LOCAL LANGUAGE LIMITATIONS: REFORMING COPYRIGHT TO PROMOTE PUBLISHING IN MINORITY LANGUAGES

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INTRODUCTION AND SUMMARY

Walk into any bookstore in South Africa and you are bound to find a copy of Nelson Mandela’s 1995 autobiography, *Long Walk to Freedom*. The work surveys Mandela’s life as he became part of the anti-apartheid movement, was imprisoned for his political activities, and led South Africa’s national reconciliation as the first post-apartheid President. *Long Walk to Freedom* quickly became an international success; one American newspaper’s review said the book “should be read by every person alive.”¹

Most of the world’s people are native speakers of a “local language” — a language spoken by a community of 1 million to 100 million persons, mostly within a single nation. Only a minority of the world’s population is fluent in a “global language” — languages understood by at least 100 million people worldwide, such as Mandarin, Spanish, and English. At present, vast and growing bodies of printed material are available in global languages, including everything from children’s literature to adult fiction and how-to manuals to academic works. Yet almost none of this material is available in most of the world’s local languages. This unfortunate reality denies hundreds of millions of people meaningful access to literature, learning materials, and opportunities for education. This article argues that the dearth of reading material in local languages is a significant public policy problem, which can be substantially alleviated through strategic copyright reform at the national level.

Part I of the Article begins by offering a framework for conceptualizing a universal “right to read” in one’s own language as a normative basis for copyright reform. Well-recognized norms of international human rights law include a universal right to education, the right to take part in cultural life, and the right of minority groups to use their own languages. Elaborating upon these norms, this article proposes recognition of a universal human right to read in one’s preferred language. This right has three components: the liberty to read and write in any language, the individual capacity to read and write, and the reasonable availability of a broad range of accessible reading materials in one’s preferred language. The first two dimensions — liberty and capacity - are uncontroversial. States must refrain from discriminatory legislation that would limit minority language education or publishing. States also have a positive duty to provide educational opportunities to help children and adults acquire literacy. Less well understood, however, is the State’s duty to promote affordable access to reading materials. I argue that this goal cannot be left purely to market forces, but requires government support. One

necessary element of this support is ensuring that national copyright laws facilitate the availability of reading materials in all languages.

Next, Part II of the Article critically examines the role of copyright law as a barrier to expanding the availability of reading materials in local languages. Copyright law clearly has failed to effectively incentivize original works and translations in many of the world’s local languages. Less obviously, this Article argues that copyright protection necessarily fails to incentive publication of such works where the linguistic community is small and poor. From a market standpoint, a limited audience with very low disposable income translates into extremely low effective demand. Copyright’s incentive structure overwhelmingly favors publication of works spoken by large numbers of wealthy people. Copyright law also imposes significant barriers to the translation and adaptation of existing works into other languages, which is considered infringement unless explicitly authorized by the copyright holder. Copyright law also impedes the cheap reproduction and distribution of printed material, raising book prices above what the world’s poor majority could possibly afford. Copyright law thus operates in practice to effectively promote the availability of reading materials in a certain languages—particularly those languages historically imposed by military colonialism—while limiting the availability of works in local languages. This dynamic of “colonial copyright” is a significant barrier to realizing the right to read.

As a solution, Part III of this Article proposes a pragmatic and narrowly tailored reform to copyright law, which may be enacted at the discretion of any country through domestic legislation. The reform would create “local language limitations” defining the scope of copyright protection to specify that no printed textual material in specifically designated local languages shall be deemed infringing. This reform impacts leaves copyright law unchanged as it impacts the publishing markets that are currently thriving. For those local languages without viable publishing markets, however, the reform creates a linguistically bounded public domain. It establishes the freedom to translate existing works into that local language and encourages their low-cost reproduction and distribution. An important goal of this proposal is to not only facilitate the availability of translated works, but also to encourage the emergency of locally authored original works. This section also discusses how the reform can help to achieve this goal. It also explores related policy tools such as national subsidies or prize competitions for translators and authors and technological advancements that promise to reduce the costs of translation, printing, and distribution. I also discuss norm-building and institutional efforts that can encourage respect for authors’ moral rights to attribution and integrity and authors’ ability to earn a livelihood from their works, without relying on copyright.
Finally, Part IV of this Article considers the interaction between the proposed national reforms and international copyright law. International treaties greatly constrain the scope of national policymaking discretion on copyright matters, restricting States’ ability to set copyright protections below internationally mandated standards. This fact has prevented the implementation of a great many sensible copyright reform proposals in the past. The present reform is unique, however, because it is narrowly tailored to impact local-language works where a market does not currently exist — and honor a State’s international human rights obligations — without significantly impacting the economic interests of publishers and authors in existing markets. The reform is thus consistent with both the letter and the spirit of the “three-step test” of the Berne Convention and TRIPS Agreement for permissible exceptions and limitations to copyright protection. States retain the necessary national sovereignty to “decolonize” copyright law through local language limitations. Doing so holds great promise to promote the flourishing of readers, authors and markets for local language works, and make the right to read a reality in every language.

While much of this article operates at the level of theory and cross-cultural generalizations, sensible policymaking must begin from the pragmatic starting point of familiarity with a specific national and linguistic context. Readers who come from developing countries will surely be able to draw their own connections to the problems described here, judging for themselves the relevance and suitability of my proposed reform in their own national context. Since not all of my readers have such a background, this Article will repeatedly refer to South Africa, and to the Zulu language in particular, to ground its discussion of problems that face many countries and languages. I chose this example since it is a context I am particularly familiar with, having recently lived in South Africa as a Fulbright Scholar, as well as having studied isiZulu during college as part of a the University of Chicago’s study abroad program there.

I. THE RIGHT TO READ

The primary goal of this Part is to elaborate a normative framework, based in the framework of international human rights law, for recognizing a duty of national governments to ensure that their copyright law encourages publishing in minority languages. This part pursues this goal first by clarifying the value of reading and writing from a variety of ethical and policy perspectives, and then by drawing on principles and methodologies of international human rights law to state what this specifically means from a legal perspective.

A secondary goal, however, is to address objections I encountered from many (English-speaking) readers as I was developing this article,
that promoting the availability of reading material in every language might not be a particularly worthwhile goal. Typically, readers identifying this objection pointed out that both access to reading material as well as many other personal benefits might better be advanced by helping everyone to acquire fluency in a global language such as English. The first response to such readers is that teaching foreign-language fluency is extraordinarily difficult, time-intensive, and expensive. Some countries, such as Sweden, have succeeded impressively at providing bilingual education to accord their citizens the benefits of fluency and literacy in both their native language and English. Many more countries, however, still struggle to fund a minimally adequate primary and secondary education. Ensuring that their learners also graduate fluent and literate in a foreign language remains a very ambitious and distant goal. For a country like South Africa, this goal is probably several generations away from being achieved. In the meantime, there are hundreds of millions of people alive today who will never understand English, Spanish, Mandarin, or some other global lingua franca, but who manage their daily lives quite well in a less popular language. My goal is that we enable these people to enjoy the private pleasures and practical advantages of reading, by expanding the literature available in their languages, rather than requiring them to first acquire fluency in a foreign one.

The right to read in every language does not require that every work be available in every language. There is probably no desire to read Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development in most of the world’s 6000 languages. It also strikes me as reasonable to presume that anyone who has enjoyed sufficient educational advantages in life to substantively appreciate a journal article on theoretical physics may also be reasonably expected to read that article in a foreign language. The standard is certainly not the impossible goal that every work be available in every language. The human rights principle of “progressive realization” presumes some level of cost-benefit analysis in the realization of socioeconomic rights such as the right to read. The goal should be to have a reasonably flourishing body of literature available at least in all those languages of a certain size. For very small languages – approximately 6% of the world’s population speaks a language spoken by fewer than 1 million speakers – the selection might be very narrow indeed. But there is much to be gained from ensuring that readers in all languages have access to even a few hundred desirable and relevant works in that language. For a language spoken by ten million of people, a reasonable goal might be a body of printed works numbering in the tens of thousands.
A. The value of reading and writing

One does not have to subscribe to principles of international human rights law to embrace the wider enjoyment of reading as a normatively positive goal. The shortage of written works in local languages can also be understood as a problem of justice, as elaborated by the human capabilities approach of Amartya Sen and Martha Nussbaum. In this vein, Madhavi Sunder’s work advocates reorienting copyright law to promote “the good life” for all people. One way to pursue this goal is to ensure that copyright law is tailored to encourage the availability of reading materials in all languages, not just dominant ones. The current lack of reading materials in most of the world’s languages deprives their speakers of opportunities to read for pleasure, to pursue formal education, and to engage in life-long learning. It also deprives speakers of these languages of the opportunity to be writers, as well as readers. A language’s literature must be understood as an ecosystem. When there are few works in a language, it is difficult for readers in that language to become educated and literate. Would-be authors in that language do not have the inspiration and opportunities for practice to develop their talents. Every writer in existence learned to write first by speaking a language, then by learning to read in it, then by practicing writing in the context of formal education, and then honing their craft by repeatedly writing for an audience of people in that language. There must also be a critical mass of works in a language to develop the readership and publication markets that create livelihood opportunities for authors in that language.

From a less sentimental standpoint, the shortage of printed material in local languages is also a problem from the perspective of economic growth, particularly for developing countries. It is widely recognized that developing nations must invest in education, expanding literacy, and enhancing their human capital to see their economies thrive. This is a major factor that has driven the shift over recent decades to promote mother-language instruction in public schooling. Unsurprisingly, students learn best when the language of instruction is one they already understand. Yet beyond the primary level, opportunities for instruction in local languages remain limited, and a major factor is the shortage of appropriate learning materials in those languages. Promoting the flourishing of local language literatures is one way to promote literacy and life-long learning. Nations that have a high proportion of the population that is fluent in a local language but not a global one should be particularly concerned about this problem as one important to national development.
B. Relevant international human rights norms

Promoting the availability of written materials in local languages is not only desirable from the perspectives of public policy and justice. It is also a specific legal obligation of States that are parties to certain international human rights treaties. Drawing on established norms of international human rights law, it may be seen that implicit in these norms is a universal human right to read, and more specifically, to read in one’s preferred language. In many countries, including South Africa and India, norms of international human rights law are incorporated into the domestic constitutional order. Thus, being able to make an argument for copyright reform from the standpoint of human rights rather than simply from arguments of justice or good public policy opens up avenues for advocacy in the courts, as well being a persuasive frame to domestic policymakers. Arguments from international human rights law may prove particularly salient if and when these domestic reforms are challenged as being inconsistent with norms of international intellectual property law. Bodies interpreting international IP law’s vague norms may be influenced by arguments that international human rights norms require or strongly encourage certain policy measures.

The first of these norms may be traced to Article 27 of the 1948 Universal Declaration of Human Rights states that: “Everyone 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.” Although the Universal Declaration is a nonbinding instrument, this principle has later found partial expression in several binding instruments. Article 27 of the International Covenant on Civil and Political Rights, a treaty binding on most of the world’s nations, states: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” The principle also found expression in a second binding treaty (this one, however, has never been ratified by the United States) in the Article 13 of the International Covenant on Economic, Social and Cultural Rights which recognizes “the right of everyone to take part in cultural life.”

My prior scholarship suggests that this “right to culture” should be understood as a call on governments to create conditions enabling everyone to consume and create cultural works. Other provisions of international human rights law also support recognition of a “right to read” that can be a basis for critiquing colonial copyright. This includes provisions on ensuring universal access to education and freedom of expression. The right to education has specifically been interpreted to include a minimum obligation on all countries, no
matter their level of development or available resources, to achieve universal primary education, including basic literacy. It also includes an obligation on states to progressively make fuller educational opportunities available to all without discrimination.

C. Three aspects of the right to read

Implicit in the existing norms highlighted above is a “right to read” that lies at their intersection. By highlighting and further elaborating the content this right to read, we can clarify the scope of government duties implicit in the right.

i) The liberty aspect of the right to read

Specifically, the right to read encompasses three aspects. First, there is the liberty component – the freedom to read and write in one’s preferred language. The liberty component of the right to read has historically been the subject of violations in cases where a country’s dominant ethnic group seeks to force its language upon minority groups. For instance, the Permanent Court of International Justice in 1935 held that Albania had violated the human rights of the Greek-Albanian minority when it banned the operation of private schools. Although facially neutral, the effective impact of the legislation was to prohibit education in the Greek language. In 1976, the Soweto uprising against South Africa’s apartheid government was sparked by a measure that mandated Afrikaans as the language of instruction for half of subjects taught at the middle school and high school level. At one time in the United States, some states made it illegal to teach slaves to read or write. All of these measures must be understood as violations of the basic liberty dimension of the right to read in one’s preferred language. These violations of the liberty dimension of the right to read were widely condemned in their own time and continue to shock the conscience today. The duty of state governments to abstain from measures violating the liberty dimension of the right to read is well established and widely accepted.

ii) The capacity aspect of the right to read

Yet the liberty dimension alone does not go far to ensure enjoyment of the right to read. The freedom to read and write is meaningless unless one also has the ability to exercise it, which must be learned through a long process. This is the capacity dimension of the right to read, which imposes upon governments a duty to ensure that all people within their territory enjoy the educational opportunities necessary to acquire literacy. Whereas the liberty component of the right to read is violated by state action, the capacity
component is typically violated by state inaction – the failure of governments to effectively fund and organize literacy instruction. This reflects the typical categorization of human rights into “first generation” rights or civil liberties that impose primarily negative state obligations versus “second generation” rights or social entitlements that impose positive state duties. Second generation human rights are generally less widely accepted as a normative matter. Yet even in nations that have been hostile to the development of second-generation human rights entitlements, such as the United States, the idea that the government has a duty to ensure everyone learns to read is not that controversial. Even developing countries with limited resources have accepted the goal of universal literacy and the primary responsibility of the state to achieve this goal.

iii) The availability aspect of the right to read

There is however a necessary third dimension of the right to read, which is much less clearly established. This is the necessity of access to reading materials, or the availability dimension. The freedom and ability to read become truly meaningful only when the individual also enjoys access to materials that they find interesting, relevant, and which advance their personal goals for learning or enjoyment. To be sure, even in the absence of literature, basic literacy has some significant value. It enables one to read signs, to complete forms necessary to access government services, to write a shopping list or a letter or text message to communicate with others. But the true value of literacy is realized in the doors it unlocks to literature, and the ability to read for pleasure and for knowledge. Thus the right to read is not truly enjoyed unless one has effective access to a significant body of literature.

Jurists elaborating the human right to health have defined several dimensions of access to health care services which can usefully be adapted to conceptualize access to reading materials as well. First and foremost, the access must be affordable; not necessarily free, but at a reasonable cost that the individual in question can afford. For very poor populations, it may be the case that affordable access does mean at no cost. In the United States, affordable access to reading material is promoted by locally-and nationally-funded public libraries, by public schools, by federally-subsidized student loans for higher education. The doctrinal rule that a copyright holder relinquishes their right to control a particular copy of a book as soon as the “first sale” is made also promotes affordable access to books, by legalizing book resale and book lending practices that would be illegal if the scope of copyright were broader. In addition to affordability, geographical realities must also be considered. The sites of distribution of affordable reading materials must be physically
acceptable to people who may have very little disposable income to spend on transportation. This is a challenge to library-based distribution in many developing country settings, where public libraries are concentrated in a few urban settings inaccessible to most residents.

Reading materials (like health care services) must also meet standards of acceptability to the patient or reader. In the context of the right to read, this means first and foremost that the books are available in the language that the reader can understand. It also means that the selection of books must be reasonably adequate to serve the reader’s interests. For instance, copyright law poses no barrier to the translation of Shakespeare into other languages, because the age of the material means that it has fallen out of copyright. Yet readers must be forgiven if they are disinterested in a reading selection limited to centuries-old works of poetry. Even a perennial favorite such as *Romeo and Juliet* loses most of its appeal if translated into another language; Early Modern English iambic pentameter and sexual double-meanings will not translate well! More broadly, most of the written material now in the public domain and freely available for translating is over a century old. Works of fiction of this vintage have limited cultural relevance to modern audiences. Works of non-fiction are virtually useless, except as historical curiosities. Books must be available that people actually want to read. The availability dimension must also take into account the special needs of certain readers; individuals who are blind will need texts in special formats.

In the abstract, the necessity of the availability dimension of the right to read is self-evident. U.S. and European audiences may be tempted to take the availability of materials for granted, because we enjoy such an embarrassment of riches. Yet availability is a well-recognized challenge in resource-poor countries, where book prices are typically higher than in the U.S., despite lower local incomes. Even in Brazil, one of the world’s ten largest economies, university students experience great difficulty gaining physical access to assigned texts even in the original English, because of inadequacies of (legal) distribution mechanisms and prohibitively high prices. The availability problem is much more acute, however, when language barriers are taken into account. In many languages there is simply very little to read, even if cost were no barrier. To the speakers of these languages, the availability dimension of the right to read is the crucial dimension to overcome in order to enjoy the right to read.

There are also interactions between these three aspects of the right to read. If a government prohibited the publication of books in a language, this would directly violate the liberty dimension but also have an obvious impact on the availability dimension. If a government fails to promote literacy in its local languages, the prospects for the emergence and availability of literature in those languages are
obviously dim. Less obviously, the dynamic can also work the other way. If reading materials are unavailable in a particular language, speakers of that language have less incentive and fewer opportunities to develop their literacy. And the smaller the pool of readers, the less of a market there is for writers and publishers to produce literature for. Thus attempting to realize and promote the right to read without addressing the availability dimension is unlikely to succeed past a certain point.

D. State duties with respect to the right

As soon as we accept that there is a human right to access a significant body of literature in one’s preferred language, we must confront the challenge to define precisely the corresponding state duties. This is where greater controversy may arise. Is there a State duty to support libraries? Is there a State duty to ensure these libraries are reasonably accessible to all classes of people in all parts of the country? Should States actively subsidize the production of works through subsidies or commissions, or does freedom of expression require this be left to independent bodies or the market? Some may resist the suggestion of any state responsibility to ensure the availability of materials. While education is a well-established province of government, surely the distribution of books is a matter particularly well-suited to markets? In fact, there may be no nation in the world where the availability of literature is purely addressed by the market. In the United States, for instance, it is believed that children’s publishing would be financially infeasible if not for the existence of public libraries as a buyer.

In the section that follows, I will focus on one driver of availability that is ineluctably a function of government involvement: copyright law. My argument is that governments have a duty to ensure that their copyright laws are well designed to promote, rather than suppress, the availability of reading materials in local languages.

II. COPYRIGHT AND THE AVAILABILITY PROBLEM

In a perfect world, all people would enjoy similarly extensive opportunities to enjoy and create cultural works, regardless of their native language. Yet in practice, different languages offer their speakers dramatically different opportunities to enjoy literature. This point is helpfully illustrated through a concrete example.

A. The case study of South Africa

South Africa has 11 official languages. These include nine local languages spoken by the black majority as well as English and
Afrikaans, a local language that is descended from Dutch. English is currently the dominant language of government and commerce, yet few South Africans speak it at home (10%). The most commonly spoken languages are Zulu (23%) and Xhosa (17%). Afrikaans is the third most significant native tongue, spoken both by the white Afrikaaner minority and by the “coloured” ethnic group (13%). South Africa’s post-apartheid constitution imposes a positive duty upon the state to promote the use of the country’s native languages: “Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.”

The roots of linguistic inequality in South Africa are deeply bound up with the country’s colonial and apartheid past. Yet the problem of “diminished use and status” very much continues into the present. One objective indicator of this unequal status is the relative poverty of printed literature available in local languages, as reflected in data compiled by the Publisher’s Association of South Africa. Of all book sales occurring within South Africa, a supermajority are in English (71.7%), followed by Afrikaans (16.6%). Sales of books in all African languages combined totaled R231 million or $27 million annually (11.3%). Of total African-language book sales, the vast majority are student textbooks, followed by religious books as a distant second. Only R1.13 million or $127,000 of general trade books – adult and child, fiction and nonfiction – are sold each year in all the African languages combined. This represents 0.04% of total South African book sales. Thus the majority of South Africans – precisely that majority historically most disenfranchised and discriminated against – have virtually no access to books in their native language for pleasure reading or independent learning. It is also not currently possible to pursue higher education in South Africa in languages other than English and Afrikaans – one major reason being the lack of appropriate teaching materials in the African languages.

Notably, the two categories of books for which African language sales are substantial reflect the relative efficiency of alternative incentive models. The production of educational textbooks in Zulu and Xhosa has been directly subsidized by the South African government through commissions and advance purchase commitments. The production of religious books in these languages is presumably subsidized by ministries having an evangelical rather than profit-seeking mission. These non-market based mechanisms have succeeded where copyright law has failed in motivating the production of printed literature in local languages. Their purchase in great volume, despite the limited resources possessed by members of this market, reflects the desire of black South Africans for reading material in their native languages. If globally popular trade books such as
Harry Potter, The Little Prince, Think and Grow Rich, The Purpose Driven Life, and Fifty Shades of Grey were made available in Xhosa and Zulu at low cost, they would likely also find hundreds of thousands of eager readers. As a financial matter, however, hundreds of thousands of readers paying a small amount per copy may not translate into a good reason to invest significant resources in translation and distribution.

Because of these market realities, copyright protection simply cannot provide effective incentives for the production of books in lesser-spoken and economically marginal languages such as Zulu and Xhosa. But the criticism of copyright’s impact on local literatures must go even deeper. Copyright is not only of no use to expanding literatures in local languages, it is also a significant barrier. An effective, low-cost way for government or nonprofit efforts to make books available in local languages would be to subsidize the translation of books that have already proven popular in other languages. An author might take a year or two to produce the original book, requiring income to support an affluent lifestyle in New York City or London during that time. Yet a translator working out of Johannesburg, South Africa might need only a month to produce a professional-quality translation, with significantly lower living expenses. Copyright law, however, imposes barriers to such translation efforts. Producing an unauthorized translation is copyright infringement. This creates significant red tape to be cleared before the translation can begin. Experience suggests that as a market reality, the revenue to be realized from such translations does not effectively compensate for both the translator’s time and the transaction costs of securing permission for the translation.

B. The problem generalized: market realities

Copyright protection works well to incentivize the production and publication of works in languages read by vast numbers of affluent people. But it works poorly to incentivize works in languages read by smaller linguistic communities whose members are mostly poor.

i) Realities of market size and the incentive problem

Copyright law is understood as a mechanism to create market incentives for the production and distribution of creative work. By protecting the exclusive right of the author to authorize reproduction, distribution, and adaptation of literary creations, copyright protection incentivizes authors and publishers to produce works in expectation of a financial reward to be paid by those wishing to enjoy the works. Because this is a market mechanism, it is influenced by the basic laws of supply and demand. There is a large universe of global readers
eager to purchase new works in English. South African English speakers benefit from the demand exercised by English speakers across the globe. Moreover, the global English-speaking audience is particularly affluent, with significant disposable income to devote to consumption of books. In contrast, only a few million people globally speak Zulu or Xhosa, and a majority of these individuals are at or near the poverty line. As a matter of market incentives, there is little effective demand for works in these languages. This is not the same thing as saying there is no desire to read works in these languages. It means only that copyright law cannot effectively incentivize the production of original works in these languages.

Copyright law offers a subsidy to the production of cultural works. But it also imposes burdens on the diffusion of those works, by requiring users of the work to obtain the author or publisher’s permission before reproducing, lending, adapting, or performing the work. In the U.S. context, the balance between incentives and access may not be ideal, but it is acceptable. The overwhelming majority of Americans speak a colonial language (English or Spanish) and new works in those languages are flourishing. Copyright protection limits the reproduction of these works and makes accessing them more expensive, but even those without substantial resources to devote to purchasing books are able to enjoy a good section of them through paperback editions, the used book market, and public libraries. Because printed English literature has a long history, moreover, there is an ample public domain of classic works no longer protected by copyright’s term. In many developing countries, however, the balance of benefits and burdens imposed by copyright law has not worked out as well, and it has worked out particularly poorly for speakers of local languages. It has effectively promoted the flourishing of literature in global languages, while doing almost nothing to encourage the production of cultural works in local languages.

The observed reality is that copyright law has not achieved its own aims with respect to encouraging the production of literature in local languages. Viewing the problem from the perspective of market incentives suggests that copyright law is not and cannot be an effective tool to stimulate literature in local languages. Rather, copyright law suppresses the effort to build local literatures, limiting the life opportunities of speakers of local languages and privileging a narrow set of global languages as the gateway to educational and livelihood opportunities.

ii) Copyright as a tax on cultural works

Copyright protection imposes substantial “red tape” on the production and distribution of cultural works, and these transaction costs may by unsustainable for poor consumers. And it is not the case
that without copyright protection, there would be no incentivizes whatsoever for cultural production. Developing country contexts provide multiple examples of thriving creative industries in circumstances where copyright law is ignored to the point of irrelevance. In Nigeria, for example, the “Nollywood” film industry produces a thriving body of original films in local languages, without the benefit of copyright protection. In Brazil, the tecnobrega music scene is widely enjoyed and generates substantial revenues, again without the benefit of copyright enforcement. As scholars who have analyzed these models point out, local culture is flourishing in these areas not just despite the absence of copyright protection, but because of its absence. Notably, both these examples are instances of a for-profit market emerging to create and distribute affordable works involving low-budget production efforts and cheap distribution networks on the streets, without any public subsidy. The model that has worked for film and music might also work for books, if legal restrictions were loosened.

C. Colonial copyright and the need for reform

The European powers originated copyright law, and quite literally imposed it upon their Asian and African colonies to promote the economic and cultural interests of the colonial power. If copyright protection happened to limit the development of literature in local languages, that was either not considered a problem in the mindset of the time, or was considered an acceptable sacrifice in pursuit of imperial goals. Today, however, we can and should consider copyright’s negative impact on the flourishing of local language literatures to be a serious problem.

More than one hundred years ago, the European powers negotiating amendments to the Berne Convention first decided that an author’s copyright should extend to the right to authorize (or block) translations of that work into other languages. This international standardization of a translation right was resisted by India, which believed that freedom of translation was essential to promote the development of literature in India’s vernacular languages and to expand access to knowledge for the country’s advancement. India’s opposition to the translation right was recognized by the colonial British government, but the colony did not have sufficient political power to block the effort given the support for translation rights among European publishers.

Today a neocolonial dynamic still exists in international lawmaking on intellectual property. At the behest of multinational corporations based in developed countries, international treaties promote a “one size fits all” copyright system in which a system that works well for certain languages has been established as the norm that
all countries must abide by. It is widely recognized by copyright scholars and policymakers from the global South that the international standard of high copyright protection does not serve the interests of developing countries. Yet the realities of international political power are such that poorer and weaker countries enjoy little choice in the matter.

III. THE SOLUTION: LOCAL LANGUAGE LIMITATIONS

The challenge, then, is to “decolonize” copyright law so that it no longer stifles the production of local literatures, and better serves the needs of all people. My proposal aims to address the specific problem of copyright protection’s negative impact on local literatures, while leaving the operation of copyright law on global language publishing markets untouched. The solution should be narrowly tailored to solve a specific identified problem, without requiring unnecessary sacrifices or costs to publishing markets in global languages. This is important both as a matter of crafting ideal public policy, and as a pragmatic matter of creating a politically viable solution that will generate as little opposition as possible.

A. Basics of copyright law

Before explaining the reform in detail, it is necessary to explain for the benefit of all readers how copyright law currently operates. Readers already familiar with copyright law may skip this section.

Under international norms adhered to by the vast majority of countries, any new creative work is automatically entitled to copyright protection. Copyright inheres as soon as a qualifying creative work comes into being. Generally speaking it is the author of the work who receives the copyright, although authors frequently transfer their copyright by contract to their employer or publisher. Some nations operate systems whereby authors may register their copyright with a national office, securing certain privileges. In the United States, for example, registration of a copyright entitles the owner to collect statutory damages from an infringer without proving specific harm. Under international law, however, registration must be optional and not a condition of copyright protection. Some countries, including South Africa, do not have any registration system.

The copyright entitles the author (or their assignee) to prohibit others from doing certain things with their work. These exclusive rights of the author may be thought of as a bundle of rights implicit in the copyright. Within this bundle are the exclusive rights to produce copies of the copyrighted work (reproduction) and to produce new works derived from the original one such as a translation or abridgement (adaptation). Reproduction and adaptation do not
exhaust the list of an author’s exclusive rights, but they are the most relevant ones for our discussion. Because the author by default possesses these exclusive rights, no one else may reproduce, translate, abridge, or alter the work without their permission. The ability to sell this permission is a major way that authors derive financial benefit from their creations.

When an author believes that any of their exclusive rights has been violated, they must bring suit against the alleged infringer. The allegedly infringing work – the bootleg copy, the unauthorized translation, or the suspiciously similar poem – will be entered into evidence. The legal inquiry then determines whether the accused work is in fact infringing. The court will verify the validity of the copyright, ascertain the facts surrounding the creation of the accused work, evaluate the degree of similarity between the two works, and inquire whether the defendant’s activities fall within one of the domestically recognized exceptions and limitations to copyright protection.

For our purposes, it is important to say a bit more about exceptions and limitations. These are ways of statutorily defining exceptions to the general rule of thumb. For instance, most countries have a well-established exception that allows for the quotation of small amounts of copyrighted material for the purposes of commentary. In the U.S., this is one of many situations controlled by the doctrine of fair use. 17 U.S.C. 107. To take another example, the United States has several statutory limitations on the “public performance” right. 17 U.S.C. 110. One of these specifies that it is not infringement for a teacher to show a movie during class, so long as a legal copy is used and the teaching takes place within a nonprofit educational institution. 17 U.S.C. 110(1). The reform proposed here takes the form of a specially enumerated exception or limitation to the reproduction and adaptation rights of the copyright holder as it pertains to works in specific local languages.

B. An illustration of the proposed reform

The proposal begins with a national legislature identifying which of its local languages are appropriate candidates for modified application of copyright law. For instance, South Africa has more than 10 local languages. One of these, Afrikaans, already has a viable publishing market; it is therefore not a good candidate for the proposed reform. Some of South Africa’s local languages are spoken not only in South Africa, but also in one or more neighboring countries; for instance, seSotho is spoken both in South Africa and in neighboring Lesotho. SeSotho might therefore be a poor candidate for early policy experimentation, because any changes in South African law would likely have spillover effects on the neighboring country. In contrast, Zulu and Xhosa would be ideal candidate languages for early
adoption of a local language limitation. These two languages are overwhelmingly spoken only inside South Africa, and current publishing is insignificant (outside of the textbook and religious book markets; more on that exception later). They are also spoken by significant populations, raising the chances that the policy reform will be successful in achieving its impact. Let us suppose that for hypothetical arcane reasons of domestic politics, the South African legislature chooses to enact the reform for Zulu but not for Xhosa (perhaps because legislators from Capetown are more skeptical of the proposal.) This would be fine; it is not necessary that the proposal be enacted identically for all of a nation’s languages. In fact, differing treatment would allow for a natural experiment, permitting the nation to observe the differing outcomes over the next decade in the two linguistic communities.

Once the designated local languages are chosen, the legislature would revise its domestic copyright code to specify that henceforth, no text-based work in that language may be deemed infringing. Thus, while Nelson Mandela retains the copyright in his English-language autobiography *Long Walk to Freedom*, a professor at the University of KwaZulu-Natal would no longer need to negotiate permission before translating portions of Mandela’s work into Zulu. Mandela’s permission would still be required, however, to translate his work into Afrikaans. (In fact, Mandela has licensed an Afrikaans translation by South African author Antjie Krog, enabling readers who understand Afrikaans but not English to enjoy the book already. *Long Walk to Freedom* has not yet been translated in Mandela’s native Zulu, reflecting the consideration of publishers that the Zulu-language publishing market is not a viable one.) The reform would apply only to text-based works in printed form, either on paper or digitally. If a television or movie studio wants to turn *Long Walk to Freedom* into a film, they will need to secure Mandela’s permission, even if the film were to be released in Zulu rather than in English.

Are works created in local languages still protected by copyright? Yes. This reform does not alter the eligibility of any work for copyright protection. Rather, it alters the scope of protection available to all copyrighted works. A work written in Zulu will continue to be automatically protected by copyright. That copyright will continue to prevent that book’s unauthorized translation and publication into English or Afrikaans or German. This preserves the Zulu author’s ability to benefit financially from the functional publishing markets in those languages. The Zulu edition, however, is effectively dedicated to the public domain. The author of a work written in English would enjoy exactly the same rights as the author of a Zulu work. Their traditional control over the English-language edition – as well as any possible translation into German or French – remains unaltered. The right to produce a Zulu translation or adaptation, however, is now
dedicated to the public domain. This effectively creates a cultural commons within designated local languages, where works may be freely translated, reproduced, and distributed, freed from the red tape of copyright compliance.

How can local language authors earn a livelihood from their works without protection against unauthorized copying? Note first that the motivation for this reform was the observation that it is currently impossible to earn a livelihood as a local language author! The situation really cannot get worse. And there is good reason to believe that the situation will get better under the proposed reform. Building the local language literature will expand the local language readership, giving authors an audience to write for and creating a market for local language works where previously none existed. As readership grows, local-language authors can tap the potential of that new market by using a variety of business models to reap financial rewards from their works, without relying on copyright law.

One of these is to sell the privilege of first publication. A Zulu-language author might contract with a Zulu-language newspaper or other publisher for the privilege of premiering a new work that has not yet been released to the public. Once published, the work could be freely reproduced by any party, which will expand its availability and impact. Serial publication along this model was the dominant mode of marketing for English-language novels in the Victorian era, including the famous works of Charles Dickens. There is currently a young and booming Zulu-language newspaper industry in South Africa, providing an opportunity for this business model to succeed.

A second major market opportunity is the licensing of rights to translate a Zulu-language work into other languages where the copyright rules have not been altered. If a given book becomes wildly popular with the Zulu-speaking audience, English- and Afrikaans-speaking South Africans will want to read it too. Mainstream South African publishers will be willing to negotiate for the rights to publish a work of proven appeal at the high prices that works in English and Afrikaans can command. For authors fluent in both Zulu and English, this market opportunity already existed. The added benefit of the reform is to expand the Zulu-language readership so that authors fluent in Zulu but not in English can also gain exposure and a chance to prove that their works merit translation and publication in the dominant market. Currently this is not possible; South African publishing houses typically have no one on staff capable of reviewing a Zulu-language manuscript.

The reform does not depend on the rapid emergence of local-language authors. The freedom to translate works already published in other languages will itself go a long way to solving the shortage of local-language works. This is the cheapest and fastest way to build a corpus of local-language materials available for teaching purposes,
independent learning, and pleasure reading. But liberalizing translation does not merely facilitate the importation of cultural works and ideas. It will also facilitate a broader flourishing of local-language literatures, building a local-language readership and a local-language publishing infrastructure. This will ultimately result in richer opportunities for speakers of these languages to actively participate in cultural discourses, to “talk back” to the books they read, and to become authors themselves.

Notably, the reform extends to any text-based adaptation of an existing work, including an abridged translation. This is important to ensuring the availability of works at low cost, because paper and printing expenses vary significantly depending on the length of the work. In the case of Onitsha market literature, a genre of popular literature appealing to mass audiences in Nigeria, short-form texts proved most popular because of printing cost considerations. To produce literature that is affordable and accessible to the audience, freedom of abridgement is just as important as freedom of translation. The freedom only extends to the production of text-based materials, however, not to adaptations of a text-based work into other media such as television.

C. Examples of model legislation

The task of drafting precise statutory text must be tailored to the existing structure of copyright law in any individual country. In the United States, Title 17 might be amended to add:

Section 121(b). Limitations on Exclusive Rights: Reproduction and Adaptation for Readers of Minority Languages

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright to produce or distribute copies or derivative works of a previously published literary work if such copies are reproduced or distributed in a minority language.

(b) For the purposes of section 121(b), the following languages, at a minimum, are designated as minority languages: Cherokee, Haitian Creole, [etc.].

(c) The Registrar of Copyrights may designate additional minority languages for the purposes of section 121(b). Before designating a particular minority language, the Registrar of Copyrights must determine that, with respect to said language, this limitation would not conflict with a normal economic exploitation of the copyright and would not unreasonably prejudice the legitimate interests of the right holder.
D. Domestic, not international, copyright reform

Importantly, my proposal operates at the national level; it may be enacted as purely domestic legislation by any nation that chooses. It is consistent with existing international obligations on intellectual property, and does not require any reform of modification of international IP law. This is vital as a matter of pragmatic politics. The public choice dynamics of international lawmaking on intellectual property are such that it is very difficult to advance a proposal that promotes the needs of developing countries, if the proposal does not advance the interests of developed countries.

For instance, an effort has been underway for some years now at the World Intellectual Property Organization, a forum where most of the world’s nations are represented in a deliberative process to build new treaties on copyright, patents, and other forms of intellectual property. This effort seeks to create internationally standardized exceptions and limitations to copyright protection to facilitate access to reading materials for persons with blindness or other print disabilities. Despite the highly sympathetic nature of the cause, this common-sense effort has been vigorously fought by developed countries, apparently on IP-maximalist principle.

Because blind readers are dispersed through many countries, the solution to that particular problem of availability requires international cooperation, which has unfortunately proven difficult to achieve. The situation of local language availability is different, however, because the relevant population is concentrated within a single nation or two or three bordering nations. The problem can effectively be solved at the domestic level. From the perspective of game theory, we would say that this is a lawmaking problem that requires minimal coordination. Only the domestic constituencies must be aligned to produce the reform in domestic copyright law. While it would be naïve to expect these domestic constituencies to align in every country that could stand to benefit from the reform, it is realistic to expect these domestic constituencies to align in some countries. These initial success stories then provide the opportunity to prove the effectiveness of the model and increase support for attempting the reform elsewhere.

IV. INTERNATIONAL LAW AND NATIONAL POLICYMAKING

The final part of this paper considers the implementation of local language limitations in the context of modern copyright policymaking, where individual nations get to make many decisions at the national
level, but are also constrained by international copyright treaties. Part IV first explains this transnational context of copyright reform, concluding that local language limitations are within the scope of national discretion and not prohibited by international obligations. The Part then looks at specific decisions that countries choosing to implement local language limitations must make, offering recommendations to ensure the success of the proposal and to avoid conflicts with international copyright law.

A. International constraints on copyright reform

Any discussion of copyright reform must address the modern reality of international regulation of intellectual property law. National legislatures do not have unlimited discretion to design their copyright systems in the way they deem best. Domestic legislative choices are constrained by a country’s international treaty obligations, particularly the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). The terms of these two international IP treaties are binding on the overwhelming majority of the world’s countries, including the United States. Many countries also belong to a number of bilateral IP treaties, which establish intellectual property obligations above and beyond the international baseline. Thus a threshold question for the political and legal viability of this proposal is whether broad exceptions for translations into local languages are consistent with international treaty obligations.

Both the Berne Convention and the TRIPs Agreement reflect an “IP-maximalist” approach to international harmonization of intellectual property law. This term means that these agreements set mandatory minimum floors of copyright protection, while allowing countries to offer even greater protection by choice. No restrictions are imposed upon the freedom of treaty members to depart from the international standard in order to provide even greater protection to copyright holders. The ability of member countries to loosen copyright protection, however, is significantly constrained by these treaties.

B. Local language limitations pass the “three-step test”

The TRIPs Agreement incorporates the Berne Convention’s “three-step” test that limits the scope of national governments to establish exceptions to copyright protection. In the United States, the parallel to the Berne Convention’s three-step test is the judicially developed doctrine of fair use. It has previously been argued that nonprofit translations into lesser-spoken languages should be considered fair use under American law. Conduct analysis under the three-step test and the American-style fair use analysis and compare/contrast the
international treatment of this solution with a reliance on fair use defense as found in American law. Under the three-step test, it is crucially important to consider the economic impact the limit would have upon copyright holders. The data from South Africa, at least, suggest that the reform would have a *de minimis* impact, acceptable under international law.

C. Decisions to be made at the national level

National legislatures are best suited to craft local language limits with sensitivity to the circumstances of the particular language and socio-economic realities of a linguistic community. This is true both at the level of deciding which languages should benefit from local language limitations, and at the level of deciding exactly how to structure such limitations.

i) Which languages should qualify?

It is not necessary or desirable to negotiate international treaties listing local languages that qualify for these limits. Nor is it necessary to identify specific criteria, based on number of speakers or average income, that determine which languages are appropriate candidates. These determinations are best made at the national level. South Africans, for example, should decide which South African languages should benefit from these limitations. Factors that need to be taken into account in striking the optimal policy balance include:

- **Whether there is currently a viable commercial publishing market in a particular local language.** Legislators should enquire what percentage of the recent publication lists of national for-profit publishing houses are works in local languages as opposed to the majority language. If there are effective market incentives for the production of copyrighted works, a local language exception is less likely needed, and more likely to conflict with the three-step test. As a pragmatic political matter, if there is a viable commercial publishing market, we should expect publishers to speak up oppose the enactment of a local language exception. A lack of such opposition may be a good indication that there is little to lose by enacting a local language exception. For example, there is currently a thriving publishing market in Afrikaans. This suggests both that limits on copyright protection over Afrikaans work will be unacceptable as a matter of domestic politics and inappropriate as a matter of international law.
• **Whether creators currently producing works in the local languages support or oppose the reform.** The premise of this article is that local language limitations will stimulate the broader use of local languages and ultimately increase demand for local language works, and increase opportunities for local language authors. To the extent this prediction is persuasive in a particular national context, there should be support from local language authors (or would-be authors) for a local language limitation. On the other hand, if because of empirical disagreements, or the political or cultural context of a particular country or community, local language authors are opposed to a local language limitation, it is probably inappropriate to enact one. Again, this factor is likely to find expression and weight in the democratic process.

• **Whether other countries adopting local language limitations have realized the hoped-for results.** The first few countries to enact local language limitations are taking a bold step with little assurance of the end results. Likely, the first countries to innovate in this direction will be those creating limitations for languages where there is the least to lose, because the factors point strongly in favor of creating exceptions. After the experiment has run its course for several years in a few contexts, however, there will be more information available to future legislators. They can see for themselves the results and adopt, reject or fine-tune the proposal accordingly. This learning process may even happen within a single country. For instance, if South Africa initially passes the proposal for Zulu only, it can learn from that experience in deciding whether to expand the reforms to other languages.

ii) **What types of works should be included?**

This article has assumed that local language limitations would apply only to text-based works expressed in print (either on paper or digitally). Applying local language limitations to other genres of works raises new issues and challenges. Many genres of copyrightable works are not linguistically encoded, so the application of local-language limitations would be impossible. This is true, for example, with paintings, photography, architecture, sculptures, and carvings. Other genres are linguistically encoded, yet retain significant appeal even if one does not understand the language. For instance, a musical composition might be sung in Zulu, yet the nonlinguistic components of the work — the melodies, instrumentals, rhythms, etc. — have universal appeal even to those that cannot understand the work.
Musical works sung in Zulu may have significant marketability beyond the community of Zulu-speakers. The same might be true of a movie as well. Text-based materials such as books, poems, and newspapers are truly unique because they are not marketable outside of a linguistic community. It is this uniqueness that makes it possible to encourage local language literature without diminishing the revenues a copyright holder can expect to earn in the original language. Arguably, radio performances of a text-based work should be permitted as well, since such performances have no appeal outside of the linguistic community. On the other hand, it may be desirable to preserve radio performance as a market opportunity for the author of the work to exploit.

It may be the case, however, that not all text-based works are appropriate for inclusion. If a local language newspaper industry exists that feels the reform would threaten its business model, domestic legislation could exempt newspaper publications. In most countries, companies exist that produce and deliver primary school books in local languages. Again, this genre of work might be excluded in order to build support while minimizing the risk that any existing markets would be negatively impacted. On the other hand, the timeliness of newspaper content makes newspapers uniquely nonreliant on copyright protection – a single day’s lead time over competitors is sufficient to exploit the market potential of the content. Newspapers and other serials were traditionally thought of as not needing copyright protection and in fact were not protected by the original American copyright statute, which extended only to “books, maps, and charts.” Textbooks, in turn, have their own special market reality. To the extent that the government is the primary purchaser, they could insist contractually that copyright in the work be dedicated to the public domain. Excluding textbooks from coverage in the statute would help ensure that the Berne three-step test is satisfied. The same effect might later be achieved through contract rather than through legislation.

iii) What restrictions should apply?

As local language limitations are being debated at the national level, requests will likely be put forth on behalf of copyright holders whose works might be translated to restrict the proposal in several ways. For instance, the proposal might be modified to say that only not-for-profit translations are freely permitted, but if there is any commercial aspect to the publication, then the copyright holder’s permission must be sought. Another modification might seek to ensure the integrity of translated works by requiring they be translated faithfully and forbidding abridgments or other adaptations. A third modification would allow translations but use standard
copyright rules to protect the results of those translations. While all of these modifications have strong theoretical and normative appeal, they are in fact misguided and risk destroying the effectiveness of the proposal. At bottom, they recreate the restrictive, permission-based approach to publication that has failed to prove effective in the context of local languages. To the extent that the normative motivation behind these proposals is to protect non-monetary interests of authors, this goal will be better served by efforts to promote norms of respect for authors that are not enforced by the legal system. This can include cultivating professional standards of fidelity in translation, respect for the author’s right to attribution, and an ethical obligation to offer royalties to authors where profit margins make this reasonable. Tying these expectations to the legality of the endeavor, however, creates burdensome costs that local language publishing may not be able to support.