provides an exception for the electronic reproduction and communication of all types of copyrighted material; thus, Australian copyright law supports both digital and distance education.
[601] Michael Geist, Supreme Court of Canada Speaks: How to Assess Fair Dealing for Education, above n 545.

5.4.2 The Circumvention of Technological Protection Measures

Technological Protection Measures (TPMs) are also known as Digital Rights Management (DRM) measures or digital locks. These are a set of access control technologies for restricting the use of proprietary hardware and copyrighted works.[602] Such technologies try to control the use, modification and distribution of copyrighted works (such as software and multimedia content), as well as systems within devices that enforce these policies.[603] In this vein, there are two main categories of TPM: access control TPMs and copyright protection TPMs. Access control TPMs allow the copyright owner to control access to copyrighted material, for example, password protections, file permissions and encryption. Copyright protection measures are designed to control activities such as reproduction of copyright material, for example, by limiting the number of copies that a consumer might make of an item. One of the main differences between the two types of TPMs is that access control TPMs block access generally, while copyright protection TPMs operate at the point where there is an attempt to perform an act protected by the copyright, for example, making a copy of the material.[604]

TPMs are 'one of the greatest controversies in contemporary copyright law'[605] as they restrain a user's fair use in the digital environment.[606] TPMs were introduced by two *WIPO* copyright treaties,[607] both of which require Member States to provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures' used by copyright holders in relation to digital works.[608] Interestingly, the *WIPO* treaties reinforce the copyright holder-centric theme by ignoring the legitimate uses of copyright that can be affected by TPMs, because TPM provisions do not impose any obligation on Member States to preserve fair uses allowed under copyright law.[609] Further, the *WIPO* treaties do not

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[602] Computer Forensics: Investigating Network Intrusions and Cybercrime. Cengage Learning.(EC-Council Press, 2010) https://news.asis.io/sites/default/files/Investigating_Intrusions_Network_CyberCrime.pdf

[603] *Fact Sheet: Digital Rights Management and have to do: Technical Protection Measures*, 24 November 2006, https://www.priv.gc.ca/.

[604] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, November 1999, 60 states that 'Copy control measures are more closely allied with copyright, and the infringement of copyright, than access control measures. Access control measures seek to prevent all access to copyright material, not only that access which is unlawful'.

[605] Chapdelain, *Copyright User Rights*, above n 425,129.

[606] See Nick Scharf, 'Digital Rights Management and Fair Use' (2010) 1(2) *European Journal of Law and Technology* 1.

[607] *WCT* and *WPPT*.

[608] *WCT* art 11; *WPPT* art 18.

[609] See David Vaver, 'Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?' (2007) *Case Western Reserve Law Review* 731 (describing the imbalance created by copyright holders and users by the implementation of TPMs).

outline how to implement TPMs at national levels, which has led to variation in their implementation in different jurisdictions.[610] As a result, there are variations in TPM regimes among countries. For example, the US adopted one of the strongest TPM regimes with the entry into force of the *Digital Millennium Copyright Act* (*DMCA*),[611] which is said to go beyond the boundaries of the requirements of the *WIPO* treaties.[612] The absence of an obligation to safeguard permitted uses under copyright law, such as fair use, has not prevented some jurisdictions from legislating some counterbalances for copyright holders who benefit from TPMs, as in the EU.[613] However, these exceptions to TPMs conferred by Directive 2001/29/EC are limited.[614] Nonetheless, some jurisdictions have adopted a lower level of TPM protection, including Switzerland and New Zealand.[615]

One of the outstanding features of the TPMs that directly hampers facilitation of free, quality education in a LDC like Palestine is that fair use that is crucial to advance education and knowledge dissemination is not identified in the realm of the TPMs. This means that circumvention is prohibited, even if the use does not constitute a copyright infringement.[616] Thus, liability for circumventing the TPMs is irrelevant to the existence of copyright infringement.[617] Further, not only is copyright infringement irrelevant to the rise of

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[610] See Attorney General Department (AGD), Submission No. 52, 3. The AGD noted that 'as is the case with most multilateral treaties, the obligations in the WIPO Internet Treaty are broadly stated and give some flexibility for implementation at a national level'; Chapdelain, above n, 137 'Questions about the minimum level of protection of technological measures that needs to be put in place to comply with the WIPO Internet treaties remain controversial and pertinent more than 20 years after the signature of the treaties as evidenced by national jurisdictions' efforts to implement the treaties in their domestic sphere'.

[611] *Digital Millennium Copyright Act*, Pub L No 105-304, 112 Stat 2860 (1998), amending 17 USC, including the introduction of ss 1201–1205 ('*DMCA*'); US House Judiciary Committee, *WIPO Copyright Treaties Implementation and On-line Copyright Infringement Liability Limitation* (HR Rep No 105-551) (1998). Preparatory works leading to the adoption of the *DMCA* acknowledged that the *DMCA* went beyond the minimum requirements of the WIPO internet treaties; ibid 5.

[612] US House Judiciary Committee, above n 604..

[613] European Commission, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ, L 167/10.

[614] Zohar Efroni, *Access-Right: The Future of Digital Copyright Law* (Oxford University Press, 2011) 367–80, analysing the TPM regime of Directive 2001/29/EC and how limited is the Member State obligation to accommodate the exercise the exceptions to copyright infringement.

[615] *Federal Act on Copyright and Related Rights* (Switzerland) of 9 October 1992 art 39a; *Copyright Act* (Japan) (Act No 48 of 6 May 1970, as amended up to Act No 35 of 14 May 2014) art 2(1); *Copyright Act 1994* (NZ), 1994/143, ss 226ff in particular s 266(D) (prior to amendments made by *Transpacific Partnership Agreement Amendment Act 2016* (NZ)), cited in Paschale, above n 134.

[616] 17 US Code s 1201(a)(1) (A) (2010); Directive 2001/29/EC art 6.1; Canada CA s 41.1.1(a). See, however, *Chamberlain Group, Inc v Skylink Techs, Inc*, 381 F (3d) 1178 (Fed Cir 2004) establishing a test linking the application of the TPM provisions to copyright infringement.

[617] Carys Craig, 'Locking Our Lawful Uses: Fair Dealing and Anti-Circumvention in Bill C-32' in Michael Geist (ed), *From Radical Extremism to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 192.

TPM circumvention liability, but copyright exceptions and limitations cannot be used as a defence against this liability.[618] Ultimately, TPMs have created 'a parallel universe with their own rules and exceptions',[619] which adds another layer of protection or 'para-copyright' to copyright holders' exclusive rights.[620] This is true in both the US and Canada as these jurisdictions legislate exemptions to the prohibition of the circumvention of access controls that may apply from time to time to a certain class of persons or type of works if there is a likelihood of adverse effects on the ability to make non-infringing uses of a particular class of works.[621]

Nonetheless, some jurisdictions apply a more balanced approach towards the implementation of TPMs. For example, Japan, New Zealand and Switzerland link the liability for TPMs circumvention to an infringement of copyright.[622]

TPMs do not recognise copyright exceptions and limitations and that the existence of copyright infringement is not relevant in accessing the liability under the TPM regime. Consequently, fair use doctrine as an essential component of copyright does not exist in the realm of TPMs. TPM regimes are being criticised for creating exclusive rights that are not parallel to the exclusive rights of copyright law.[623] Access control TPMs have never been part of the copyright exclusive right.[624] TPMs have the potential to deny access to copyright works that have materials already in the public domain.[625] In addition, TPMs expand the scope of copyright exclusive rights by controlling the amount of reading, viewing and listening that are part of the exclusive rights.[626] This implicitly declares the 'death of copyright'.[627]

Against the background of this severe effect of TPMs on accessing digital copyright, Palestinian legislator and the judiciary should be aware of the negative effect on facilitating free, quality education. Creating a

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[618] See *Universal City Studios, Inc v Corley* (n 56); *Universal City Studios, Inc v Reimerdes*, 111 F Supp (2d) 294 (SDNY 2000); *Apple Inc v Psystar Corporation*, 673 F Supp (2d) 931 (ND Cal 2009), on appeal: *Apple Inc v Psystar Corporation* 658 F (3d) 1150 (9th Cir 2011); *Realnetworks, Inc v DVD Copy Control Association*, 641 F Supp (2d) 913 (ND Cal 2009).
[619] Paschale, 137.
[620] Glynn S Lunney, Jr, 'The Death of Copyright: Digital Technology, Private Copying and the Digital Millennium Copyright Act' (2001) 87 *Virginia Law Review* 813, 839–40; see Efroni, above n 614, 348–67.
[621] 17 US Code s 1201(a)(1)(c); see also Canada CA (n 43) s 41.21(2)(a).
[622] See Kenneth D Crews, WIPO Standing Committee on Copyright and Related Rights, 'Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised' (10 June 2015); Michael Geist, 'The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements' in Michael Geist (ed), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010).
[623] Craig, above n 167, 192.
[624] David Vaver, *Intellectual Property Law Copyright, Patents, Trademarks* (Irwin Law, 2nd ed, 2011) 199.
[625] Craig, above n 167, 195.
[626] Jessica Litman, 'Lawful Personal Use' (2007) 85 *Texas Law Review* 1871, 1872.
[627] Lunney, above n 620, 818–19.

link between the liability for TPM circumvention and copyright infringement falls well within the realm of copyright Paradigm I of the proposed reformation. In fact, it is a natural result of conceptualising fair use as a positive right; a positive right that should not be overridden either by copyright law or TPM laws. Thus, typically, the judiciary that adopts copyright Paradigm I should not hesitate to link copyright infringement and the circumvention of TPMs to decide liability. In particular, this judicial practice occurred in the landmark US judgement *Chamberlain Group, Inc v Skylink Techs*,[628] where the Court of Appeal, Federal Circuit required a link between copyright infringement and the act of circumvention for liability to arise:

> A copyright owner seeking to impose liability on an accused circumventor must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization— as well as notice that authorization was withheld. A copyright owner seeking to impose liability on an accused trafficker must demonstrate that the trafficker's device enables either copyright infringement or a prohibited.[629]

This judgment occurred in a jurisdiction that adopts a strong TPM regime; thus, it is reasonable to undertake this approach towards the liability of TPM circumvention in a country where no TPMs are yet adopted and where copyright Paradigm I is followed.[630] Therefore, reformation under copyright Paradigm I only requires the Palestinian judiciary to be aware of the TPM's effect on access and the scope of copyright exclusive rights, and to safeguard fair use as a positive right by requiring a link between copyright infringement and liability under TPM regimes.[631]

However, adopting copyright Paradigm II towards reformation where educational use is an exception to the rule of copyright may require express legislation that liability for circumventing TPMs only arises upon the existence of copyright infringement, as in Japan, New Zealand and Switzerland. It might be sensible as well to legislate specific exceptions to allow educational institutions to circumvent TPMs for fair use purposes, thus preventing the expansion of copyright exclusive rights as per TPMs and reinforcing fair educational use.

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[628] *Chamberlain,* 381 F (3d) 1178 (Fed Cir 2004).
[629] Ibid 1204.
[630] Palestine does not yet have any TPM laws, nonetheless, this may occur in the future as part of legislating laws for the digital environment. Copyright Paradigm I holds the potential to safeguard fair use from the protection of TPMs once fair use is well-established as a positive right under Paradigm I.
[631] Similarly, in *Nintendo Co Ltd v PC Box SRL* C- 355/ 12, [2014] (ECJ), the EU Court of Justice interpreted the legal protection offered by Directive 2001/ 29/ EC69 as applying 'only in the light of protecting that right holder against acts which require his authorisation' [25].

5.4 Concluding Remarks

Chapter 5 proposed copyright reform in Palestine in the light of copyright paradigms. The proposal's aim is to achieve the best outcomes with respect to the common values and education without unduly restricting the interpretation of copyright.

Chapter 5 nominated adhering to copyright Paradigm I as the best option for reform in Palestine, because of all the strengths of this paradigm. This approach to reform does not necessitate reforming current legislation as it depends on the interpretation of the judiciary for the concept of copyright and the users' entitlement to use copyright work as a right, not an exception. In this vein, the judiciary must develop an infringement test. Chapter 5 proposed an infringement test in line with the Australian infringement test, with the addition of a fourth element: 'non-productive or non-transformative' use. Following Paradigm II is the second option for copyright reform in Palestine, if adopting Paradigm I proves too difficult. Proposed reformation under copyright Paradigm II is based on three levels: first, interpretation of the Three-Step Test in a balanced way; second, legislation for a broad flexible fair use provision and abandoning of the fair dealing provision; third, undertaking a users' rights approach as in Canada. Nonetheless, this chapter encourages Palestine to undertake Paradigm I of copyright, especially as this may not require changes to the legislation. Having said this, the judiciary should be exposed to copyright paradigms and understand their crucial variations.

This chapter then argued that undertaking this reform will ensure that any educational use that is fair under copyright Paradigm I or II will be comprehensively covered; thereby preventing excessive protection of copyright or the risk of a fair educational use being treated as unfair. The chapter further argued that the proposed reformation—regardless of the paradigm—makes legislating for specific exceptions for uncompensated educational uses unnecessary in the light of conceptualising fair use as a right in Paradigm I or as an exception with the proposed safeguards (broad flexible exception, balanced interpretation of the Three-Step Test and employing a users' rights approach as in Canada). Significantly, practice shows that these specific exceptions for educational purposes are narrow in scope and that it is best for educational use to be assessed under the fair use provision for the sake of flexibility. Building on that, the chapter argued that fair educational uses in the digital environment are most likely to be well accommodated under this reformation, with no need to legislate for specific exceptions of educational uses in the digital environment. In addition, conceptualising fair use as a right under copyright Paradigm I makes circumventing the protection of TPMs a reasonable matter. Nonetheless, under copyright Paradigm II where fair use is an

exception, it is best for Palestinian legislator to expressly address this matter to ensure that TPMs do not hamper fair educational use.

PART IV
COPYRIGHT VOLUNTARY MECHANISMS: POTENTIAL AND PRACTICE

Chapter 6—Copyright Voluntary Mechanisms in Support of Free, Quality Education

Chapter 6 investigates voluntary mechanisms that allow use of copyright works to open up copyright content in advance of free, quality education in Palestine. It focuses on OA to peer-reviewed journal articles and OER. It makes the case for applying such mechanisms and highlights the challenges of this within the Palestinian education system.

Chapter 7—Copyright for Better Education: Policy Framework

Chapter 7 seeks to outline a clear policy framework to create a copyright system that supports free, quality education. The structure provides steps towards untangling copyright in support of free, quality education. Some are immediate requirements, while others are suggested for later stages.

Chapter 6

Supporting Education through Copyright Voluntary Mechanism

Objectives

1. Demonstrate the potential benefits of OA (to peer- reviewed journal articles and OA archives) and OER for improving education.
2. Explore the status of OA in Palestine.
3. Explain the legal framework that underpins OA to peer-reviewed journal articles, archives and OER.

6.1 Introduction

Voluntary mechanisms auch as Open Access (OA) rely on the owner of copyright giving permission (in advance) to use their material. Such mechanisms have proven immediate and effective for providing access to copyright materials in many sectors including education. OA presents pragmatic model for improving access to free, quality education in Palestine. OA aims to overcome barriers created by the copyright system by encouraging copyright holders to make their work available online so it can be accessed by anyone who has a computer and access to the Internet. OA enables the public to access the content and to read, listen and watch without paying subscription fees.

There are many kinds of OA content. The OA movement began with a focus on particular literature; that is, peer-reviewed journal articles. Later, the concept of OA was implemented with respect to other content, in particular, Public Sector Information (PSI), OER and data from scientific research. Diagram (6) below shows the different types of content that can apply the concept of OA.

Diagram (6) Types of OA Content

OA as a concept has been dopted and enabled by various stakeholders: copyright holders, employers, governments, public funders (national or international), private funders (where a grant is made on the condition of OA), research organisations, universities, faculties, schools and any organisation that deals with and/or creates copyright content (such as a broadcasting corporation). The main OA policies advocate openly sharing, using and reusing copyright materials to advance knowledge without financial (price), legal or technical restrictions. Diagram (7) below shows the different stakeholders that can adopt OA as a concept and reap its benefit.

Diagram (7) Stakeholders to Adopt the OA Concept

Key stakeholders usually implement the OA concept through an OA policy. An effective OA policy depends on four main dimensions: legal, price, technical and cultural. The legal dimension of OA involves clear permission from the copyright holder to the end user for the kinds of permitted uses. The price dimension refers to the ability to access the content without paying any royalty or subscription fees. The technical dimension refers to the ability to locate and use the content.[632] The cultural pillar involves the cultivation of the concept and mechanisms of OA by prospective stakeholders.[633] Diagram (8) shows the four domensions that should be considered in order to achieve an effective OA policy.

[632] This technical dimension of OA enatils the so called concept of 'interoperability'. A dictionary meaning for this concept simply means 'the ability of computer systems or software to exchange and make use of information'.

[633]See Patrick O Brown, Diane Cabell, Aravinda Chakravarti, Barbara Cohen, Tony Delamothe, Michael Eisen, Les Grivell, Jean-Claude Guédon, R Scott Hawley, Richard K Johnson, Marc W Kirschner, David Lipman, Arnold P Lutzker, Elizabeth Marincola, Richard J Roberts, Gerald M Rubin, Robert Schloegl, Vivian Siegel, Anthony D So, Peter Suber, Harold E Varmus, Jan Velterop, Mark J Walport, and Linda Watson, *Bethesda Statement on Open Access Publishing* (20 June 2003).The *Bethesda Statement* designated all relevant parties to OA publishing, these parties are: 'the organizations that foster and support scientific research, the scientists that generate the research results, the publishers who facilitate the peer review and distribution of results of the research, and the scientists, librarians and others who depend on access to this knowledge—can take to promote the rapid and efficient transition to open access publishing.'

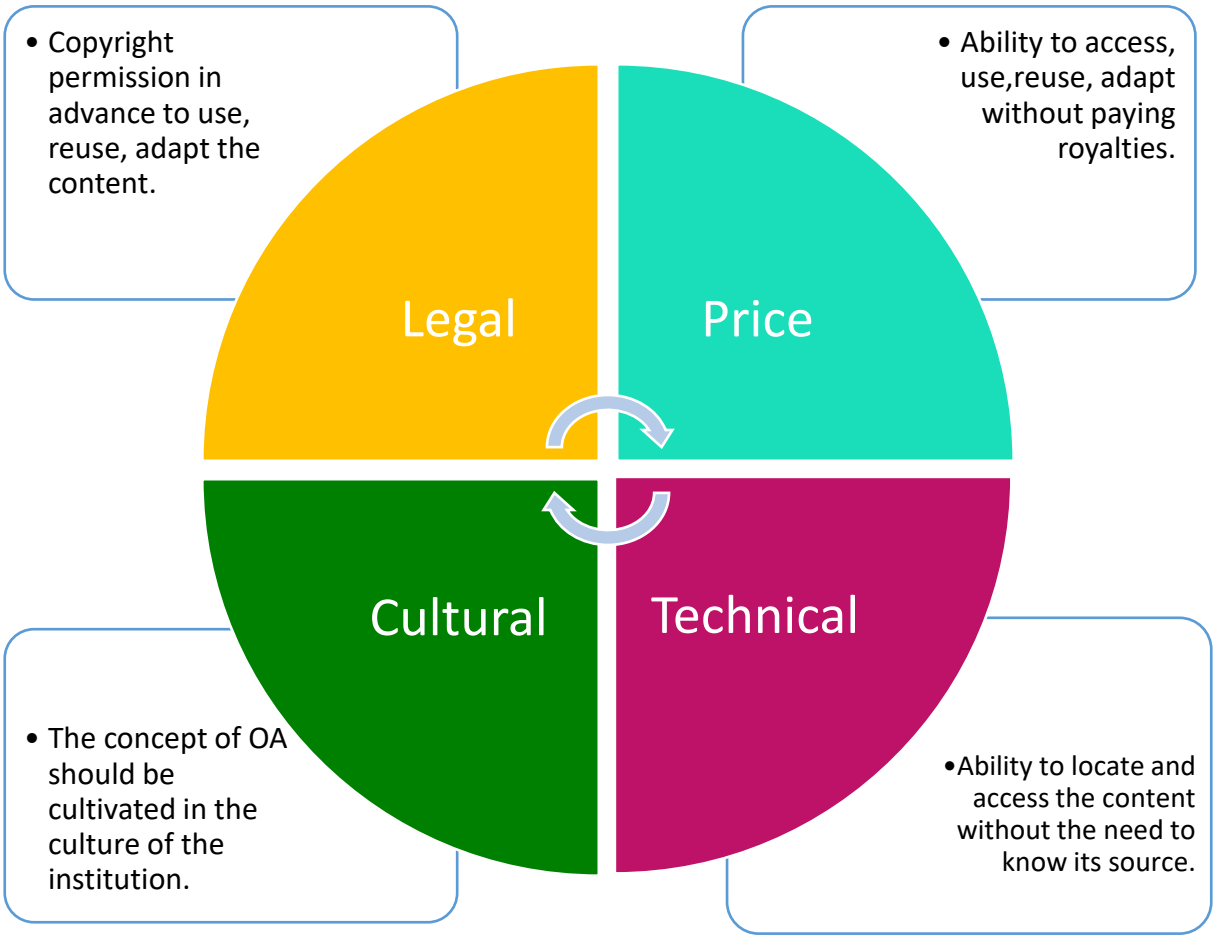

Diagram (8) The Four Dimensions of an Effective OA Policy

Although OA has gained momentum all over the world, it is at an early stage of implementation in Palestine.[634] To achieve the benefits of OA in the Palestinian education sector a comprehensive OA policy should be adopted by the key stakeholders in Palestine.[635]

While acknowledging the feasibility of all types of OA content for advancing the educational process and outcomes, this chapter focuses only on the following types of OA: OA to peer-reviewed journal articles (Gold OA or OA publishing), OA archives (OA repositories) and OER. Therefore, this chapter is divided into four sections. Section 6.2 explains the concept and nuances of OA to peer-reviewed journal articles and repositories. Section 6.3 outlines the case for OA in the field of education (benefits and challenges). Section 6.4 explains the concept and benefits of OER. Section 6.5 describes the legal framework to support OA to peer-reviewed journal articles, OA repositories and OER.

[634] See Research Output Management through Open Access Institutional Repositories in Palestinian Higher Education (‘*ROMOR Project*’) http://romor.iugaza.edu.ps/romor/index.php.
[635] See Diagram (7) Types of organisation to adopt OA policy.

6.2 Open Access to Peer-Reviewed Journal Articles and Repositories

This section aims to introduce the concept of OA, its subject matter and nuances—focusing on OA to peer-reviewed journal articles and OA repositories—through the eyes of the main OA initiatives: the *Budapest Open Access Initiative* (*BOAI*), the *Bethesda Statement on Open Access Publishing* (*Bethesda Statement*) and the *Berlin Declaration on Open Access to Knowledge in the Science and Humanities* (*Berlin Declaration*)[636]

6.2.1. The Concept

OA was first officially expressed and defined[637] in the *BOAI* (February 2002)[638] and later through the *Bethesda Statement* (June 2003)[639] and the *Berlin Declaration* (October 2003).[640]

The *BOAI* was launched in an effort to accelerate progress in OA to the peer-reviewed journal literature fostered via self-archiving and a new generation of OA journals.[641] The *BOAI* was the first to use the term

[636] Also see, Public Library of Science (PLoS): http://www.plos.org/about/history.html; *Wellcome Trust Statement*: http://www.wellcome.ac.uk/en/1/awtvispolpub.html; *International Federation of Library Associations and Institutions Statement*: http://www.ifla.org/V/cdoc/open-access04.html
[637] Mellisa Hagemann, *Ten Years on, Researchers Embrace Open Access* (20 February 2013) http://www.opensocietyfoundations.org/voices/ten-years-on-researchers-embrace-open-access.
[638] Leslie Chan, Darius Cuplinskas, Michael Eisen, et al. *Budapest Open Access Initiative* (14 February 2002) ('*BOAI*'), www.opensocietyfoundations.org/openaccess/read.
[639] Patrick O Brown, Diane Cabell, Aravinda Chakravarti, Barbara Cohen, Tony Delamothe, Michael Eisen, Les Grivell, Jean-Claude Guédon, R Scott Hawley, Richard K Johnson, Marc W Kirschner, David Lipman, Arnold P Lutzker, Elizabeth Marincola, Richard J Roberts, Gerald M Rubin, Robert Schloegl, Vivian Siegel, Anthony D So, Peter Suber, Harold E Varmus, Jan Velterop, Mark J Walport, and Linda Watson, *Bethesda Statement on Open Access Publishing* (20 June 2003), http://www.earlham.edu/~peters/fos/bethesda.htm.
[640] Max–Planck–Gesellschaft, *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* (2003), https://openaccess.mpg.de/Berlin-Declaration. The declaration, which was signed on 22 October 2003, also defines the term by providing a definition of an OA contribution and the conditions it must satisfy.
[641] Budapest Open Access Initiative**,** http://www.budapestopenaccessinitiative.org/read.

'open access' and to generate a public definition and was the first to propose complementary strategies for realising OA.[642]

The rationale for OA is expressly stated by the *BOAI* as:

> An old tradition and a new technology have converged to make possible an unprecedented public good. The old tradition is the willingness of scientists and scholars to publish the fruits of their research in scholarly journals without payment, for the sake of inquiry and knowledge. The new technology is the internet. The public good they make possible is the world-wide electronic distribution of the peer-reviewed journal literature and completely free and unrestricted access to it by all scientists, scholars, teachers, students, and other curious minds. Removing access barriers to this literature will accelerate research, enrich education, share the learning of the rich with the poor and the poor with the rich, make this literature as useful as it can be, and lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge.[643]

The argument of the *BOAI* is that 'scientific literature' in the form of published peer-reviewed journal articles is a 'public good' resulting from the unity of an 'old tradition'—that is the readiness of scientists and scholars to publish their works via journal articles without payment—with the 'new technology' and that this public good should be freely available for the benefit of all.[644] This public good to be considered OA it should be electronically and freely distributed worldwide without any access restrictions.[645]

The *BOAI* defines OA literature as:

> [Freely available] on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.[646]

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[642] *Ten years on from the Budapest Open Access Initiative: Setting the Default to Open: Prologue: The Budapest Open Access Initiative after 10 years* (12 September 2012) Budapest, http://www.budapestopenaccessinitiative.org/boai-10-recommendations

[643] Budapest Open Access Initiative, above n 641.

[644] Leslie Chan and Sely Costa, Participation in the Global Knowledge Commons: Challenges and Opportunities for Research Dissemination in Developing Countries (2005) 106(3–4) *New Library World* 141, 149.

[645] Peter Suber, Removing the barriers to research: An introduction to open access for librarians (2003) 64(2): 92-94 *College and Research Libraries News* 113 https://dash.harvard.edu. Suber expalines 'In the age of print, open access was physically and economically impossible, even if the copyright holder wanted it. The cost of print publication was substantial and had to be recovered, so that journals necessarily existed behind a price barrier. Insofar as this limited access, the limitations were forgivable, even if harmful to research. But these limitations are no longer necessary, and hence, no longer excusable.'

[646] Budapest Open Access Initiative, above n 641.

Enriching education is one explicit aim of OA to peer-reviewed journal articles; nonetheless, all the other objectives support education directly or indirectly. Further, the *BOAI* identifies three main obstacles—financial, legal and technical—to accessing the peer-reviewed journal article literature and declares that access to this literature is open only when it is free of these kinds of barriers.

The *Berlin Declaration*[647], which was released on 22 October 2003, defines its goals in the following way:

> Our mission of disseminating knowledge is only half complete if the information is not made widely and readily available to society. New possibilities of knowledge dissemination not only through the classical form but also and increasingly through the OA paradigm via the Internet have to be supported. We define OA as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community. In order to realize the vision of a global and accessible representation of knowledge, the future Web has to be sustainable, interactive, and transparent. Content and software tools must be openly accessible and compatible.[648]

The *Berlin Declaration*[649] also provides a definition of an OA contribution, mirroring the definitions drafted in the *BOAI* and *Bethesda Statement*:

> Establishing open access as a worthwhile procedure ideally requires the active commitment of each and every individual producer of scientific knowledge and holder of cultural heritage. Open access contributions include original scientific research results, raw data and metadata, source materials, digital representations of pictorial and graphical materials and scholarly multimedia material. Open access contributions must satisfy two conditions:[650]
>
> > 1. The author(s) and right holder(s) of such contributions grant(s) to all users a free, Olairrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship (community standards, will continue to provide the mechanism for enforcement of proper attribution and responsible use of the published work, as they do now), as well as the right to make small numbers of printed copies for their personal use.[651]
> >
> > 2. A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in an appropriate standard electronic format is deposited (and thus published) in at least one online repository using suitable technical standards (such as the Open Archive definitions) that is supported and maintained by an academic institution, scholarly society, government agency, or other well established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving.

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[647] *The Berlin Declaration*, above n 640.
[648] Ibid.
[649] Ibid.
[650] Ibid.
[651] Note that there is no stipulation that the work be made available by the author or copyright owner solely for non-commercial reuse.

Adding to these more formal definitions of OA, Stevan Harnad defines it as 'free, immediate, permanent online access to the full text of research articles for anyone web wide'[652] and the Public Library of Science (PLoS) views OA as 'unrestricted access and unrestricted reuse'.[653] These definitions are legitimate, but Peter Suber's definition of OA as 'digital, online, free of charge, and free of *most* copyright and licensing restrictions'[654] is more realistic as it reflects the existence of some copyright restrictions (at its minimum), and that even maximum openness achieved within the boundaries of OA—as officially defined—requires at least attribution to the original author.[655]

Finally, OA is not a specific kind of content—any content can be OA—and is not a business model or licence; rather it is a policy supporting openness by removing the price and permission barriers within the legal framework of copyright. Ultimately, the aim of OA[656] is to help readers to find and make use of relevant literature and to give authors and their works 'vast and measurable new visibility, readership, and impact'.[657]

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[652] Stevan Harnad, *What is Open Access?* http://www.eprints.org/openaccess/.
[653] Public Library of Science, *Open Access*, www.plos.org/about/open-access.
[654] Peter Suber, *Open Access* (MIT Press, 2012) 4.
[655] Ibid. OA does not encompass universal access. Universal access entails the removal of other access barriers. Peter Suber describes four kinds of barriers that are not removed by OA: 'Filtering and censorship barriers. Many schools, employers, and governments want to limit what you can see. Language barriers. Most online literature is in English, or just one language, and machine translation is very weak. Handicap access barriers. Most web sites are not yet as accessible to handicapped users as they should be. Connectivity barriers. The digital divide keeps billions of people, including millions of serious scholars, offline'.
[656]Budapest Open Access Initiative, above n 641.
[657] For the academic, economic and social impact of OA see Jonathan P Tennant, François Waldner, Damien C Jacques, Paola Masuzzo, Lauren B Collister and Chris HJ Hartgerink, The Academic, Economic and Societal Impacts of OA: An evidence-based review [version 1; referees: four approved, one approved with reservations] (2016); Bo-Christer Björk and David Solomon, Open Access Versus Subscription Journals: a Comparison of Scientific Impact (17 July 2012) BioMed Central http://www.biomedcentral.com/1741-7015/10/73; Steve Lawrence, Free Online Availability Substantially Increases a Paper's Impact (2001) 411(6837) *Nature* 521; Stevan Harnad and Tim Brody, Comparing the Impact of Open Access (OA) vs. Non-OA articles in the Same Journals (2004) 10(6) *D-Lib Magazine*; Henk Moed, The Effect of "Open Access" upon Citation Impact: An Analysis of ArXiv's Condensed Matter Section (2007) 58 *Journal of the American Society for Information Science & Technology* 2047; Yassine Gargouri, Chawki Hajjem, Vincent Larivière, Yves Gingras, Les Carr, Tim Brody and Stevan Harnad, Self-Selected or Mandated, Open Access Increases Citation Impact for Higher Quality Research (2010) 5(10) *PLoS ONE*; Tránsito Ferreras-Fernández, Francisco García-Peñalvo, José A Merlo-Vega, Helena Martín-Rodero, Providing Open Access to PhD Theses: Visibility and Citation Benefits (2016) 50(4) *Program* 399; Isabel Bernal, Open Access and the Changing Landscape of Research Impact Indicators: New Roles for Repositories (2013) 1(2) *Publications* 56, doi:10.3390/publications1020056. Peter Suber, 'Visibility beyond Open Access', *SPARC Open Access Newsletter* (2 July 2005), https://dash.harvard.edu/handle/1/4725012.

6.2.2 Subject Matter[658]

The focus of OA is the literature that authors give to the world without an expectation of payment; namely, peer-reviewed scientific and scholarly research articles and their preprints. Peter Suber calls this kind of literature 'royalty-free literature'.[659] In this kind of literature, scholars do not write for money, as scholarly journals generally do not pay authors for their articles; authors write journal articles to have impact and advance their careers.[660] Royalty-free literature is 'the low-hanging fruit' of OA.[661]

Further, OA initiatives focus on publicly funded research[662] and a growing number of countries require OA to publicly funded research.[663] 'The lowest of the low-hanging fruit is research that is both royalty-free and publicly funded'.[664] However, OA initiatives are not limited to publicly funded research and seek access to research that is unfunded or funded by private foundations such as the Wellcome Trust[665] or Howard Hughes Medical Institute.[666]

[658] OA is not a kind of content; any kind of digital content can be OA, from texts and data to software, audio, video and multimedia. The OA movement focuses on peer-reviewed research articles and their preprints. While most of these are just text, a growing number integrate text with images, data and executable code. OA can also apply to non-scholarly content, like music, movies and novels, even if these are not the focus of most OA activists, https://legacy.earlham.edu/~peters/fos/overview.htm.
[659] Ibid.
[660] Ibid.
[661] Ibid.
[662] The argument for public access to publicly funded research is strong. OA to publicly funded research usually recognises exceptions for (1) classified, military research, (2) research resulting in patentable discoveries, and (3) research that authors publish in some royalty-producing form, such as books. Recognising these exceptions is at least pragmatic and helps avoid needless battles while working for OA to the largest, easiest subset of publicly funded research.
[663] See Registry of Open Access Repository Mandates and Policies (ROARMAP) http://roarmap.eprints.org/. An example of OA to publicly funded research is the policy of the US National Institutes of Health (NIH), https://publicaccess.nih.gov/.
[664] https://legacy.earlham.edu/~peters/fos/overview.htm.
[665] The Wellcome Trust, https://wellcome.ac.uk/.
[666] Howard Hughes Medical Institute, http://www.hhmi.org/.

6.2.3 Open Access Variations[667]

There are different access vehicles and access barriers. When OA is delivered by journals, it is called 'gold OA' and if it is delivered by repositories (archives) it is called 'green OA'. OA literature, regardless of the vehicle, reduces the price to the user as an access barrier. However, permission barriers are not all necessarily reduced:[668]

> There is some flexibility about which permission barriers to remove. For example, some OA providers permit commercial reuse and some do not. Some permit derivative works and some do not. But all the major public definitions of OA agree that merely removing price barriers, or limiting permissible use to 'fair use' is not enough.[669]

If OA removes only the price barrier it is called 'gratis OA' and users must either limit themselves to fair use or seek permission to exceed it. In contrast, 'libre OA' is free of charge and *expressly* permits uses beyond fair use. [670]

[667] See Peter Suber, Ensuring Open Access for Publicly Funded Research (2012) *British Medical Journal* 345, doi:https://doi.org/10.1136/bmj.e5184 for a comparison between the two main roads of OA**.**
[668] Peter Suber, *Open Access* (MIT Press, 2012) above n 654, 6.
[669] Peter Suber, Open Access Overview: Focusing on Open Access to Peer-reviewed Rsearch Articles and their Preprints (First put online 21 June 2004, last revised 5 December 2015) ('OA Overview') http://legacy.earlham.edu/~peters/fos/overview.htm.
[670] Ibid. 'There are two roads to OA: the "golden" road (publish your article in an OA journal) and the "green" road (publish your article in a non-OA journal but also self-archive it in an OA archive). About 10% of journals are gold, but over 90% are already green (i.e., they have given their authors the green light to self-archive); yet only about 10–20% of articles have been self-archived. To reach 100% OA, self-archiving needs to be mandated by researchers' employers and funders, as the United Kingdom and the United States have recently recommended, and universities need to implement that mandate'

6.2.3.1 The Golden Road: Publishing in Open Access Journals

OA journals[671] conduct peer review and are more likely to allow authors to retain their copyright and more likely to practise libre OA. Some OA journal publishers like PLoS are non-profit[672]; others, like BioMed Central,[673] are for-profit. How OA journals cover their expanses is best illustrated by Peter Suber:

> OA journals pay their bills the way broadcast televisions and radio stations do: those with an interest in disseminating the content pay the production costs upfront so that access can be free of charge for everyone with the right equipment. Sometimes this means that journals have a subsidy from a university or professional society. Sometimes it means that journals charge a publication fee on accepted articles to be paid by the authors or the author's sponsor (employer, funding agency).[674]

There are many business models for OA journals. Statistics show that 70% of OA journals do not charge author-side fees and 75% of non-OA journals do charge author-side fees. Of the fees charged by OA journals, 88% are paid by the authors' sponsors (employers or funders) or are waived; they are not paid by the authors. A growing number of universities maintain funds to pay publication fees on behalf of faculty who choose to publish in fee-based OA journals.[675]

[671] See the Directory of Open Access Journals (DOAJ). DOAJ defines itself as 'a community-curated online directory that indexes and provides access to high quality, open access, peer-reviewed journals. DOAJ is independent. All funding is via donations, 40% of which comes from sponsors and 60% from members and publisher members. All DOAJ services are free of charge including being indexed in DOAJ. All data is freely available. DOAJ operates an education and outreach program across the globe, focussing on improving the quality of applications submitted.' For a list of OA journals in all fields and languages, https://doaj.org/.

[672] Public Library of Science, www.plos.org.

[673] See https://www.biomedcentral.com/about. BioMed Central is a United Kingdom-based, for-profit scientific open access publisher. BioMed Central 'has an evolving portfolio of some 300 peer-reviewed journals'. All BioMed Central journals are only published online. BioMed Central describes itself as the first and largest open access science publisher. It is owned by Springer Nature.

[674] Peter Suber, OA Overview, above n 669.

[675] See Open Access Directory, Open Access Journal Business Models, oad.simmons.edu/oadwiki/OA_journal_business_models. Listing a number of business models to cover the cost of OA publishing. These models vary from advertising, auction, crowdfunding, e-commerce, fund raising, and others.

6.2.3.2 Green Road: Open Access Archives (Publishing in Open Access Repositories)[676]

OA archives (repositories) are a far more immediate and beneficial route for less developed countries.[677] There are various forms of OA archives including institutional archives based at universities or research institutes, and discipline-based archives such as the famous physics E-Prints archive (www.arXiv.org) and other specialty archives such as PubMed Central.[678]

The term 'self-archiving' refers to the process whereby individual authors submit their own published papers or preprints (collectively known as e-prints) to a publicly accessible archive of their choice. Many institutions also archive publications on behalf of their faculty. Ideally, the archive should be compliant with the Open Archive Initiative (OAI) *Protocol for Metadata Harvesting* [679]to 'maximise interoperability with other OAI servers worldwide, thereby linking all servers into a worldwide and seamless virtual library'[680]

OA repositories do not perform peer review themselves and they are more likely to be gratis OA as they cannot generate permission on their own, unlike OA journals.[681] OA repositories may host articles peer

[676] Bo-Christer Björk, Mikael Laakso, Patrik Welling and Patrik Paetau, Anatomy of Green Open Access, (2014) 65(2) *Journal of the Association for Information Science & Technology* 237; Confederation of Open Access Repositories, *The Current State of Open Access Repository Interoperability* (2012); COAR Roadmap Future Directions for Repository Interoperability (Working Group 2: Repository Intraperability, 2015); Tránsito Ferreras-Fernández, Francisco J. García-Peñalvo and Jose A. Merlo-Vega, Open Access Repositories as Channel of Publication Scientific Grey Literature in FJ García-Peñalvo (ed.), *Proceedings of the 3rd International Conference on Technological Ecosystems for Enhancing Multiculturality*— TEEM '15 (ACM Press, 2015) 419–426.
[677] Chan and Costa, above n 644, 150.
[678] PubMed Central, www.pubmed.org.
[679]See Open Archives Initiative, https://www.openarchives.org/. Open Archive Initiative states its mission as 'The Open Archives Initiative develops and promotes interoperability standards that aim to facilitate the efficient dissemination of content. The Open Archives Initiative has its roots in an effort to enhance access to e-print archives as a means of increasing the availability of scholarly communication. Continued support of this work remains a cornerstone of the Open Archives program. The fundamental technological framework and standards that are developing to support this work are, however, independent of the both the type of content offered and the economic mechanisms surrounding that content, and promise to have much broader relevance in opening up access to a range of digital materials. As a result, the Open Archives Initiative is currently an organization and an effort explicitly in transition, and is committed to exploring and enabling this new and broader range of applications. As we gain greater knowledge of the scope of applicability of the underlying technology and standards being developed, and begin to understand the structure and culture of the various adopter communities, we expect that we will have to make continued evolutionary changes to both the mission and organization of the Open Archives Initiative.'
[680] Chan and Costa, above n 644, 151.
[681] Peter Suber, Open Access Overview, above n 669.

reviewed elsewhere as preprints, postprints[682] or both. A preprint is any version prior to peer review and publication, usually the version submitted to a journal. A postprint is any version approved by peer review. Sometimes it is important to distinguish two kinds of postprint: (a) those that have been peer reviewed but not copy edited and (b) those that have been both peer reviewed and copy edited. Some journals give authors permission to deposit the first but not the second kind in an OA repository. OA repositories may also include theses and dissertations, course materials, departmental databases, data files, audio and video files, institutional records and digitised special collections from a library.

The two leading lists of OA repositories globally are the Directory of Open Access Repositories (OpenDOAR)[683] and the Registry of Open Access Repositories (ROAR).[684] If an institution aims to take advantage of the OA repository route, two vital points must be considered: the repository should comply with the OAI and the institution should implement an OA mandate.

Open Archives Initiative

The most useful OA repositories comply with the OAI *Protocol for Metadata Harvesting*,[685] which makes them interoperable. In practice, this means that users can find a work in an OAI-compliant archive without knowing which archives exist, where they are located or what they contain.

The Confederation of Open Access Repositories submit a clear explainiation for the role and significance of interoperability for OA repositories:

> Each individual repository is of limited value for research: the real power of Open Access lies in the possibility of connecting and tying together repositories, which is why we need interoperability. In order to create a seamless layer of content through connected repositories from around the world, Open Access relies on interoperability, the ability for systems to communicate with each other and pass information back and forth in a usable format. Interoperability allows us to exploit today‟s computational power so that we can aggregate, data mine, create new tools and services, and generate new knowledge from repository content …… Interoperability is the technical glue that makes this integration possible – and makes the goals of Open Access possible to achieve [686]

[682] Sherpa, Definitions and Terms, http://www.sherpa.ac.uk/romeoinfo.html ‘pre-prints as being the version of the paper before peer review and post-prints as being the version of the paper after peer-review, with revisions having been made.’
[683] Directory of Open Access Repositories http://www.opendoar.org/.
[684] Registry of Open Access Repositories, http://roar.eprints.org/.
[685] Open Archives Initiative, above n 678, https://www.openarchives.org/.
[686] Confederation of Open Access Repositories, ‘The Case for Interoperability for Open Access Repositories’, Working Group 2: Repository Interoperability (July 2011) 3.

Therefore, interoperability is the technical aspect required for OA to achieve its goal of openness. The aim of Open Access Inititaive is to achieve interoperability by the application of the *Protocol for Metadata Harvesting.*

Open Access Mandates

OA mandates are policies adopted by institutions[687] that aim to ensure the output of academic scholarship—peer-reviewed journal publications, research findings, conference papers, theses, dissertations and institutional information—are made OA by the self-archiving of such documents in a freely accessible central or institutional repository.[688]

OA mandates place an obligation on employees (academics, scholars, PhD students) to make the output of their research available via the platform of self-archiving. An important consequence of this mandate is that it places authors in a position of strength to bargain with publishers for the right to self-archive the output of their research and thus provide OA to such journal articles.[689] It also places a responsibility on authors who would ordinarily not have bothered, to ensure that their works are deposited in an institutional repository:[690]

Olukunle Rotimi Ola explains:

> A good example is the National Institutes of Health (NIH) in the United States of America, which has made it mandatory that the output of all funded research be deposited in its institutional repository, PubMed. OA self-archiving has been mandated by over universities, including Harvard University, Queensland University of Technology (QUT), Massachusetts Institute of Technology (MIT), University College of London, research organisations in the United States (National Institutes of Health), United Kingdom (RCUK) and Europe (European Research Council (ERC)) the Australian Research Council (ARC) the World Bank and the major global funding organisations. A comprehensive list of registered repositories can be found on the website of the Registry of Open Access Repositories Mandatory Archiving Policies (ROARMAP).[691]

[687] See Diagram (7).
[688] Stevan Harnad et al, 'The Access/Impact Problem and the Green and Gold Roads to Open Access' (2004) 30(4) *Serial Review* 310, which notes that to reach 100% OA, self-archiving needs to be mandated by researchers' employers and funders, as the UK and the US recently recommended, and universities need to implement that mandate.
[689] Olukunle Rotimi Ola, Developing a framework for open access knowledge in Nigeria (PhD.Thesis, Australian Catholic University, 2016) 21.
[690] See Alma Swan, *Open Access Self-archiving: An Introduction* (2005) http://eprints.soton.ac.uk/261006/1/jiscsum.pdf.[691] Ola, above n 689, 21.
[691] Ola, above n 689, 21.

To maximise the benefits of OA repositories, every university in the world can and should have its own OAI-compliant repository and a policy to encourage or require its faculty members to deposit their research output in the repository through an OA mandate.

6.2.4 The Price of Open Access

OA literature is not free to produce or publish but it can be much less expensive to produce than conventionally published literature—even less expensive than priced online-only literature. The right question to ask within the realm of OA is whether there are better ways to pay the bills other than charging readers and creating access barriers. The wrong question to ask is whether scholarly literature can be made costless. 'Free' in the realm of OA means free for readers not producers:

> *Free* is ambiguous. We mean free for readers, not free for producers. We know that OA literature is not free (without cost) to produce. But that does not foreclose the possibility of making it free of charge (without price) for readers and users. The costs of producing OA literature are much lower than the costs of producing print literature or toll-access online literature. These low costs can be borne by any of a wide variety of potential funders, among which BOAI has no preferences.[692]

OA eliminates subscription management (soliciting, tracking, renewing subscribers, negotiating prices and site licences, collecting fees). Further, it eliminates Digital Rights Management.[693] It also reduces or eliminates legal expenses such as drafting and enforcing restrictive licences. Peter Suber explains that 'many OA journals eliminate marketing and rely solely on spontaneous aid from other players, such as search engines, bloggers, discussion forums, social tagging and social networking.'[694]

Gold OA journals provide access to peer-reviewed literature at no charge; that is, free of charge to users. It is however without dispute that there are costs in producing peer-reviewed journals: peer review, editing, printing, marketing and other sundry costs are involved. This cost under the OA model is covered by the adoption of a range of business models. Some journals charge an article processing charge (APC) to cover the cost of production. For example, BioMed Central, one of the world's leading OA commercial publishers—with over 258 peer-reviewed OA journals and 482 members in 52 countries—charges an APC

[692] *Budapest Open Access Initiative,* 'Frequently Asked Questions', https://legacy.earlham.edu/~peters/fos/boaifaq.htm.
[693] Managing digital rights requires 'authenticating users, distinguishing authorised from unauthorised users, blocking access to the unauthorised.' and reduces or eliminates legal expenses (drafting and enforcing restrictive licences).
[694] Peter Suber, 'Open Access Overview', above n 669.

for each paper to cover the entire publication process.[695] Other OA journals do not charge article processing fees but deploy alternative strategies for the purposes of covering their production costs.

6.2.5 The Case for Open Access

Knowledge sharing is the common—and main—theme between OA in general and education: they both aim to disseminate knowledge. In fact, OA evolved and was developed as a policy tool to be used by institutions that are responsible for generating and disseminating knowledge.

OA helps education and research institutions to effectively perform their designated role in the community and fulfil their obligation in two main ways. First, OA reduces access barriers to the world's library of scientific research output expressed through peer-reviewed journal articles, theses, dissertations, lectures and other ways of delivering knowledge. Second, it is an effective tool to be used by local institutions (universities and research institutions) to overcome the dilemma of journal article publication in developing countries and LDCs (as explained below) and its consequences for inaccessibility, invisibility and loss of research impact.

The following subsections explain why the Palestinian education system as a whole should adopt an OA policy.

6.2.5.1 Open Access to Publicly Funded Research

OA to publicly funded research is one of the strongest arguments for OA. When funding agencies disburse public funds, OA provides fundamental fairness for taxpayers and public access to the results of publicly funded research. OA gives citizens access to the research for which they have already paid through their taxes; even those with no interest in reading this literature for themselves will benefit indirectly because researchers will benefit directly. OA accelerates not only research but the translation of research into new medicines, useful technologies, solved problems and informed decisions that benefit everyone.[696]

The results of publicly funded research 'from tax payers' should be publicly released for free. Governments frequently fund the development of education and research resources using taxpayer dollars. Because the

[695] BioMed Central, 'Publication Costs', https://www.biomedcentral.com/about/publication-costs-and-funding.
[696] David Wiley and Cable Green, *Why Openness in Education?* (EDUCAUSE Library, 2012) ch 6, https://library.educause.edu/resources/2012/5/chapter-6-why-openness-in-education

bulk of education and research funding comes from taxpayer money, it is essential that the results of the publicly funded research are openly accessed.[697]

As governments move to require open policies, educational and research resources will become freely and legally available to the public that paid for them: Every taxpayer has a reasonable expectation of access to educational materials and research products whose creation tax dollars supported'.[698]

6.2.5.2 Increased Accessibility and Visibility of an Institution's Research Output

OA maintains a sustainable source of knowledge for universities' libraries, academic staff and students. The educational process involves a chain of events. At the higher education level, universities and their libraries are one part of the chain, academic staff are the second part and students are the third. In a perfect world, universities would be responsible for supplying a quality and up-to-date education for their students through their libraries and academics. Therefore, universities must ensure that their libraries are on top of current global knowledge, as libraries should facilitate and aid academics in their preparation of courses to be delivered for students. Universities should support their libraries by allocating sufficient budgets for them to subscribe to renowned peer-reviewed journals.

Within a Palestinian reality, as in all low-income countries' realities, universities are not able to meet their responsibilities because of severe budget shortages combined with high subscription fees.[699] Given these circumstances, the knowledge of academic staff might be questioned. Sustainable knowledge among academics is core to the quality of education in any educational institution. Without cutting-edge, up-to-date knowledge in their respective fields, students (the third part of the chain) are likely to graduate with poor-quality degrees. In Palestine, academics are unable to access this cutting-edge knowledge because of high subscription fees for journal articles. The limited budgets of Palestinian universities do not cover such subscriptions. Thus, Palestinian academics are kept isolated in a closed bubble while global knowledge in all fields, specially the sciences, carries on evolving at a tremendous pace. The consequence of such

[697] See Julie L. Kimbrough and Laura N. Gasaway, 'Publication of Government-Funded Research, Open Access, and the Public Interest' 18(2) (2015) *Vanderbit Journal of Entertainment and Technology Law* 267; Peter Suber, 'Ensuring open access for publicly funded research: The right way to mix green and gold approaches' (2012) *PMJ* 245. 'Public access to government-funded research is an issue of tremendous importance to researchers, librarians, and ordinary citizens around the world. Based on the notion that taxpayers finance research through their tax dollars, research data should be available to them. Rapid, unfettered access to research publications provides access to medical research to patients, encourages further exploration and inquiry by other researchers, informs citizens, and advances scientific research.': Kimbrough and Gasaway, above n 700, 267.
[698] Wiley and Green, above n 696.
[699] See Chapter 2 explaining the circumstances of higher education in Palestine.

isolation is tragic—students graduate with already-outdated knowledge. Significantly, it is a waste of money, effort and most importantly 'time' of all related parties in the educational process. OA plays a perfect role in overcoming the 'high cost' of accessing this literature via the traditional route of publishing through peer-reviewed journal articles; thereby better accessibility is secured through OA.[700]

OA can play another significant role in supporting and enhancing educational institutions in Palestine, by the visibility of institutions' research output, hence overcoming the journal article publishing dilemma that is common in low-income countries of which Palestine is no exception.[701] This dilemma arises from the fact that scholars in LDCs are encouraged to publish the results of their research in foreign (international) journals with high impact factors (IFs) to maximise the chance of being recognised locally and globally.[702] Typically, these journals are inaccessible to scientists, researchers and even their own institutions in LDCs because of high subscription fees. The university and the granting body lose control over the results of the funded research. The result of this common situation in low-income countries is the invisibility of these articles in the country of the scholar.[703]Diagram (9) explains the cycle of low visibility of journal articles in less developed countries.

[700] Ola, above n 689, 158. See also Leslie Chan, Barbara Kirsop and Subbiah Arunachalam, 'Open Access Archiving: the Fast Track to Building Research Capacity in Developing Countries' (Science and Development Network, 2005).
[701] See Diagram (9).
[702] Chan, Kirsop and Arunachalam, above n 700, 151.
[703] Ibid 158.

Diagram (9) Cycle of Low Visibility

Green OA, in particular, overcomes this dilemma as peer-reviewed journals normally allow article publication through self-archiving OA after an embargo period. Further, it is now well established that peer-reviewed journal articles respect institutions' OA mandates. Setting up institutional OA archives and asking

staff scientists and faculty to submit their published papers would make a corpus of published research instantly accessible to all. Such archives would be especially significant for transitional economies:[704]

> If universities and science academies in these countries set up archives, they could be immediately populated with a great number of papers. By showcasing their faculty's research output, OA will bring prestige to both the staff and the institution. Above all, such archives will reconnect local and international research and provide a better picture of a country's research output and areas of specialization. This will have implications for future international collaboration, funding proposals, and even recruitment of new faculty.[705]

OA largely can effectively increase the visibility of Palestinian works locally and globally, potentially conferring them with citation advantages. Empirical studies show that OA articles—regardless of the vehicle—receive significantly more citations than do non-OA articles.[706] OA increases the visibility of a university's faculty and research, reduces their expenses for journals and advances their mission to share knowledge.

6.2.5.3 Improved Research Output Impact

The research impact problem arises because journal articles are not accessible to all of their would-be users; hence, they are losing potential research impact. The solution is to make all articles OA so that they have significantly higher citation impact than non-OA articles.[707] OA gives articles a worldwide audience larger than that of articles in any subscription-based journal, no matter how prestigious or popular, and demonstrably increases their visibility and impact. Thus, the most persuasive reason for institutions, both in the developed and in the developing world, to establish interoperable OA archives is the growing evidence that citations and the impact of papers that are openly accessible are far greater than those for non-OA publications.[708] This incentivises researchers to make their research openly accessible through their

[704] Ibid 151.
[705] Ibid.
[706] See Min Tang, James D Bever, and Fei-Hai Yu, Open Access Increases Citations of Papers in Ecology (2017) 8(7) *Ecosphere*, e01887. 10.1002/ecs2.1887; Ferreras-Fernández, García-Peñalvo, Merlo-Vega and Martín-Rodero, above n 608, 399–416. For example, the effect of using OA for institutional repository to e-theses showed that an OA institutional repository is an 'advantageous channel of scientific communication to grey literature like dissertations and PhD theses, because it increases visibility'.
[707] Steven Harnad, Tim Brody, François Valliares, Les Carr, Steve Hitchcock, Yves Gingras, Charles Oppenheim, Heinrich Stamerjohanns and Eberhard R Hilf, The Access/Impact Problem and the Green and Gold Roads to Open Access (2008) 34(1) *Serials Review* 36–40, published online 6 December 2013.
[708]Steve Lawrence, Online or Invisible (2001) 411(6837) *Nature* 521. http://ivyspring.com/steveLawrence/SteveLawrence.htm. Lawrence found an "average of 336 per cent more citations of online articles compared to offline articles published in the same venue.'

institutional archives and for institutions to begin implementing policies for setting up and filling their archives to maximise the impact of their collective research output.[709]

6.3 Open Access in Palestine

This section aims to explore the current status of access to Palestinian research output and the initiatives and projects designed to address this problem.

6.3.1 Current Status of Access to Palestinian Research Output

Access to Palestinian research output is poor because of the primitive practice of research output management;[710] thus visibility of research output of PS HEIs is limited.[711] Palestinian researchers encounter difficulty in publishing and accessing scientific research;[712] most Palestinian scholarship is either unpublished or suffers delays in publishing. Further, the high cost of publication has contributed to limited

[709] Leslie Chan, Barbara Kirsop and Subbiah Arunachalam, above n 700, 152.

[710]Mazin Qumsiyeh and Jad Isaac, 'Research and Development in the Occupied Palestinian Territories: Challenges and Opportunities' (2012) 34 *Arab Studies Quarterly*.158, 165. 'The output for research in [Palestine] was rather small. Considering even the small total number of researchers (1,744), it appears that there is less than one [i]nternational publication per three researchers per year. If we add the local journals, the percentage goes up to 1.1 publications per person per year. This is low when compared to developed countries but on par with Arab countries'. Further Qumsiyeh and Isaac explain 'ns. A system needs to be developed to encourage researchers to work together to reduce costs and avoid duplication of efforts and expenses. For example, a single institution could be agreed upon to conduct analysis of pesticide residues while another one could be appointed to conduct heavy metal analysis. For information and communications technologies to be effective in improving management, boosting profitability, competitiveness, and surviving in the national and global economy, organizations have to exert extra efforts in selecting the right ICT applications, enhancing the existing ones, developing others and keeping track with the latest advances in that field. That basically requires the setting up of a specialized unit to perform research and development in relation to ICT for the benefit of all Palestinian institutions. The survey researched this aspect by asking organizations about engagements in R&D activities regarding their use of ICT applications and services. The enterprises' reactions to this issue have showed minor interest in the subject matter where about 10.0 percent of enterprises are involved in activities related to research and development in ICT.'at 171.

[711] Rawia Awadallah, *Research Output Management through Open Access Institutional Repository* (*ROMOR*), http://romor.iugaza.edu.ps/romor/images/documents/ROMOR_IUG_ROMOROVERVIEW_200117_Rawia-Awadallah.pdf

[712] Ibid.

growth of Palestinian scholarship.[713] Most research outcomes addressing local and regional developmental issues are published in local journals with poor distribution and recognition.[714]

6.3.2 Cultivating Open Access in Palestinian Higher Education Institutions

With the support of international entities,[715] stakeholders in Palestine have begun to show an interest in having their own institutional repositories. There has been a positive and steady—although slow—response to OA by various stakeholders in Palestine.[716] For instance, Palestinian researchers publish articles in international OA periodicals, 12 of which have appeared in BioMed Central.[717] As of October 2017, one OA journal published in Palestine was indexed in the Directory of Open Access Journals and sixteen OA journals were indexed in the Directory of Open Access Scholarly Resource.[718] Nonetheless, implementation has been limited because of the lack of policy at government and institutional levels and poor information communication technology (ICT) infrastructure.

6.3.3 Major Projects and Open Access-related Activities

Currently, the *Research Output Management through Open Access Institutional Repository* (*ROMOR*)[719] project aims, over the course of three years, to build capacity in research output management in four leading

[713]See generally Qumsiyeh and Isaac, above n 710.
[714] Awadallah, above n 711.
[715] These entities are Open Access organisations, Palestinian Library and Information Consortium, Electronic Information for Librarians.
[716] Global Open Access Portal, http://www.unesco.org/new/en/communication-and-information/portals-and-platforms/goap/access-by-region/arab-states/palestine.
[717] The most viewed articles published by researchers from the Department of Biology and Biotechnology, An-Najah University, and the Biodiversity and Environmental Research Center.
[718]See Directory of Open Access Scholarly Resources.
[719] The *ROMOR* project aims build capacity for research output management by establishing OA institutional repositories in the four Palestinian universities: the Islamic University of Gaza, which will coordinate the project, Al-Quds Open University, Birzeit University and Palestine Technical University—Kadoorie. The four European universities are the Vienna University of Technology (Austria), the University of Parma (Italy) and the universities of Brighton and Glasgow (both in the UK). Electronic Information for Librarians and its partner in Palestine, the Palestinian Library and Information Consortium, which unites libraries in the West Bank and Gaza, will provide training to establish, populate and manage OA repositories, to speed up OA advocacy and awareness-raising activities, and to build understanding of copyright issues. The project team will work with two other agencies: the AQAC at the Palestinian MOEHE, which will monitor and evaluate the project as an external partner and ensure that it

PS HEIs by establishing OA institutional repositories. The training required to establish these repositories and then implement, populate and manage them will be the core activity of *ROMOR*.[720]

In 2009, Bethlehem University (BU) launched a project to digitise their videos, films and DVDs. The BU Library was awarded two separate but related grants by the New Zealand Embassy Home Office: one for the purchase of a streaming server and the other for the purchase of high-powered computers to support access to the streaming server and other Internet services, to support the project of digitalisation begun by the library.

An-Najah National University[721] maintains an OA portal—An-Najah Scholars—that includes journal articles (from *An-Najah University Journal for Research—Humanities, Medical and Health Sciences and Natural Sciences*), conference proceedings and theses. In 2016, Birzeit University[722] launched its OA repository, made up of theses and dissertations and Birzeit University publications. Palestine Polytechnic University publishes the *Palestine Journal of Mathematics* as an OA journal. Al-Quds Open University became the first university in Palestine to establish an OA institutional repository using DSpace FOSS.

Overall, despite these initiatives and projects, OA in Palestine is still in its early stages. For successful integration of OA and real results, Palestinian institutions need comprehensive policies that encompass the three pillars (legal, cultural and infrastructural) of OA as explained in Chapter 7.

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is sustainable at the end of the three-year project period; and the Research Council at the Palestinian MOEHE, which will help prepare recommendations, formulate policies for the institutional OA repositories and accelerate advocacy activities for populating and scaling up institutional repositories.

[720] ROMOR, above n 634.

[721] An-Najah National University is the largest university in Palestine, with over 25,000 students.

[722] Birzeit University has over 11,000 students, including 9,764 undergraduate students, 1,168 graduate students and 91 diploma and special students. '"FADA" is Birzeit University Open Access Repository. FADA in Arabic means space; it is an online archive to host, collect, preserve and disseminate the intellectual digital output created, collected and published by the institution, its institutes and centers, faculty members, researchers, and students. Materials could be articles, books, working papers, studies, theses and dissertations, projects, datasets, archaeological pieces, ethnographic and artistic collections … FADA aims at increasing the visibility of the university and its scholars at a wider level by providing a platform for saving, discovering and sharing materials produced by Birzeit University and its community from a free and persistent point of access'. 'FADA' Birzeit University Open Access Repository, above n 213.

6.4 Open Educational Resources

OER is another type of OA content that has great potential to support free, quality education in Palestine. This section is devoted to OER. It explores the concept of OER, the degree of openness of OER (permitted uses) and the technical requirements for OER to support openness.

6.4.1 The Concept of Open Educational Resources

Education is a matter of sharing and the OER approach is designed specifically to enable extremely efficient and affordable sharing:[723] 'Open educational resources allow the full technical power of the Internet to be brought to bear on education. OER allow exactly what the Internet enables: free sharing of educational resources with the world'.[724] Under current copyright laws, instructors are essentially powerless to legally improve the materials they use in their classes. OER provide instructors with free and legal permission to engage in continuous quality-improvement processes such as incremental adaptation and revision—empowering instructors to take ownership and control over their courses and textbooks in a manner not previously possible.[725]

The concept of OER was originally created during the UNESCO Forum on Open Courseware for Higher Education in Developing Countries, held in 2002. The Second World OER Congress of 2017 defined OER as:

> OER are teaching, learning and research materials in any medium—digital or otherwise—that reside in the public domain or have been released under an open license that permits no-cost access, use, adaptation and redistribution by others with no or limited restrictions. Open licensing is built within the framework of intellectual property rights as defined by relevant international conventions to respect the authorship of work. OER are a strategic opportunity to improve knowledge sharing, capacity building and universal access to quality learning and teaching resources.[726]

[723] https://learn.canvas.net/courses/4/pages/the-extended-argument-for-openness-in-education
[724] Ibid.
[725] Ibid.
[726] *Ljubljana OER Action Plan (2017)*, Second World OER Congress held in Ljubljana, Slovenia, 18–20 September 2017, https://en.unesco.org/sites/default/files/ljubljana_oer_action_plan_2017.pdf. The same definition was adopted at the UNESCO World Open Educational Resources (OER) Congress held in Paris, 2—22 June 2012.

The potential and role of OER in advancing the *2030 Agenda for Sustainable Development*—in particular Development Goal 4 on Quality Education—was highlighted at the Second World OER Congress through the *Ljubljana OER Action Plan 2017*:[727]

> The transformative potential of OER—reinforced by the expansion of ICT and broadband infrastructure—broadens horizons for knowledge sharing and collaboration among educators, institutions and countries. If used effectively and supported by sound pedagogical practices, OER allow for the possibility to dramatically increase access to education through ICT, opening up opportunities to create and share a wider array of educational resources to accommodate a greater diversity of educator and learner needs. Increased online access to OER further promotes individualized study, which, when coupled with social networking and collaborative learning, fosters opportunities for pedagogical innovation and knowledge creation. These opportunities can have a direct impact on improving access to and the quality of education, if other preconditions for quality education are put in place: including well-resourced education institutions, with empowered, adequately recruited and remunerated, well-trained, qualified and motivated staff.[728]

6.4.2 The Degree of Openness Offered by Open Educational Resources

The degree of OER openness is not fixed. Scholars simplify this using the analogue description, 'openness is not like a light switch that is either "on" or "off." Rather it is like a dimmer switch, with varying degrees of openness'.[729] Thus, there are different degrees of OER openness defined by the range of uses permitted by OER creators. The 'four R's'[730] are identified to clarify the range of uses permitted of the OER:

[727] *Ljubljana OER Action Plan (2017)*, above n 726, states that in fact OER is vital to all relevant UN frameworks. The *UDHR* states that all people have rights and fundamental freedoms that include the right to receive and impart information and ideas through any media and regardless of frontiers (art 19), as well as the right to education (art 26). The *Ljubljana OER Action Plan (2017)* also supports the objectives of the 2003 UNESCO *Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace*. It reaffirms the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expression*, which states that 'Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding'; and the 2006 *Convention on the Rights of People with Disabilities* (art 24), which recognises the rights of persons with disabilities to education.

[728] *Ljubljana OER Action Plan (2017)*, above n 726.

[729] John Hilton III, David Wiley, Jared Stein and Aaron Johnson, *The Four R's of Openness and ALMS Analysis: Frameworks for Open Educational Resources* 4, https://www.redhat.com/archives/osdc-edu-authors/2011-January/pdfoziqzY4Mtn.pdf.

[730] As developed by David Wiley, 'Creating Open Educational Resources' (2009). Materials prepared for an independent study class on OER.

> Reuse: The most basic level of openness. People are allowed to use all or part of the work for their own purposes (e.g. download an educational video to watch at a later time).
>
> Redistribute: People can share the work with others (e.g. email a digital article to a colleague).
>
> Revise: People can adapt, modify, translate, or change the form of the work (e.g. take a book written in English and turn it into an Arabic audio book).
>
> Remix: People can take two or more existing resources and combine them to create a new resource (e.g. take audio lectures from one course and combine them with slides from another course to create a new derivative work).

If creators of OER want their resources to be as open as possible they allow and facilitate all four R's of openness. A key tool that creators of OER can use to legally permit these four R's is open licensing, indeed 'Open licenses are critical for defining OER'.[731] Open licensing as a legal framework enabling OER is discussed in Section 6.5 of this chapter.

6.4.3 The Technical Requirements of Open Educational Resources

Granting a licence that permits all the four R's is one way to guarantee the widest level of openness. Nonetheless, enabling the four R's—in particular, remix and revise—requires the combination of these permissions with the technical tools necessary to unlock OER, so that the educator or institution can adapt the resources for their prospective contexts.[732]

David Wiley developed the ALMS (Access to editing tools; Level of expertise required to revise or remix; meaningfully editable; and Source-file access) analysis[733] as a framework for thinking about the technical aspects of localisation.

[731] Ahrash Bissell, 'Permission Granted: Open Licensing for Educational Resources' (2009) 24(1) *Open Learning, The Journal of Open and Distance Learning* 97.
[732] Hilton, Wiley and Stein and Johnson, above n 729, 8.
[733] See generally Wiley, above n 730.

6.5 The Legal Framework for Open Access and Open Educational Resources–Open Content Licences

The legal basis of OA is the consent of the copyright holder, for newer literature, or the expiration of copyright for older literature. Because OA uses copyright holder consent or the expiration of copyright, it does not require the reform, abolition or infringement of copyright law.

Therefore, OA is not an unlawful movement: 'It is about lawful sharing, not sharing in disregard of law. OA is not against copyright rather it is a framework that is supportive for the rationale of copyright'. [734]

A legal mechanism that has been developed, known as open content licensing, provides copyright owners with a facility for sharing their content with the world, thereby establishing a zone or space on the Internet for lawful and seamless access. One easy, effective and increasingly common way for copyright holders to manifest their consent to OA is to use one of the Creative Commons (CC) licences.

CC introduces itself as a framework for legal sharing of knowledge and creativity for the purpose of building 'a more equitable, accessible, and innovative world' by unlocking the full potential of the Internet 'to drive a new era of development, growth, and productivity'.[735] The mission of the CC is to creatively develop, support, and steward 'legal and technical infrastructure that maximizes digital creativity, sharing, and innovation'.[736] Its vision 'is nothing less than realizing the full potential of the Internet—universal access to research and education, full participation in culture'.[737]

CC has developed various open content licences along with metadata that can be used to associate creative works with their licence status in a machine-readable way. All CC open content licences share baseline features in addition to other licensing options available for the copyright holder to choose from.

[734] See Lawrence Lessig, 'The Vision for the Creative Commons: What are We and Where are We Headed? Free Culture' in Brian Fitzgerald (ed) *Open Content Licensing: Cultivating the Creative Commons* (Sydney University Press, 2007) 42, where he says 'I want to be clear about something, intellectual property is good. I am in favour of it'.
[735] Creative Commons (CC), 'What is Creative Commons?', https://creativecommons.org/about/.
[736] CC, 'Mission and Vision', https://creativecommons.org/about/mission-and-vision/
[737] Ibid.

All CC licences grant the right to copy, distribute, display, digitally perform and make verbatim copies of the work into another format. Also, all CC licences have worldwide application that lasts for the entire duration of copyright and are irrevocable. Typically, licensees cannot use TPMs to restrict access to the work. Further, copyright notice should not be removed from any copy of the work and every copy of the work should maintain a link to the licence. All CC licences must give 'attribution' to the creator of the copyright work (Attribution, or BY).

In addition to the basic features that must exist in all CC licences, copyright owners can choose an optional feature for their CC licences: Non-Commercial (NC);[738] No Derivatives (ND);[739] or Share Alike (SA).[740] Usually, copyright holders attach more than one optional feature to their CC licence. The result is the following types of licence: BY; BY–NC; BY–ND; BY–SA; BY–NC–SA; and BY–NC–ND.[741] The implications of these licences for using copyright content for educational purposes are discussed in Chapter 7.[742]

Each CC licence is expressed in three ways:[743] the Commons Deed, that is, a simple, plain-English language summary of the licence, together with the relevant icon/s that indicate the scope of permitted use; the Legal Code, that is, the dense legal 'fine print' licence document; and the Digital Code, that is, metadata that highlight what licence is attached to the content.[744]

CC licences are an application of the legal concept of open licensing; that they are easy to understand and apply is evidenced by their widespread and strong presence among online materials. Open licensing is the legal basis for OA and OER where copyright holders give their permission in advance to access, use and reuse. Surely, for OA and OER to achieve their ultimate purpose of complete openness, CC BY is the ideal

[738] 'Non-Commercial' (NC) means that others are permitted to copy, distribute, display and perform the copyright work—and any derivative works based upon it—but for non-commercial purposes only.
[739] 'No Derivatives' (ND) means that others are permitted to copy, distribute, display and perform exact copies of the work only and cannot make derivative works based upon it; Note that the ND option is incompatible with the 'Share Alike' (SA) option.
[740] SA means others may distribute derivative works only under a licence identical to that covering the original work.
[741] BY–NC–ND is the most restrictive of the six core licences. It is often called the 'advertising' licence because it only allows a work to be copied and shared with others in its original form, and only for non-commercial purposes and where credit is provided to the original author. This licence does not allow the creation of derivative works, or the use of the work for commercial purposes.
[742] See Chapter 7, (Subsection 7.2.1).
[743] See creativecommons.org/about/licenses/meet-the-licenses.
[744] For further information, see 'Creative Commons Developers—Using Creative Commons Metadata' at http://creativecommons.org/technology/usingmarkup

type of open licensing as it allows access, use and reuse. Nonetheless, other types will do the job for educational purposes, as we will see in Chapter 7.

6.6 Concluding Remarks

The mere concepts of OA and OER justify their importance and practicality for free, quality education. OA to peer-reviewed journal articles, which stems from the unity of old tradition and new technology, is achieving the purpose of OA. That is, it is advancing knowledge dissemination by addressing:

- price, by overcoming the high cost of accessing these journal articles
- legal barriers, as the copyright holder gives permission in advance to access their peer-reviewed articles
- technical barriers, by using platforms that are applying the OAI, which enhances the visibility of the content and hence its impact.

In addition to OA's ability to allow Palestine to access the world's OA knowledge, it also has the potential to increase the visibility and impact of Palestinian research output, whether via gold OA or green OA.

OER is a type of OA content with some variations. It concentrates on developing an educational content that fits the context by opening up knowledge and encouraging sharing of these materials. One option that must exist in an OER content is for content to be completely open without any restrictions, meaning that the open licence underpinning the OER content should allow for the four R's, as explained in this chapter. Without this full range of permissible uses, OER may not achieve its purpose.

Having established the principles and concepts of copyright voluntary mechanisms, such as OA and OER, the next chapter outlines a policy framework for their implementation in Palestine in order to realise the goal of this thesis: better copyright for a better education.

Chapter 7

Copyright for Better Education: Policy Framework

Objectives

1. Provide guidance for policy development and implementation in Palestine in relation to copyright and education.
2. Outline the three core pillars that underpin successful policy development on this topic.
3. Establish an action plan for implementation.

7.1 Introduction

As explained in Chapter 6, voluntary mechanisms rather than law reform through legislation are a more pragmatic and achievable option. In fact, they can be put into place immediately; indeed some stakeholders in Palestine are already taking this approach.[745] This chapter is designed to provide guidance on how we can better manage copyright through voluntary mechanisms to achieve better education.

In light of the absence of any effective policies to regulate and manage the production and circulation of up-to-date learning materials, education in Palestine will keep missing an important chance to achieve quality. It is vital to acknowledge that the poor quality of learning materials is not only due to financial deficiencies, but also the absence of an effective copyright policy and management.[746] The dilemma of copyright and education in a Palestinian context involves not only the inability to access international copyrighted content, but also the lack of production of local knowledge. Increased quality of learning materials is not achievable if the available knowledge does not fit the Palestinian cultural and social context. In other words, Palestine needs to secure a permanent source of up-to-date learning materials for

[745] *ROMOR* is an ongoing project in Palestine funded by the European Commission.
[746] See Chapter 2 for further discussion of this issue.

educational purposes. How is this aim achievable given Palestinian legal, social, cultural and economic circumstances?

An effective policy to manage copyright for better education should have two main functions. **First**, it should *ensure* the maximum *use* and *reuse* of the available OA and OER content. **Second**, it should *enable* and *ensure* the creation and circulation of Palestinian OA and OER content. To successfully achieve these functions, this policy should stand on three pillars: a legal pillar, an infrastructural pillar and a cultural pillar.

The legal pillar of this policy has one core issue that should be addressed—copyright management (including open licensing). The resolution of this issue is essential for the integration and efficiency of OA and OER policies. The infrastructural pillar encompasses setting up a repository and its technical and administrative aspects. The cultural pillar stands on communicating the concepts and significance of OA and OER and mobilising the main stakeholders for real engagement with these concepts. This chapter concludes with an action plan that consists of clear steps to manage copyright for better education. Diagram (10) below outlines the three pillars which are vital for an efficient managing of copyright for better education.

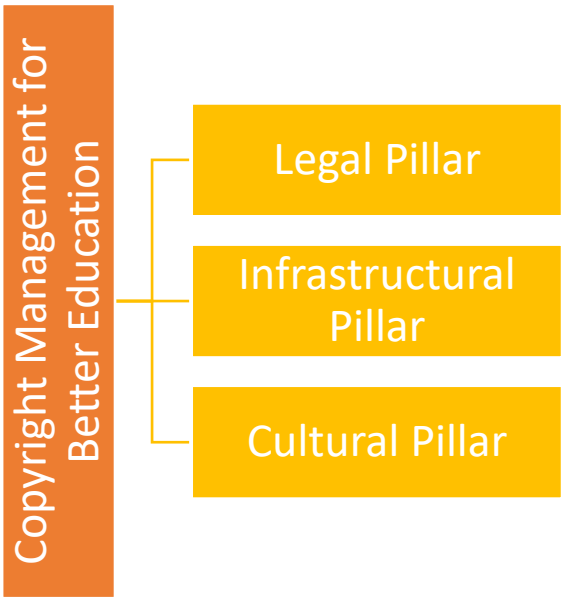

Diagram (10) Copyright Management for Better Education

7.2. The Legal Pillar

The legal pillar of the copyright for better education policy has two aspects: law reform and copyright management. This chapter focuses on copyright management, as copyright law reform was explained in Chapter 5.[747]

Managing copyright for the betterment of education stands on harnessing the concepts and benefits of OA and OER; therefore the policy aims to:

- ensure the maximum use and reuse of available OA and OER content (managing the input)
- ensure the Palestinian research output is OA or OER (managing the output).

Chapter 6 explained that OA and OER depend on the voluntary consent of copyright holders with respect to end users. The ambition of OA and OER is to enable the maximum degree of content openness; an openness that allows access, use, reuse and remixing. However, this degree of openness is not the default. Copyright holders who wish to make their content OA or OER should provide clear and precise consent to end users about the permitted uses. Open content licensing is a legal mechanism developed to provide copyright owners with a facility for sharing their content with the world, thereby establishing a zone or space on the Internet for lawful and seamless access. One easy, effective and increasingly common way for copyright holders to manifest their consent to OA or OER is to use one of the CC licences.

The legal pillar of managing copyright for better education reflects the fundamental purpose of this policy, which is to guide input and output requirements to achieve maximum use and reuse by end users.[748] It must be noted that OA and OER can be implemented at governmental or institutional levels. It is better for government to take the lead and apply national OA and OER policies. Nonetheless, implementation at an institutional level may occur easily. Further, it may pave the way for the government to create and implement national policies.

[747] See Chapter 5 regarding reforming the law for maximising the use and reuse of copyright content for educational purposes.

[748] Maximum use and reuse by end users is the ultimate aim of this policy. This aim cannot be achieved without a clear policy that states how exactly the end user can handle the content. An efficient policy removes any uncertainty regarding the allowed uses of the content.

7.2.1 Managing Copyright for Open Access and Open Educational Resources

To fully harness OA and OER for better education, OA/OER policies should be adopted by the main government body responsible for education. In Palestine, that is the MOEHE and its related government bodies, namely the Higher Education Council, Scientific Research Council, Council of Technical Education, Accreditation and Quality Assurance Commission (AQAC), the Palestinian Curriculum Development Centre and the National Institute for Educational Training.[749] In addition, the Palestinian higher education institutions (universities and colleges) and research institutions[750] should also implement these policies.

The case for openness within a Palestinian context was outlined in Chapter 6, which argued that OA to peer-reviewed journal articles enhances the accessibility and visibility of Palestinian research output locally and globally, thus improving research impact, especially when it is available for use, reuse and circulation among HEIs. In particular, OA will advance education in Palestine as it offers cost-free, permission-free, quality content that it is aimed at the Palestinian people. Similarly, OER has the potential to transform education by enabling efficient and affordable sharing of educational and learning materials[751] that reside in the public domain or are released under an open content licence with no or limited restrictions.[752]

Palestinian OA content is rare. The plan is to *utilise* the present global OA content for the *creation* of Palestinian OA content. To do so, a policy to secure the input and ensure the output should be in place. This policy can be implemented at both governmental and institutional levels.

[749] See www.mohe.pna.ps/Councils-and-Commissions/National-Institute-for-Educational-Training. For the aims and specialty of each of these bodies, see Chapter 2.
[750] See Chapter 6 for current research institutions in Palestine.
[751] https://learn.canvas.net/courses/4/pages/the-extended-argument-for-openness-in-education [accessed 4 October 2017].
[752] *Ljubljana OER Action Plan (2017*), above n 726. The same definition was adopted at the UNESCO World OER Congress held in Paris, 20–22 June 2012.

7.2.2 Policy to maximise the use of the available Open Access and Open Educational Resources content

Utilising OA and OER content for articulating and developing learning materials in Palestine entails two valid scenarios. One scenario involves the MOEHE taking a leading role in this utilisation by using OA and OER for the development of curricula and learning materials for educational purposes. The other scenario involves this utilisation being performed by researchers, academics and students.

The main stakeholders—primarily the MOEHE—should adopt a policy that aims to effectively reuse OA and OER content for the benefit of Palestinian education. This policy should consider the legal aspects of OA and OER, to confirm the legality of utilising the content for education. The policy should explain the uses allowed under different CC licences and how they are expressed in educational contexts. Available OA and OER content in Palestine is useless if it is not utilised by stakeholders.[753]

The policy should explain that the best OA and OER content for education is that which offers maximum openness. The most open CC licence is CC BY, which allows use and reuse of OA and OER content. Further, the policy should explain the term 'reuse' for full understanding of the range of uses allowed under the OA and OER. Another concept that should be considered is the meaning of 'non-commercial' reuse.

According to David Wiley, 'use' in the context of open content means:[754]

1. Reuse—Make and use verbatim copies of the work, just as you found it.
2. Revise—Alter or transform the work so that it better meets your needs.
3. Remix—Combine the (verbatim or altered) work with other works to better meet your needs.
4. Redistribute—Share the verbatim work, the revised work or the remixed work with others.

Non-commercial as explained by the CC means 'not primarily intended for or directed towards commercial advantage or monetary compensation'[755] Further, it is stated that:

[753] Mathias Hatakka, 'Build it and They Will Come?—Inhibiting Factors for Reuse of Open Content in Developing Countries' (2009) 37(1) *Electronic Journal of Information Systems in Developing Countries* 1–16.
[754] David Wiley, 'Impediments to Learning Object Reuse and Openness as a Potential Solution' (2009) 17(3) *Brazilian Journal of Computers in Education* (RBIE) 9.
[755] Creative Commons, 'Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"' (September 2009) app 5, 88, available at: http://wiki.creativecommons.org/Defining_Noncommercial.

> The inclusion of 'primarily' in the definition recognises that no activity is completely disconnected from commercial activity; it is only the primary purpose of the reuse that needs to be considered.[756]

In spite of this flexibility in defining 'non-commercial', uncertainty about whether the use of the work for educational purposes entails commercial activity may impede use of a CC licence that has the non-commercial condition.[757] This downside of the non-commercial condition makes CC BY–NC and CC BY–NC–SA imperfect CC licences for use by educational institutions.[758]

Accordingly, the policy should nominate CC BY and CC BY–SA as the most suitable CC licences. At the next level of openness comes CC BY–ND, which does not allow the adaptation of the work; however it is useful for education as it allows reproduction, distribution, performance and display of verbatim copies. However, any CC licence that has the non-commercial condition creates a level of legal uncertainty that may lead to the work not being used for educational purposes to avoid potential litigation. Table (4) explains the six types of CC licences, available uses under each type and their suitability for educational use.

[756] Ibid 80.
[757] Ibid.
[758] The fact that use is for educational purposes does not mean it is non-commercial. Consequently, educational institutions may refrain from using a CC licence which has a 'non-commercial' condition. Ibid.

Table (4) Creative Commons Licences: Permitted Uses and Education

Type of CC licence	Allowed content use	Allowed educational uses
CC BY 	• Most liberal CC licence. • Copy, redistribute, display, perform, adapt and remix. • Credit for the original creator. • Source must be linked to any copy made under this licence.	• Reproduce[759]and distribute[760] verbatim copies for students and teachers. • Perform[761] the work publicly. • Adapt[762] the work to fit the Palestinian context. • Translate the work. • Remix the work with another work.
CC BY–NC 	• All the above uses, only for non-commercial purposes. • Credit for the original creator. • Source linked to.	• All the above uses, as education is most likely to be non-commercial. However, there is legal uncertainty[763].
CC BY–ND 	• Distribute, display and perform verbatim copies of the work only. • Adaptation not allowed. • Credit for the original creator.	• Adapting the work to fit the context is not allowed. However, distributing, performing and displaying

[759] Ibid, 87. '"Reproduce" means to make copies of the Work by any means, including without limitation by sound or visual recordings and the right of fixation and reproducing fixations of the Work, including storage of a protected performance or phonogram in digital form or other electronic medium'.
[760] Ibid 86 '"Distribute" means to make available to the public the original and copies of the Work or Adaptation, as appropriate, through sale or other transfer of ownership'.
[761] . Ibid. According to Creative Commons, 'adaptation' means 'a work based upon the Work, or upon the Work and other pre-existing works, such as a translation, adaptation, derivative work, arrangement of music or other alterations of a literary or artistic work, or phonogram or performance and includes cinematographic adaptations or any other form in which the Work may be recast, transformed, or adapted including in any form recognisably derived from the original, except that a work that constitutes a Collection will not be considered an Adaptation for the purpose of this License. For the avoidance of doubt, where the Work is a musical work, performance or phonogram, the synchronisation of the Work in timed-relation with a moving image ("synching") will be considered an Adaptation for the purpose of this License'.
[762] Ibid 87 '"Publicly Perform" means to perform public recitations of the Work and to communicate to the public those public recitations, by any means or process, including by wire or wireless means or public digital performances; to make available to the public Works in such a way that members of the public may access these Works from a place and at a place individually chosen by them; to perform the Work to the public by any means or process and the communication to the public of the performances of the Work, including by public digital performance; to broadcast and rebroadcast the Work by any means including signs, sounds or images'.
[763] See discussion above – under his subsection - regarding the definition of non-commercial and its implications on using a cc licence that is NC for education.

Type of CC licence	Allowed content use	Allowed educational uses
	• Source linked to.	verbatim copies are allowed. Legal uncertainty.
CC BY–SA 	• Copy, distribute, display, perform, adapt and remix. • The derivative work should be distributed under the same licence attached to the original work. • Credit for the original creator. • Source linked to.	• Reuse is allowed under the condition of sharing the new work under the same CC licence; e.g., the institution, teacher or academic should redistribute the new work under the same licence.
CC BY–NC–SA 	• Copy, distribute, display, perform, adapt and remix for non-commercial purposes only. The derivative work should be licensed under the same licence as the original work. • Credit for the original creator. • Source linked to.	• As above. Education is most likely to be non-commercial activity.
CC BY–NC–ND 	• The most restrictive CC licence. • Copy, distribute, display and perform for non-commercial purposes only. • Adaptation and remixing are not allowed. • Credit for the original creator. • Source linked to.	• It is the most restrictive licence. Although adapting and remixing are prohibited, the work can be copied, distributed, displayed and performed in public for educational purposes, as education is most likely not considered a commercial activity.

Overall, the adopted policy should ensure that all the main stakeholders of education in Palestine understand the legal aspects of CC licences that are the most frequently used for OA and OER. The purpose of this understanding is to fully utilise available OA and OER. Without such an understanding, all available OA and OER is ineffective for education in Palestine.

Securing the 'input' by utilising the available OA and OER content is only one side of the coin; ensuring openness of the Palestinian research output is the other side.

7.2.3 Policy for Open Access to Palestinian Research Output

A vital policy strategy to support cost-free and permission-free, quality learning materials is to ensure that Palestinian research output is open. To achieve this, the Palestinian Government and institutions should adopt an OA policy for publicly funded research output. Such a policy is aligned with the global OA movement in which funding bodies, international organisations, governments and institutions have implemented OA policies or guidelines. For example, the Australian Government has an OA policy for publicly funded research, wherein publicly funded research output is to be made available in a publicly accessible repository within 12 months of publication. Further, the Australian Government requires all publicly funded research agencies to put in place transparent OA policies that are consistent with this requirement, with the flexibility to allow exemptions in specific circumstances, tailored to the needs of individual agencies.[764] Moreover, OA policies are applied by several institutions and funding bodies: for example, the Australian Research Council (ARC),[765] the National Health and Medical Research Council (NHMRC) in Australia;[766] and the National Institutes of Health in the US, which has made it mandatory that the output of all research it funds be deposited in its institutional repository, PubMed.[767] The same policy was adopted by the Research Councils United Kingdom (RCUK)[768] and the European Research Council (ERC).[769]

An efficient OA to peer-reviewed journal articles policy should be adopted by Palestinian institutions and research centres. Such a policy should address the following legal aspects:

- The policy should explain that copyright is a bundle of rights and that it is possible to retain sufficient rights to be able to disseminate the work as required.

[764] Commonwealth of Australia, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (August 2017) 18, https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf.
[765] Australian Research Council (ARC), *ARC Open Access Policy* Version 2017, http://www.arc.gov.au/arc-open-access-policy-version-20171, (the first ARC OA policy adopted on 1 January 2013).
[766] See National Health and Medical Research Council (NHMRC), *NHMRC Open Access Policy*, 15 January 2018, https://www.nhmrc.gov.au/_files_nhmrc/file/research/nhmrc_open_access_policy_15_january_2018_v2.pdf.
[767] NIH, *NIH Public Access Policy*, http://publicaccess.nih.gov/.
[768] Research Councils United Kingdom (RCUK) *RCUK Policy on Open Access*, http://www.rcuk.ac.uk/research/Pages/outputs.aspx.
[769] 'Open Access Mandate', http://en.wikipedia.org/wiki/Open-access_mandate.

- The institution should ensure that the author is able to disseminate work as OA by retaining sufficient rights for this.[770] Institutions can secure sufficient rights themselves as a condition of employment[771] or they can be granted those rights by authors.[772]

- The policy should explain that the majority of journals allow self-archiving, highlighting services such as SHERPA RoMEO[773] as a reference for academics and researchers to identify publisher permissions so they can check what the position is for the journal in which they wish to publish.

- The policy should accommodate an embargo period.

- The policy should require each work be under a CC licence that is readable by humans and machines.

- The policy should be mandatory.

[770] Alma Swan, *Policy Guidelines for the Development and Promotion of Open Access* (UNESCO, 2012) 45–50.

[771] Queensland University of Technology (QUT) has the following wording in its *Intellectual Property Policy*: 'Ownership of copyright: In accordance with general law principles noted in Section 3.1.4 above, QUT as an employer is the owner of copyright where the work is created by staff members in the course of their employment. QUT's ownership of copyright applies to both academic and professional staff. Assignment of scholarly works: Provided that QUT does not have contractual obligations to a third party which would prevent QUT effecting such an assignment, QUT assigns the right to publish scholarly works to the creator(s) of that work. The assignment is subject to a perpetual, irrevocable, worldwide, royalty-free, non-exclusive licence in favour of QUT to allow QUT to use that work for teaching, research and commercialization purposes and to reproduce and communicate that work online for non-commercial purposes via QUT's open access digital repository. The version of the scholarly work that QUT can make available via the digital repository may be the published version or the final post-peer-review manuscript version. QUT will agree to third party publisher-requested embargoes of 12 months or less (from date of publication by the third-party publisher) on the publication of the manuscript via the digital repository. Any subsequent publication agreement or assignment of the right to publish the scholarly work entered into by the creator will be subject to the terms of the pre-existing non-exclusive licence referred to in this section 3.1.5'.

[772] An example of the latter is the Harvard University position: researchers in six faculties voted to grant the university a non-exclusive, irrevocable right to distribute their scholarly articles for any non-commercial purpose. This right trumps any subsequent agreement with publishers.

[773] SHERPA RoMEO is 'an online resource that aggregates and analyses publisher open access policies from around the world and provides summaries of self-archiving permissions and conditions of rights given to authors on a journal-by-journal basis. RoMEO is a Jisc service and has collaborative relationships with many international partners, who contribute time and effort to developing and maintaining the service', http://www.sherpa.ac.uk/romeo/about.php?la=en&fIDnum=|&mode=simple.

7.2.4 Open Educational Resources Policy

In addition to the adoption of OA policy, the Palestinian Government should adopt an OER policy that requires the release of publicly funded learning materials under an open licence. Section 2.2 identified the CC BY and CC BY–SA licences as the best types with respect to openness.

The legal sharing mechanism under which OER operates is open licensing, the focus of which—just like that of open source software—is not to prohibit or even discourage commercialisation but to enable access for use as well as reuse, leading to further development. It may therefore serve the wider interest if OER were neutrally sensitive to the issue of 'commercial or non-commercial'. OER should therefore not be restricted to non-commercial use, as such restrictions can limit the enabling ability of the contents being created. Rather, OER should focus on providing right of access, use and reuse and not limit the potential ability of the reuse right.[774]

The significance of OER policies is reflected by the number of national OER policies adopted by various countries around the world.[775] Developed countries as well as developing countries and LDCs have adopted or are in the process of adopting national OER policies.[776]

An example of a stand-alone policy for OER is the *Policy Framework for the Provision of Distance Education in South African Universities*.[777] One of the key provisions of this policy is 'promoting the development and use of OER'.[778] Collaborative development of shared, high-quality learning programmes and resources and use of OER has been highlighted as a strategic issue in creating an enabling environment for expanded distance education.[779]

[774] Ola, above n 689, 175.
[775] See OER Policy Registry, https://wiki.creativecommons.org/wiki/OER_Policy_Registry.
[776] Ibid.
[777] *Policy for the Provision of Distance Education in South African Universities in the Context of an Integrated Post school System*, Government Notice, Department of Higher Education and Training, No. 535 (7 July 2014), http://www.saide.org.za/documents/Distance_education_policy.pdf.
[778] Ibid 7.
[779] Ibid 15.

7.2.5 Government - Open Licensing Framework

The Palestinian Government should develop an open licensing framework to provide support and guidance to government and related sectors to facilitate OA to publicly funded information. For instance, the Australian Government's *Open Access and Licensing Framework* [780] makes it possible for organisations to manage their risks when publishing information and data in a way that drives innovation and entrepreneurial activities, providing enhanced economic and social benefits to the wider community.

Another example is the UK Government's *Licensing Framework,*[781] which provides a policy and legal overview of the arrangements for licensing the use and reuse of PSI, both in the central government and the wider public sector. It sets out best practice, standardises the licensing principles for government information, mandates the Open Government Licence (OGL) as the default licence for Crown bodies and recommends the OGL for other sector bodies.

7.3 The Infrastructural Pillar

The infrastructural pillar is an important aspect of a successful copyright policy for better education. This pillar encompasses the following aspects.

7.3.1 Online Repositories

Creating an online repository is an inevitable part of the adoption of an institutional OA policy. A repository is a location where research outputs can be accessed locally and globally. Each university and research institution should have a repository that is compatible with the OA initiative.[782]

Further, it is useful to combine all of the Palestinian institutional repositories into one national repository. This repository might be organised by one university or a non-governmental organisation. An example of the former is the Costa Rican National Repository, also known as Kimuk [783] at the University of Costa Rica.

[780] Australian Government, *Open Access and Licensing Framework,* http://www.ausgoal.gov.au/.
[781] The National Archives, UK Government's *Licensing Framework,* http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/uk-government-licensing-framework/
[782] It is noteworthy that An-Najah National University has a DSpace Repository without an OA policy and it does not comply with the OAI, see https://repository.najah.edu/.
[783] The Costa Rican National Repository, http://kimuk.conare.ac.cr/.

Kimuk gathers content from four State universities that are responsible for 70% of the academic and scientific production in the country; it has 32,480 documents including articles, theses and reports[784] and is based on the *OpenAIRE Guidelines for Literature Repositories*.[785]

An example of the latter is African Journals Online (AJOL).[786] This non-profit organisation based in South Africa is the world's largest online collection of African-published, peer-reviewed scholarly journals.[787] Its mission is 'to increase online visibility, access and use of African-published research output in support of quality African research and higher education'.[788] AJOL is a successful example; its website has a Google page rank of 8 and it receives over 200,000 visits per month from countries around the world.[789] It must be noted that AJOL is not entirely OA content, even though more than half of the 100,000 full text articles on the site are in OA journal partners. In some cases, it only allows free access to article abstracts and offers a progressively charged article download service for researchers and librarians to access the full text of individual articles.[790]

7.3.2 Software

Several software packages are available for creating and maintaining a digital repository[791] including E-Prints[792] (from the University of Southampton), DSpace[793] (from MIT), and Fedora[794] (from Cornell University and the University of Virginia). The E-Prints, DSpace and Fedora software is made freely available for anyone to use.[795]

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[784] 'Costa Rica Launches National Open Access Repository', http://lareferencia.redclara.net/rfr/noticias/costa-rica-launches-national-open-access-repository.html.
[785] *OpenAIRE Guidelines for Literature Repositories* https://guidelines.readthedocs.io/en/latest/literature/index.html.
[786] African Journals Online, https://www.ajol.info/.
[787] https://www.ajol.info/index.php/ajol/pages/view/about-AJOL-African-Journals-Online.
[788] 'AJOL provides free online hosting for over 500 peer-reviewed journals from 31 African countries, using open source software. AJOL's partner journals cover the full range of academic disciplines with particularly strong sections on health, agriculture and African studies', Ibid.
[789] Ibid.
[790] Ibid.
[791] For a comparison among the various software packages available, see Open Society Institute, *A Guide to Institutional Repository Software* (3rd ed, 2004).
[792] See http://www.eprints.org.
[793] See https://dspace.mit.edu/.
[794] See http://fedorarepository.org/
[795] EPrints Organisation, http://www.eprints.org/uk/; Dspace, http://www.dspace.org/; Fedora, http://fedorarepository.org/.

All these software packages are designed to be easy to use. However, some institutions have found that while;

> other library staff can perform much of the policy-based component of the repository, setting up the repository technical infrastructure—even using a largely turn-key solution such as the E-Prints software—requires the assistance of a technical administrator.[796]

The staff time required to install and configure the repository software is one person for four to five days: one to two days for software installation and around three days for Web interface customisation.[797]

These software packages are compliant with the OAI *Protocol for Metadata Harvesting*,[798] which has become a widely adopted international standard for metadata sharing and resource discovery. Any publications residing in an OAI-compliant server will be discoverable by any OAI-aware search service, such as OAIster.org,[799] no matter where the server resides.

This is a great advantage for publications from academics and researchers in developing countries and LDCs, as institutions with OA servers become part of the international community and their published research, part of the global library of science.[800]

7.3.3 Cost

Repository software can be obtained and installed for free and can run on a basic hardware configuration. However, funds may need to be expended on improved hardware, as 'disk storage, server capacity, and perhaps other specifications would need to be upgraded as the repository [moves] from a pilot stage into public operation and heavy use'.[801] There will be some costs associated with acquiring technical staff to assist in installing the repository software. Most labour costs, however, will relate to nontechnical staff.[802] Staff will need to be appointed and trained in the ongoing management of the repository, which includes

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[796] Raym Crow, *SPARC Institutional Repository Checklist and Resource Guide*, (2002) https://sparcopen.org/wp-content/uploads/2016/01/IR_Guide__Checklist_v1_0.pdf.
[797] Ibid. See also Stephen Pinfield, Mike Gardner and John MacColl, *Setting up an Institutional E-print Archive*, http://www.ariadne.ac.uk/issue31/eprint-archives
[798] Open Archives Initiative, *Open Archives Initiative Protocol for Metadata Harvesting*, https://www.openarchives.org/OAI/openarchivesprotocol.html.
[799] The OAIster database, https://www.oclc.org/en/oaister.html.
[800] Chan, Kirsop and Arunachalam, above n 700, 152.
[801] Crow, above n 749.
[802] Kylie Pappalardo, Anne Fitzgerald, Brian Fitzgerald, Scott KielChisholm, Damien O'Brien and Anthony Auston, *A Guide to Developing Open Access through Your Digital Repository* (2007) http://eprints.qut.edu.au/9671/1/9671.pdf.

assisting authors to deposit their work and checking copyright permissions from publishers. Money may also need to be spent on advocacy and marketing of the repository.[803]

7.3.4 Uploading the Materials

The policy should indicate that it is the responsibility of authors and researchers to upload their material to the repository. However, institutions should develop an online guide to inform their authors of how to submit to the repository. This will be a technical guide rather than a legal one and should describe the process of attaching and uploading a document.[804]

7.3.5 Managing the Repository

Once material is uploaded to the repository, it is the responsibility of the institution to manage the repository and the material within. Ideally, a repository manager would be appointed to deal with these responsibilities.[805] Additional staff can be appointed, or library staff can be trained to assist the repository manager where required.[806]

7.4 The Cultural Pillar

This thesis has demonstrated that copyright management in Palestinian institutions is at an early stage of implementation. In addition, there have been attempts to apply OA and OER in Palestine.[807] The Palestinian Government does not have a copyright policy and the main related stakeholders either do not have a copyright policy or have such a policy that is not clear or effective.[808] This implies a low degree of awareness of the role of copyright regulation and management as a development policy tool. The MOEHE,

[803] Ibid.
[804] Ibid 57.
[805] For example, Massachusetts Institute of Technology has hired a part-time Scholarly Publishing Consultant to advise faculty about their OA options within scholarly publishing. QUT has a fulltime eResearch Access Coordinator, who manages QUT's digital repository for research publications and supports QUT researchers in making their work publicly available online. Ibid.
[806] Ibid.
[807] See Chapter 6.
[808]See, e.g., the 'Use Policy' and 'Post Policy' for 'FADA'Birzeit University Open Access Repository, above n 213.

universities and research institutions are not aware of the effect of copyright management and regulations on facilitating free, quality content for Palestinians, and on enhancing the research and development sector by adopting lawful copyright mechanisms that lead to enhanced impact and visibility of Palestinian research. In light of these facts, escalating the level of copyright management awareness should be the cornerstone of any copyright-related policy. Creating a positive atmosphere towards using copyright as a development policy tool can be achieved via two related steps: communication and mobilisation.

7.4.1 Communication

The main stakeholders[809] should understand and appreciate the role of copyright as a development tool. Changing the culture of these stakeholders is not an easy task. Therefore, the way the problem is defined is crucial for policy debate as it influences the necessity and nature of any intervention.[810] The problem must be 'represented in a widely accepted scenario or narrative as a "crisis", requiring rapid and dramatic action to avoid catastrophe'. Further, there should be 'an explicit link' between the 'problem' and its policy implications.[811] Policy implications are identified by 'policy analyses'.[812]

Therefore, research into the effect of the absence of a copyright policy on the quality of education should be undertaken in a scientific, technical way, producing tangible data that offer something concrete to act on.[813] Ground-breaking research output should trigger awareness among the government, research funders, research institutions and universities in Palestine of the intimate relationship between copyright policies and the quality of education.

Communicating the significance of copyright, OA, OER and their effects on the quality of education and development is the first step towards creating a culture of using copyright as a development tool. In particular, the following facts should be effectively communicated to the main stakeholders:

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[809] The MOEHE and its related government bodies, namely, the Higher Education Council, Scientific Research Council, Council of Technical Education, National Committee for the Accreditation and Quality of Higher Educational Institutions, Palestinian Curriculum Development Centre and National Institute for the Educational Training, in addition to higher education institutions (universities and colleges) and research institutions.

[810] David W Stewart, 'What Is Policy? And Why It Matters' (2014) 33(1) *Journal of Public Policy & Marketing* 1, 2.

[811] Ibid.

[812] Ibid.

[813] 'Thereby, it is not surprising that most successful policies are triggered by a new ground-breaking piece of research [which] defines a problem and clarifies appropriate courses of action to remedy'. Rebecca Sutton, *The Policy Process: An Overview*, Working Paper No. 118 (Overseas Development Institute, 1999).

- The fact that the Palestinian Government has a significant role in supporting free, quality education for Palestinians should be communicated to the government and its agencies. Further, the government as research funder is capable of requiring that all publicly funded research and publicly funded learning materials be not only openly accessible to the public but also reusable, by adopting a licensing framework policy.

- The fact that OER have transformative potential for education in Palestine should be communicated to the government and its related agencies. If OER are to contribute to increasing access to and sharing of knowledge and resources in Palestine, it is crucial that all contributing parties—from policy and decision makers at all levels, to teachers and academics—be made aware of OER's potential, so that they will be able to make informed decisions on whether and how OER can be used in their local situation. Raising awareness of OER and their attendant issues must be the primary goal of a designated spearheading institution, as it is clear that continuing and concerted awareness-raising actions must be a priority.

- The fact that copyright can be managed by Palestinian research institutions and universities to enable OA to their scholars' research outputs and peer-reviewed journal articles should be communicated to these entities.

- Imparting of greater knowledge among Palestinian scientists, researchers, scholars and academic staff of the copyright implications of their work and of access to and communication to the public of their work should be undertaken.

Long-term policy goals should include:

- Integrating copyright law and IP law as an essential part of law faculties' curricula at PS HEIs.

- Integrating the concepts and use of OER and open licensing into any degree in education. This will allow a natural integration of OER within the education system by recruiting staff that are already familiar with the concept and its practices.

Having communicated these facts to targeted stakeholders, the next is to mobilise them towards the adoption of actual copyright, OA and OER policies.

7.4.2 Mobilisation

In this vein, it must be noted that the role of 'change agents'[814] is crucial for highlighting the problem and its implications for the quality of education and development. Their role at this stage includes not only mobilising the main stakeholders mentioned above, but also mobilising the public, civil community organisations and non-governmental organisations, and creating a rich atmosphere to attract the attention of the government to the necessity of addressing this 'public' problem. Launching campaigns to mobilise the public and stakeholders plays a central role.[815]

Overall, the way to create a positive atmosphere to pioneer a cultural change among the main stakeholders to utilise copyright management and regulations to serve education and development can be summarised in two words: communicate and mobilise. Ground-breaking research that highlights and analyses the effect of copyright on education is essential and the role of change agents is crucial.

Once the vital role of copyright management on the quality of education and development has been established by effectively communicating and mobilising, an action plan must be developed.

7.5 An Action Plan

This chapter aimed to draw a road map for Palestinian educational stakeholders to apply OA and OER to provide cost-free, quality, learning materials.

[814] Change agent(s) '[are] an individual or group of people who have an idea for new policy direction. These change agents carry the idea forward, explaining it to others and building a consensus towards the new position', Ibid.

[815] For example, in the field of OER, the *#GoOpen* campaign in the US is a multi-faceted approach to furthering open education that includes the following aspects:

- CC will lead OER workshops across the country.
- A proposed *Open License Policy* will require 'grantees who receive funding through competitive discretionary grant programmes to openly license all copyrightable resources …'.
- The use of CC licenses in new OER platforms, including Amazon and Microsoft.
- Naming of Andrew Marcinek as the first US Government Open Education Adviser.
- Ten school districts will replace at least one textbook with OER within the next year.
- Six *#GoOpen* Ambassador Districts will help other school districts move to openly licensed materials.
- The former Association for Supervision and Curriculum Development will provide ongoing professional development resources and webinars for 'Future Ready' school districts committing to help train educators on the use of OER.

Managing copyright for the betterment of education relies on harnessing the concepts and benefits of OA and OER. It is important to have an action plan that encompasses all the above mentioned pillars: legal, infrastructural and cultural. That action plan must have a legal framework and an administrational framework.

7.5.1 Legal Framework

The legal framework for the action plan can be at both a governmental and an institutional level.

7.5.1.1 Governmental Level

The MOEHE should establish a 'Copyright Unit' that operates for and under the umbrella of the ministry. This unit should employ a copyright legal expert(s) and its primary purpose should be to:

1. maximise the use and reuse of available OA and OER content, by the MOEHE sorting out the content that is completely open for adaptation and remixing by the ministry to create up-to-date learning materials
2. formulate OA and OER policies to be adopted by the MOEHE
3. communicate the significance of OA and OER by conducting presentations within the ministry itself and for universities and other research institutions
4. explain copyright, authors' rights and end users' rights to the various stakeholders
5. explain how to set up an institutional repository.

Further, for the ministry to fully utilise free content for the benefit of education, a 'Translation Unit' should be created for the sake of translating English learning materials into Arabic for further adaptation, remixing and circulation as OA and OER content. The MOEHE should also adopt an OA policy for publicly funded research output and an OER policy.

7.5.1.2 Institutional Level

The action plan on an institutional level encompasses:

1. Institutions should adopt mandatory OA.
2. Institutions should adopt an OER policy.
3. Institutions should set up a digital repository.
4. The policies should be clear with regard to end users' rights.

7.5.2 Administration Framework: Infrastructural and Cultural Pillars

It is vital to manage copyright for education. OA policy, OER policy and their digital repositories require administration as this is critical for the success of the infrastructural and cultural pillars. In particular, repository governance, general infrastructure maintenance, advocacy and awareness raising, along with human resource management are aspects that need to be addressed to successfully achieve copyright management for better education, as follows:

1. Repositories: Material must be organised in a way that is logical and easily searchable and accessible. Further, it must be ensured that material has been uploaded to the repository correctly and that any unauthorised material is removed from the repository. Authors may need assistance with converting their files to the relevant format (such as PDF) and depositing their material in the repository.
2. Ongoing maintenance: Once repository infrastructure including software and management frameworks is in place, it will be necessary to ensure the enduring maintenance of that infrastructure.
3. Advocacy: Academics, staff and students must be aware of policies and repositories. Administration should promote the repository and address academics' concerns about the time and effort involved in depositing their work, the copyright implications of depositing published material and how the repository is organised and managed by the institution.

4. Human resource policy*:* Regarding whether the creation of certain kinds of work (e.g. learning resources) constitutes part of the job description for staff and what the implications are for development, performance management, remuneration and promotion purposes.

7.6 Concluding Remarks

The poor quality of learning materials is not due solely to financial deficiencies, but also to the absence of an effective copyright policy. The inability to access international copyrighted content is only one part of the problem. The lack of production and invisibility of local knowledge is another major factor. Both of these issues (international access and local production) can influence the quality of learning materials; high quality is not achievable if the available knowledge does not fit the Palestinian cultural and social context.

The aim of this chapter was to articulate a framework for copyright management for better education policy. This policy should ensure the maximum use and reuse of available OA and OER content and the creation and circulation of Palestinian OA and OER content.

This chapter has suggested that the articulated policy framework should stand on three pillars: a legal pillar, an infrastructural pillar and a cultural pillar. In conclusion, this chapter recommends the policy framework outlined in the box below. The framework aims to put Palestine on track with regard to advancing its education system through better copyright management. It provides a road map for immediate and achievable action to improve the state of play in Palestine. The only thing stopping Palestine from reaping the rewards of this framework is the courage to embark on the proposed initiative.

Recommended Policy Framework

Creating Policies

1. The MOEHE and its related governmental bodies, namely the Higher Education Council, Scientific Research Council, Council of Technical Education, the National Committee for the Accreditation and Quality of Higher Educational Institutions, the Palestinian Curriculum Development Centre and the National Institute for Educational Training, along with PS HEIs (universities and colleges) and research institutions should adopt OA and OER policies.
2. The MOEHE should take the lead role in this initiative by using OA and OER for the development of curricula and learning materials for educational purposes.

Legal

3. The policy should explain that the best OA and OER content for education is that which offers maximum openness. The most open CC licence is CC BY. This licence allows use and reuse of OA and OER content. Further, the policy should explain the term 'reuse' for full understanding of the range of uses allowed under the OA and OER.
4. The adopted policy should ensure that the main stakeholders of education in Palestine understand the legal aspect of CC licences, which are the most frequently used for OA and OER. The purpose of this understanding is to promote full utilisation of the available OA and OER. Without such an understanding it might not be possible to fully utilise available OA and OER materials for education in Palestine.
5. The Palestinian Government should adopt a mandatory OA policy for publicly funded research output.
6. The Palestinian Government should adopt an OER policy that requires releasing of publicly funded learning materials under an open licence.
7. The government should develop an open licensing framework to provide support and guidance to government and related sectors to facilitate open access to publicly funded information.
8. Each university and research institution should adopt a mandatory OA policy.

Infrastructural

9. Each university and research institution should have a repository that is compatible with the OAI by using one of the free software packages available for creating and maintaining a digital repository.
10. One national repository should be created to harvest all of the Palestinian institutional repository information. This repository might be organised by one university or a non-governmental organisation.
11. A repository manager should be appointed to deal with responsibilities related to managing the institutional repository.
12. Institutions should develop an online guide to inform their authors of how to submit to the repository.

Cultural

13. Research should be conducted into implications of the absence of a copyright policy for the quality of education, to produce tangible data that offers a basis on which to act.
14. The level of copyright appreciation among the main stakeholders should be upgraded by effectively communicating the relationship between copyright and education.
15. At an early stage, the fact that cost-free and quality education can be supported by adopting OA and OER policies should be communicated.
16. Campaigns should be launched to mobilise the public and other stakeholders about the role of copyright in support of education and development in general.
17. At a later stage, the adopted governmental OA and OER policies should be communicated to relevant stakeholders.
18. Institutions should effectively communicate the adopted OA policies to their employees.
19. Long-term policy goals should include copyright and intellectual property law as an essential part of law and other relevant faculties' curricula at PS HEIs.
20. The concepts and use of OER and open licensing should be integrated into all degrees in education. This will allow for natural integration of OER into the education system by recruiting staff that are already familiar with the concept and its practices.

21. The MOEHE should establish a ‘Copyright Unit’ that operates for and under the umbrella of the ministry. This unit should employ copyright legal experts that aim to pioneer and develop the usage of copyright as a policy tool to advance the Palestinian education system. This unit would be responsible for promoting the legal framework for copyright management for better education.
22. The MOEHE should also create a ‘Translation Unit’ to translate English learning materials into Arabic for further adaptation, remixing and circulation as OA and OER content in Palestine

PART V
Conclusion and Recommendations

Part V concludes the thesis and outlines recommendations through Chapter 8 - Conclusion

Chapter 8
Conclusion

Palestine is a nascent country with unstable political and economic circumstances. At the same time as it fights for its freedom and independence at the international level, it also has the responsibility to manage and fulfil its obligations towards its people under a functioning government. Education is highly valued by both the Palestinian Government and Palestinians. This is reflected by the fact that education as a sector has been developed and progressed and has been subject to regular national plans to build its capacity since the creation of the PA, which means the MOEHE is subject to constant development and attention. Also, the high literacy and enrolment rate among Palestinians at all levels of education reflects the level of appreciation for the significance of education; not allowing the poor economic and political situation to negatively affect their desire to educate themselves. Nonetheless, this is prejudiced by the low quality of educational content in relation to the availability of up-to-date knowledge that fits the Palestinian context. However, the Palestinian strategy places no special emphasis on copyright law and policy, which reflects the serious lack of awareness of copyright as a concept, law and policy, and its role in creating barriers against or enabling access to knowledge goods in general and for educational purposes in particular.

Important common values underpin both copyright and education, which suggests that these systems should coexist and facilitate each other. Copyright and education both aim to disseminate knowledge, achieve public interest and seek development; further, authors' moral and material interests and the right to education are both human rights under the umbrella of the human rights framework where they are equal without any hierarchy. Disappointingly, this theme of the coexistence of copyright and education to pursue common values is inadequately reflected in copyright law. Having said this, Palestinian law, policy and practice is just one layer of the dilemma. Another layer is created by an established international copyright system based on mandatory minimum exclusive *rights* and accommodating the common values via non-mandatory narrow *exceptions*. This structure of the system has resulted in the expansion of copyright exclusive rights, leading to closing up of culture rather than sharing it. This has led to several attempts at the international level to alter the negative effects of copyright on access to content being initiated by mainly developing countries demanding a fairer system that accommodates their social, cultural, economic and developmental needs. The *Berne Appendix* is one result of these attempts, which aimed to seek access to content for educational purposes and which failed to adequately address these countries' needs. The *WIPO Development Agenda* represents another attempt to deal with copyright holders' dominance of the system

by highlighting and emphasising that development should be the ultimate aim of any IP system including copyright. Further, calls by the less privileged countries to use arts 7 and 8 of *TRIPS*—which set its 'objectives and principles'— voiced a viable pathway to overcome the dilemma of copyright and its compatibility in the national context. In addition to formal attempts at the international copyright law level, the A2K movement emerged as a consequence of the culture and knowledge closure movement led by the expansion of copyright protection.

Obviously, attempts to revise the expansion of copyright holders' exclusive rights at the expense of user rights over the last 100 years have struggled to find models, frameworks or tools to make copyright fairer. This thesis argues that all of these thoughts can be united by seeing copyright as being understood through two paradigms.

The building blocks of copyright Paradigm I were established over 100 years ago, as evident by British case law of the mid-eighteenth to early nineteenth centuries; this paradigm correlated with the users' rights discussion of today. Paradigm I was once the dominant copyright paradigm, but over the past 100 years it has been pushed into the background. Making use of this history, Paradigm I is a way to bring all of the arguments for fairness together. It also complies with the *Berne Convention*, which has no definition of exclusive rights or an infringement test.

8.1 The Thesis Question

The thesis question was:

How can we use copyright to facilitate and improve free, quality education in Palestine?

The thesis addresses this question by providing three options for Palestine to consider for the purpose of facilitating and improving free, quality education. The first option, which is the preferred one, is to adopt copyright Paradigm I towards reforming copyright. This option constitutes a new path that mainly depends on the interpretation of courts of copyright as a utilitarian rather a natural property right and on approaching 'use' as positive 'non-infringing' right when it is fair. Adopting copyright Paradigm I implies the development and application of the 'four elements' infringement test as suggested in Chapter 5 and outlined below. Notably, Paradigm I does not necessitate changing the legislation as it depends on judicial interpretation mainly.

The other option is reforming the *Palestinian Copyright Act* as per the alternative copyright Paradigm II, which necessitates changing the act, mainly to abandon the fair dealing provision and legislate for a fair

use provision, designating ‘education’ as fair. Further, the option requires legislating for specific exceptions for education. In addition to legislative reform, Paradigm II requires a balanced interpretation of the Three-Step Test by Palestinian courts, so this part of reform under Paradigm II depends on judicial interpretation rather than legislative reform.

The third, crucial pillars to improve copyright for education involves the legal, cultural and infrastructural integration of copyright voluntary mechanisms, namely OA and OER.

8.2 The Objectives of This Thesis

The objectives of this thesis were:

1. Understand the Palestinian context of copyright and education.
2. Establish the case for education in the realm of copyright.
3. Investigate the potential to maximise free quality education through copyright reform of Palestinian copyright law.
4. Explore the possible challenges and opportunities of using voluntary copyright mechanisms to support free quality education in Palestine.
5. Propose a policy framework to enhance copyright for better education in Palestine through copyright voluntary mechanisms.

8.3 Findings

Objective 1: Understand the Palestinian context of copyright and education

To understand the Palestinian context of copyright and education, Chapter 2 offered a comprehensive account of the political, legislative and legal circumstances in the country. It also described the main challenges that face the education sector there. Further, it highlighted the status of copyright law and policy in the country. The main findings of this chapter were:

- The absence of any copyright presence in the Palestinian system reflects low awareness of the concept of copyright and its potential to support access to knowledge in general, and serve education objectives in the country in particular. The low awareness is suggested from the outdated,

copyright law untouched since the British Mandate and the absence of copyright policies at PS HEIs and the MOEHE in the country.

- Palestine has the authority to legislate, regulate and manage both copyright and education as per the *Oslo Accords* that created the PA. Also, Palestine is not a party or a Member State of any of the international copyright instruments but it has the obligation to respect, protect and fulfil the human right to education and the human right to ensure the protection of everyone with respect to material and moral interests in their intellectual works, as per the *ICESCR* of which Palestine is a party.

- Finally, Chapter 2 concluded that raising awareness of copyright among the main stakeholders, policymakers and the community as a whole is a first step towards using copyright as a policy tool to support access to knowledge goods for educational purposes and access to knowledge in general.

Objective 2: Establish the case for education in the realm of copyright

Chapter 3 aimed to fulfil Objective 2 of this thesis by demonstrating legitimate reasons for the supportive role of copyright for accessing, using and reusing content for educational purposes. The main findings of this chapter were:

- Copyright as a facilitator and promoter of education conforms to the instrumental nature of copyright, which establishes that copyright is not a natural right; rather it is a grant of a number of exclusive rights that are created by a statute for one ultimate purpose—that is, the encouragement of the dissemination of knowledge.

- Copyright as a facilitator and promoter of education conforms to the human right to development and the purpose and philosophy of the *WIPO Development Agenda*.

- Copyright as a facilitator and promoter of education conforms to the human rights framework, its obligation and principles. The human rights framework should inform copyright law, not vice versa.

- The role of copyright as a facilitator and promoter of education might be hindered by the structure of international copyright law, which sets mandatory minimum standards for copyright holders' exclusive rights while the interests of copyright users are considered through the articulation of non-mandatory exceptions that must fit within the boundaries of the Three-Step Test.

- The uncertainty that surrounds the optimal point of balance of interests opens the way for various interpretations in terms of the breadth of exceptions and the scope of exclusive rights. Added to this, the structure of international copyright law is copyright holder-centric and thus underpins copyright holders' power to continue lobbying to expand their statutory rights.

- Finally, Chapter 3 concluded that to remove the negative effect of copyright exclusive right expansion on the freedom of accessing, using and reusing knowledge goods without excessive restrictions from copyright, LDCs like Palestine need to take a more pragmatic approach towards understanding, interpreting and legislating copyright, which leads us to Chapter 4.

Objective 3: Investigate the potential to maximise free, quality education through copyright reform of the *Palestinian Copyright Act*

Chapter 4 aimed to articulate better copyright for better education by demonstrating that there are two main copyright paradigms. Paradigm I views fair use as a positive right for the user whereas Paradigm II views fair use as an exception. The findings of Chapter 4 were:

- Paradigm I has its origins in early British cases where the use was considered non-infringing at the point of the infringement test, when the use was fair.

- Arguably Paradigm I is legitimate under international copyright law, which does not define with precision the scope of exclusive rights or the infringement test to be conducted, leaving these matters for national legislative discretion.

- The users' rights approach boldly taken by the Supreme Court of Canada is a valuable step towards Paradigm I: the Court articulates legislative exceptions as users' rights to broaden the scope of exceptions.

- While Paradigm I is a viable option for Palestine, Chapter 4 acknowledges the challenges in undertaking it. Therefore, the chapter discusses the possibilities of undertaking Paradigm II to flexibly interpret copyright exceptions in favour of educational use.

- Finally, Chapter 4 concluded that while the legislative language of fair use/dealing is important, judicial interpretation of the provision is crucial for creating an equitable balance between copyright owners' rights and users' rights.

Chapter 5 aimed to fulfil the third objective of the thesis by making a copyright reformation proposal employing copyright paradigms. To this end, this chapter outlined a clear plan for reformation under each paradigm that aims to secure free, quality education. The findings of Chapter 4 were:

- Copyright reformation under copyright Paradigm I does not necessitate changing the law to secure free and quality education and to uphold the common values, as this paradigm depends on interpreting and conceptualising fair use as a positive right. Thus, the Palestinian judiciary is the leader in implementing this paradigm of copyright. The leading role of the judiciary is clearly

demonstrated in legal systems such as those of Israel and Canada, where they have interpreted the rigid provisions of the law in a flexible way. Thus judicial practices have led to legislative changes, not vice versa.

- Adopting copyright Paradigm I necessitates undertaking a fairer infringement test that assesses a use on its own merit as to whether it is the user's right. Thus, it is a fairer infringement test because it liberates the use of copyright from the burden of being an exception in the first place and from the application of the Three-Step Test.

- The Palestinian judiciary needs to develop an infringement test under copyright Paradigm I. The suggested test is drawn from Australian judicial practice with the addition of a 'non-productive use' element. The suggested infringement test under copyright Paradigm I assures all fair uses will qualify as fair under this test.

- While the priority is for copyright Paradigm I as the best route for copyright reformation, chapter 5 also outlined a plan for reform under copyright Paradigm II, in which fair use is conceptualised as an exception. This plan rests on three steps: legislating a fair use provision that is broad and flexible; taking a balanced approach towards interpreting the Three-Step Test as in the *Max Planck Declaration*; and taking a users' rights approach as in Canada.

- Adopting copyright Paradigm II necessitates legislative change along with a balanced approach to interpretation by the judiciary.

Chapter 5 argues that the proposed reformation under both paradigms may not require legislating for specific exceptions to include fair use for distance learning. However, under copyright Paradigm II it may be necessary to explicitly indicate that a link should exist between copyright infringement and TPMs' circumvention liability to safeguard allowed uses—mainly fair use—under copyright law.

Objective 4: Explore the possible challenges and opportunities of using voluntary copyright mechanisms to support quality education in Palestine

Chapter 6 aimed to add another dimension in support of education in Palestine through the implementation of voluntary mechanisms (i.e., where the copyright owner consents (in advance) to specified uses). The main findings of Chapter 6 were:

- Copyright voluntary mechanisms are a practical, immediate tool to improve education through copyright.
- The great potential of OA and OER will not be achieved in Palestine unless a comprehensive policy that covers the legal, cultural and technical pillars of these mechanisms is in place.

Objective 5: Propose a policy framework to enhance copyright for better education in Palestine

Chapter 7 was dedicated to achieving this objective of the thesis. The findings of Chapter 7 were:

- To improve the quality of education, a comprehensive copyright for education policy should be developed and implemented.
- This policy should consider the low awareness of copyright in the Palestinian context and effectively work on raising the level of awareness among all relevant stakeholders.
- This policy should undertake a 'development from below' approach.
- This policy should encompass law reform, judicial interpretation of copyright and integration of OA and OER in the practice of the educational sector.

8.4 Recommendations

To achieve the overarching purpose of this thesis—fair copyright for fair education—and in light of the three options explained above, the recommendations of this thesis are divided into four groups:

- Group I addresses recommendations in relation to judicial interpretation under copyright Paradigm I.
- Group II addresses recommendations in relation to judicial interpretation under copyright Paradigm II.

- Group III addresses recommendations in relation to legislative reform under copyright Paradigm II.
- Group IV addresses recommendations in relation to copyright voluntary mechanisms.

In implementing these recommendations, it is submitted that Groups I and IV lead to one path for reform if Palestine chooses to endorse copyright Paradigm I, while Groups II, III and IV lead to an alternative path for reform if Palestine prefers Paradigm II. Group IV, which addresses recommendations with respect to voluntary mechanisms, can and must be undertaken regardless of which paradigm is endorsed.

These groups of recommendations are highlighted in the boxes below.

Group I: Judicial Interpretation under Copyright Paradigm I

1. Undertake copyright Paradigm I in interpreting and understanding copyright.
2. Develop an infringement test under Paradigm I, which should include the following elements:
    a. objective similarities
    b. causal link
    c. substantiality (quality and quantity)
    d. non-productive use.
3. Undertake a purposive interpretation of copyright exceptions under copyright Paradigm I.

Group II: Judicial Interpretation under Copyright Paradigm II

1. Undertake a balanced interpretation of the three-step test along with the Max Planck *Declaration, A Balanced Interpretation of the 'Three-step Test' in Copyright Law*.
2. Undertake a purposive interpretation of copyright exceptions.

Group III: Legislative Reform under Copyright Paradigm II

1. Legislate the purpose of copyright as a policy tool to disseminate knowledge and safeguard public interest and human rights.
2. Legislate for a fair use provision; that is, a broad, flexible open-ended exception. This provision should not discriminate between commercial use and non-commercial use as this will limit the exception.
3. Specify education as one of the fair uses.
4. Legislate this provision under the title ‘permitted uses or users’ rights’.

Group IV: Copyright Voluntary Mechanisms

5. Adopt and apply OA and OER policies on an institutional and governmental level.
6. These policies should accommodate the legal, cultural, and infrastructural pillars.
7. These policies should aim to make use of the free content released via OA and OER by adapting it to fit the Palestinian context.
8. These policies should aim to release research and educational output under an OA and OER to guarantee its visibility and hence wide dissemination.

8.5 Change is not Impossible

It is hoped that this thesis will be a catalyst for change in Palestine in the future. It proposes a new approach to copyright for the sake of fairer copyright to the advantage of all parties, copyright holders and copyright users.

Paradigm I of copyright may not be broadly tolerated because of its boldness. Nonetheless, less privileged countries need to be aware of such a paradigm. These countries need to have the ability to argue for fairer copyright and this thesis offers them this pathway to change.

For Palestine, this research was undertaken despite the scarcity of scientific resources; the author was determined to embark on this project based on the strong belief that copyright can and should bring about a transformative change at all levels of Palestinians' lives but primarily at the level of education.

In the twenty-first century, in the digital age and knowledge economy, Palestine, without an adequate copyright law and policy is carrying a strong risk of being left behind. This thesis urges Palestine to get on board with knowledge and use of copyright as a tool to steer this goal. Palestine should not hesitate to undertake copyright Paradigm I. As a State, Palestine should be eager to protect the public interest envisaged in knowledge dissemination. Paradigm I is legitimate and only needs application.

Nonetheless, to create a comprehensive coverage of options for copyright reform in Palestine, the thesis also put forward a reform proposal under copyright Paradigm II—a proposal that aims to soften copyright inequalities. If Palestine fails to adopt copyright Paradigm I mainly because it is seen as daring from the perspective of copyright holders who may oppose it, copyright Paradigm II will do the job but not with the innovation of Paradigm I.

Another option that should accompany both paradigms is the remarkable voluntary copyright mechanisms that are reliant on advanced permission from copyright holders to use and reuse content under an open licence. OA and OER are smart, practical, uncomplicated tools to change the face of research and education and the sharing and dissemination of all kinds of information in Palestine. This option should be put into practice immediately. To this end, this thesis has simplified these mechanisms to be understandable by any person without a legal background.

I began this thesis by stating that Palestine is a poor and disrupted territory; education is vital to its future prosperity and wellbeing, and that copyright and education can function more effectively in the Palestinian context to bring about transformational change and meaningful development. I conclude that copyright law and policy reform in Palestine is a necessity and is an urgent matter as it directly affects the quality of

education, which is a component of the human right to education, and it is an essential ingredient in all future Palestinian education development plans.

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