

LOCAL LANGUAGE LIMITATIONS: COPYRIGHT AND THE COMMONS

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ABSTRACT

Copyright's system of financial incentives is working well to encourage publishing in some languages, such as English and French, but not in all languages. The law should recognize this reality, and adjust the rules of copyright protection accordingly, creating different regulatory structures for different languages. Smaller language markets will require different regulatory structures to unleash their publishing potential—particularly languages where most readers are very poor. This article suggests that this tailoring can be achieved through the use of “local language limitations” to copyright protection.

According to this proposal, a national legislature identifies one or more specific local languages as underserved by the publishing industry. It then enacts a statutory limitation on copyright protection, which creates a bounded commons for material in those languages. By enabling permissionless translation, adaptation, and reproduction, local language limitations will drive down the cost of works in those languages to prices that are affordable to the very poor, while creating legal room for lower-cost translation and distribution models.

This approach has four novel virtues. First, it takes advantage of language barriers to promote access for disadvantaged readers, without reducing the protection afforded to authors and publishers in more profitable markets. Second, it illustrates the potential of innovative, syncretic approaches to IP protection, beyond the “one size fits all” model. Third, it promotes reform of copyright law at the domestic level, rather than at the international level, where developing countries have power. Fourth, it enables “copyright experimentalism,” making it possible for researchers and policy makers to draw empirical lessons about the impact of copyright law on creativity based on real-world experience.

The Article first introduces the problem of neglected languages of publishing and explains why there are good reasons to believe that loosening copyright rules will, in certain contexts, result in greater creativity as well as broader access. It then explains the proposal for local language limitations, exploring variations on the approach, identifying potential pitfalls, responding to objections, and recommending best practices. Finally, the article discusses the compatibility of local language limitations with international treaties on intellectual property and human rights.

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 book 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 Yet most South Africans not only have not read *Long Walk to Freedom*, they *cannot* read it. Illiteracy is not the problem; literacy rates are high in South Africa, even among those living in poverty. The problem is that most South Africans speak and read in a language other than English – such as Xhosa, Tsonga, or Sotho. And in the two decades since Mandela's biography was released in English, the work has yet to be made available in these languages.

Most of the world's people are native speakers of what I term here a "local language" – a language spoken by a community of 1 million to 100 million persons, mostly within the boundaries of a single country. Only a minority of the world's population is fluent in what I will refer to as a "global language" – a language understood by at least 100 million people often spanning many borders, such as English or Spanish or French. At present, vast and growing bodies of printed material are available in the global languages, including everything from children's literature to adult fiction and how-to manuals to academic works. Yet very little reading material is being made available in local languages, which are largely ignored by the profit-oriented publishing industry. This unfortunate reality denies billions of local language speakers meaningful access to literature, learning materials, and opportunities for education.

This Article proposes a novel solution: a pragmatic and narrowly tailored reform to copyright law designed to encourage greater publication of books in local languages at affordable prices. My proposal takes advantage of the "inequality insight" I elaborated in an earlier article.² Copyright's system of financial incentives is working well to encourage publishing in certain languages, but not in others.

¹ Attributed to the Boston Sunday Globe; quotation taken from the jacket of the 1995 edition of *Long Walk to Freedom*, published by Back Bay Books.

² Lea Shaver, *Copyright and Inequality*, __ WASHINGTON U. L. REV. __ (2014).

The law should recognize that reality, and adjust the rules of copyright protection accordingly, creating different regulatory structures for different languages. Smaller linguistic markets, particularly where the majority of potential readers are very poor, will require different legal rules to unleash their publishing potential. I suggest that this can be achieved through the use of “local language limitations” to copyright.

Copyright scholars and policymakers have long spoken of “exceptions and limitations” as an important part of copyright law. Although copyright laws create strong exclusive rights in the copyright holder to control the copyrighted work, these rights are also subject to limits that seek to balance opposing interests. For example, a copyright holder’s exclusive rights are limited to the precise expression they use, and do not extend to the underlying ideas, which advances the societal interest in free expression and exchange of ideas. Many countries also have some form of a “personal copy” exception, which permits reproduction for certain private purposes so long as the user is not commercially marketing the copies. I propose that a similar approach be used to balance the exclusive right of copyright holders to market their works with the societal interest in promoting wider access to works in neglected languages.

As proposed here, a “local language limitation” to copyright would specify that no textual work in a designated local language may be considered to infringe copyright law. Existing works – such as *Long Walk to Freedom* – could be translated or adapted into the designated languages without the need to seek a license. The resulting translations, as well as original works produced in local languages, could also be reproduced and circulated free of copyright restrictions, encouraging the supply of cheap copies. Importantly, local language limitations would leave copyright law entirely unchanged as it applies to the publishing markets that are already thriving. Works being published in English and other non-designated languages will remain subject to exactly the same copyright rules as before. This eliminates the risk that the reform would undermine the incentives to produce works for these well-functioning markets. It also preserves important livelihood opportunities for authors... both existing authors writing in English and new authors writing in local languages, who may earn revenue by licensing English-language translations of their works for the mass market. In the targeted local language, however, the effect of this limitation would be to create a linguistically-bounded public domain, in which the usual restraints of copyright law do not apply. This would open the door to a radically different publishing economy, one which can succeed in delivering written works at the very low price points needed by the intended audiences.

The proposal to *encourage* authorship and publishing by *lowering* copyright protection will surely strike many readers as deeply counterintuitive, if not nonsensical. From the perspective of copyright

experts, however, the suggestion is not so surprising. Scholars in our field have long acknowledged that copyright protection is just one of many incentives for the creation and publication of works. A variety of incentives – including intrinsic motivations as well as livelihood opportunities not dependent on copyright protection – inspire people to create and distribute written works.³ Indeed, copyright protection is something of a dual-edged sword. On the one hand, it dramatically enhances the financial incentives to create and distribute certain types of works, particularly works with mass-market appeal. On the other hand, it makes it significantly more difficult to create and distribute other types of works, by restricting the freedom to adapt preexisting material. Copyright protection also restricts competition in the supply of copies, which can result in book prices that are unaffordable to many potential readers, particularly the poor.

My argument is that in certain local languages – particularly those languages whose speakers are predominantly poor – copyright protection is simply failing to provide effective financial incentives. By admitting that failure and modifying copyright law where it has proven to be ineffective, we can create greater room for alternative incentives and business models to flourish. Part II develops this argument and explores the empirical evidence supporting the intuition that *less* may be *more* when it comes to copyright protection and local language publishing. I draw particularly on research that describes alternative business models for creative production in a variety of developing countries. These case studies include studies of popular music in both Egypt and Brazil, as well as the “Nollywood” film industry in Nigeria. Although copyright protection is theoretically available to such works, the laws are not effectively enforced in these contexts and piracy rates are extremely high. Yet creativity continues to flourish, and both creators and distributors have found ways to make money in the absence of copyright protection. Notably, copies of the resulting creative works are being sold very cheaply, enabling them to be widely enjoyed by rich and poor alike. I suggest that such business models could also work for books, but will require more formal legal accommodation in the form of a local language limitation.

Part III provides more detail on exactly how a local language limitation should be implemented. In contrast to many recent calls for

³ See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. STATE U. L. REV. 623 (2012) (drawing on research in economics, psychology and business management to argue that technology and the arts would continue to flourish even in the absence of external rewards, because the intrinsic motivations to create are substantial); YOCHAI BENKLER, THE WEALTH OF NETWORKS, Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U. C. DAVIS L. REV. 1151 (arguing that a more realistic representation of human creativity reveals both the limits of copyright’s potential to encourage creative activity and the harms that may result from overly broad copyright protection).

internationally harmonized exceptions and limitations to promote access to copyrighted works, my proposal very intentionally operates at the national level, rather than internationally. A local language limitation may be adopted by any individual country on its own initiative, as part of its domestic copyright code. The localism of this approach has several advantages. First, it enables copyright reform efforts to sidestep the political barriers often encountered in international fora, where developed and developing countries frequently clash over their opposing interests and priorities. Second, it allows countries to experiment with different approaches, opening the door to a process of learning what works best.⁴ In this section, I provide model statutory language to demonstrate how it may be done, and discuss considerations that national legislatures should take into account in deciding whether a particular local language is a good candidate for such a limitation.

Part IV examines how viable local language publishing models could emerge within the room created by local language limitations. While exclusive control over the translated work would not be available as an incentive for writing and publishing, other economic and non-economic incentives exist and are detailed here. An important goal of this proposal is to not only facilitate the availability of translated works, but also to encourage the emergence of locally authored original works. This part 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 V 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

⁴ See Lisa Larrimore Ouellette, *IP Experimentalism*, ____ L. Rev. ____ (2014) (arguing that the emphasis on harmonization and consistency in IP law is undermining efforts to understand which approaches are empirically the most effective, and proposing "IP experimentalism" as an alternative approach to evidence-based lawmaking).

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.

II. THE NEED FOR REFORM

[This Part still to be written; will draw upon Lea Shaver, *Copyright and Inequality*, Washington University Law Review 2014, <http://ssrn.com/abstract=2398373>.]

III. LOCAL LANGUAGE LIMITATIONS

The challenge, then, is to reform 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: braille, Cherokee, Haitian Creole, Tagalog, Yiddish [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.

[Also insert South African model statute, and discuss how implementation might be different in the context of a civil law legal system.]

IV. PUBLISHING IN A LINGUISTICALLY-BOUNDED COMMONS

[This Part still to be written. Describe how publishing could work within this system. Where are alternative incentive structures needed and how could they be provided? How can authors' interests be attended to and livelihood opportunities promoted?]

A. Alternative distribution mechanisms

[Describe envisioned distribution mechanisms... copyshops, street vendors, cell phones, etc.]

B. Alternative incentive structures

[Discuss prizes, government subsidies, other mechanisms for encouraging authorship and translation, including crowd-sourced translation possibilities.]

C. Advancing the interests of authors

One important objection that should arise to my proposal is this: without copyright protection, how will local-language authors be able to earn a living? This is a natural question to ask. Yet it is the wrong question. The first reason is that even successful authors of top-selling books in global languages are largely unable to earn a living from sales of their writings. There is much less money to be had in writing than one might think. The second reason for discounting this objection is that the inability of local-language authors to earn a living from authorship is already a feature of the status quo, the promise of copyright protection notwithstanding. Third and most importantly, however, there are counterintuitive ways in which loosening copyright can *boost* livelihood opportunities for local-language authors. These three lines of inquiry are further explored below.

First, the income-generating potential of book authorship tends to be grossly exaggerated. It is often assumed that most professional authors earn a living primarily from sales of their works, and that this would not be possible without the protection of copyright law. Certainly, we have some very high-profile examples of immense economic success, such as J.K. Rowling, whom Forbes estimates to have earned \$13 million from the Harry Potter empire.⁵ Rowling's particularly savvy licensing of publishing, adaptation, and merchandising rights surrounding the children's series contribute to this success.⁶ But pointing to J.K. Rowling as an example of the livelihood opportunities in writing is something like saying that Oprah Winfrey proves that acting is a lucrative career path. Most writers, like most actors, earn much less.

Patrick Wensink's novel, *Broken Piano for President*, became famous in intellectual property circles after it was the target of a conspicuously polite cease-and-desist letter sent by trademark counsel at Jack Daniel's.⁷ More recently, Wensink penned a self-revealing piece humorously contrasting public assumptions about the material rewards of literary success with the much more humble reality.⁸ In his case, even hitting the Amazon.com bestseller list netted a meager \$12,000... before taxes. Clearly, that would not go far in legal fees had the author tried to fight the

⁵ Forbes.com, *J.K. Rowling Celebrity Profile*, <http://www.forbes.com/profile/jk-rowling/> (accessed June 26, 2013). The income stream should grow still further, as Rowling was unique among authors in withholding eBook rights from her publishers, and now stands to realize most of the revenue on such sales in the future.

⁶ For instance, Rowling was unique among authors in withholding eBook rights from her publishers, and now stands to realize most of the revenue on such sales in the future. Forbes.com, *J.K. Rowling Celebrity Profile*, <http://www.forbes.com/profile/jk-rowling/> (accessed June 26, 2013).

⁷ The letter, penned by Christy Susman, Senior Attorney at Jack Daniels Properties, went viral first in legal circles and then in mass media as an example of civility too often lacking in the legal profession. I use the letter with my students as an example of how tone can make a difference in getting another party to comply with your client's agenda or stoking their resistance, particularly when the legal merits of the dispute are far from one-sided. For more about the dispute, images of the allegedly infringing book cover, and a copy of the attorney's letter, see e.g., Mark Hughes, *Jack Daniels Sends 'World's Most Polite Cease-and-Desist Letter,'* *The Telegraph* 25 July 2012, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9427111/Jack-Daniels-sends-worlds-most-polite-cease-and-desist-letter.html>; Patrick Wensink, "The Whiskey Rebellion," *brokenpianoforpresident.com*, July 19, 2012, at <http://brokenpianoforpresident.com/2012/07/19/jack-daniels-lawsuit-the-full-scoop/>.

⁸ Patrick Wensink, *My Amazon bestseller made me nothing*, SALON.COM, March 15, 2013, at http://www.salon.com/2013/03/15/hey_amazon_wheres_my_money/ (last accessed June 19, 2013).

trademark issue on fair use grounds. Wensink writes: “there’s a reason most well-known writers still teach English. There’s a reason most authors drive dented cars. There’s a reason most writers have bad teeth. It’s not because we’ve chosen a life of poverty. It’s that poverty has chosen our profession. Even when there’s money in writing, there’s not much money.” Legal scholars may be more typical of most authors than is acknowledged. Yes, writing is our profession. But we earn our living by teaching... like most professional novelists and musicians.

Another rung down from Wensink’s experience lies the reality experienced by most English-language authors, as described by Australian fantasy novelist Ian Irvine. “Here’s the sad truth: most people who write a book will never get it published, half the writers who are published won’t see a second book in print... and most published writers won’t earn anything from their book apart from the advance. So don’t *expect* anything from your writing apart from the personal fulfillment of having learned your craft and created a work that didn’t exist before.”⁹ Irvine advises would-be authors that most advances in England, the U.S., and the U.K. are less than \$10,000. This drops still lower for a high-quality literary work, which will sell fewer copies: perhaps \$1000-3000.¹⁰ Such income streams are not insignificant, but they are quite on par than the wages paid to an adjunct professor of creative writing. On an hourly basis, it is surely more lucrative to wait tables at a nice restaurant than to write a decently successful novel. And bear in mind that the class of people with the high levels of education and human capital required to write a decently successful novel have many other livelihood opportunities to choose from.

The income-generating prospects of authorship are necessarily even lower in less-developed publishing markets where the readership is smaller and has much less disposable income. As Bgoya, a Tanzanian publisher has pointed out: “with the exception of just a few individuals, African authors are very poorly remunerated, copyright notwithstanding. That is because print runs of their books are low, and prices of books are low, from the point of view of the author’s income, and high from that of book buyers.”¹¹ Bgoya concludes that copyright protection is not a

⁹ Ian Irvine, *The Truth About Publishing*, <http://www.ian-irvine.com/publishing.html> (last accessed June 19, 2013).

¹⁰ Ian Irvine, *The Truth About Publishing*, <http://www.ian-irvine.com/publishing.html> (last accessed June 19, 2013).

¹¹ Walter Bgoya, *Publishing in Africa: Culture and Development*, in *THE MUSE OF MODERNITY: ESSAYS ON CULTURE AS DEVELOPMENT IN AFRICA* (eds. Philip G. Altbach & Salah M. Hassan) 151-180, 165 (1996).

sufficient means of supporting African authorship (in any language), and suggests a twenty- to twenty-five-year moratorium on copyright enforcement to help the local publishing industries develop a readership that could later support copyright-based publishing on a more economical scale.¹²

Copyright protection clearly helps publishers charge a higher price for their works, and keep more of the revenue to themselves rather than splitting it with free-riding competitors. Royalties form the author's slice of that plum pie. Copyright protection is certainly not a sufficient strategy to ensure authors' livelihoods, even in major markets. But copyright-based revenue streams are far from the only economic rewards to be realized from a career in writing. Many authors teach at the secondary or university level, either part-time or with tenure. They offer classes in writing. They receive honoraria for giving talks, or charge a fee for attendance at lectures, at which copies of their books are often given away as part of the package. Scientific research confirms this picture. According to one quantitative review of creator's earnings in European and North American countries: "the empirical study of artists' occupational profiles reveals risky, often stuttering careers. Earnings from non-copyright and even non-artistic activities are an important source of income for most creators. Many more creators attempt to embark on artistic careers than are able to sustain them. The decision to 'start-up' as an artistic enterprise appears to follow a deliberate process of risk-taking."¹³

V. 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

¹² *Id.* at 165-69 (noting also that the United States leveraged such a "piracy first, protection later" strategy for more than 100 years in its development).

¹³ Martin Kretschmer, *Empirical Evidence on Copyright Earnings*, Paper for Dynamics and Institutions of Markets in Europe (DIME) network conference: Intellectual Property Rights: The influence of rules, norms and standards on knowledge exchange, London, 14-15 September 2006, page 16, at <http://eprints.bournemouth.ac.uk/3696/1/811.pdf> (copy on file with the author).

recommendations to ensure the success of the proposal and to avoid conflicts with international copyright law.

A. International constraints on 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 or 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.

Nevertheless, 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 and the "three-step test"

[To be written. 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.]

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.