



**A Study on “Copyrights, Access to Culture and New Technologies: Evolving Challenges to Cultural Diversity” prepared by the Brazilian Ministry of Culture<sup>1</sup>**

**Introduction - The subject “Copyrights, access to culture and new technologies: evolving challenges to cultural diversity”**

The **Living Culture Program** has been one of the Brazilian Ministry of Culture’s flagships for its policies of promoting and protecting cultural diversity, access to culture and digital inclusion. Conceived as an organic network of cultural creation and administration, it is mediated by the **Culture Points**, its main action.

The **Culture Point** is the priority activity of the **Living Culture Program** and through it all further actions are carried out. It is the reference for a horizontal network of integration, reception and dissemination of initiatives and creative willpower. A small mark, a sign, a point with no hierarchical gradation, a support point, a lever for a new social and cultural process. As a mediator in the relationship between State and society, and within the network, the Culture Point brings together cultural agents who coordinate and propel a set of actions both within their own communities and among the communities themselves

Currently there are just over 400 culture points scattered throughout the Country, established in needy communities, cultural groups, on the outskirts of major cities, in Indigenous communities and even abroad, where there are significant communities of Brazilian emigrants.

The Program faces problems when dealing with access to protected works, and often the feasibility of creating and producing new works is impaired, which is why we have chosen “Copyrights, access to culture and new technologies: evolving challenges to cultural diversity” as the subject of this meeting.

There can be no doubt that Copyrights, as part of the broader field of Intellectual Property, are a subject of interest to developing countries, and for two reasons:

On one hand, most developed countries and some International Organizations such as WIPO argue that strengthening Intellectual Property rights is an end in itself, which would automatically lead to the technological, economic and social development of those countries that adopted stricter norms on the issue. The justification usually invoked to defend the increased protection of Intellectual Property Rights is the alleged relation of causality between the protection of Intellectual Property and the attraction of investments. From this perspective, Intellectual Property is perceived as a purely technical issue, which

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<sup>1</sup> The present study is the consolidation and analysis of the answers to the questionnaire “Copyrights, Access to Culture and New Technologies: Challenges in Evolution to the Cultural Diversity” elaborated by the Brazilian Ministry of Culture. We received answers from the following members of INCP: South Africa, Germany, Angola, Belgium, Brazil, Canada, Colombia, Croatia, Cuba, Denmark, Spain, Estonia, Philippines, Finland, France, Georgia, Greece, Iceland, Latvia, Mexico, Norway, Portugal, United Kingdom, Senegal, Sweden and Switzerland. The Republic of Armenia has also sent an answer but it has not been included in this study because it had already been concluded when the answer arrived.



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should not be influenced by concerns of other natures, and should be discussed only at certain specialized forums.

On the other hand, augmenting Intellectual Property Rights clashes with the concern shown over the past few years by international organizations, public bodies, specialist and academic groups, in the sense of warning that imperfections in the present Intellectual Property system and its eventual strengthening could have harmful effects on development. In this sense, many developing countries, as well as wide sectors of civil society in developed countries, believe that the radicalization of these rights unfairly limits people's access to culture, information and knowledge, and consequently produces negative impacts on their social and economical well-being and even on innovation and creativity in countries in general, whether developed or developing.

This second train of thought sees imperfections in the Intellectual Property system's current operation in regard to its alleged automatic effects of inducing technological, economic and social development, and thus it defends the idea that any expansion of Intellectual Property Rights should be preceded by a cautious and discerning appraisal, to avoid harming the balance of rights and obligations and public interest. In this perspective, Intellectual Property is not an isolated matter, and therefore, it deserves to be subjected to critical analysis at the various discussion forums, so that it may effectively become an instrument for development. Regarding the relation between Intellectual Property and investment, according to the World Bank's *Global Economic Prospects 2005*<sup>2</sup>:

*"The evidence is inconclusive regarding the relation between direct foreign investments and intellectual property regulations."*

The increased protection of Intellectual Property Rights in developing countries, intensified by TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights), seems to have generated a concentration of innovative activity in a few developed countries, and consequently, the denationalization of production in developing countries. Data from the United Nations Industrial Development Organization (UNIDO) reveals that in the case of Brazil, investments in biotechnology have fallen from 28 million dollars in 1994, to 15 million in 2003. Investments in the pharmaceutical area have fallen from 91 million dollars in 1994, to 37 million in 2003<sup>3</sup>.

In the case of Brazil, for instance, from 1996 to 1998, we implemented a broad-based updating of Intellectual Property legislation with the approval of new laws for Industrial Property, Cultivars, Author's Rights and Computer Programs. Nevertheless, according to American researcher A.T. Kearney, who was advisor to former President Bill Clinton, in

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<sup>2</sup> Op. Cit., p.110.

<sup>3</sup> UNIDO Indstat 4, Database ISIC ver.2 and ISIC ver.3, Zicher, Benjamin and Timothy Wolfe: *Biotechnological and pharmaceutical research and development investment under a patent-based access and benefit-sharing regime*. Pacific Research Institute. San Francisco: 2005, p. D7 (the study can be found at: [http://www.wipo.int/meetings/2006/scp\\_of\\_ge\\_06/en/presentations/scp\\_of\\_ge\\_06\\_zycher.pdf](http://www.wipo.int/meetings/2006/scp_of_ge_06/en/presentations/scp_of_ge_06_zycher.pdf))



the ranking of the most attractive countries for direct foreign investments, Brazil fell from 2<sup>nd</sup> place in 1998, to 17<sup>th</sup> in 2004<sup>4</sup>.

### Copyrights within the scope of commercial policies

In order to understand this issue, we must analyze what the answers to our questionnaire have to say regarding the balance of royalty payments related to Copyrights (question A-2).

With this question, we sought a better understanding of the meaning and dimension of copyrights flows in international commercial transactions. The few answers presented (only 5 in a universe of 26 countries), far from leaving us in an information void, confirm something that has usually been suspected: the scant attention given to the economic dimension of cultural goods by official government bodies in charge of culture. This lack of attention also affects the economic aspect of copyrights, since knowing the royalty flow of these rights means, not only understanding their economic-financial distribution chains, but also the flow of the cultural goods themselves. The balance of payments and the flows of international transactions involving cultural goods can, when properly implemented and coordinated with other analytical tools, not only lead to the knowledge of the relative importance of such goods (and concomitantly, of copyrights) in the sphere of the international economy, but also provide an international map of the flow of ideas and symbolic values.

Evidently, the information received does not allow for strict conclusions. However, the financial flow of cultural goods is directly related to the country's degree of development and wealth. Thus, the more economically poor the country, the higher the chances of its importing agenda becoming hostage to capital goods and essential consumer goods. For this reason, it is not unusual to see a developing country, rich in cultural diversity, having a financial surplus in its Balance of Payments with a developed country. Senegal is a significant example, with cultural asset exports that exceed imports fourfold (302 million against 70 million).

Another relevant aspect is the study of the international flow of cultural goods and their conditioning variables. An obvious variable is linguistics, particularly for audiovisual products and books. The second is the historic variable, clearly noticeable in countries that have been through the historic process of colonization. The North-South relation remains particularly strong in the flow of this type of product. Of course the first variable is directly related to the second. Senegal is once again a great example: its commercial transactions of cultural goods occur mainly with French-speaking countries (France, Canada and Switzerland). We must also stress the fact that the weight of the financial and commercial flow is subordinated to North-South and North-North relations and, economically speaking, South-South transactions are relatively small, be it because they occur under other rules of exchange that are not financial or capitalist, or because the cultural industry has not yet consolidated or privileged this commercial route. It is evident that the privilege for developing countries of the South-North direction has the power of reiterating historic

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<sup>4</sup> Kearney, A.T. and Robert Shapiro: "Ataque aos Piratas". Direto ao Ponto. Interview to Cátia Luz. *Época Magazine*, p. 56. 12/09/05.



relationships, going beyond economic influence, and reaching the dominant spheres of cultural and symbolic power between countries.

Cultural goods with more weight in the balance of payments are usually those more strongly marked by the culture industry, namely music and audiovisual. France has a quite a unique category in this field: trading works of art.

Another question related to the commercial/economic issue in our questionnaire was the one dealing with the division of royalties among the various owners of intellectual works (D-2).

Few countries answered this question. Many alleged they do not have the information available, and others that the issue is conditioned to agreements among the parties. Many countries have also informed that levying and distribution of royalties is done according to the use detected for each work, as occurs in Brazil with those works managed by the Central Office for the Collection and Distribution of royalty rights related to public performances of songs – ECAD.

Actually, the answers make sense when faced with the information presented in question D-1. With so many countries, and all so diverse, there are various associations for copyrights administration. Therefore, it is to be expected there would be a plurality of ways to collect and distribute royalty rights held by authors.

Given the scarcity of information supplied by the countries surveyed, we can specifically expose the following:

Analysis by country:<sup>5</sup>

United Kingdom: Apparently, in the United Kingdom the various associations for each artistic sector compete against each other for potential associates. This is indicated by the answer: *“each collecting society will endeavour to keep its costs in check to enable it to distribute as much as possible to its members”*.

This is an issue that should be carefully analyzed. In principle, the existence of competition among associations could be a good thing. The Federal Constitution of Brazil, for instance, ensures the freedom of association to all (art. 5<sup>th</sup>, XVII and XVIII) and although the associations are non-profit organizations (as in England), it does not mean they do not wish to make a profit<sup>6</sup>. Free competition, which is a principle of the constitutional economic

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<sup>5</sup> Where relevant.

<sup>6</sup> According to the comments of the Brazilian Civil code, “the distinction between associations and companies, contrary to what a first reading of the device [art.53] could suggest, are not a paramount factor of the economic character or not of the activity carried out. Indeed, although article 53 defines associations as entities without economic goal, the expression cannot be interpreted in a literal way. Obviously, while linking itself with a precise aim, associations seek to extract from this union a certain type of advantage, which, and is not rare, results from the activity or the service lent to association, existing here, by definition, as an economic nature. What does not exist in these associations it is the lucrative purpose, i.e., the paramount objective to produce benefit and to distribute them between the associates. This persecution of the benefit and its division



order (art.170, IV), and which could be invoked here *lato sensu*, usually leads to a better offering of services both to associates and the public that makes use of the works.

An analysis of the way in which the works are administered economically must be carried out together with a review of the concepts of limitation and exception and remuneration by private copying. Besides, with the scarce data provided we do not have elements to affirm whether the existence of various collecting associations in INCP member countries is fruitful or not.

### What are Copyrights?

Copyrights refer to the protection of works of creation, that is, the authorship of such works, including computer programs. These rights have two dimensions of protection - the **Economic or patrimonial** and the **Moral** – and are split into two sets of rights – one is **primary, and the other is derived or neighbouring**, that is, the actual **Author's Right**, and the **Neighbouring Rights**, related to the rights of interpreters or performing artists, phonogram producers and broadcasting organizations.

### Examples of works protected by Copyrights

These are works protected by Copyrights:

- **Musical** works such as compositions, arrangements, musical performances;
- **Dramatic** works, such as choreographies, pantomimes, various performances, theatrical works, movie, radio or television scripts;
- **Audiovisual** works, such as movies, videos, videogames;
- **Literary non-dramatic** works, such as articles and essays, poetry, pronouncements, dissertations, theses, novels;
- **Visual art** works, such as paintings, graphic arts, sculpture, including works in 2 or 3 dimensions of applied graphic art – i.e.: architectural works and models, cartoons, postcards, holograms, jewellery design, paintings, murals, installations;
- And other works such as maps, globes, geographic charts, technical designs, models, mosaics, serigraphy works, ceramics, posters, postcards, tapestry, etc.

### Cultural Industries

According to UNESCO 2000, Cultural Industries “*are those that unite the creation, production and trading of contents that are intangible and cultural by nature. **These contents are protected by copyright and can take the shape of goods and services. These industries are intensive in work and knowledge and they stimulate creativity and bring incentives to the innovation of production and trading processes***”.

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are features which characterize companies, and which are precisely used to differentiate between associations, in the most modern sense”. Tepedido, Gustavo; Barboza, Heloísa Helena and Moraes, Maria Celina Bodin from: *Interpretation of the Civil Code Conforming to the Republic's Constitution – Vol. 1*, Rio de Janeiro: Renovar, 2005.



### Industries based on Copyright

WIPO stipulates a four-level taxonomy for Copyright-based Industries: **Main (or Essential)** are those with the primary purpose of producing or distributing goods directly submitted to copyright; **Partial** are industries that have some products directly submitted to copyright; **Support (or non-dedicated)** are industries that distribute products that are directly submitted to copyright, to trade and to consumers; and **Interdependent**, which are the industries that produce, manufacture and sell goods and whose primary purpose is to facilitate the creation, production or use of copyright-based works. These four groups together comprise the whole of Copyright-based Industries. Therefore, it must be understood that cultural goods and services generate or could generate Copyrights.

According to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, cultural industries are those that produce and distribute cultural goods and services, which, in turn, incorporate or transmit cultural expressions resulting from the creativity of individuals, groups and societies and which have cultural content, that is, the symbolic aspect, the artistic dimension and the cultural values that originate from or express cultural identities.

### UNESCO Convention X Copyrights

The same Convention, for which we all fight, affirms in its preamble that:

*“...cultural activities, goods and services have a double nature, both economical and cultural, as they carry identities, values and meanings, and therefore they should not be regarded as if they had a merely commercial value...”*

Likewise, one of the objectives of the Convention is:

*“...to recognize the specific nature of cultural activities, goods and services as carriers of identities, values and meanings...”*

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions represents an important public policy instrument for all activities related to cultural industries when it acknowledges that cultural goods and services are not products like other types of merchandise. Within this context, the Convention has revealed itself a strong tool before GATS (General Agreement on Trade in Services), since, although it does not detract the trade of cultural goods and services from the scope of GATS, it establishes a new standard for the world trade system when it forces the parties to take into account their objectives and requirements at the time of applying and interpreting their commercial obligations.

However, the Convention was unsatisfactory with regard to TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights), currently the biggest regulatory mark for intellectual property, as well as to various treaties and conventions regarding Copyrights



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within the sphere of WIPO, for which cultural goods and services, as we have seen, generate or could generate Copyrights, and which are regarded as common merchandise under TRIPS and WIPO.

### **UNESCO Convention X Copyrights – How to make them compatible**

How can we make the Convention on the Protection and Promotion of the Diversity of Cultural Expressions compatible with the international copyright system?

How can we ensure the free circulation of ideas through words and images, the frequent interchanges and interactions between cultures in a mutually advantageous way, if Copyrights usually imposes costs on developing countries that hinder such practices?

How can we develop a culture for the advancement of society in general through interaction and creativity, if initiatives aiming to stimulate them are seen as attacks on rights that have become crystallized with the passage time?

How can we overcome the risks of imbalances between wealthy and poor nations in regard to new information and communication technologies, if the Copyright System imposes rules on such technologies that discourage interaction between cultures?

How can we allow for equitable access to a rich and diversified range of cultural expressions originating from all parts of the world and access of cultures to the means of expression and transmission, if this implies following a Copyright System which imposes barriers and heavy costs on such accesses? How can we sustain and support artists and those who participate in the creation of cultural expression, if the norms concerning Copyright and Related Rights have lost the equilibrium between creation and production?

How can we harness the dialogue among cultures and ensure wider and more balanced cultural interchanges throughout the world, as well as strengthen international cooperation and solidarity in a spirit of collaboration aiming to reinforce the abilities of developing countries, particularly their means of cultural expression and cultural industries, without ensuring that there be a balance struck between the rights granted by the Copyright System and public interests in general?

How can we stimulate creativity, which depends on access to ideas, to studies and to the culture of others, in the present and in the past, if the laws which regulate the Copyright System have made it become an end in itself?

The answer to these questions can be found in the Universal Declaration of Human Rights, which in Article 27 establishes that the protection of moral and material interests of authors of scientific, literary and artistic works should be balanced with the right of every person to freely participate in the cultural life of their community, to enjoy the arts and to participate in scientific progress and its benefits. This balance is exactly the key to making the Convention on the Protection and Promotion of the Diversity of Cultural Expressions compatible with the Copyright System, allowing this System to actually stimulate creativity



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and innovation, fulfilling social and economical purposes, without being an end in itself, and it should be limited in time and duration, not going beyond what is fair and necessary.

Rather than favour the production and dissemination of knowledge, Copyrights, when radicalized as in today's case, unfairly limit access to information and could go against the legitimate right of people to culture and knowledge, with negative impacts on social and economical well-being and even on actual innovation and creativity in all countries, whether developed or developing. Copyrights should serve, and not be more highly valued than, basic human rights related to education, knowledge, information and cultural life; rights which are present not only in international instruments concerning human rights and fundamental freedom, but also in the Constitutions of most countries in the world.

The scene portrayed by our survey indicates the need to ensure a balance of interests in discussions regarding intellectual property, particularly in order to preserve existing flexibilities which, with all the limitations imposed by the TRIPS Agreement, have been allowing countries to adopt policies that are adapted to their development needs.

As pointed out by the World Bank's Global Economic Prospects 2005<sup>7</sup>:

*"All things considered, the general conclusion is that countries should develop a strategy concerning intellectual property that is adequate to their level of development".*

### **But how does this balance work? Rights over works X Access Rights**

On the one hand, the Copyright system guarantees to authors and other holders, such as interpreting and performing artists, phonogram producers and broadcasters, rights over their works, usually of an exclusive nature, to authorize or prohibit: the translation, reproduction, fixation, recording, editing, distribution, public reproduction and performance, communication to the public, broadcasting, adaptation, arrangement and any other modality of use of their works, or, when such is the case, of their emissions and phonograms. In theory, for any such rights over such uses there is a corresponding remuneration that should be paid by the consumer of such work. This necessarily implies the existence of minimum conditions for consumption of the work, such as purchasing power.

On the other hand, the rights of members of a society to free access to culture, information and knowledge without the need for remuneration are ensured by two types of clauses: those concerning public domain and those concerning limitations and exceptions, or fair use. In the case of public domain, these are clauses that create time limits, or according to some criteria, monopolistic rights for commercial exploitation of the work. At the TRIPS, the minimum limit established is 50 years for most works.

In the case of limitations and exceptions or fair use, these are clauses which allow the consumer certain types of use of works with no need to remunerate the author or other holders. The countries are free to determine such uses in their national legislations, as long as they observe what international conventions and treaties establish on the matter. Usually,

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<sup>7</sup> World Bank: *Global Economic Prospects 2005*, cit., p. 111.



such treaties and conventions determine that the limitations and exceptions or fair use should follow three criteria, stipulated as the “three steps rule”: they should be limited to certain special cases, that is, should not be valid for all; they should not hinder the normal exploitation of the work, and should not cause an unjustified loss to the authors and other holders of the works.

It is clear that there is an emphasis on economic aspects when the scope of limitations and exceptions is determined, and at the same time, due to the subjective nature of the “three steps rule”, there is a huge variation among countries regarding their implementation in national legislations.

But what is the situation of this balance in INCP member countries? Before we actually start analyzing this picture, let’s see what the INCP member countries answered regarding the recognition of moral rights to authors of protected works and other holders of neighbouring rights.

The question on moral rights in our questionnaire attempted to identify the primary goal of the copyright law of each country: whether it focused on the *author* and, therefore, on his personality and creativity; or whether it focused on the *holder of the commercial rights*, that is, the economic or patrimonial exploitation of the works.

Analyzing the answers it becomes possible to identify the focus of each country: (i) whether it is on the author’s creativity and personality, or (ii) on the commercial exploitation of the works. Logically, there is the possibility of a balance between the two points. Actually, there should ideally be a balance between the promotion of creativity and the protection of the author’s personality, and the promotion and protection of the commercial exploitation of the works, all to the benefit of promoting sciences and arts, and cultural diversity.

All countries that answered the questionnaire grant some type of protection to the author’s moral rights. Some of these countries grant moral rights to the neighbouring rights of the artistes, interpreters and performers.

According to the countries’ answers, the most mentioned moral rights of authors are: (i) paternity or being recognized as the author of the work, as well as having the name mentioned on it, and (ii) preventing distortion, mutilation or changes in the work.

There are countries that clearly limit the authors’ moral rights, which indicate that they assign more importance to the commercial exploitation of the works than to the authors’ personality rights. In Denmark, Norway, Finland and Iceland, for instance, in some cases the author’s moral right does not have to be observed if the use of the work is limited by its nature and extension. This renouncing seems to make sense, as long as it is really used solely and exclusively for the purposes mentioned, that is, only in cases that do not affect the author in an unjustified way. In Canada, the author may renounce his moral copyrights in writing, which shows a tendency towards the protection of commercial rights of authored works.



It is important to stress the difference in the protection of cinematographic or audiovisual works in some countries, such as South Africa and Germany, where there is no protection – or there is some limitation – to the moral rights concerning modifications to the movies. This demonstrates the commercial purpose of such works.

Furthermore, we must mention that in Belgium, Colombia and the United Kingdom, explicitly, there is no protection to moral rights of broadcasters, which occurs in an arranged way, as there is no need to talk about moral protection - this is intrinsically related to the individuality and personality of the author - in the case of broadcasting companies. If they are companies, they do not have the typical identity of an individual; otherwise, we would be facing a purely legal strategy.

Analysis by country:<sup>8</sup>

Greece: we observed the possibility there of cancelling the concession contract for patrimonial copyrights, or the agreement or license for exploitation, in the case of a literary or scientific work, although it is subject to payment for material damages to the owner, when the author deems such action necessary for the protection of his person due to changes in his beliefs or circumstances. However, the individual interest of the author must be weighed against the collective interest of access to already published material.

Mexico and United Kingdom: in the case of advertisers, except in the case of an agreement that states otherwise, they will authorize the omission of author credits during the use or exploitation of the work. Such device shows the commercial and corporate aspect of advertising works, to the detriment of their creators.

Mexico: the literary, artistic works, popular art or crafts, developed and maintained in a community or ethnic group originated or established in the Mexican Republic, deserve protection against deformation, done with the purpose of causing demerit or prejudice to the reputation or image of the community or ethnic group to which they belong. Such moral protection is welcome, as it is aimed at promoting the maintenance and protection of cultural diversity.

United Kingdom: recognition of authorship (paternity) only if the author, director or performer requests it. This shows copyright's patrimonial or commercial aspect in the United Kingdom, which grants only relative importance to the figure of the author, giving more emphasis to the economic exploitation of the works.

**The situation of the balance in INCP member countries (Questions B2 and B3)**

The issue of the duration of Copyright protection, whether moral or patrimonial and, consequently, the question of public domain, brings to the agenda an important issue which merits reflection. An excessive period of protection could emphasize imbalance between

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<sup>8</sup> Where relevant.



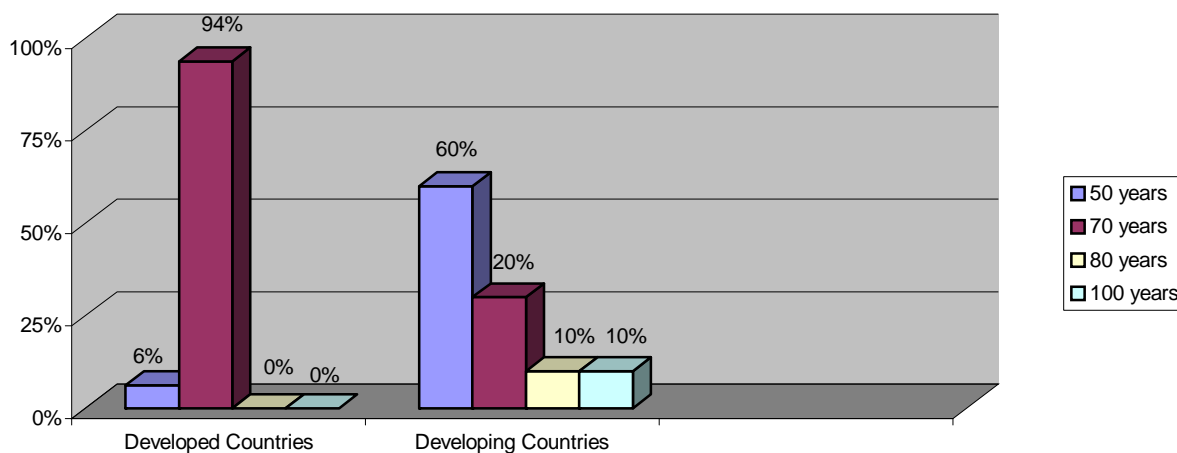
the Copyrights granted to the holders of intellectual works and the rights of members of society to have access to culture, knowledge and information.

The answers to the questionnaire confirm the above statement. Most countries presented a protection period superior to that established in the TRIPS agreement, that is, 50 years after the author's death.

Almost all developed countries that answered the questionnaire limit the protection period of patrimonial rights to 70 years after the author's death. The only exception is Canada, with a protection period of 50 years after the author's death. Over half of the developing countries establish the period for the author's patrimonial protection at the minimum level determined by the Bern Convention, that is, 50 years. Twenty percent of developing countries have set it at the level adopted by developed countries – 70 years. Two countries, Colombia and Mexico, adopt longer terms, 80 and 100 years, respectively, for the patrimonial protection of author's rights. Different periods are adopted for some other types of artistic works, such as photography and cinematography.

	50 years	70 years	80 years	100 years
Developed Countries	6%	94%	0%	0%
Developing Countries	60%	20%	10%	10%

Period of Protection of Patrimonial Rights



All the countries answered that a criterion that is appropriate for a work protected by Copyright and Related Rights to fall into public domain is the expiry of the period of protection. Colombia and Estonia have also mentioned another adequate criterion: the



recognition of the work as folklore, since there is a rejection of author protection for creations which, according to these countries, should belong to public domain. The Philippines mentioned renouncing the author's patrimonial rights as another criterion for attaining such status. Brazilian Copyright Law also recognizes that besides those works for which the period of protection of patrimonial rights has elapsed, other works that belong to public domain include: those of deceased authors who did not leave successors and those of unknown authors, except for the legal protection assigned to ethnic and traditional knowledge.

It is our duty to remember that the main goal of copyrights is to promote creativity and the dissemination of art with the consequent protection and promotion of cultural diversity. Therefore, the author, as an individual, is stimulated to create works for the enjoyment of the population. Thus, it does not make much sense, bearing in mind the primary goal of copyright, of protecting works for a period that extends well beyond the author's death, since he would be dead and, therefore, could not be stimulated to create. Logically, one may consider a period of protection after his death having the heirs' interests in mind, but the constant and huge extension of the period of copyright protection seems to benefit mainly the holders of such rights, who are usually major corporations, to the detriment of the actual authors.

Therefore, it seems to us there must be a better balance struck between the private patrimonial interests of the corporations and the public interest of access to culture. In this sense, the period of protection for authors' works should be kept to a minimum, following international treaties in developing countries or those with a relatively lesser degree of development.

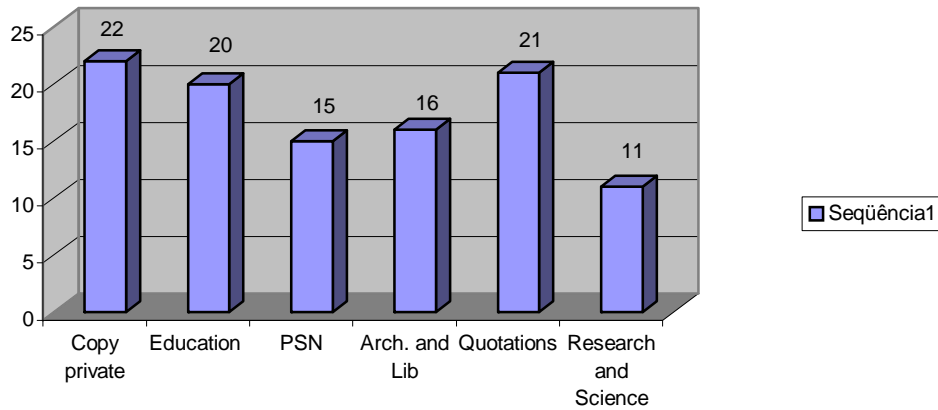
#### **The situation of the balance in INCP member countries (Questions B4 and B5)**

Just as occurs with public domain, the subject of "limitations and exceptions" to Copyrights and fair use could indicate the level of access to culture, to knowledge and to information of a country. In order to preserve and amplify access to culture, cultural policy needs to provide conditions for the creation and production of cultural goods and services, and also the feasibility of facilities which allow society to have access to such goods and services.

Let's see in the graph below the answers regarding six types of exceptions and limitations to Copyrights foreseen in some countries that have answered the questionnaire:



Number of occurrences of types of Limitations and Exceptions



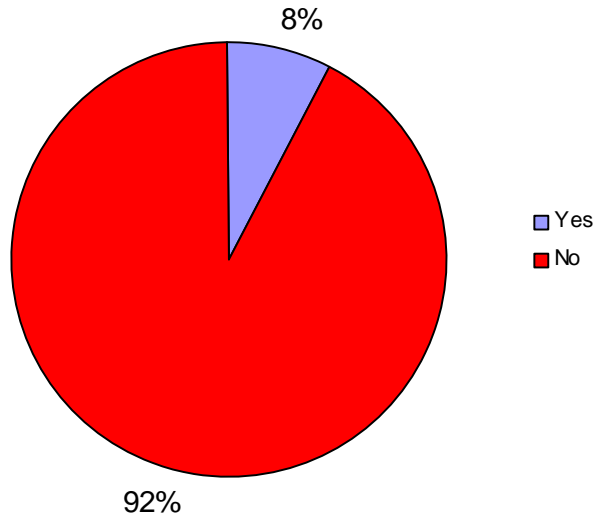
For purposes of analysis and illustration of this question, six typical categories of limitations and exceptions have been selected: for private copy, for educational purposes, for people with special needs, for archives and libraries, for quotations and for research and science. As in all systematizations, a series of categories has been left out. However, by reading the answers it becomes apparent that developed countries have a list of limitations and exceptions that is much wider than those established by legislations in developing countries. That is, developing countries usually have stricter author legislation, with a lack of legal mechanisms to ease the population's access to protected intellectual works, and compatible with the stage of economical and social development of the country.

There is, therefore, a clear incongruity. Precisely those countries that need to emphasize access to information, culture and knowledge in general, so they can reach levels comparable to those of developed countries, are those with stricter legislation. As a minimum, these countries should implement all the flexibilities established by the Bern Convention and the TRIPS Treaty, in their legislations.

On the other hand, the graph below shows us that the general trend is not to regard limitations and exceptions as actual rights, but as mere exceptions.



**Are the Limitations and Exceptions regarded as users' rights?**



The answer to this question is meaningful since it indicates that for all countries, with the exception of Senegal and the Philippines (but even so in an interpretative way, and not established by law), limitations and exceptions are not regarded as user rights.

The issue is quite controversial. One could say that Copyright is the exception to the rule, which is public domain. In this sense, the contents of limitations and exceptions have never been protected by author's rights, and from the beginning have remained outside the author's domain. Besides, just as there are rights for the creators and holders of copyrights, so there are rights for users of the works. This balance should always be sought. Just as the authors and holders have certain rights, so the public has the right, in certain specific cases and without detriment to the normal exploitation of the work or even to the holder of the work, to have access to such works, whether for educational purposes, for their own use with non-profit purposes, or for reasons of physical disability, among others.

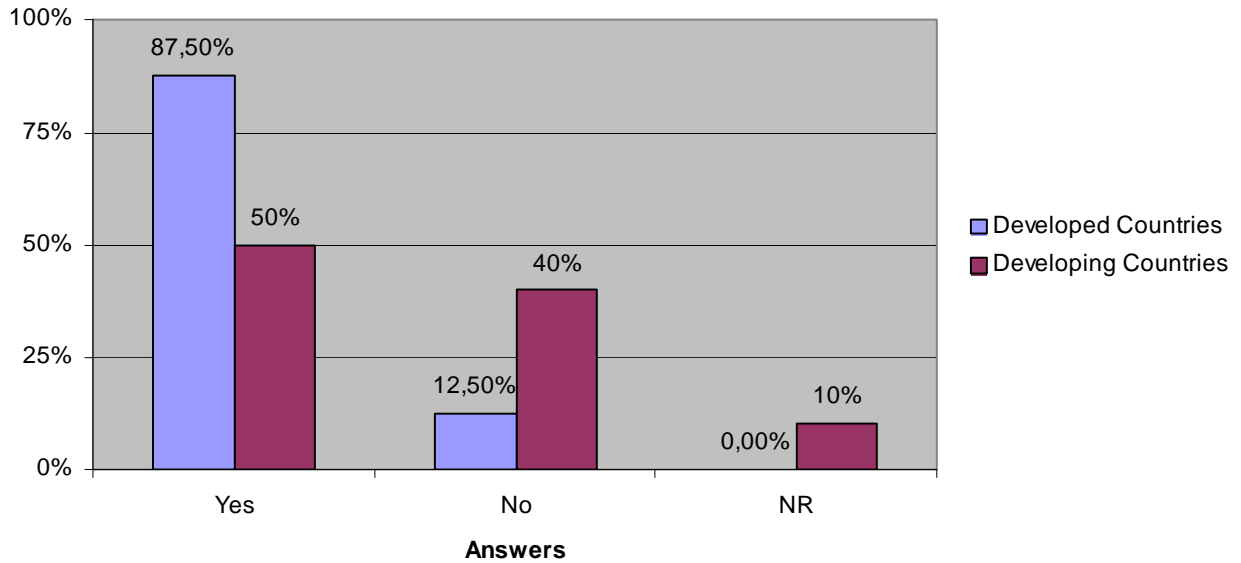
**The situation of the balance in INCP member countries (Question B6)**

This question was intended to garner information on the implementation of Technological Protection Measures (TPM's) and their impact on access to culture. Such measures have been established internationally within the scope of the WIPO's so-called "Digital Agenda", which resulted in the creation of the "New WIPO Treaties", which are the Copyright Treaty (WCT) and the WIPO Phonogram and Performers Treaty (WPPT). Technological protection measures have set a new prerogative for Copyright and Related Rights holders in the digital environment: the implementation of self-enforcement devices that do not take into account the type of intended use of the protected works within the digital environment, with negative impacts on the exercise of limitations and exceptions to Copyrights and to access to public domain.



Let us examine the graph below with the answers divided into developed and developing countries; and those with a lesser degree of development:

**Does your country adopt technological protection measures?**



This question shows a clear discrepancy between the answers provided by developed and developing countries. Most developed countries adopt technological protection measures in their legislation - 87.5% - while for those undergoing development the index is 50%. There is an international effort being made so that the use of technological measures may be adopted by the various national legislations.

Regarding the compatibility of technological protection measures, there is no pattern in the answers which would allow for processing the data. The European Union, for instance, follows EC2001/29/EC guidelines, which state that the infringement of technological measures is forbidden. These same guidelines, however, establish that European Union Member-States should adopt proper measures to ensure Copyright and Related Rights owners make the required means available to beneficiaries of certain exceptions and limitations, so they can make use of them. In Brazil, whoever alters, omits, modifies or voids the “technological measures” will be sued civilly for such acts.

The answers indicate that it is difficult to conciliate technological protection measures with the exercise of limitations and exceptions and access to Public Domain, although many countries state that their legislations rule on such compatibility (i.e. Angola, Belgium, Estonia, Latvia, Finland and Iceland). Compatibility, when it exists, could be prejudicial to both types of clauses that ensure access to culture, whether through the creation of administrative or legal entities to analyze and release certain uses of works, which increases the time required to obtain access to them, or through the reduction of “fair use” prerogatives in the implementation of technological protection measures. That is, they just allow some types of licit access. But even in cases where it is allowed, there is considerable



difficulty in accessing the content of the work due to bureaucratic impediments, which are not easy to administer, and also due to the delay caused by such measures.

In this sense, a possible conclusion one could reach is that the implementation of technological protection measures reduces the degree of access to culture in all countries, whether developed or developing. In developed countries, they clash with the freedom of access to culture and in developing countries they mean an increase in barriers against access to culture. Indeed, the problem does not usually have a normative aspect, but a practical aspect, where the use of technological measures effectively generates restrictions to the exercise of limitations and exceptions, whether due to the user's lack of knowledge, or the costs generated, to be met by the supposed beneficiaries.

Furthermore, such technological measures could eventually serve as an instrument for copyright abuse, when fair uses and limitations and exceptions are not readily respected by rights holders.

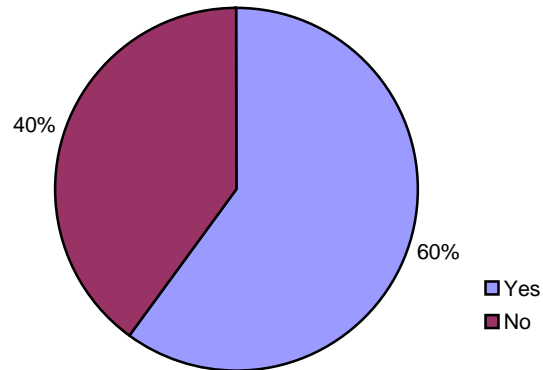
### **The situation of the balance in INCP member countries (Question D3)**

In our questionnaire, we elaborated a question concerning both support for creativity and the existing level of access to culture in INCP countries. On one hand, the question seeks to examine whether there is a built-in levy in the prices of electronic goods and blank media and how the authors and other Copyright and Related Rights holders are remunerated by the production of copies of their works. The question also seeks to establish the relationship between the levy and access to culture, when it focuses on how the consumer is informed about the existence of such a levy and the connection with the technological protection measures.

The graph below helps us evaluate the answers:



### Is there a levy?



The answers indicate a great variation in whether the levy actually exists, and show a trend, where the levy is adopted, of coexistence with the technological protection measures. This trend could be interpreted as an imbalance, as it reveals two measures (levy and TPM) to deal with the same fact (copying of works).

With the exception of South Africa, Colombia, Cuba, the Philippines, Georgia, Mexico, United Kingdom and Senegal, all the countries surveyed have stated the existence of collection systems for payment of private copies. This way, except for the United Kingdom, all developed countries count on such a system.

In fact, at present there does not seem to be any other implemented means to remunerate authors for the limitation on their copyright that allows a private copy by society, except for Norway, which remunerates them in another way (see below).

Remuneration is made, at times, through a percentage charged in the sales amount of the products. In other cases, the amount is fixed and there are references for the annual review of these amounts. It seems to us that the charge by percentage is more adequate and dispenses the need for a periodic review of amounts due. For example, the laws of Estonia and Portugal charge percentages. On the other hand, the laws of Germany, Denmark and Finland have opted for the fixed amount system.

#### Analysis by country:<sup>9</sup>

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<sup>9</sup> Where relevant.



Germany and Denmark: according to Danish law, consumers don't need to be informed about the amounts paid for the potential private copies that could be produced with the devices purchased. However, German law establishes that such amounts should appear on the invoice. The discrimination of the amounts on invoices not only conforms to the desired transparency in consumer relations but also alerts consumers to copyright issues that may be unknown to them.

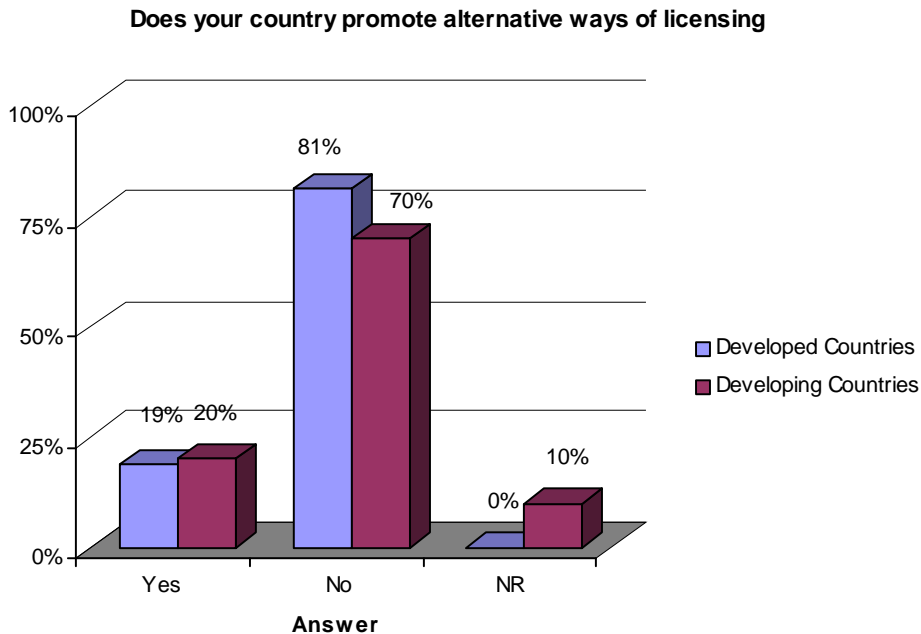
Canada: Canada opted for the remuneration system after a public inquiry to decide the amounts to be charged to consumers.

Norway: although there is remuneration for private copying, authors are paid through state subsidies, so the amounts to be paid are not passed on to consumers.

Portugal and Sweden: both countries establish exceptions to the payment for private copies. In both cases, the organizations whose purpose is to provide copies of works to people with visual and/or hearing impairment are exempt from payment. Although other countries haven't mentioned it expressly, it is expected that many will adopt this measure.

**The situation of the balance in INCP member countries (Question B7)**

The graph below indicates the rate of alternative license use, splitting the countries into developed and developing countries and those with a lesser degree of development:



This question attempted to find out whether there are alternative ways to license works protected by Copyright and Related Rights in INCP countries, seeing that they represent an option to ensure access to culture by the populations of the countries that have implemented them.



According to the answers, in a significant way, the countries, without exception, are not promoting alternative ways of licensing. This may reveal an alignment with the traditional and official (WIPO) discourse on the ways to protect author creations, and also a lack of awareness of official government bodies about the dimension and scope of these new licensing alternatives.

We must underscore that the various Creative Commons licenses, for instance, already amount to 140 million, with prestigious institutions such as the Massachusetts Institute of Technology (MIT) adopting such licenses for some of their traditional and respected courses. As is known, public institutions in some countries, such as South Africa and Brazil, adopt such licenses (THUTONG, the educational portal of the Department of Education of South Africa, and FINEP, in Brazil). Regarding free software licenses, it is widely known that Brazil, as well as Spain, particularly the municipalities of Extremadura and Barcelona, adopt such licenses. Likewise, many developed countries are adopting them, as is the case of the Camden district in London, England; or some public bodies of the United States, such as the White House, the Pentagon, CIA, FBI, among others; or even the municipality of Munich, in Germany, among many others.

Such licenses should be more widely adopted, since they are based on the copyright system. They promote wider access to information and tend to reduce costs considerably.

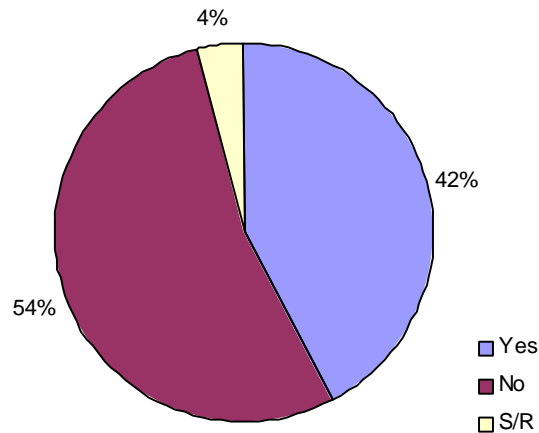
#### **The situation of the balance in INCP member countries (Question B8)**

Our questionnaire intended to analyze the adoption level of existing flexibilities in international agreements by INCP countries, by asking about the use of the main flexibility: the compulsory licensing of the works.

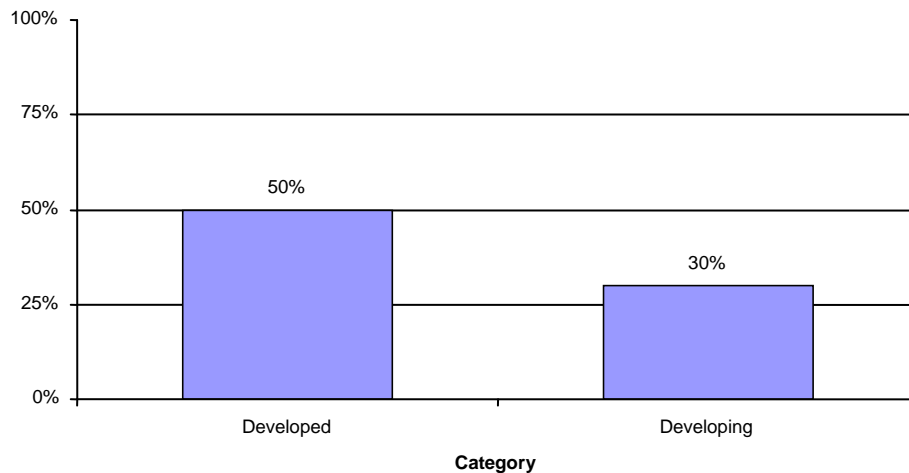
Let's see the answers on the graphs below:



Is there compulsory licensing?



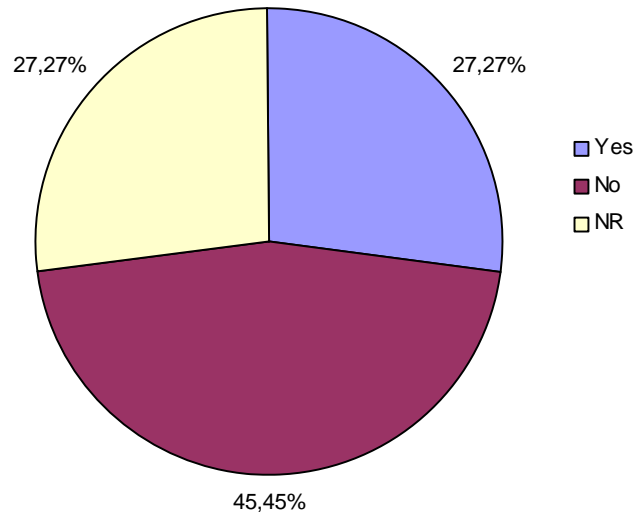
Percentage of countries with compulsory licensing by category (Developed x In development)



A significant fact on this question is the number of negative answers to the existence of compulsory licensing in the respective national legislations. Also noteworthy is the stronger presence of this statute in the legislations of the developed countries, against those that are undergoing development - 50% against 30%. Some compulsory licensing categories mentioned are listed as follows: education activities (Cuba, Denmark, Finland, Iceland, Norway and Sweden), audio-books for the visually disabled (Denmark, Finland, Iceland and Norway), translation or reproduction of a foreign work (Colombia), science development (Cuba), sound recording (Germany, United Kingdom and Sweden). However, few countries demonstrated knowledge of the effective adoption of the compulsory licensing instrument in their countries (Germany, Iceland and Norway).



**Of those with compulsory licensing how many have already adopted**



The non adoption of compulsory licensing, together with the lack of knowledge about its effective adoption have reached high figures – around 73%. This could reveal the little attention official government bodies dedicate to the matter (the non-availability of information is very high - 45.45%) and also the low level of information of the consumer public regarding these rights.

**Conclusion on the balance in INCP member countries**

As a conclusion, it can be stated that national legislations in INCP member countries reflect a movement of expansion of subjects, length of protection, scope and reach of clauses related to Copyright and Related Rights throughout the world, a movement which has occurred to the detriment of the right of access to culture, information and knowledge by a portion of the members of the community. However, the situation seems to be worse for developing countries, where Copyright rules are stricter than in developed countries.

But why are developing countries more vulnerable to the amplification of Copyrights to the detriment of the right of access to culture? The answers to our questionnaire offer a good source for reflection on this issue.

**Developing countries are more vulnerable to a decrease in the right of access to culture (Question A1)**

The TRIPS agreement has significantly increased the protection of Intellectual Property Rights, for instance, with the requirement of granting patents to products and processes in all technological fields. Despite this, the TRIPS established flexibilities, which somehow maintain a delicate balance between rights and obligations and allow developing countries



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to adopt some obligations established in the Agreement according to their national particularities.

However, the TRIPS Agreement hasn't exhausted international negotiations on Intellectual Property. Currently, there is a negotiation program on the international agenda in which some countries defend an increase in the standards of Intellectual Property Rights protection to levels that are higher than those established by the TRIPS Agreement – a “TRIPS-plus” agenda, which could erode most of the flexibilities that have been highlighted. Such negotiations can be seen particularly at the WIPO and in free trade agreements. In the case of Copyrights, the negotiation procedures at WIPO had been recently organized in the “Digital Agenda” – which ultimately aims at filling the gaps the TRIPS Agreement had left at the States' discretion.

The WIPO “Digital Agenda” is based on the premise that the harmonizing of norms to protect Intellectual Property, on an international scale, would be beneficial to all countries. In 1996, the Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT) were negotiated within this context. In 2000, the diplomatic conference that would adopt the treaty on performing audiovisual artists ended inconclusively, due to the impossibility of an agreement to strengthen such rights<sup>10</sup>. Currently an eventual new Treaty on the Protection of Broadcasting Organizations is being discussed.

Besides the multilateral negotiations aimed at increased protection for intellectual property, it is worth mentioning the adoption of “TRIPS-plus” type norms in various free trade agreements, which in varying ways limit flexibilities foreseen by the TRIPS Agreement.

On the question concerning free trade agreements, the intention of Brazil's Ministry of Culture was to draw attention to a fact that is little known by those in charge of Culture in INCP member countries. Everyone knows the harmful effects of treaties maintained with the United States, regarding the ability of countries that honour them to implement cultural policies, notably those concerning the protection and promotion of cultural diversity or support to national cultural industries.

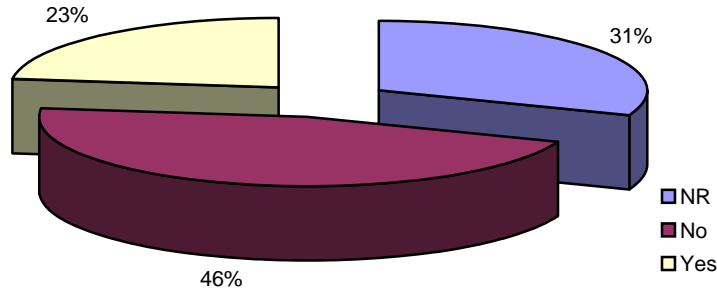
However, what few people know regarding these treaties is that, when they are established with the United States, they will invariably bring along devices relating to various sectors of intellectual property, including Copyrights, establishing greater obligations than those already featured in the treaties managed by WIPO and also in the WTO's TRIPS Agreement, the so called TRIPS-plus clauses.

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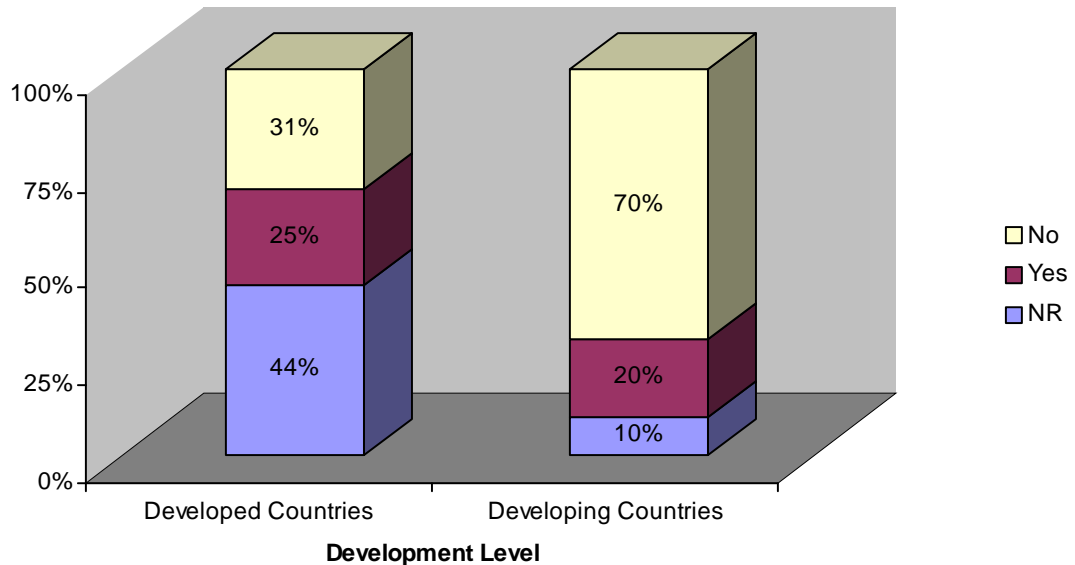
<sup>10</sup> WIPO document WO/GA/32/4 from 20/7/2005: “A Diplomatic Conference on the Protection of Audiovisual Performances held in December 2000 was unable to reach agreement on all articles of a proposed treaty aimed at strengthening the rights of performers in their audiovisual performances.”



Have signed FTAs



Proportion of countries that signed TLCs



For this reason it should be made clear that agreements made within the scope of establishing the European Union were not regarded as Free Trade Agreements. Still, the number of developed countries that did not answer the question was quite high, 44%. On

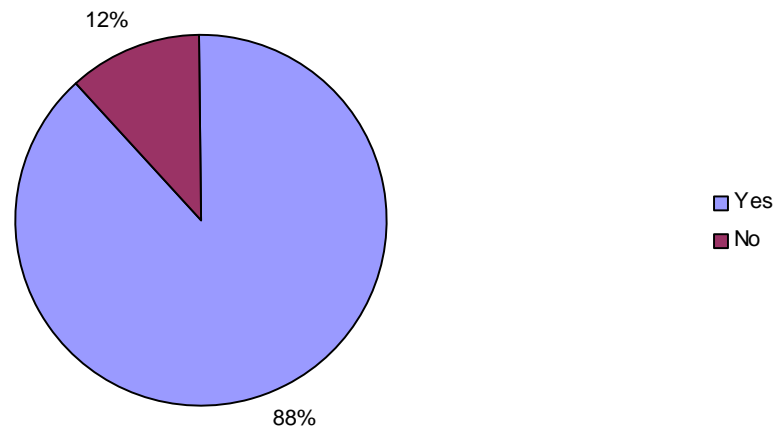


the other hand, we can see that the percentage of developing countries that claimed not having signed the Free Trade Agreements was high. Still, we can regard the percentages obtained among developed countries, on one side, and developing countries, on the other side, as similar to those who said yes to said question (25% and 20%, respectively). Although the scanty data presented does not permit conclusions, we could still surmise the statistical reason for this excessive declining to answer. This excess could reveal, among other things, a lack of understanding of the question, or an actual lack of knowledge of the answer on the part of the respondent. However, we believe the excessive number of declined answers will tend, over the years, to migrate to the positive answer regarding the signature of Free Trade Agreements.

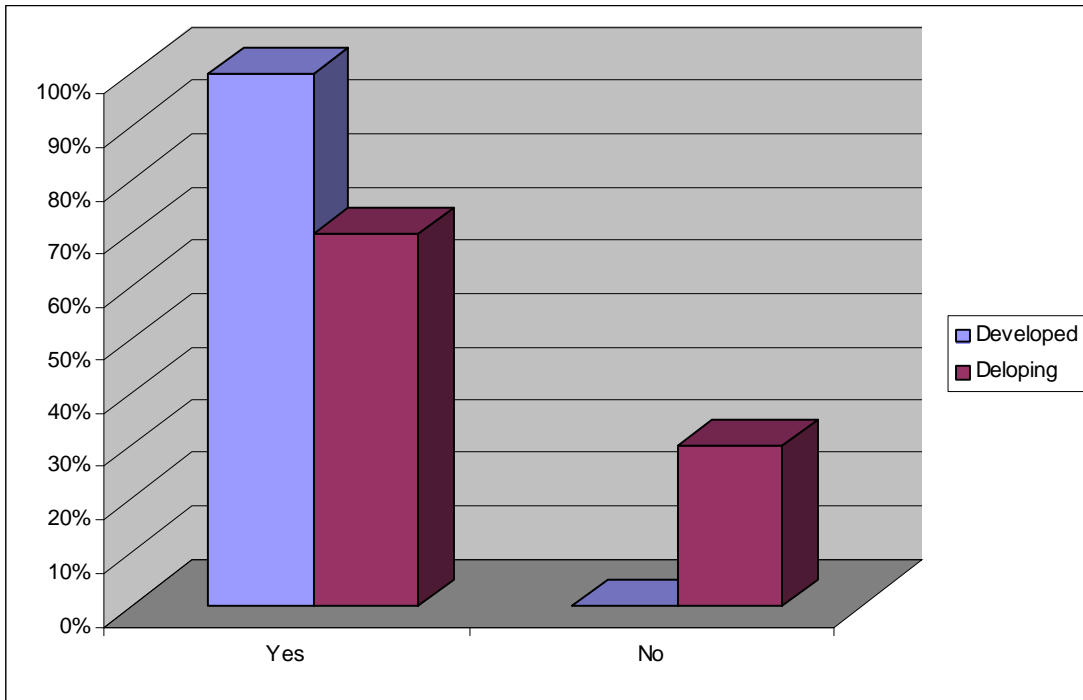
**Developing countries are more vulnerable to the reduction of the right of access to culture (Questions D1, D4 and D5)**

In our questionnaire there were three questions dealing with issues concerning compliance with the "political field" of Copyrights in INCP countries. Almost all of these countries count on some type of association for the defence of authors' interests and other Copyright and Related Rights holders, as demonstrated by a prior analysis of the graphs:

**Are there any associations for the defense copyright holders?**



Below, the answers by country block: developed and developing.



Generally speaking, it highlights the need to structure a good system of collective administration to accomplish one of the basic principles of copyright: remunerate the author so he can carry on producing.

Few countries have answered the questions fully, so our analysis is based on information that is not always sufficient. Anyhow, after analyzing the answers received, what draws attention initially is that most countries have a plural copyrights administration system, and the various classes have their rights protected.

However, in order for the collective administration structure to function effectively, it is fundamental to carry out a review of the concepts of limitations and exceptions to the law and the levy issue should be discussed (see question D3). We have observed that at least four countries have raised such issues: Portugal, by mentioning the existence of a society that deals with private copying, and Finland, Iceland and Latvia, when they expressively deal with the levy, which ultimately also deals with private copying.

Analysis by country:<sup>11</sup>

It is worth mentioning the answers of at least two cases:

- (a) Germany, Spain, Mexico, Portugal and United Kingdom stand out for the amount and diversity of associations for the collective administration of rights. In Germany, for instance, 12 examples have been mentioned, with various performances: (1) composers, authors and editors of musical works; (2) authors of language works and their editors; (3)

<sup>11</sup> Where relevant.



artists, promoters, producers of recordings of audio and video clips; (4) authors of artistic works, photography, cinematography and illustrations of a scientific or technical character (5) authors and editors of scientific editions of musical works and posthumous musical works (Sections 70 and 71, Copyright Act); (6) movie producers and broadcasting organizations; (7) producers and authors of cinematography (particularly foreign producers), broadcasting organizations; (8) the same abovementioned beneficiaries; (9) producers of pornographic cinematography; (10) producers and sponsors of cinematography; (11) copyright and related rights of media organizations and (12) authors, composers and musical editors.

Estonia has introduced the policies of rights administration organizations in its territory. The indicated guidelines help us understand that in that country the associations have a role that is more effective than simply collecting and distributing amounts, being in fact a rights administrator: *The collective administration organizations should exercise and protect the economic and non-economic personal rights of their members in conformity with the procedure established in their statutes and membership contracts, including:*

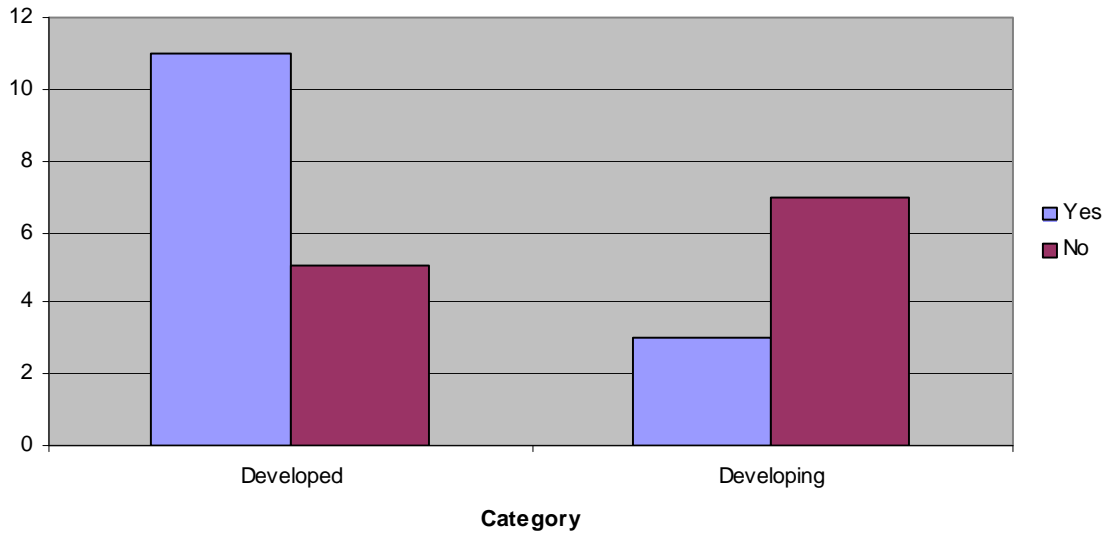
- 1) grant concessions for the use of works or objects of related rights (presentations, phonograms, broadcasting or radio or television programs), making the corresponding agreements with the users;*
- 2) determine the amount of the author's remuneration, licensing fees, artist fees or other remuneration, with the goal to carry out negotiations, if required;*
- 3) collect and pay the remuneration for the use of works or objects of related rights;*
- 4) establish and administrate the foundations to improve the conditions required for the creative activities of Estonian authors and artists, offer them social guarantees and promote their works abroad.*
- 5) protect and represent the rights of authors and holders of related rights in court and other institutions;*
- 6) promote other activities in the field of exercise of copyright and related rights in conformity with an authorization provided by authors or holders of related rights.*

In addition to the previous comments, we can affirm that widening the scope of performance of rights administration associations could be an efficient way to honour contracts and provide access to various works (when the authors are often unknown or, if deceased, one does not know who to contact to obtain the required authorizations) etc. However, it is an issue that should be analyzed together with many other aspects and requires public investment and political willingness.

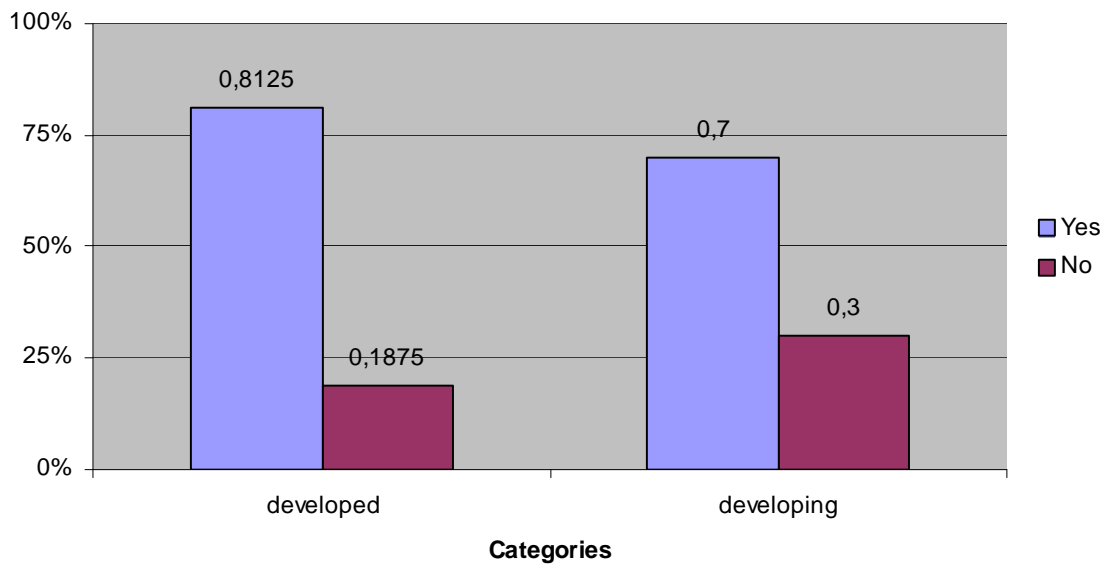
Regarding the existence of associations of users of protected intellectual works and NGOs that defend the public interest regarding Copyrights, the graphs below help us evaluate the answers:



**Are there associations of users of protected works?**



**Are there NGOs that defend the public interest regarding Copyright?**



The goal of the first question was to measure civil society's degree of organization to act on the defence of copyrights from the public interest standpoint, which should include ensuring access to knowledge, as well as imposing limits to the abuse of rights by their holders.



According to the answers presented, we can split the countries in three distinct groups: (a) those that affirm that their territories do not have or they are not aware of any associations of users of works protected by copyright and related rights; (b) those who did not answer the question directly and (c) those who said there are such organizations and mentioned them. Let's see the groups:

(a) Angola, Colombia, Cuba, Estonia, Greece, Latvia and Mexico.

(b) Germany, the Philippines and Georgia. Georgia has answered regarding collective administration.

(c) South Africa, Belgium, Canada, Croatia, Denmark, Spain, Finland, France, Iceland, Norway, Portugal, United Kingdom, Senegal, Sweden and Switzerland. The organizations most often mentioned were those linked to consumer rights (Belgium, Canada, Denmark, France, Iceland, Norway and Portugal), libraries/library users (South Africa, Canada, Denmark, Spain, France, Iceland, Norway, Sweden and Switzerland) and the disabled (Denmark, Iceland, Norway, Sweden). Other classes have also been mentioned, such as education, research, archiving, technology, trade, etc.

The answers lead us to believe that there is more organization of classes in developed countries.

It is very important to observe the most recurrent answers concerning existing organizations promoting the defence of public interests. The most mentioned types involve the defence of consumers, libraries and archives and the disabled. We understand that the existence of such organizations is fundamental for the defence of the public interest against possible abuses practiced by copyrights holders, particularly if we consider Brazilian law, which is extremely restrictive.

Actually, if we consider what is established by Brazil's Consumer Defence Code (also considering that libraries, archives and the disabled are consumers with peculiar characteristics), we will see that art. 5 of such law states that for the execution of the National Policy for Consumer Relations, the Public Power will count on granting incentives for the creation and development of Consumer Defence Associations.

This device is in perfect consonance with the Brazilian Federal Constitution, when it establishes that the State will promote consumer defence, by law (art. 5<sup>th</sup>, XXXII) and that the economic order, founded on the enhanced valuing of work and free enterprise, has the goal of ensuring to all, a worthy existence, according to social justice clauses, observing, among other things, consumer defence (art. 170, V).

Thus, we believe that the existence of organizations for the defence of users of works protected by copyrights should be stimulated (*i*) both by legal guidance and (*ii*) by the practical aspects of the battle for consumer interests.



On the other hand, according to the answers presented to the question about NGOs for the defence of public interests, we can split the countries in three distinct groups: (a) those that affirm that in their territories there aren't any non-governmental organizations with the purposes mentioned in the question; (b) those who affirm that such organizations exist, but apparently made a mistake in the answer (c) those who said there are such organizations and mentioned them. Let's see the groups:

(a) Cuba, Spain, France, Georgia, Latvia and Mexico. Although their answers indicate a lack of information about them or the non existence of the actual organizations, Latvia has offered an interesting answer when affirming it is the responsibility of the Ministry of Culture, the highest ranking body for copyright-related policies, to act upon and observe both authors' and society's rights.

(b) Angola and the Philippines: in their answers, they indicated that there are organizations that defend the public interest regarding copyrights. However, in both cases, they only indicate government bodies or collective administration bodies, which are the subject of question D1.

(c) South Africa, Germany, Belgium, Canada, Colombia, Croatia, Denmark, Estonia, Finland, Greece, Iceland, Norway, Portugal, United Kingdom, Senegal, Sweden and Switzerland. Once again, the organizations most mentioned were those linked to consumer rights (Germany, Canada, Denmark, Iceland, Norway and Sweden), libraries/library users (Germany, Denmark, Finland, Iceland, Norway, Portugal, United Kingdom) and the disabled (Denmark, Iceland, Norway, Sweden). Other classes have also been mentioned, such as education, internet, bidding, etc.

For the analysis of this question (D-5), we refer to comments made in the previous question (D-4).

#### Analysis by country:<sup>12</sup>

Latvia: the statement regarding the Ministry of Culture's action on public policies for balancing copyrights draws attention to the political action of the actual government in defence of social interests.

United Kingdom: it is interesting to observe the indication, by the United Kingdom, of the existence of a Copyright Court which decides when the parties cannot come to an agreement, the terms and conditions of the contracts. Its decisions can be appealed at higher courts only in legal aspects. The specialization of the judging bodies seems to be a need arising from the ever more complex legal relations.

To conclude on this point, only developed countries have a higher number of associations of users of protected intellectual works and NGOs that defend public interest regarding Copyright and Related Rights. One possible explanation is that this "political field" of Copyrights is more unbalanced in developing countries and less developed ones, since there

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<sup>12</sup> Where relevant.



are no, or few organizations that defend access to culture, making their already strict laws even stricter from a consumer standpoint.

### Broadcasting

Our questionnaire also included a specific question on Broadcasting Organizations. The question's intention was to start a discussion on the possible implications a new Treaty on the Protection of Broadcasting Organizations, which is being discussed at WIPO, could have for public Broadcasting, bearing in mind what is established by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions on the matter. However, due to the standstill in the WIPO negotiations on the issue, we have opted for refraining to introduce it in our presentation, regarding the analysis that follows.

With the exception of the Philippines and Greece, all countries stated that there are broadcasting organizations with a public service status, although most of them have equally stated there are also private broadcasters.

The issue, quite relevant from the political, strategic and public interest standpoints, is related to various constitutional and infra-legal issues. It should be observed that this is one of the wider issues to be analyzed in the questionnaire, as it extrapolates the copyright scope, dealing with many other areas in the legal field. Thus, for a more thorough analysis, an economic and legal study would be required, in order to determine the best measures to be adopted in such case.

#### Analysis by country:<sup>13</sup>

Two countries presented interesting points that deserve mentioning.

(a) Estonia: According to the information provided, the goal of the roles of Estonian Radio (Eesti Raadio) and Estonian Television (Eesti Televisioon) seems to be a good guideline to examine. As mentioned in the answers, the functions of the state telecoms in this country are: *(i)* to harness and promote national Estonian culture, as well as register, record and present its major productions; *(ii)* introduce the major world culture productions to the public; *(iii)* to create and broadcast services of diversified and balanced programs of high journalistic, artistic and technical level; *(iv)* to fulfill the information needs of all segments of the population, including minorities; *(v)* to create programs, mostly informative, cultural, educational and for entertainment.

The quest for a balance between information and entertainment is clear, without protectionism, since the incentive extends to the broadcasting of cultural productions on a worldwide scale (item *ii*). At the same time, the guidelines adopted seem to be aligned with contemporary principles of accomplishment of human dignity, when the quest for a "high journalistic, artistic and technical level" is valued (item *iii*), as well as fulfilling information needs, also for minorities (item *iv*).

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<sup>13</sup> When relevant.



Besides, “Estonian Radio (Eesti Raadio) and Estonian Television (Eesti Televisioon) should ensure the recording of events and significant works from the national culture and history points of view, and the preservation of recordings for future generations”. Thus the cultural memory of a country is assured. Although the answer does not present further details, it seems to us that this issue is directly linked to the possibility of making a private copy for records.

(b) France: France, in its answer, states that “(...) although the activity of broadcasting organizations is exercised under public domain, not all of them have a public service statute, and every broadcasting organization, whether public or private, can be a candidate for the assignment of a frequency. Although they do not have a public service role, private broadcasters who benefit from an authorization should also establish a convention with the CSA through which they are committed to respect countless commitments to a general interest objective. Thus, for instance, they should broadcast a certain percentage of musical works or audiovisual European and/or French expression works; finance part of the production of audiovisual works or propose accessible programs to people with hearing impairment. These obligations are seen as a counterpart to their occupation of the public domain (...)”.

The concept of counterpart contribution French law imposes in concession cases is interesting. Despite being a private broadcasting organization, the public body could intervene in order to enforce public policies to which the telecommunication services should be subject. Since it is a state authorization, we understand it should be possible to have State intervention in programming content to be broadcast.

### Conclusion

The Brazilian initiative, welcomed by countries in the International Network of Cultural Policies – INCP, of conducting a pioneer survey on the levels of ability and experiences the various official bodies in charge of culture present concerning the handling of the copyright issue, has been quite productive. The information received went through a process of tabulation, discrimination of categories and a qualitative analysis. In this analysis, the lack of information often had a meaning that was potentially more significant than the actual information *per se*, since the non-information had the power to objectively accuse various difficulties with some fundamental issues of culture, represented herein by copyrights. Thus, in the interests of and in tune with the Network’s goals, it is important to acknowledge gaps, point out weaknesses, ultimately to raise problems in an attempt to allow constructive self-criticism for the better conducting of public policies on culture.

The promotion of culture in its various aspects without looking carefully at the Copyright issue is like trying to walk without the fundamental references of orientation, since these are the rights which determine the legal, institutional, commercial and economic boundaries for production, circulation and consumption of cultural goods and services. Brazil’s Ministry of Culture hopes to have contributed to the stimulus and to greater reflection on the issue within the scope of the INCP, since the goal, when we requested you and your teams’ kind collaboration in filling out the questionnaires, was only one: to spread the



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conviction that any useful discussion which intends to work on the basis of a public policy for culture that is efficient and capable, in its various purposes and aspects, must necessarily coordinate its efforts with knowledge on the Copyright issue.

### Discussion questions

1. Why do people consider Copyright a taboo issue?
2. Is Copyright an end in itself?
3. Why do people discuss Copyrights primarily within the scope of Commercial Policies?
4. How should we use Copyrights to strengthen the cultural industries of developing and less developed countries?
5. How can we prevent Copyrights from increasing the disparities between rich and poor countries in the face of new information and communication technologies?
6. How can we promote equal access for members of society, *via* new technologies, to the global myriad of cultural expressions without infringing upon Copyrights?
7. How can we guarantee the protection of intellectual productions in the digital field?
8. Is it feasible to apply the rules of Copyright, in its traditional form, to the digital field?
9. How can we guarantee the enforcement of Copyright Law in the digital field without breaking the balance between costs and benefits and without infringing upon basic guarantees, such as the right to privacy and the confidentiality of correspondence?