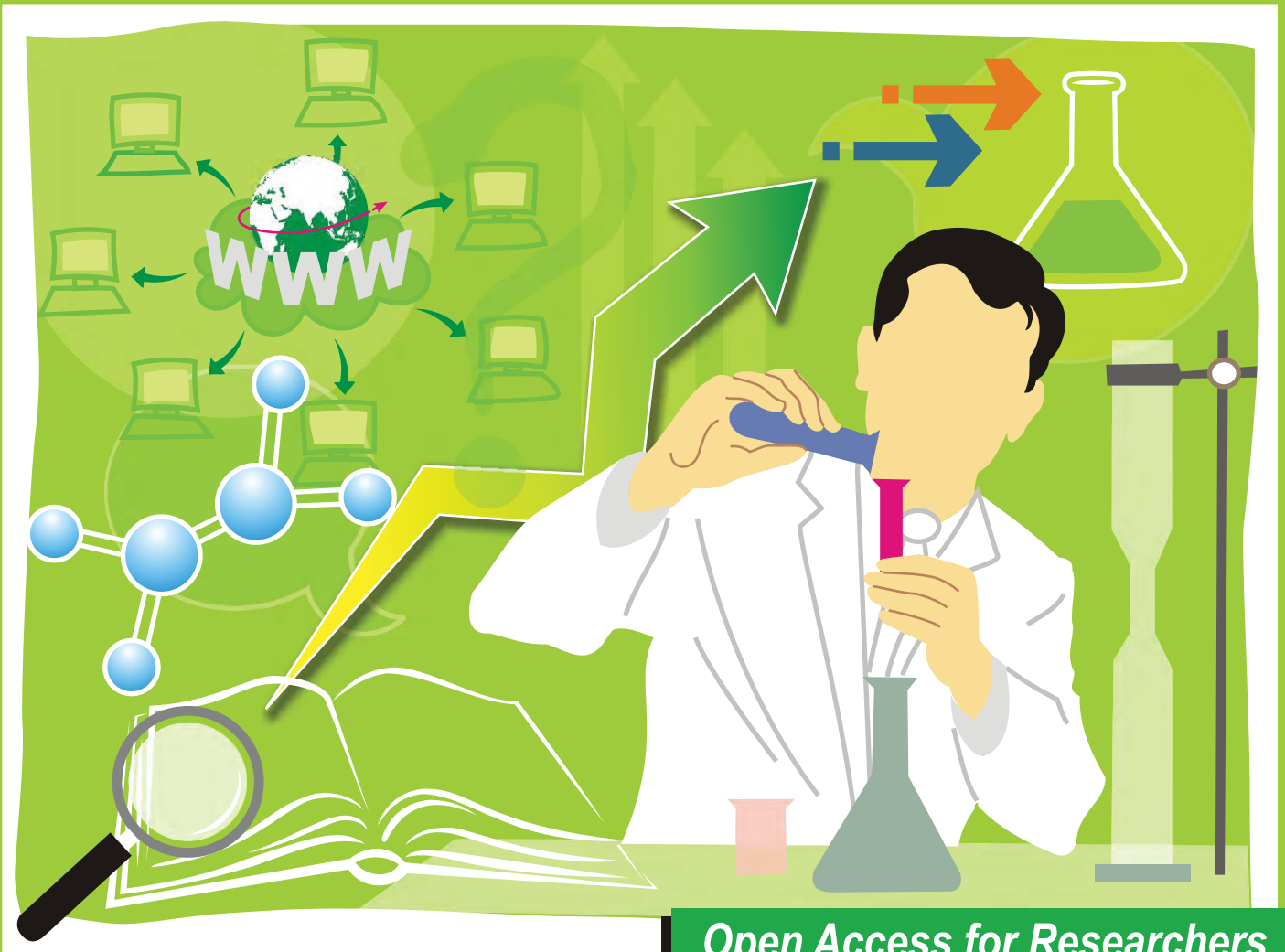




United Nations  
Educational, Scientific and  
Cultural Organization



# Intellectual Property Rights



*Open Access for Researchers*



United Nations  
Educational, Scientific and  
Cultural Organization

# Intellectual Property Rights

Module

## 3

### Intellectual Property Rights

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#### UNIT 1

<b>Understanding Intellectual Property Rights</b>	<b>5</b>
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#### UNIT 2

<b>Copyright</b>	<b>18</b>
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#### UNIT 3

<b>Alternative to a Strict Copyright Regime</b>	<b>25</b>
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# MODULE INTRODUCTION

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Intellectual Property Rights (IPR) are set of rights associated with creations of the human mind. An output of the human mind may be attributed with intellectual property rights. These are like any other property, and the law allows the owner to use the same to economically profit from the intellectual work. Broadly IPR covers laws related to copyrights, patents and trademarks. While laws for these are different in different countries, they follow the international legal instruments. The establishment of the World Intellectual Property Organization (WIPO) has established the significance of IPR for the economic growth of nations in the knowledge economy.

This module has three units, and while the Unit 1 covers the basics of IPR, Unit 2 expands in detail the components of copyright and explains the origins and conventions associated with it. Unit 3 discusses the emergence of liberal licensing of copyrighted work to share human creation in the commons. In the last unit, we discuss the Creative Commons approach to licensing of creative works within the structures of the copyright regime that permits the authors to exercise their rights to share in the way they intend to. Creative Commons provides six different types of licenses, of which the Creative Commons Attribution license is the most widely used in research journals part of the Open Access framework.

*At the end of this module, you are expected to be able to:*

- Understand intellectual property rights and related issues
- Explain copyright, authors' rights, licensing and retention of rights; and
- Use the Creative Commons licensing system.

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# UNIT 1 UNDERSTANDING INTELLECTUAL PROPERTY RIGHTS

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## Structure

- 1.0 Introduction
- 1.1 Learning Outcomes
- 1.2 History and Philosophy of Intellectual Property
- 1.3 Understanding Copyright
- 1.4 Understanding Patents
- 1.5 Understanding Trademarks
- 1.6 Other IP
- 1.7 Key Emerging Issues
  - 1.7.1 The US '301 Report'
  - 1.7.2 WTO and Emerging IP Norms
- 1.8 Let Us Sum Up

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## 1.0 INTRODUCTION

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Intellectual property rights (IPR) are a set of rights associated with creations of the human mind. If you create something, invent a product; write a program, lyrics, etc. you are engaged in the process of creating intellectual property, which is like any other property that you can sell, license, gift, etc. The law allows the creator to economically benefit out of the creation. The establishment of the World Intellectual Property Organization (WIPO) is an important milestone in the history of human-kind that recognises the legitimate rights of the creator to their work. IPR covers literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and any other rights resulting from intellectual efforts.

In this unit, we will discuss the history and philosophy of IPR and understand the basics of copyright, patents and trademarks. We will also highlight the emerging issues in this field to orient you toward the bases of IPR.

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## 1.1 LEARNING OUTCOMES

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*After studying this unit, you are expected to be able to:*

- Describe the history of intellectual property law;
- Understand the philosophical basis of intellectual property law;
- Differentiate between the different kinds of intellectual property; and
- Identify and apply the different concepts studied in this unit in day to day life.

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## 1.2 HISTORY AND PHILOSOPHY OF INTELLECTUAL PROPERTY

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In the middle of the 16<sup>th</sup> century, Queen Mary was faced with a difficult question that was brought to her by none other than most powerful publishing house in England at the time. The Stationers, like any other craft guild in the business of printing and producing books loved a monopoly in the profits of their books and terribly feared competition. Therefore, they went to Queen Mary with the request of a royal charter. This charter would allow them to seize illicit editions of their books and bar the publication of books unlicensed by the crown. The Queen suddenly thought that this could indeed be a more efficient way to squash sedition and dissent through censorship by puppeteering this craft guild than previous, perhaps less subtle means like torture and death. In 1557, she granted them this early form of a copyright. Notice how the author or the creator of the work has no place in this agreement and the origins of intellectual property in English law are based on privilege, namely power and profit. This rhetoric, however, changes with the coming of the 18<sup>th</sup> century and the passing of the Act of Anne in 1707 to one of creativity and learning. The concern for the author has a steady positivist rise after this in the tug of war over intellectual property. In the case *Miller v Taylor* in 1769, the author sought to extend copyright to common law. Three judges ruled in favour of this motion and two judges ruled against. A closer examination at the reasoning provided by the three assenting judges will tell us almost all the philosophical justifications of intellectual property. The first judge called upon his notion of justice and said it is just that the author control the destiny of his work as it is a product of his labour. The second judge said that extending the copyright would encourage creativity by making the work the creator's property. The third judge said it is the authors natural right as the work wouldn't exist if not for the mental labour of the author. Together, *justice*, *incentives* and *natural rights* are the cornerstones of the justifications of intellectual property.

Although history is littered with theories on property, there have been only sparse discussions on intellectual property. The question then arises, can intellectual property be accommodated within normal property. The similarity is in the fact that intellectual property is also a relationship between people but the difference lies in the fact that the object is an abstract one. This leads many to believe that it cannot be subject to the same rules of property. The first dissenting judge in *Miller v Taylor*, for example, said that abstract ideas cannot be occupied like corporeal objects so they cannot be property. He said the author deserves a reward which the *Act of Anne* provides in the form of limited monopoly but that's about it. In fact, an idea is almost the perfect example of a resource like the air or light that is not zero sum and inexhaustible in that my use of it doesn't take away from your use of it. Neither air nor light can become personal property which leaves ideas in a property limbo. This leaves room for very interesting discussions and debates over the existence of intellectual property and the place it should occupy in the society. This discourse has largely taken two forms: the deontological and the

consequentialist. Deontological justifications for intellectual property come from *a priori* reasons like rights or duties which can be established in many forms. There is the ontological basis for rights which answers questions like whether rights exist and if so, where they come from. One of the preeminent figures in this discourse has been John Locke, an English philosopher whose argument for individual property as “natural rights” remains relevant even today when applied to intellectual property. Locke’s major assumptions in his claim were:

- a) God has given the world to people in common.
- b) Every person owns his/her own personality.
- c) A person’s labour belongs to him/her.
- d) When a person mixes his labour with something in the commons he makes it his/her property.
- e) The right of property is contingent upon its being good for commoners.

In order to extend this argument, Locke says that exclusive ownership of a resource is a precondition for production. Ideas before laboured upon by people, however, are not exclusively owned which resists the cross application of his ideas to intellectual property. Another impediment in extending the natural right to intellectual property is the 5<sup>th</sup> assumption. Intellectual labour, in annexing an idea, stops it from becoming a part of the intellectual commons. If this labour, armed with the property of becoming property is doing a disservice to society, then it may not be a natural right at all. The notion that ideas are a part of the intellectual commons is also one that needed evidence and Locke found that in scripture as Judeo-Christian philosophy clearly advocates the idea of all worldly resources being part of the commons.

Hegel, on the other hand, took the route of personality theory. He argued that if individuals have claims to anything, they had to be considered an individual first. He states that in order to be individuals, people must have a moral claim to things like their character traits, feelings, talents and experience. The definition of these aspects or the process of self-actualization requires an interaction with tangible and intangible objects in the world. The external actualization process requires property that includes intellectual property for Hegel as he sees the works as an extension or an establishment of the self in the external world that embody the person’s personality in an inseparable and even immortal way.

The consequentialist justifications of IP assume that the specious connection between IP and creativity is fact and warn of a chilling effect on creative activity in the absence of IP. History shows us that the relationship between IP and creativity is local and contingent rather than necessary and universal. Imperial China, for example, was a creative and inventive empire that gave rise to many technologies and artistic sub-cultures without any promise of IP. Indeed, Marx’s historical materialism could be seen as condemning IP as a superstructural phenomenon in the industrial development phase of capitalist societies and one that a future society can function well without. If one was

interested in the consequentialist debate over IP, then historical empirical data would be more important than an *a priori* analysis.

The lack of a definitive philosophical, ethical or normative justification for the existence of Intellectual Property rights unlike those for free expression or equal treatment under the law shows us that its application needs to be tempered with other considerations. If, as Rawls suggested, we hide behind the veil of ignorance and tried to form an ideal society, then IP may not feature within it as it tends to create social stratification and further marginalizes the least advantaged in social life and democratic culture (Murphy, 2012). Since IP's are liberty intrusive privileges that do not "allow the most extensive liberty compatible with a like liberty for all." or "benefit the least advantaged." or are "open to all under conditions of fair equality of opportunity.", their utilitarian claims of creativity have to answer to the injustices that manifest from them before they get a *carte blanche* in society.

Intellectual Property Rights are of different types, namely: Copyrights, Patents and Trademarks. We will discuss about these in the next sections.

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### 1.3 UNDERSTANDING COPYRIGHT

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 **Activity**

From your library and/or bookshelf, pick any 5 books. Try and ensure that the books are from different categories: fiction novels, coffee table books, reference books etc. Flip through the books and try to find the following:

- a) A symbol that looks like this: ©
- b) A statement to the effect of "Copyright (year)", or something similar.
- c) A statement "reserving all rights" for the author/publisher
- d) A statement forbidding you from selling/copying or making any other 'unauthorised' use of the book in question.

What do you notice? Did you find all of the above in all books, or only in some of them? Make a note of your findings.

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## What is Copyright?

The questions raised in the exercise in the previous section are all a reflection of the various facets of Copyright. Before we proceed any further, however, we must understand what we mean by the term ‘copyright’ and consequently, by ‘copyright law’.

Copyright, as the name suggests, is a kind of right that protects the ‘expressions’ of some ideas, but not the idea itself. This concept where the expression is protected, but not the idea itself, is called the *idea-expression dichotomy*. We will learn more about this in the next unit.

Copyright protects a range of works that are expressions of ideas. These include literary works, artistic works and dramatic works.

## Owner and Author

*Is the owner of copyright different from the author of the work?*

This question may be answered by way of two illustrations.

Illustration one- Pick up your favourite book. Write down the names of the author(s), the publisher(s), the editor(s), the printer(s) and any other persons/entities that would have contributed to the production of that book.

Illustration two- Think of your favourite movie. Make a list of the producer(s), director(s), star cast, editor(s), music director(s), screen play writer(s), story writer(s) and any other artist involved in the making of that movie. Do you think all of them contributed toward the making of that movie? Can you think of reasons for your answer?

In both of the illustrations above, you will notice that there are various persons involved in the creation of the work (book, movie respectively) in question. Some may have provided creative input (the author of the book or the director/screen play writer/story writer of the movie), and some may have provided monetary input (the publisher of the book/producer of the movie). Both of these concepts find recognition under copyright.

The author of the work has the ‘moral right’ to be identified as the author of the work and object to the distortion of the work. Economic rights associated with copyright vest in the owner of the copyright. The owner could be different from the author. For instance, in case of the book, the owner of the copyright could be the publisher, and in the case of the movie, it could be the producer. In some instances, copyright may be jointly owned as well. Copyright grants the owner the right to exclude all others from making use of/exploiting the work in question commercially. This would essentially prevent others from adapting, copying, distributing, or making any other use of the protected work, unless authorised by the owner.

Do you remember the introductory exercise we undertook at the beginning of this section? That is a reflection of the owner(s) and author(s) asserting their respective rights under copyright.

## Copyright and the Law

Copyright is the subject matter for national legislations. Subject matter of protection, term of protection, whether registration is mandatory or not, the rights associated with copyright and term of copyright are some of the main subjects addressed by these legislations. The key international instrument governing copyright issues is the Berne Convention for the Protection of Literary and Artistic Works, 1886. Additionally, some other important international instruments include the WIPO Copyright Treaty, 1996 and the WIPO Performers and Phonograms Treaty, 1996.

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## 1.4 UNDERSTANDING PATENTS

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### Activity

Take a walk around your neighbourhood. Make a list of 10 different objects that you see around you, for instance cars, trees and flowers. Would you classify them as inventions? Why or why not? We will revisit this question later in the section.

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### What are Patents?

Patents are a set of exclusive rights granted by a sovereign state to an inventor. These rights are granted for a limited period of time, usually about twenty years. The granting of these rights is in return for public disclosure of the invention.

### Criteria for Patentability

Patents protect inventions. These inventions could be either products or processes. All inventions are required to meet the criteria for patentability. These criteria are the presence of a patentable subject matter, novelty, non-obviousness and utility/industrial application. The criterion of an inventive step is particularly important. Mere discoveries are not patentable, and neither are algorithms.

Now examine the objects that we discussed in the introductory exercise in greater detail. Would you be granted patents on these objects? Why, or why not?

### Patents and the Law

Patents are the subject matter of national legislation. Besides prescribing the patentability criteria laid out in the previous section, legislations also provide the term of protection, the role of patent examiners, rights of patent holders, exceptions to patentability, provisions around compulsory licensing, conditions for licensing etc.

Recent debates around the subject matter of patentability revolve around patentability of medicines/drugs and software. Different nations tend to adopt differential standards for patentability of drugs and software, leading to the tension at the international level. For instance, while the United States is in favour of patents on software, India adopts a more cautious approach. Similarly, while the drug manufacturer lobby is strong in the United States, and the nation favour the patenting of drugs, India is considered to be the home of generic medicines and drugs, due to its more cautious approach when it comes to the patentability of drugs and medicines.

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## 1.5 UNDERSTANDING TRADEMARKS

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### Activity

Make a list of the top fifty brands in your country. Have you ever seen this symbol ® on any of their merchandize, advertisements or in any other manner associated with these brands? Have you seen “TM” or “SM” perhaps? Make a note of the brands for which you have seen either of these, or for those that you have not. We will revisit this exercise at a subsequent point in this section.

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## What is a Trademark?

A trademark is a recognizable symbol, sign, expression, design or the like which is used to identify and differentiate one product or service emanating from a particular source against one emanating from another source. The association of a trademark with an entity may take many forms, and could be visible on packaging, labels, advertisements, all company merchandise, etc.

## Legal Aspects of Trademarks

The holder of a trademark has the benefit of rights associated with trademarks and these rights can be enforced when an action for trademark infringement is brought. It must be noted that for this, the trademark has to be registered. In cases of unregistered trademarks, remedy may have to be sort elsewhere. In this case, it could be under the common law wrong of “passing off”.

The rationale of trademark law is also one of consumer protection, since it prevents the public from being misled about the origin or quality of a product or service.

Now think about the illustration that we discussed at the beginning of this section. Do you identify the brands with specific entities on the basis of their trademarks? Conduct this exercise for a further 20 brands and discuss your findings.

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## 1.6 OTHER IP

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In this section, we will examine a few other types of intellectual property or allied fields.

### Trade Dress

When we talk about trade dress, we refer to the visual appearance of a product. This could be its packaging. In the case of architecture, it could be the design of a building. The principle is akin to that of trademarks, in that the source or origin of the product has to be communicated to the consumers.

### Trade Secrets

When we speak of trade secrets, we speak for instance, of Coca Cola’s secret recipe to manufacture their popular beverage. Trade secrets, therefore, basically refer to information, be it a formula, a program, a method, a pattern, a process or anything of the like. The rationale of keeping the same a ‘secret’ is to have a competitive economic advantage over one’s competitors in one’s trade.

### Geographical Indicators

What do Champagne, Darjeeling Tea, Columbian Coffee or Swiss Cheese/Watches/Cuckoo Clocks/Chocolates have in common? They are all examples of geographical indications.

A geographical indication (GI) is a sign that is used on goods and denotes the geographical origin of the said good. The qualities of that product, or the reputation and characteristics that it enjoys are attributable to the place of origin of the product, and are represented by the GI. A GI will, more often than not, include the name of the place of the origin of the goods. Recognition of GIs is a matter of national law. In international law, the Paris Convention for the Protection of Industrial Property, 1883; the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958 most notably deal with GIs.

### **Traditional Knowledge**

Does your family have its own set of rituals and traditions that might be reflected in festivals or weddings? How about the recipe for that perfect pie that might have been passed down in your family from generation to generation, beyond anyone's memory; or those "home remedies" for the common cold or fever? These might just be one manifestation of what we call "traditional knowledge" (TK).

When we speak of TK, we refer to the knowledge, the skills, the know-how, the practices that have been passed down from generation to generation, within a community, having been developed and sustained in that community. This knowledge forms a part of the cultural and spiritual identity of communities and may be a part of scientific, agricultural and medical contexts, among others.

It is interesting to note that while innovations based on TK are protectable under systems of patents, trademarks, copyrights, or GIs, TK itself does not enjoy protection under intellectual property law as it stands today. Issues in this area are therefore two fold- first, of developing strategies to ensure third parties do not exploit TK at the cost of communities and do not enjoy an unfair benefit as a result of IP protections on work based on TK and second, of communities actively using, exploiting and benefiting economically from their TK.

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## **1.7 KEY EMERGING ISSUES**

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This section studies emerging issues that form a part of and influence the IP landscape in the present world. This section will only present you with an overview of these issues. It is strongly suggested that you read about these in greater detail.

### **1.7.1 The US '301 Report'**

The US 301 Report is representative of a larger, growing trend towards the forced universalisation of IP norms. It smacks of the kind of hubris that is normally characteristic of national security rhetoric. In this era when culture and business are strange bedfellows, never has the US discovered cultural diversity to be of such a grave threat to its entrenched economic interests. To that extent, reports like the 301 Report, threats of litigation, political pressure

etc. are tools used to leverage other issues with IP laws. The manner in which business works today means that a judgement in India that enhances access to cheap generic medicine in India at the cost of ostensible patents that a multinational company holds is tantamount to a souring ‘business environment’ for US rights holders. In other words, it is the US reaching out to foreign markets because it understands the extent to which it depends on other jurisdictions, consumers and economies for the robustness of its own financial system. The Report is a unique way that the US Government has discovered to deal with its own fragility and dependence in the contemporary. This brief note will touch upon the following themes:

- Pressure of compliance
- Particular nature of the demands
- Impact on Discourse and Progressive Development

Opacity appears to characterize US engagement with intellectual property rights more than competence. At the cost of involving more stakeholders and therefore reaching more sustainable solutions, the USTR has consistently followed a policy of asymmetric involvement of stakeholders, concerted effort to influence academic discourse, application of political pressure under the veil of legality to pressurise smaller countries to ratchet up their IP laws to more restrictive levels. This is a recurrent theme whether through the ACTA, ongoing negotiations on the TPP (IP Chapter) and a raft of bilateral agreements the US has concluded in which the hand of Big Content and Big Pharma is but subtle. The 301 Report, for example, is a way for the US to signal its discontent at those jurisdictions in which its industries will find it difficult to protect their pecuniary interests. Laws that allow generic medicine or enhance access to reading material online do not suit the pharmaceutical and publishing industries that lobby the USG on a continuous basis. This pressure to comply that usually takes on subtle forms at diplomatic setups, has been brazen when it comes to IP compliance. The US demands not just the protection of the rights of *all* stakeholders on an even playing field but the protection of *specific* rights of *specific* stakeholders in a manner that is nothing but coercive.

The specificity of the demands came to the forefront in the US response to India’s *Novartis* judgement that established the “enhanced efficacy” standard for granting of patents. The ideology that the SC is clearly espousing is that the threshold for patents must be high given the virtual monopoly that it grants its holders at the expense of immediate innovation and access that would logically flow from a major discovery. The USG is clearly displeased with the impact the judgement would have on the “patentability of potentially beneficial innovations”. Now, it is clear that the standard of the Supreme Court is not patently at odds with the three step test for a patent: being new, must involve an inventive step and must have an industrial application. Enhanced efficacy has been read into ‘new’ with the Court opining that not every minor change in the product makes it new and deserving of legally protected monopoly. However, such technicalities aside, the specificity of the demand is worthy of attention. The Report is not just an exercise at mapping the IP developments in

different nations, an exercise that no doubt all would appreciate given its academic value but is an expression of US reaction at every legal development abroad – one might say sovereignty is at stake here. The *raison d'être* of sovereignty is to protect the legal and cultural diversity of nations, to ensure that the inevitable hierarchy of nations does not lead to the universalization of norms. The report is the antithesis of this idea and is deserving of a scathing sovereignty challenge.

Finally, the impact that such projects of universalisation has on diversity and development merits attention. The tacit assumption of the 301 Report is the presumed correctness and efficacy of US IP laws. So, the USG is not only harming the diversity abroad but also within its borders by choosing to export and market a particular interpretation of its IP laws. This project, if successful or even just its attempt, harms the field of IP in the long run. The notion of progress in any field of study is hinged on the possibility of inclusion of a wide spectrum of opinions. The 301 Report is the way for the USG to signal displeasure, an oft-used euphemism, at IP developments that don't suit it. This moulds the progress of IP laws in a singular direction at the cost of the value that diversity brings with it. A consequence of such efforts is the paralysis that we're witnessing now. Long drawn efforts of the USG to shut out opinions that it doesn't like has led to an establishment that speaks the same voice and language. When confronted with the issues that the internet, digitization and anonymity threw up, the establishment went into paralysis and displayed its police powers in all its infamous might. The teenagers, musicians and activists became the pirates of the contemporary to face the music – because listening to their side of the story was a lost art.

### 1.7.2 WTO and Emerging IP Norms

The World Trade Organization has played a seminal role in the process of introduction of intellectual property norms and practices into the multilateral trading system. The reason behind this interaction between trade and intellectual property is that with the maturation of the knowledge economy, ideas have become an important constituent of the trading process. Ideas have become the goods of today and are crucial for the initiation of industry, innovation and sometimes entire economies. One need only look towards Silicon Valley to understand how ideas can create and shape economies and why understanding the structures of trading of ideas is so very critical. Further, even the traditional manufacturing process and the products that are a result of it have seen an infusion of innovation and creativity in their design. This issue can be examined from the other side as well- the protection of intellectual property rights have a significant impact on economies and innovation. Regimes of IPR protection therefore assume great importance in the scheme of trade.

Now, the variation of IP norms across the world was a source of concern for the WTO and entrenched business interests as the diversity does not suit profit maximization. Cultural diversity was something to be appreciated as long as it did not come in the way of business. Therefore, in furtherance of the

standardization of IP norms, the Uruguay Round was commenced. The goal was to instil clarity in global understanding of IP rules across jurisdictions and to be able to resolve disputes in a predictable and amicable manner. Common international rules were negotiated and the TRIPS Agreement started taking shape. In the course of time, the TRIPS Agreement became one of the foundational agreements of the WTO, forming one of its 'three pillars', the other two being trade in goods and trade in services.

The two principles of national treatment (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS) and most-favoured nation form the foundation of intellectual property negotiation. The engagement of trade norms with IP rules is aimed at reducing barriers to trade, and by extension the trading of ideas. The national treatment principle states that the manner in which governments treat their own citizens must be similar to the way they treat foreigners. This is to ensure that governments do not treat their own citizens more favourably than foreigners thereby denying them the equal opportunity to access markets. The goal of equal access to markets is thwarted the moment governments set up preferences that disadvantage foreign firms. We see this extreme even today in the form of excess taxes on particular nationals in countries that are not particular friendly towards it. Business, in a certain sense, must be blind towards national differences. This prioritization of free trade is reflected in MFN Principle as well – which states that any favour granted to one's own nationals or to any one country must be extended to all countries that are trading partners in the WTO. These two principles capture the gist of the TRIPS Agreement.

Another aspect of this agreement is the process of ensuring that at least minimum levels of IP protection are offered in all countries. The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works were the two regimes in existence prior to the establishment of the WTO. What the TRIPS Agreement did was to both cover all the areas of IP protection that were precluded by the Paris and Berne Convention and to collate all the norms in one single agreement, thereby making diplomacy on IP norms an easier process. The TRIPS Agreement covers, inter alia, copyright, trademarks, geographical indicators, industrial designs, patents, integrated circuits layout designs, trade secrets, curbing anti-competitive licensing contracts and technology transfer.

TRIPS has come under a modicum of sustained criticism because of its overbroad nature. It is at the forefront of emerging IP norms that seek to sacrifice access at the altar of IP protection, without the understanding that there won't be anything for IP norms to protect if access is not promoted instead of being diminished. Critics condemn the TRIPS in toto as being an agreement that was born out of a genuine fear of US firms that they would lose their competitiveness after the slump of the 1980s. Thus commenced the effort to link IPR and trade spearheaded by Big Pharma, and eventually also by Big Content (music, sound and other copyright-based industries), that resulted in the amendment of Section 301 of the US Trade and Tariff Act. This called for trade sanctions on countries that did not comply with basic minimum norms on IP protection. This carrot-and-stick policy has continued since in the form of



tacit and explicit efforts to export US IP norms under the garb of international negotiations and well-drafted euphemisms.

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## **1.8 LET US SUM UP**

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By this time, you have understood that IPR is like any other property rights that enable the owner to economically benefit for the works. While copyright is the first kind of IPR available to human-kind, other types of IPR are related to patents and trademarks. Each of these has their specific laws in different jurisdictions. We also briefly discussed other types of IPR such as trade secrets, geographic indicators and traditional knowledge. We also discussed the emergence of World Trade Organization, and its response on global exchange of intellectual property.

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## **SOME USEFUL VIDEOS**

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Copyright by WIPO, **Video**<sup>1</sup>

Patents by WIPO, **Video**<sup>2</sup>

Trademark by WIPO, **Video**<sup>3</sup>

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<sup>1</sup><http://www.youtube.com/watch?v=eEB5MYcj-Ns>

<sup>2</sup><http://www.youtube.com/watch?v=Bb9EBtlGx7w>

<sup>3</sup><http://www.youtube.com/watch?v=J-PYuZOPrZI>

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## UNIT 2 COPYRIGHT

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### Structure

- 2.0 Introduction
- 2.1 Learning Outcomes
- 2.2 Origins of Copyright
- 2.3 Understanding Copyright and its Components
- 2.4 Important International Legal Instruments
- 2.5 Let Us Sum Up

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### 2.0 INTRODUCTION

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As a researcher you will often be associated with creation of scholarly work that will fall within the scope of copyright law in your country. As creator of new knowledge and intellectual property, it is important for you to understand your rights associated with your work. Continuing from the Unit 1 in this module, we expand the copyright area in this unit to discuss authors' rights, the controversy surrounding idea and expression, fair dealing and transfer of rights. We also identify and briefly discuss the international legal instruments related to copyright.

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### 2.1 LEARNING OUTCOMES

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*After studying this unit, you are expected to be able to:*

- Describe the origins of copyright;
- Understand the various components of copyright laws;
- Identify important international legal instruments in the area of copyright;
- Understand the application of copyright in the digital era; and
- Explore both sides of the copyright debate and identify the key issues involved.

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### 2.2 ORIGINS OF COPYRIGHT

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In today's world, the justification employed in support of copyright is that it enables the creator/author of a work to realize economic benefit from the same and that this acts as a motivation for further creation. This understanding is grounded in the capitalist approach to an economy, that is, goods and services command a monetary value, and their utilization is contingent on the exchange of money for the same.

The origins of copyright might not necessarily be founded on this economic understanding. What relatively undisputed, however, is that the origins of copyright can be traced back to the invention of the printing press and the industrial revolution, which gave rise to greater dissemination of books and

other reading material to the general public. What remains unclear is the rationale for this introduction of copyright, and there are largely two broad schools of thought in this division. The first of these schools argues that the origins of copyright may be traced to England, and the Licensing of the Press Act, 1662; passed by Charles II after concern over the unregulated copying of books. This legislation required copies of books to be deposited with the Stationers' Company and established a register for licensed books. This legislation, it is said, merely continued the existing system of licensing of material. The second school of thought argues that the intent behind the introduction of these reforms was not concern over the unregulated copying of books, but was to control the amount of printed matter in circulation, i.e., censorship. The Stationers' Company was granted a monopoly over all printing in England, over old and new works. It further had the right to search and confiscate unauthorized presses and books. The licensing system required that the printing of books only follow the entry into the Register, and the entry into this Register would only be possible after clearance was obtained from the Crown censor or had been self-censored by the Stationers' Company. The first copyright act was the Statute of Anne, 1710, of the Parliament of Great Britain. This legislation granted publishers rights over the work in question for a fixed period of time.

The past few centuries have seen copyright law make significant advancements from the position expounded in the Statute of Anne. From being a staple only of the publishing industry, copyright law now transcends industries, and includes within its purview not only books and reading material, but also sound recordings, photographs, cinematographic films, software, architectural works and more.

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## 2.3 UNDERSTANDING COPYRIGHT AND ITS COMPONENTS

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In this section, we will understand the various components of copyright and copyright law.

### **Nature of the Right**

One of the fundamental principles of copyright law was that of territoriality, that is, the copyright granted by law is only recognized and enforceable in the territory of the state that has granted the said right. The exception to this situation is one in which the state in question has entered into any international agreement to the contrary, which is the case with most nations of the world today. That said, however, there are many aspects of copyright laws that remain territorial in nature. The most important of these include the term of copyright and situations that qualify as fair use/fair dealing; which we will discuss in the subsequent sections.

Generally, the term of copyright is the lifetime of the author (creator/owner) (plus) fifty to hundred years from the death of the creator. In the case of anonymous works or where the copyright vests in the corporation, the term of copyright is a fixed period, usually between fifty to hundred years from the date of creation of the work.

Copyright extends to a variety of ‘works’, either literary, artistic, dramatic or scientific. These include, among others, books, stories, poems, plays, motion pictures, music compositions, software, drawings, sound recordings, industrial designs etc. The owner of the copyright typically has the exclusive right to produce copies of the work, decide the terms and conditions for import/export, transmit the work in any manner, perform/display the work, create adaptations or derivations of the existing work and to transfer these rights to any other person, either by assignment or sale.

### **The ‘Idea’-‘Expression’ Dichotomy**

The common misconception is that copyright protects ‘ideas’. You might have heard the phrase in common parlance; “I have this great idea for a story... I’m going to copyright it.” This is a classic illustration of a misunderstanding of what copyright protects.

Copyright does not protect idea or mere information. The protection is only extended to the expression of this idea/information. For instance, assume that there was the basic plot of a murder mystery; and you authored a book on the same. The copyright of that book would vest with you and/or the publisher of that book. If this basic plot was modified and expressed in a different form and resulted in another novel, the copyright of the second novel would vest in the author and/or publisher of the second novel.

### **Fair Use/Fair Dealing**

While the general rule is that all copying and distribution of the copyrighted work has to be done with the express permission of the copyright holder, some exceptional circumstances allow for this requirement to be dispensed with. These are known as fair use/fair dealing (depending on the jurisdiction). In most jurisdictions across the world, private use, copying for the purposes of education/research/study, non-commercial purposes, making accessible copies for persons with print disabilities and temporary reproduction of the work in machine readable form for a computer and making transient and incidental copies of the work would, among others, fall under this exception. The guiding principles to be followed when examining ‘use’ as fair use/fair dealing include examining the nature of the copyrighted work, the purpose of the intended use, proportion of the original work in the new work and the effect of the intended use on the potential market of the copyrighted work in question.

### **Transfer of the Right**

Aspects of copyright are transferrable from one person to another. This transfer may be as a result of assignment as well. This is typically the case in today’s world, where an author transfers the copyright to the publisher in return for a

lump-sum payment, and the royalties accruing from copyright are payable to the publishers. Similarly, a music composer transfers royalties to the record companies, film makers to producers and so on.

While in most instances the prior permission of the copyright holder is a prerequisite for using a copyrighted work and one requires a license from the holder to use the work, in some cases, it might not be needed to obtain this from the holder of the copyright. This concept is that of the compulsory license, which is recognized in some jurisdictions. This application is to be made to the government/established authority with a proper notice.

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## 2.4 IMPORTANT INTERNATIONAL LEGAL INSTRUMENTS

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This section examines important international legal instruments applicable to the area of copyright and related rights, and provides a brief overview of their contribution to the development of international intellectual property law. In addition to examining existing legal instruments, this section also presents a perspective on ongoing negotiations at the WIPO.

### **Berne Convention<sup>4</sup>**

Formally referred to as the **Berne Convention for the Protection of Literary and Artistic Works**, The Berne Convention is an international agreement governing term of copyright, and was first accepted in Berne, Switzerland, in 1886. This requires signatories to not only recognize the copyright of works of authors of one's own country, but of all other signatory countries as well, and also required member states to provide strong minimum standards for copyright law. Under the Berne Convention, copyright must be automatic and prohibits the requiring of formal registration.

### **WIPO Internet Treaties<sup>5</sup>**

With the technological progress brought on by the last several decades, there was a need to address new questions concerning copyright as new means of worldwide communication allowed for new ways of spreading creations. As a result, WIPO set the standards for copyright protection in cyberspace through the **WIPO Copyright Treaty<sup>6</sup>** (WCT) and the **WIPO Performances and Phonograms Treaty<sup>7</sup>** (WPPT), known together as the "Internet Treaties." These treaties aimed at preventing unauthorized access to and use of creative works on the Internet and other digital networks.

The WCT looks at protection for authors of literary and artistic works, such as writings and computer programs, musical works, and works of fine art and

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<sup>4</sup>[http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698)

<sup>5</sup>[http://www.wipo.int/copyright/en/activities/internet\\_treaties.html](http://www.wipo.int/copyright/en/activities/internet_treaties.html)

<sup>6</sup>[http://www.wipo.int/treaties/en/text.jsp?file\\_id=295166](http://www.wipo.int/treaties/en/text.jsp?file_id=295166)

<sup>7</sup><http://www.wipo.int/treaties/en/ip/wppt/>

photographs, while the WPPT outlines protection for authors rights of performers and producers of phonograms.

### **Marrakesh Treaty<sup>8</sup>**

The **Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled** specifically defines its beneficiaries and aims to facilitate access to works in any accessible format for these beneficiaries, the blind or visually impaired, by removing barriers to access, recognising the right to read, and establishing equal opportunities and rights for the blind, visually impaired and otherwise print disabled persons who are marginalised due to lack of access to published works. It is expected to alleviate the “book famine” experienced by many of the 300 million people suffering from such disability, WHO-estimated in the world. This book famine is partly due to access barriers in copyright law, which the treaty helps to remove. Within India alone, there are an estimated more than 63 million visually impaired people, according to the World Health Organization (WHO), of whom 8 million are blind.

Countries that ratify the treaty are required to have an exception to domestic copyright law, which means that visually impaired and print disabled people and their organisations are allowed by law to make accessible format books without the need to ask permission first from the author or publisher who holds the copyright.

### **Beijing Treaty<sup>9</sup>**

The early 20<sup>th</sup> century brought the development of an industry around silent films, and shortly after talking pictures. For the first time, performers – such as actors and singers – were being recorded, with their performances reproduced and distributed to vast audiences. While the **WIPO Performances and Phonograms Treaty** (WPPT) modernized international standards for sound performances, audio-visual performers and their performances continued to be largely unprotected with only gave limited rights.

On June 26, 2012, the WIPO **Beijing Treaty on Audio-visual Performances** (BTAP) was finalized in its final round of negotiations while at the diplomatic conference in Beijing to do so—putting an end to over 12 years of negotiations. For the first time, the treaty brings audio-visual performers into the sight of the international copyright framework.

The BTAP seeks to strengthen the economic rights of film actors and other performers and to potentially provide extra income from their work, i.e. by enabling performers to share proceeds with producers for revenues generated internationally by audio-visual productions. By providing a clearer international legal framework for their protection, the new treaty aims to strengthen the position of performers in the audio-visual industry, and also to

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<sup>8</sup><http://www.wipo.int/treaties/en/ip/marrakesh>

<sup>9</sup><http://www.wipo.int/treaties/en/ip/beijing/>

protect the rights of these performers against unauthorized use of their performances in audio-visual media, such as television, film and video.

### **Broadcast Treaty<sup>10</sup>**

Officially known as the **Treaty on the Protection of Broadcasting Organizations**, the WIPO Broadcasting Treaty is an ongoing proposal to grant copyright-like protection to broadcasters in their signals, and to give broadcasters some control over the content of their broadcasts. In addition to the copyrights held by the creators of the works, in order to prevent signal piracy.

This treaty has received much opposition from non-governmental organizations for acting as an additional roadblock to accessing content broadcasted in the sense that a broadcaster may receive protection for the content of their broadcasts when they have no copyright in what they show. This treaty is also said to threaten the nature of the internet as a communication medium by giving rights to the middleman for feeding any “sounds and images” through a web server as opposed to the creator having the rights over their own works.

This treaty is said to be a means of preventing “signal piracy,” but is argued to go well beyond the scope of signals to govern and control the content of the broadcasts themselves.

### **Limitations and Exceptions for Libraries<sup>11</sup>**

The **Treaty on the Limitations and Exceptions for Libraries and Archives** is a proposed treaty to guide the WIPO’s Member States in updating the limitations and exceptions for libraries worldwide—the primary institutions for providing information as a public good. This treaty aims to address the need for libraries to have international copyright norms, along with limitations and exceptions (or legal flexibilities) in order to ensure a balance between users and creators of protected works. By copyright exceptions alone, libraries are able to preserve and make available works. These same exceptions, by which libraries are legally governed, had been established in the print era and have not been updated to meet the needs of the digital age. As users have an increased access to books online and have moved from photocopying chapters to downloading them, restrictive copyright laws continue to obstruct access and reproduction of material for the purpose of knowledge sharing.

Such an international instrument to standardise these exceptions and limitations for libraries and archives is argued to be critical especially from the perspective of developing and least developed countries, to ensure development of an international copyright system that balances the rights of the users and rights holders.

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<sup>10</sup><http://www.wipo.int/pressroom/en/briefs/broadcasting.html>

<sup>11</sup><http://www.wipo.int/copyright/en/limitations/>

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## 2.5 LET US SUM UP

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The origins of copyright may be traced to England, and the Licensing of the Press Act, 1662; passed by Charles II after concern over the unregulated copying of books. This legislation required copies of books to be deposited with the Stationers' Company and established a register for licensed books. Some other believe that such a legislation was not concern over the unregulated copying of books, but was to control the amount of printed matter in circulation, i.e., censorship. The first copyright act was the Statute of Anne, 1710, of the Parliament of Great Britain. This legislation granted publishers rights over the work in question for a fixed period of time. In this unit we studies various international legal instruments related to copyrights that provides various components of the same, sued in different ways in different geographical entities. While authors' moral rights over the work and rights to trade the work are common, the number of years for which the copyright is allowed differs. Some countries allow copyrights up to 50 years after the death of the authors, while others allow up to 70 years. Copyright laws allow fair use or fair dealing for private use and for educational purposes. We also learned that ideas are not copyrighted, but the expression of ideas is copyrighted.

In the next unit, we will discuss the system to help authors and creators share their work through a system of legal licensing system.



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## UNIT 3 ALTERNATIVES TO A STRICT COPYRIGHT REGIME

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### Structure

- 3.0 Introduction
- 3.1 Learning Outcomes
- 3.2 Copyright: Fostering Creativity by Restricting Information?
- 3.3 Two Case Studies
  - 3.3.1 The Photocopy Case – Need for a Commons
  - 3.3.2 An Act of Subversion – Copyright and a Police State
- 3.4 Two schools of thought of IP law: IP maximalism and minimalism
- 3.5 Examining Alternatives: Creative and Science Commons
  - 3.5.1 The Possibility of Alternatives
- 3.6 Creative Commons License
- 3.7 Types of CC licenses
  - 3.7.1 Attribution License
  - 3.7.2 Attribution-ShareAlike License
  - 3.7.3 Attribution-NoDerivs License
  - 3.7.4 Attribution-NonCommercial License
  - 3.7.5 Attribution-NonCommercial-ShareAlike License
  - 3.7.6 Attribution-NonCommercial-NoDerivs License
- 3.8 Addendum Claims
- 3.9 Let Us Sum Up

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### 3.0 INTRODUCTION

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“The purpose of intellectual property law (such as copyright and patents) should be, now as it was in the past, to ensure both the sharing of knowledge and the rewarding of innovation. The expansion in the law’s breadth, scope and term over the last 30 years has resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend.”

- The Adelphi Charter<sup>12</sup>

The idea of intellectual property is a simple and elegant one to comprehend. It aims at conferring value on goods so as to act as a system that incentivizes innovation – a brainchild of the information economy. Copyright is but one galaxy of the IP universe. Copyright gives the creators of a wide range of material certain rights that enable them to control the use of that material. Whether through a strict licensing system or royalty, copyright owners significantly benefit from their work by controlling if and how it is used. Our

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<sup>12</sup><http://legacy.earlham.edu/~peters/fos/2005/10/adelphi-charter-to-protect-public.html>

discussion of copyright law in this unit will focus on the implications of the latter aspect of copyright and will present a pragmatic view of the alternatives available. As you may have gleaned from the wording of the definition, there are two aspects of copyright – *first*, is the conferral of, often exclusive, rights on creators and *second*, is the ability to not just benefit from the use of the copyrighted material but also control and restrict its use. The latter aspect enables the former but is in many ways pernicious and harmful to the free flow of information. This unit will help in a clearer understanding of the pitfalls of a restrictive copyright regime. Further, it will also introduce you to some emerging alternatives to strict copyright laws. We will gain a bird’s eye view of interesting discussions surrounding these alternatives while simultaneously gaining a pragmatic understanding of how to work with the alternatives.

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### 3.1 LEARNING OBJECTIVES

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*After working through this unit, you are expected to be able to:*

- Understand the manner in which contemporary copyright laws are restrictive;
- Explain succinctly the need for thinking about alternatives to strict copyright regimes;
- Navigate through the system of Creative Commons licensing; and
- Use appropriate Creative Commons license for your needs.

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### 3.2 COPYRIGHT – FOSTERING CREATIVITY BY RESTRICTING INFORMATION?

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Incentivizing creativity stands at the heart of copyright laws. The world’s first copyright statute, the 1710 Statute of Anne, was drafted to act as an incentive for creative output. Copyright advocates opine that no economy can function without a system of incentives. Staunch supporters even go to the extent of saying that without copyright, authors, artists and researchers would simply stop working. They cannot imagine that intellectual discourse can occur without vesting an exclusive *property* right in intellectual output. As more and more people began to comprehend the lacunae in such a system, a counterculture emerged. Proponents of this counterculture, which we will understand in the course of this unit, argued that the idea of property as we know it does not conform to the contours of intellectual goods. A house or land is not the same as a book or a YouTube video. This provides a laconic overview of the two schools of IP thought, which we will return to at a later point. For now, it is important to understand the immense value that creativity and innovation carry in our economy. For example, the software industry would collapse if talented programmers stop writing more sophisticated code that meets the changing needs of industry and research. The question that many are asking today is whether our understanding of copyright is in consonance with its stated goal?

Let us consider a contemporaneous and relevant example and study it to get a better understanding of what we're discussing. Universities prize publications both of its teachers and students. While students seek to rack up as many publications as possible to include in their resumes, faculty members have an entire system of promotion and research grants that are linked to the number and quality of their publications. These research papers, very often of high quality, are submitted to prestigious national and international journals where they undergo a rigorous editorial process. Authors hope to publish in a prestigious journal with the hope that their research will be read by as wide an audience as possible. This research output is not only a reflection of the quality of academics in our universities but is also crucial to the development of fields of study. Intellectual property law, for example, is shaped every day by the thousands of articles and books published every year by professors, academicians, independent researchers and students of the field. When Albert Einstein wanted to tell the world about his Special Theory of Relativity, he wrote a paper titled '*On the Electrodynamics of Moving Bodies*', which together with his 'Annus Mirabilis' papers transformed the study of physics forever. Suffice to say that academia depends almost entirely on the research output that is compiled in journals. Therefore, it is crucial that these papers are not only published by eminent journals but are also accessible for the purpose of education and research, for what is the point of publishing path-breaking work on a legal doctrine or scientific data but only allowing a miniscule minority of the academic community to access it? However, that is precisely what is happening today. These journals are compiled by large corporations for the purpose of creating databases of knowledge. Very often, these corporations then exercise the exclusive right to publish or provide access to these journals. In a cruel twist of language, these 'knowledge companies' then charge prohibitively high fees to access these databases, thereby effectively restricting the number of people who can read them. Smaller research institutions, rural universities, individual researchers and others are precluded from reading these research papers simply because they cannot afford it. Attempts to access and use the information are met with coercive legal sanction egged on by vested corporate interests.

This growing privatization of knowledge strikes at the very reason for the existence of copyright laws - encouraging creativity. The current system would rather protect Einstein's copyright and place his revolutionary paper under lock and key rather than allow free access and engender robust discourse in physics, thereby serving the greater good. Restrictive copyright laws such as the Sonny Bono Copyright Term Extension Act that extended the term of copyright to far beyond the life of the owner stand in the way free flow of knowledge. No artist or author works in a vacuum. Authors read entire libraries to write a single book while artists study diverse genres of paintings to gain inspiration. Isaac Newton, in a moment of candour, himself admitted that "If I have seen further it is by standing on the shoulders of giants." Access to the most contemporary works in their field is crucial to researchers, artists and authors- the purported beneficiaries of copyright. Contemporary copyright, on the other hand, thrives on restricting access by placing it in the hands of profit-hungry companies. Subjecting the logic of creativity to the convolutions of the marketplace has

landed copyright laws in quite a soup. Two examples illustrate this and establish a desperate need to imagine alternatives to our copyright regimes—alternatives that contemplate the complexities of the internet, digitization of mass media, emergence of new media and the epochal proliferation of technology into even the most quotidian aspects of our lives.

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### 3.3 TWO CASE STUDIES

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We will now study two case studies with great contemporary relevance. Through these studies we hope you will gain a clearer picture of the lacunae in our copyright laws. We hope you will understand the myriad ways in which copyright comes in the way of access to information and acts more as a tool for censorship than one to nurture creative output. Finally, these case studies will set the stage for the alternatives we hope you will gain a holistic understanding of.

#### 3.3.1 The Photocopy Case – Need for a Commons

Consider a reprographics (or photocopy as it is colloquially called) shop in a university campus. Now, students of this university are studying medicine and need to refer to the best textbooks in order to be competent in their craft. The best textbooks are published by the world's most famous publishing houses and cost exorbitant amounts. This not only places these textbooks beyond the realm of affordability for the students but also means that the library itself can procure just two copies of the textbook. Obviously, these are an inadequate number for students as they need to refer to these textbooks on a near continuous basis. Therefore, the university found a solution to this crisis of access by requesting the reprographics shop (that is a part of the university system) to put together modules that contain excerpts of multiple textbooks that the students need to refer to over the course of their study. These modules are, of course, meant only for the students and are not sold to anybody else. This has irked the publishing houses in question who feel that for every such module produced, they lose revenue. In order to recover this purportedly lost revenue and to make an example of the reprographics shop in an effort to curb the rampant practice of photocopying by students, they sue the shop for copyright infringement. Keeping aside the technicalities of copyright law that this scenario invokes (something we will return to), consider the legitimacy of the practice of photocopying. Further, try and think of arguments both in favour of and against the reprographics shop.

A brief overview of the arguments advanced in this case will help in contextualizing what we want to glean from it. The publishers argue that the act of photocopying infringes their copyright over the material and causes economic loss. They extend this argument further by stating that this also harms the academics whose works are being photocopied for a fraction of the price that would have otherwise been paid for the actual book. The defendants respond to both these arguments. First, they state that the current system of copyright benefits the publishing house more than the author as the author gives up his right over the work to the company in return for a one-time

royalty of sorts. Even if authors do benefit, a group of more than 300 academics from across the world, including some named in the lawsuit, have come out strongly in favour of the defendant. They have asked for the lawsuit to be dropped as they are in favour of their work being accessible to a wider audience. In a Third World country, like the one this shop is located in, the prices that publishing houses demand for their books are often beyond the means of all but the elite. Authors argue that in instances like this pecuniary interests must give way to the overwhelming public interest in greater access. Second, the defendants have argued that the ostensible economic loss that publishers claim is only an imaginary spectre of loss. The books that are photocopied are often too expensive for students (or even libraries in some instances) to procure for themselves. Photocopying is the only way to obtain access and prohibiting photocopying for the purposes of research would leave the students in the book-less shadows of copyright.

We understand from this that even the authors of the copyrighted works are in favour of a more relaxed regime. They understand that the extant regime is one that would, in the long term, diminish the quality of public discourse for the sake of greater profits. They certainly see a modicum of incentive in protecting the idea of copyright but excessively strict regimes also mean that access acquires the status of an incentive.

### **3.3.2 An Act of Subversion – Copyright and a Police State**

At times, excessively strict laws take on a sinister design when coupled with the draconian powers of an overzealous state. Consider the case of a bright young programmer- a child prodigy of sorts who was coding, hacking and programming in his pre-teens. He is not only a bright programmer but also uncannily aware of the larger political climate in which he was operating.

This political maturity helped him understand the implications of his work and the change he could effect. He was deeply disturbed by the gravitation towards the privatization of knowledge that he was witnessing in the information economy. On one afternoon, he tapped into the silos of a social science journal database and downloaded millions of articles. He intended to then make these articles accessible on open access sources on the internet. These articles that he downloaded were already to be released to the public domain. This act of resistance and subversion earned the ire of not only the publishers but of his Government which charged him with multiple counts of felony that could have landed him in jail. Copyright protection had never been this sinister. To the government, the fact that these articles were going to be released anyway was a mere inconvenience. They were intent on dealing with the activities of troublesome hackers with a firm hand. The government pursued this case with uncanny efficiency- an efficiency that it reserved not for matters of administration or law making but for cases like this one. Consider the legitimacy of this act. More importantly, think about the broader implications of what this subversion means. Draw historical equivalents with similar watershed moments in history if you so wish to.

It establishes a compelling need to move away from the restrictive regimes of copyright that we have today into one that gives more room to breathe to the creators and consumers (with the line between the two slowly blurring) of the digital realm.

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### **3.4 TWO SCHOOLS OF IP THOUGHT: MAXIMALISM AND MINIMALISM**

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Contemporary debates on IP largely settle into a binary with a small but vocal group advocating a raft of alternatives that we will discuss in the course of this unit. This binary grouping further helps in the contextualization of these alternatives to strict copyright regimes. IP maximalists and minimalists have drastically different ideas of the contours and consequences that IP law must hold. At a more fundamental level, they also disagree on the very idea of property.

IP maximalists conceptualize intellectual property as a building block of the economy. That do not see how intellectual goods and services can be ‘marketized’ so to speak without vesting a property right in it, either to the creator or the company that engages in its dissemination. Further, maximalists see IP as intrinsic to the human existence in this era. When intellectual goods are the scarce, valued goods of the contemporary treating them as property seems to be the only logical consequence.

IP minimalists on the other hand perceive IP to be a legal fiction that is extrinsic to our existence, a tool of the information age that seeks to manage the flow of goods, not play a deterministic role. They also believe that the term intellectual property means naught because it attempts to club a host of diverse subjects into an unlikely group. Patents, copyright and trademark, they argue, are each governed by a unique set of norms. Forcing a common thread to run through all three to create a discipline is something that many are against. There are also dangerous ramifications to this, especially when justifications for copyright are made using the example of pharmaceuticals patents, when there exists nothing in common between the two. Finally, there’s an entire line of thought that believes that knowledge should not be relegated to the caprices of the private sphere but must remain the vital public resource, a part of the commons that it is. The concept is that nothing can be constructed in a vacuum; so whether you have authored a book, penned lyrics, shot a YouTube video or a multi-billion dollar movie, you have been inspired by, drawn and learnt from, and engaged with a large corpus of other people’s work. Therefore, you owe it to the community at large to ensure that your work is also made available to the authors, artists and creators of the future.

The mainstream school of thought continues to be that of maximalism. It is one where copyright is seen as the norm, while the commons as the exception. So far, we have discussed what the shortcomings of such a system are and how it affects the multiple stakeholders at play here – the creators, the consumers, the respective fields (music, academics etc.) and the economy/community at large. We understand that continuing down this path will lead to the Balkanization of

knowledge with the greatest access being made available only to the most privileged sections of society with entire academic communities, and sometimes regions, being left out of the conversation. The sad irony of this predicament we find ourselves in is that today we live in an age when information exchange is more democratic and possible than ever before with advances in technology and the widespread proliferation of the internet. This move to the digital space also provides answers to the IP conundrum. The alternatives that we discuss - Creative Commons and Science Commons licenses – are products of the digital world that transcend the limitations of copyright laws drafted by individuals who as Swartz would say don't "understand what the internet is"<sup>13</sup>.

We will also introduce you to other alternatives that are gradually gaining traction such as the Creator-Endorsed Mark that was used as the preferred licensing tool in the film 'Sita Sings the Blues'.<sup>14</sup> By the end of this unit, you would have gained a holistic understanding of the conceptual basis of the creative common system and practical knowledge of how to procure a license.

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### 3.5 EXAMINING ALTERNATIVES: CREATIVE AND SCIENCE COMMONS

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Critiquing a system is merely one side of the coin. Offering viable alternatives or solutions to the lacunae identified in the status quo significantly buttresses critical claims. How do we wish to imagine alternatives to restrictive copyright regimes that are being exported on an alarming scale? Quite expectedly, traditional ways of thinking and reacting have proved futile to the overwhelming support that current systems of copyright receive from the elite of today. Therefore, alternatives have moved to the internet and understood the logic of its read-write culture. New media such as YouTube and platforms like WordPress have made each one of us not mere consumers of information but potential authors, film makers. Any viable alternative must contemplate this transformation of the read-only culture of the internet to the read-write culture.

This section will have three focus areas: *First*, we will explore whether it is even possible to discuss alternatives when the current IP system has dominated the discourse for so long. *Second*, we will focus on the most developed and entrenched alternative to mainstream copyright regimes presently, the Creative Commons licensing system. *Third*, the science commons merit our attention as we read about how the sciences have also developed their own version of the commons. *Finally*, this fast developing counterculture to mainstream copyright deftly refuses to agree with a conclusion of any kind. So, in lieu of a conclusion, we will discuss a spectrum of emerging alternatives.

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<sup>13</sup><http://www.youtube.com/watch?v=RFsXQXxw0Vs>

<sup>14</sup><http://archive.mises.org/13286/the-creator-endorsed-mark-as-an-alternative-to-copyright/>

### 3.5.1 The Possibility of Alternatives

The first question that arises is whether it is even possible to present alternatives when there has been little to no room given to even imagine a paradigm where intellectual goods are not vested with the characteristics of property. Parallels may be drawn to asking what a free market in legal services would be like or what free access to airwaves would mean. These questions always come to naught, in the opinion of some<sup>15</sup>, since it is not the burden of the critic of an entrenched status quo to offer tangible alternatives to be taken seriously. Very often, these are also advocates of a situation of IP anarchy where there is no concept of intellectual property whatsoever. There exists a school of thought today that believes that it is not possible to imagine any alternatives as long as we continue to function in this political economy. However, this particular line of thought is of little interest to us in this module since it is restricted to the realm of critique sans the presentation of any tangible, even tentative, alternatives.

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## 3.6 CREATIVE COMMONS LICENSE

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**Figure 1: Creative Commons Logo**

The Creative Commons license system evolved as a response to the restrictive system of copyright that many felt was stifling creativity instead of fostering it. Creative Commons (CC) is a non-profit organization that functions across the world to provide licensing tools to authors of creative works. What is unique about the licensing system is that it empowers the authors themselves to decide what kind of a license they want. This flexible copyright system was meant to enable a kind of internet culture that embraces rather than detracts from sharing, remixing, developing and parodying another person's work, as a form of creativity than disrespect. The system was conceptualized by a number of

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<sup>15</sup> *ibid*



individuals at the helm of the copyleft movement, of whom the most prominent is Professor Lawrence Lessig. The idea behind this new license system is to give back to the commons. It is conceptualized in a manner that is cognizant of the importance of the commons to creative output. Finally, it is also aware of the distinction between the commons of yore and the digital commons. The digital commons has content that can be worked upon to create new content. Licensing systems need to allow for this kind of creativity subject to the consent of the author and the ‘vast and growing digital commons’ can then be a fount of innovation in the digital marketplace of ideas.

A creative commons license is a large step away from the ‘All Rights Reserved’ model of the contemporary. In the current system, any creative work (say a book), will have all rights pertaining to the book reserved to either the author or the publisher. What this means that if any third party wants to do *anything* related to the book, prior permission will have to be sought. This struck many as unnecessarily tedious, if not impossible at times. Therefore, the Creative Commons system stands for ‘Some Rights Reserved’. As to what those some rights are, that varies from license to license that creative commons has on offer.

The CC system is not against copyright in any way but offers a middle path between overarching copyright laws and no IP laws at all. This system allows the creator to choose what kind of use she is comfortable with and will allow. Very often, creators are fine with the community using their work to build on other creative projects or as an instructional tool for educational or research purposes but uncomfortable with the commercial use of their work. CC licenses are tailored to these concerns.

Another aspect to CC licenses is that they are a part of the transition from a read-only culture of the pre-internet era to the read-write culture of today. Today, as we surf the web, the conversation we have with the internet community is a robust two-way dialogue. For example, ever remix of a YouTube video is a part of the creative dialogue and most creators are comfortable with and even encourage such uses of their work. Chunyan Wang<sup>16</sup> writes about George Lucas ‘Lucas the Litigator’, creator of the Star Wars series, who would earlier aggressively pursue anyone who attempted to use any of the songs/stills from the movies. In the course of time, the Star Wars team realized that they’re missing out on a great deal of popularity on the internet by adopting this attitude. Today, the Star Wars website has become the go-to place not just for fans of the series but also for the internet’s creative community since it allows for the non-commercial use of its works. Although this might be counter-intuitive to some, parodies and remixed of the original very often increase the popularity of the original. The example of Gangnam Style or – and the umpteen remixes on YouTube bear testimony to this fact of the digital era. This read-write culture, in expanding the contours of and participation in the conversation, made intellectual discourse much more informed. It is difficult to extrapolate enhanced quality of intellectual discourse from the mere remixing of Gangnam Style but the example is simply

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<sup>16</sup>[http://ses.library.usyd.edu.au/bitstream/2123/2360/1/CopyrightAsiaPacific\\_Ch14.pdf](http://ses.library.usyd.edu.au/bitstream/2123/2360/1/CopyrightAsiaPacific_Ch14.pdf)

illustrative of a transformed internet culture. Consider, for a moment, the Twitter feed of Professor Kyu Ho Youm<sup>17</sup> that has been recognized as one of the best media and law resources. Imagine the kind of dialogue such a feed would engender and we catch a glimpse of the transformative power of this read-write culture.

CC network exists actively in over 70 jurisdictions conducting a spectrum of activities to promote open content licensing and encouraging governments to bring their often archaic copyright laws in consonance with this emerging global standard.

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### 3.7 TYPES OF CREATIVE COMMONS LICENSES

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Once we get down to brass tacks, we understand that CC is not so much an alternative system that runs parallel to and independent of the extant copyright system but one that builds on existing copyright laws. This way, creators need not be wary of violating copyright laws or enforceability while choosing a CC license that suits them. Users have to answer two simple questions that will enable CC to choose a license that is best suited to their needs. First, whether or not the creator is willing to allow commercial use of his/her work and second, whether any derivative works are allowed. One aspect of the second question is the choice of many creators to allow for derivative work as long it is also shared i.e. it contributes to the digital commons. The CC license system has this choice inbuilt into its process. There are three versions of each license which are designed to ensure that all stakeholders on the process can access and understand the nuances. The first is the legal code layer that is written in language that lawyers are comfortable with. This is to ensure that the license begins as a “traditional legal tool”. The second layer is ‘human readable’ version of the license. The Commons Deed, as it is called, is intended to present the terms and conditions of the license to the licensors themselves and to the creative community at large who might not be comfortable with the excessively technical language that finds its way into the legal code layer. However, there is a stark distinction between the legal and the human readable version. The contents of the Commons Deed do not form a part of the legal version of the license at all. Therefore, in the event of a legal dispute only the legal code is relevant. The Commons Deed is only meant to make access to and use of the license a more user-friendly experience. Finally, it has the machine readable version as well that ensures that this system of copyright is compatible with the various kinds of technology that is meant to read it. This is so that the internet knows when a work is available under the Creative Commons license. Next, we will go through the various kinds of licenses that are available for content creators.

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<sup>17</sup><https://twitter.com/#%21/MarshallYoum>

There are six licenses (Table-1):

**Table-1: Six Types of CC licenses<sup>18</sup>**

License	Meaning
 <p>Attribution</p>	<p>This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered. Recommended for maximum dissemination and use of licensed materials.</p>
 <p>Attribution-ShareAlike</p>	<p>This license lets others remix, tweak, and build upon your work even for commercial purposes, as long as they credit you and license their new creations under the identical terms. This license is often compared to “copyleft” free and open source software licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use. This is the license used by Wikipedia, and is recommended for materials that would benefit from incorporating content from Wikipedia and similarly licensed projects.</p>
 <p>Attribution-NoDerivs</p>	<p>This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you.</p>
 <p>Attribution-NonCommercial</p>	<p>This license lets others remix, tweak, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms.</p>
 <p>Attribution-NonCommercial-ShareAlike</p>	<p>This license lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms.</p>
 <p>Attribution-NonCommercial-NoDerivs</p>	<p>This license is the most restrictive of our six main licenses, only allowing others to download your works and share them with others as long as they credit you, but they can't change them in any way or use them commercially.</p>

Net, we will demystify all these terms and make it easy for you as a creator/ researcher/ academic to choose an appropriate license for your needs.

<sup>18</sup><https://creativecommons.org/licenses/>

### 3.7.1 Attribution License (CC BY)

The Attribution license exists on one end of the spectrum of licenses that CC has on offer. It is the most enabling and non-intrusive license in that it allows both sharing and adapting. The copying and redistribution of the material is allowed in any medium or format for any purpose, including commercial purposes. Also, adaptation or the derivation of the material is also allowed. This is what allows for the myriad ways ('remix, transform and build') in which one can display one's creativity on either a video, song, literary or research work.

The only condition that is placed in this license that is attribution must be given to the original creator of the work and if changes were made, then the original licensor must not be in any sense be made to endorse those changes. Finally, no technological restrictions may be placed on either the sharing or adaptation of the material. One of the many kinds of attribution is the kind that is automatically built into the YouTube system of sharing<sup>19</sup> and adaptation of videos. This sums up the broadest license that CC offers. About 20% of journals in DOAJ use this license<sup>20</sup>. All PLOS journals use CC-BY license for the articles published there in. Other popular journals and/or Journal platforms that use CC-BY license are BioMed Central<sup>21</sup>, *Nature Communications*, *Molecular Systems Biology*, etc.

### 3.7.2 Attribution-ShareAlike License (CC BY-SA)

This license largely builds on the previous license in the sense that it enhances access. It too allows for sharing and adaptation of the work even for commercial purposes. This must also comply with the condition of attribution but it is the additional condition that is imposed that makes this kind of license unique. The ShareAlike condition means that the original creator has imposed an obligation on the adaptor of the work to also share the newly created work under the same terms and conditions as the original license.

This kind of condition is characteristic of the commons and what it stands for. The commons is a vibrant and constantly evolving organism, the health of which is dependent almost entirely upon the culture that its users share. The culture of sharing, working and giving back that this particular license is symbolic of this culture. One example of this is a heartening one from Brazil with the culture of *technobregamusic* catching on very fast. *Technobregamusic* originated in northern Brazil, with its epicentre in the city of Belem. The idea of *technobregais* one that embraces free distribution, open access and a vehement support of remixing. The entire genre of music is based on remixing. However, the culture that is has created is one that transcends mere remixing. *Technobregahas* created a whole new business model on Latin America. The musicians of this genre do not rely on music sales of any kind to make money. They understand that asking for money from music sales would inevitably

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<sup>19</sup><http://www.youtube.com/yt/copyright/en-GB/creative-commons.html>

<sup>20</sup><https://hybridpublishing.org/2014/02/cc-by-dominates-under-the-cc-licensed-journals-in-the-directory-of-open-access-journals-doaj/>

<sup>21</sup><http://www.biomedcentral.com/>

prevent those who cannot afford it from listening to their music. They believe that their music is one that was obtained from the community and that therefore, every member of the community must also have access to the music. So, they make their music and then feed it into an underground network of individuals in cheap CDs, who then ensure that the music is available throughout the country. This has been made even easier with the internet, as now *technobregamusic* is widely disseminated in the online world through file sharing websites that support it. These musicians also manage to support themselves. Their popularity is directly proportional to how many people have listened to their music, so concert tickets are a way for them to earn an income. Not only does this heavily incentivizes enhancing access but also creates newer markets through the organization of concerts around the country and region. The economic model of open content business that it has created has caught the attention of copyright and copyleft scholars around the world. The possibility of replication has also been discussed. In a sense, this particular CC license stands for this very culture of sharing and giving back to the community.

### **3.7.3 Attribution-NoDerivatives License (CC BY-ND)**

Under this license, sharing is allowed even for commercial purposes. However, no form of adaptation is allowed to be disseminated. Therefore, this license does not restrict anyone's right to adapt their work but restricts the publication or the dissemination of this work. On certain platforms, the two are not mutually exclusive, in that adaptation and dissemination happen almost simultaneously. Leaving these platforms aside, this license does not restrict the use of copyrighted material much. Exceptions and limitations, as per jurisdiction, apply as always.

This license caters to a certain section of the creative community that is not against the sharing of their work but uncomfortable with adaptations of the same. Examples could be of a particular kind of work (say, for the preservation of the cultural uniqueness of a dance form) or a literary work (if the author does not want any spoofs). The logic of the internet, at times, functions at odds with this concept but the agency of the creator stands.

### **3.7.4 Attribution-NonCommercial License (CC BY-NC)**

As the name of this license suggests, the works are allowed to be shared (copying and redistribution) in any medium or format, and also adapted. Proper attribution must be given as it is the bedrock upon which this entire licensing regime has been built. However, no use may be made of this material for commercial purposes.

A CC licensed image may be altered and put on a T-shirt and even distributed to friends. However, CC-BY-NC license would prevent the sale of those T-shirts even if it is to one individual. Such a license is primarily catered to protection of economic interests. Big brands and authors will gravitate towards such a license since it protects their income while not coming in the way of either access or creativity. This paradigm also escapes the 'imagined loss'

criticism that is often directed against ‘All Rights Reserved’ copyrighted work. Access to expensive academic books is prevented because of their copyrighted nature. Publishers argue that allowing their free download will eat into their profits but activists and students argue that the prices of these books, particularly in Third World countries, places it outside the range of affordability of most students. Therefore, these students would never be able to buy these books and downloading or photocopying is often the only way for them to access it, thereby making the putative economic loss entirely imaginary. Prohibiting photocopying is not going to do anything but block access since these students are never going to be able to afford the books. This license does not stand in the way of access in any way. Some rights reserved allow for the reservation of the economic rights while not pre-emptively blocking the access right of the user or community.

### **3.7.5 Attribution-NonCommercial-ShareAlikeLicense (CC BY-NC-SA)**

This is a combination of the ShareAlike and NonCommercial licenses. It allows for both sharing and adaptation but not for commercial purposes. In addition, any adaptation made to the original work must also be shared in the public domain (‘the digital commons’) with the same terms and conditions (i.e. also allowing for sharing). This would be the perfect union of protection of commercial interests (something that is in the interests of big business) and enabling greater access. In many ways, this would be the codification of the educational exception under most copyright laws since the very gist of education is the greater dissemination of an idea.

### **3.7.6 Attribution-NonCommercial-NoDerivs License**

In the final combination, this license does not allow commercial use nor does it allow for adaptation of the work. While the broad, enabling attribution license exists on one end of the spectrum of CC licenses, this license exists on the other. Such a license would be the most restrictive license available which, in a sense, speaks volumes about CC. This license allows only for sharing (in any medium or format) which, as you may have observed, is the *sine qua non* or basic minimum of a CC license.

Creative Commons has a license choosing option online<sup>22</sup> to help you decide the type of license you may need for your different kinds of publications/creative works.

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## **3.8 ADDENDUM CLAIMS**

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Consider two scenarios. In the first, you have written an article and published it in a well-known international journal. You know this will make it accessible to large parts of the academic community because of the widespread network that this journal enjoys. At the same time, you also give up a modicum of agency that you would otherwise have been able to access over the research

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<sup>22</sup><http://creativecommons.org/choose/>

paper. Now, you cannot share this paper on file sharing websites online, nor can you upload it on open access academic databases. The gist of it is that you cannot increase readership beyond those who have access to the international journal you have chosen to publish your paper.

Now consider a parallel universe in which you can use a legal tool (let's call it X) to sign on the dotted line with this prospective international journal while retaining your agency with respect to the paper at the same time. So, this would allow you to both publish in a reputed journal (a *sine qua non* of progress on the Academy) while expanding readership.

The Addendum, our X, is just this tool that allows authors to benefit from the best of both worlds. The Author Addendum is a resource in partnership with the Creative Commons movement that is an exercise to retain the rights in the course of signing a deal with a publishing house. It is to ensure that publishing houses do not take away all the rights of copyright holders to publish the work, leaving the author with little control over his/her own text. This also allows the author to further develop the work if he/she wishes, in a manner that he/she chooses. For example, developing the work often happens through presentation at conferences which the author can now do with the addendum without the prior permission of any publisher. Further, this also allows the author to get proper attribution for the work done. Very often, publishing houses use the material that they get from authors for their own purposes, such as marketing, without properly attributing the work to the author. Addendum claims prevent such a situation from emerging because it allows the author to retain those rights for herself. Stewardship of intellectual property becomes a more inclusive exercise with these bundles of rights that addendum claims bring along with it. A typical Author Addenda from SPARC is available<sup>23</sup> for use by researchers.

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### 3.9 LET US SUM UP

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Over the course of this unit, we emphasized authors' right over the work created by them. Copyright laws provide legal authority to authors and rights holders to claim economic advantages from their works. However the unequal distribution of knowledge and access to information is a problem due to restrictions of the copyright regime. While the copyright laws provide fair dealing clause and licensing options, authors usually do not exercise their rights to apply appropriate licenses while signing copyright transfer form of the publishers. The emergence of the Creative Commons licenses has empowered the authors to use these to share their original works in suitable open licenses. We discussed the affordances of the six types of CC licenses that are in a continuum of openness – from more liberal remix possibilities in CC-BY to only read option in CC-BY-NC-ND. We also highlighted the Author Addenda option for the researchers to use while signing off copyright of their research publication.

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<sup>23</sup>[http://www.sparc.arl.org/sites/default/files/Access-Reuse\\_Addendum.pdf](http://www.sparc.arl.org/sites/default/files/Access-Reuse_Addendum.pdf)

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## USEFUL VIDEOS ON THE TOPIC

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Lawrence Liang on Aaron Swartz as the first martyr of the free information movement, **Video**<sup>24</sup>

Professor Lawrence Lessig on Creative Commons Licensing, **Video**<sup>25</sup>

Lawrence Liang on Copyright and CC licenses, **Video**<sup>26</sup>

Creative Commons Explanation, **Video**<sup>27</sup>

Larry Lessig: Laws that choke creativity, **Video**<sup>28</sup>

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<sup>24</sup><http://www.youtube.com/watch?v=Bg87SR0TRw4>

<sup>25</sup><http://www.youtube.com/watch?v=AWxyx5iYdvI>

<sup>26</sup><http://www.youtube.com/watch?v=WwxHIAk8MhI>

<sup>27</sup><http://www.youtube.com/watch?v=Sj4YVz2VeVw>

<sup>28</sup><http://www.youtube.com/watch?v=7Q25-S7jzgs>





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