Copyright Law, Access to Translations, and Indigenous Peoples: Towards Inclusive Education and Development in Australia and Beyond

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Indigenous Peoples – Copyright – Access to Translations – Development – Education – Australia

Indigenous peoples are suffering from loss of language and culture, and the need to preserve existing Indigenous languages from extinction cannot be overemphasized. Indigenous peoples have a strong spiritual connection to their language that makes access to copyrighted works in Indigenous languages integral to the education and overall development of Indigenous peoples. Copyright law can play a role in enabling access to copyrighted works and inclusive education for Indigenous peoples. However, in many countries, the copyright system does not provide an enabling framework for addressing legal barriers to translations.

Using Australia as a case study, this article considers the existing development challenges of Indigenous Australians and hinges some of these on the lack of access to copyrighted works and inclusive education in Indigenous languages. It examines the Australian copyright framework vis-à-vis its potential to facilitate access to copyrighted works for education in Indigenous languages. It argues that the copyright framework in Australia can and should be revised to foster access to copyrighted works and inclusive education for the overall development of Indigenous Australians. The article also makes recommendations in this regard. Further, in recognition of the fact that Indigenous peoples everywhere face challenges to translation, this work also considers the international copyright framework for access to translated works and the reforms necessary within that framework to foster such access for Indigenous peoples globally.

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I. INTRODUCTION

Indigenous languages are at the core of the personalities, identities, and cultures of Indigenous peoples,[1] and the loss of their languages often leads to a strong sense of loss of personhood.[2] Before and after the Western invasion of indigenous territories, Indigenous peoples communicated, interacted within the communities, and transmitted culture, traditions, and knowledge through their languages.[3] Although many Indigenous people today speak Western languages, this has not in any way reduced the significance of Indigenous languages to Indigenous peoples.[4] Yet, the traditional publishing industry does not cater to the reading requirements of Indigenous peoples because many Indigenous groups and their communal institutions are relatively poor and therefore have a low ability to pay for copyrighted works,[5] making them unattractive markets for commercial publishers who would rather serve affluent and larger markets.[6] The choice of which Indigenous language, due to the multiplicity of Indigenous languages,[7] is another challenge commercial publishers could raise, even if they choose to publish in Indigenous languages. The population of an Indigenous language community may also be too small to be profitable for publishers. This puts Indigenous peoples in a position where they either must learn to read in "colonial" languages or have very limited access, if any at all, to the existing and growing body of useful works of knowledge.

In the absence of direct catering to Indigenous populations by copyright owners, Indigenous peoples access existing copyrighted works in their own languages by translating the published works into Indigenous languages independently of the copyright owner. This can be done by institutions and persons, other than the copyright owner, that are interested or committed to the availability of works in those languages. Such translation would provide Indigenous peoples access to useful works of knowledge in their languages when needed or preferred even if the traditional publishing market neglects the access needs of these groups. However, to embark on the translation of copyrighted works into Indigenous languages, in the absence of copyright exceptions to the translation right, the permission of the copyright owners of the original edition of the works must be sought and obtained because copyright law grants owners an exclusive right to translate their works. Negotiating and obtaining a copyright licence usually requires considerable time and expenses which can make the process cumbersome, time-consuming, and unaffordable.[8]

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[1] 'Indigenous people are the 'first' or 'original' people belonging to land or territories to which they are historically and culturally tied.' United Nations Educational, Scientific and Cultural Organization, *Education for People and Planet: Creating Sustainable Futures for All* (2016), online: UNESCO Digital Library 27 <https://unesdoc.unesco.org/ark:/48223/pf0000245752>.

[2] Anthony Ayodele Olaoye, "The Role of Indigenous Languages in National Development: A Case Study of Nigerian Linguistic Situation" (2013) 2:3 International Journal of Applied Linguistics and English Literature at 31.

[3] Ibid at 29.

[4] Ibid.

[5] Quentin Wodon & Gina Cosentino, *Education, Language and Indigenous Peoples* (August 2019), online: World Bank Blogs <https://blogs.worldbank.org/education/education-language-and-indigenous-peoples>. Indigenous people though make up only 5% of the world's population, represent 15% of the poorest in the world.

[6] Andrew Franklin, *The Profits from Publishing: A Publisher's Perspective* (March 2018), online: The Bookseller <https://www.thebookseller.com/comment/the-profits-from-publishing-a-publishers-perspective>.

[7] Wodon, supra note 5. It is estimated that there are 7,000 Indigenous languages globally.

[8] William M Landes & Richard A Posner, "An Economic Analysis of Copyright Law" (1989) 18:2 The Journal of Legal Studies 326.

The access to translation conundrum is further exacerbated by the fact that copyrights, including the right to translate, subsist in the copyright owner for an excessively long time, the lifetime of the author of the original edition plus at least 70 years after the death of the author.[9] In the absence of any limitation or exception to the translation right, copyright laws will stand in the way of translating works to foster access for underserved or unserved linguistic groups. Given the widespread consensus that copyright works are integral to education,[10] and the connection between education and development,[11] access to copyrighted works in a plurality of languages ought to be fostered to ensure that no linguistic group is left behind in the pursuit of knowledge/education and development. Inclusive and equitable educational opportunities must be created to support all groups of people. Education is recognized as a sustainable development goal (SDG) that must be realized in all nations of the world in the United Nations' 2030 Agenda for Development. One of the targets of SDG4 (the education goal) is to 'ensure equal access to all levels of education and vocational training for the vulnerable, including indigenous people'.[12] A necessary step in equal and inclusive access to education for Indigenous peoples is the availability of educational instruction in their Indigenous languages and access to educational and learning resources in those languages.[13] There is evidence that a shortage of textbooks and reading books in Indigenous languages has significantly affected the quality of education in many regions of the world.[14] Steps must be taken to close rather than widen knowledge and developmental gaps. Considering how important education is to human development,[15] access to copyrighted works that are important for education and lifelong learning should not be restricted to people who because of the circumstances of their birth have an understanding of the dominant and affluent languages of the world. Further, education is internationally recognized as a fundamental human right that must be enjoyed by everyone regardless of status or race.[16]

This paper is divided into five parts. Following this first introductory part is Part II, which highlights the significance of access to works in Indigenous languages to the educational and overall development of Indigenous peoples, with a special focus on the Indigenous peoples of Australia. Part III examines if and to what extent the Australian copyright framework facilitates access to translations for Indigenous Australians and makes recommendations for reform. In Part IV of the paper, we consider the international copyright framework for access to translated works and the reforms necessary within that framework to foster access to translations for Indigenous peoples globally. Part V provides a summary of the arguments and recommendations made in the paper.

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[9] *Copyright Act*, Cth 1968, s 33(2) [*Copyright Act*].

[10] Ruth Seotendorp & Bartolomeo Meletti, *Education*, online: CopyrightUser.Org <https://www.copyrightuser.org/understand/exceptions/education/>.

[11] Ibid.

[12] Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1 (2015) at para 4.

[13] United Nations Educational, Scientific and Cultural Organization, supra note 1, at 189.

[14] Ibid at 190.

[15] Melanie Walker & Monica McLean, *Professional Education, Capabilities and the Public Good: The role of universities in promoting human development*, 1st ed (Routledge, 2013) at 14; United Nations Development Programme, *Human Development Report 1990: Concept and Measurement of Human Development* (Oxford University Press, 1990) at 10; Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) at 33-34; Sen, *Development as Freedom* (Oxford University Press, 1999) at 5.

[16] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) at 26.

II. SIGNIFICANCE OF INDIGENOUS LANGUAGES IN INCLUSIVE EDUCATION AND DEVELOPMENT

Australia has an increasing Indigenous population of about 812,728 people, who make up 3.2% of the total Australian population.[17] The Indigenous population is expected to rise to 1.1 million people by 2031.[18] Even though the Indigenous population is rapidly growing, with a 19% increase between 2011 and 2016,[19] there is a growing decline in the percentage of people speaking any of the Indigenous languages spoken in Australia.[20] For Indigenous Australians, this is concerning as their language is a core component of their social and emotional well-being.[21] Indigenous people have communicated, exchanged, and transferred knowledge through their languages for many centuries.[22] It is therefore not surprising that the availability of educational instruction and content in Indigenous languages is important in ensuring Indigenous people enjoy quality education, realize their right to education in the same way as non-Indigenous peoples, and preserve their language.[23]

In a bid to close the gap in real-life outcomes between Indigenous and non-Indigenous Australians, the Australian government found that promoting Indigenous languages and facilitating access to information, knowledge, books, and art amongst others in these languages is essential to ensuring equal and inclusive development of Indigenous Australians.[24] Education is one of the strategic reform priority areas identified by the Australian Government, which requires equality and inclusion for Indigenous Australians.[25] However, given the significance of Indigenous languages to the receiving and transmission of knowledge and information for Indigenous Australians, it is difficult to imagine an inclusive and meaningful education if such education is not made accessible in Indigenous languages. As such, in 2019, the Australian Government committed to facilitating access to education, information, and knowledge in Indigenous

[17] Australian Bureau of Statistics, *Australia: Aboriginal and Torres Strait Islander Population Summary* (July 2022) online: Australian Bureau of Statistics < https://www.abs.gov.au/articles/australia-aboriginal-and-torres-strait-islander-population-summary>.

[18] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, 2006 to 2031* (July 2019) online: Australian Bureau of Statistics <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-and-projections-aboriginal-and-torres-strait-islander-australians/latest-release>.

[19] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (August 2018) online: Australian Bureau of Statistics <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>.

[20] Australian Bureau of Statistics, *Language Statistics for Aboriginal and Torres Strait Islander Peoples, June 2016* (April 2022) online: Australian Bureau of Statistics <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/language-statistics-aboriginal-and-torres-strait-islander-peoples/latest-release>.

[21] Department of Prime Minister and Cabinet, *Closing the Gap Report* (2019), online: NIAA at 22 < https://www.niaa.gov.au/sites/default/files/reports/closing-the-gap-2019/sites/default/files/ctg-report-20193872.pdf> [Closing the Gap]; Department of Health, *My Life My Lead: Opportunities for Strengthening Approaches to Social Determinants and Cultural Determinants of Indigenous Health* (December 2017), online: Health.gov.au at 8-10 <https://www.health.gov.au/sites/default/files/documents/2020/12/my-life-my-lead-report-on-the-national-consultations-my-life-my-lead-consultation-report.pdf>.

[22]Australian Institute of Aboriginal and Torres Strait Islanders Studies, *Living Languages* (June 2022), online: AIATSIS <https://aiatsis.gov.au/explore/living-languages>.

[23] Human Rights Council, *Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education*, UN Doc A/HRC/EMRIP/2009/2 (2009).

[24] Closing the Gap, supra note 21 at 22.

[25] Closing the Gap, supra note 21at 15.

Australian languages.[26] While Australia is a predominantly English-speaking country, a reasonable number of Indigenous peoples in Australia do not speak English as a first language.[27] Also, despite the decline in the number of Indigenous languages spoken in Australia over the years, there are still about 120 Indigenous Australian languages spoken today in the country, including 13 that are spoken by all age groups.[28] Consequently, for many Indigenous Australians, access to education also means access in Indigenous languages even to those who speak English well. To buttress this, UNESCO observed that there is a strong connection between mother tongues, literacy, and educational outcomes.[29] According to UNESCO, many students do not attend school, drop out of school, or do not perform well at school because of a lack of access to learning in their mother tongues.[30] While many public schools in Australia offer the learning of Indigenous languages as part of their curriculum,[31] it is more beneficial for Indigenous peoples for educational instruction to be delivered in their languages. Indigenous languages are widely acknowledged as a fundamental pillar for upholding the cultural integrity and well-being of Indigenous communities.[32] Educating Indigenous children in their native languages can serve as a powerful means to reinforce the inherent historical, social, and cultural significance of their linguistic heritage. Moreover, it can positively impact the happiness and overall well-being of the students, extending even to their physical and mental health.[33] Facilitating access to education in Indigenous languages not only promotes inclusive education and quality education outcomes for Indigenous peoples, but the Australian Institute of Aboriginal and Torres Strait Islanders Studies has observed that it also improves their general well-being.[34] In a recent empirical study, researchers found a positive relationship between Indigenous language use and community-based well-being in four Indigenous groups in Mexico.[35]

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[26] Australian Government, *Australian Government Action Plan for the 2019 International Year of Indigenous Languages* (2019) online: Arts.gov.au at 11 < https://www.arts.gov.au/sites/default/files/iyil_2019_action_plan.pdf>.
[27] Australian Bureau of Statistics, supra note 20. According to the Australian Bureau of Statistics, 8.9% of Indigenous Australians in 2011 do not speak English well and 2.2% of Indigenous Australians don't speak English at all.
[28] Closing the Gap, supra note 21, at 22.
[29] UNESCO, *Language Brochure* (2008) online: UNESDOC Digital Library < https://unesdoc.unesco.org/ark:/48223/pf0000158378>; UNESCO, *Why Language Matters for the Millennium Development Goals* (June 2019), online: UNESDOC Digital Library at 4 < https://bangkok.unesco.org/content/why-language-matters-millennium-development-goals>.
[30] UNESCO, supra note 29; UNESCO, supra note 29, at 12. 'School systems that do not use learners' own languages or respect their cultures make it extremely difficult for children to stay in school and learn.'
[31] Department for Education, *Aboriginal language-schools offering a program* (February 2022) online: Education.sa.gov.au <https://www.education.sa.gov.au/aboriginal-language-schools-offering-program>; Keane Bourke, *Indigenous Languages being Taught to 10,000 West Australian School Kids* (July 2022) online: ABC News<https://www.abc.net.au/news/2022-07-04/wa-students-learn-indigenous-languages-at-record-rate/101194088>; Henrietta Cook, *Record Number of Students Flock to Aboriginal Languages* (July 2019) online: The Age <https://www.theage.com.au/national/victoria/record-number-of-students-flock-to-aboriginal-languages-20190720-p52935.html>.
[32] Tracy Coates and Philip Leech-Ngo, "Overview of the Benefits of First Nations Language Immersion, Wise Practices for Indigenous Language Immersion, and Provisions for Supporting Immersion Education in the First Nations Control of First Nations Education Act" (2016) 3:1 Canadian Journal of Children's Rights 46 at 47.
[33] Ibid.
[34] Australian Institute of Aboriginal and Torres Strait Islanders Studies, *Indigenous Australian Languages* (May 2022), online: AIATSIS <https://aiatsis.gov.au/languages-aiatsis>.
[35] Justyna Olko et al, "The Positive Relationship Between Indigenous Language Use and Community-Based Well-Being in Four Nahua Ethnic Groups in Mexico" (2022) 28(1) Cultural Diversity and Ethnic Minority Psychology 132-143.

The UN Permanent Forum on Indigenous Issues has emphasized the importance of educational instruction in Indigenous languages and recommended that educational instruction take place in these languages to ensure equal participation of Indigenous peoples in education.[36] The inclusion of Indigenous languages in education can also increase the involvement of Indigenous communities in education.[37] Bilingual/multilingual education (i.e. teaching and learning in both the mainstream and Indigenous languages) is also important to give Indigenous people a chance to compete equally with their peers and as such integral to achieving meaningful and inclusive education for Indigenous peoples.[38] In Canada, it has been found that Indigenous language-based education can help support quality and inclusive teaching and learning for Indigenous peoples.[39] Quality education must necessarily reflect the dynamic cultures and languages of the learners in a way that makes them feel valued and equal.[40]

Incorporating Indigenous languages into education will also help to preserve Indigenous languages, many of which are on the verge of extinction.[41] According to the UN Nations Permanent Forum on Indigenous Issues, 'The majority of the languages that are under threat are indigenous (sic) languages. It is estimated that one indigenous language dies every two weeks.'[42] Australia has one of the world's fastest rates of language loss.[43] Indigenous languages in Australia comprise only 2% of languages spoken in the world but represent 9% of the world's critically endangered languages.[44] Before colonization, more than 250 Indigenous languages and over 750 dialects were originally spoken in Australia.[45] However, as some experts estimate, only 40 Indigenous languages are still spoken, with just 12 being learned by children in Australia.[46] The lack of support for education in Indigenous languages is one of the greatest threats to Indigenous languages as the more a person is educated in the mainstream education system and mainstream languages, the less they use their Indigenous languages.[47] Education in Indigenous languages, therefore, presents a great opportunity for the preservation of existing Australian Indigenous

[36] United Nations, *Important of Indigenous Education and Culture Highlighted, as Permanent Forum Continues Second Session,* UN Doc HR/4674 (2003).
[37] Denise Angelo et al, "Learning (in) Indigenous Languages: Common Ground, Diverse Pathways" (2022) OECD Education Working Papers, No. 278, 3.
[38] United Nations, supra note 36; Wodon, supra note 5; Human Rights Council, *Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education*, UN Doc A/HRC/12/33 (2009) at para 51-53.
[39] Government of Northwest Territories, *Aboriginal Language and Culture Based Education*, online: Education, Culture and Employment <https://www.ece.gov.nt.ca/en/services/education-renewal/aboriginal-language-and-culture-based-education>.
[40] *Human Rights* Council, supra note 23, at para 8.
[41] United Nations, *The United Nations Permanent Forum on Indigenous Issues* (2018), online: United Nations<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Languages.pdf>.
[42] Ibid.
[43] Australian National University, *1,500 endangered languages at high risk* (December 2021), online: Australian National University <https://www.anu.edu.au/news/all-news/1500-endangered-languages-at-high-risk>; Lisa Lim, Carly Steele & Toni Dobinson, *We are on the Brink of Losing Indigenous Languages in Australia – Could Schools Save Them?*, (July 2022) online: *The Conversation* < https://theconversation.com/we-are-on-the-brink-of-losing-indigenous-languages-in-australia-could-schools-save-them-184736>.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Lindell Bromham et al, "Global Predictors of Language Endangerment and the Future of Linguistic Diversity" (2022) 6 Nature Ecology & Evolution 163 at 163-173.

languages,[48] which must remain a fundamental and valued element of Australian culture and society. Even for the preservation of valuable Indigenous knowledge, Indigenous languages must be preserved. Indigenous language is so intrinsically linked to Indigenous knowledge that it is impossible to separate the two. As Nakata points out 'Without our languages, Indigenous knowledges cannot be expressed in their fullest terms or transmitted to convey their deepest and most intricate meanings. This means that as Indigenous languages are lost, so is diverse and valuable knowledge associated with the health and survival of the planet'.[49]

After conducting an empirical study on Indigenous languages learning in Australia, Canada, and New Zealand, Denise Angelo et al. found that:

> Providing access to strengthening Indigenous languages leads to many benefits for Indigenous students and their families and communities as well as non-Indigenous students and communities. These benefits include: progress towards redress and reconciliation; the transmission of Indigenous knowledges to Indigenous children and youth, as well as wider community members; strengthened cultural identity, well-being and resilience; and improved education outcomes, such as increased retention and achievement rates.[50]

Indigenous peoples, like everyone, have a right to education,[51] and receiving education in their own language is important to the realization of this right. In a study commissioned by the UN Human Rights Council on the challenges to the realization of the right of Indigenous peoples to education, it was found that to achieve the full realization of educational rights for Indigenous peoples, education must be adaptable to the languages of the Indigenous peoples concerned.[52] It is in the best interest of Indigenous peoples that their languages are integrated into mainstream education systems, especially at the primary and secondary education levels.[53] The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of Indigenous peoples to all levels and forms of education and states are obliged to ensure that Indigenous peoples have access to education in their language.[54]

Policies and laws that support bilingual/multilingual education are important to the effective participation of Indigenous peoples within the education system and the achievement of quality education outcomes.[55] Policies and laws that ignore access to knowledge in Indigenous languages do not advance the cause of Indigenous peoples and often hamper their development and progress.[56] Countries must ensure that education is flexible and adaptable to the languages of Indigenous peoples.[57]

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[48] See Coates and Leech-Ngo, supra note 32 at 49 ("Bilingual immersion programs are an effective tool for reviving and preserving Indigenous languages").
[49] N.M. Nakata, "Indigenous Languages & Education: Do We Have the Right Agenda" (2023) The Australian Educational Researcher 1 at 3.
[50] Angelo et al, supra note 37 at 18.
[51] *Universal Declaration of Human Rights*, supra note 16.
[52] *Human Rights Council*, supra note 23, at para 26.
[53] Ibid at para 51-53.
[54] *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, UN Doc A/RES/61/295 (2007) at 14.
[55] *Human Rights Council*, supra note 23, at para 54-55.
[56] Ibid at para 51-52.
[57] Ibid at para 26.

A necessary step in ensuring that Indigenous peoples in Australia and beyond have access to education in their language is the provision of educational materials in Indigenous languages. For there to be inclusive education and equal development of Indigenous people in Australia, efforts must be made to make educational resources available and accessible in Indigenous languages. The Australian Institute of Aboriginal and Torres Strait Islanders Studies noted that producing and translating knowledge resources in Indigenous Australian languages provide significant socio-economic benefits to Indigenous individuals and their communities.[58] The absence of educational materials in these languages has been found to create an educational gap between Indigenous and non-Indigenous peoples.[59] For example, the Indigenous Literacy Foundation in Australia found that the absence of adequate books in the Kriol language for Binjari children had great negative impacts on their knowledge and their literacy level.[60]

Despite the known benefits and significance of education in Indigenous languages to Indigenous students and their families and communities, there remain legal and non-legal limitations and barriers around efforts to support and restore the usage of Indigenous languages, including efforts to have access to educational materials and other copyrighted contents in Indigenous languages.[61] To facilitate access to books in Indigenous languages to support the education of Indigenous people, with the help of Indigenous people, books must be written/produced in Indigenous languages and existing books in English Language or other "dominant" languages that are relevant to education at different levels (especially primary and secondary education levels) must be translated into Indigenous languages. This paper focuses on the latter medium of facilitating access to books in Indigenous languages and the role of copyright in the availability of translations. In the next part, we examine the extent to which Australia's copyright system can support access to educational content and resources in Indigenous languages through translations.

III. AUSTRALIAN COPYRIGHT LAW & ACCESS TO TRANSLATIONS

Education and learning have always been crucial factors in shaping the development of copyright laws and policies both in national and international systems. The earliest English copyright legislation, the *Statute of Anne* has as its long title: 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.'[62] The Statute's objectives included the encouragement of learning and the dissemination of knowledge, thereby putting public interest at the fore of copyright recognition and protection.[63] Copyright was therefore historically conceived as a means to an end

[58] Australian Institute of Aboriginal and Torres Strait Islanders Studies, supra note 22.

[59] UNESCO, supra note 1, at 190; United Nations, Education, online: Department *of Economic and Social Affairs Indigenous People* <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/education.html>; William Fogarty & Inge Kral, "Indigenous Language Education in Remote Communities" (2011) 11 ANU Centre for Aboriginal Economic Policy Research at 6.

[60] Australian Government, *Lifting Literacy Levels and Instilling Lifelong Love of Reading*, (September 2018) online: *indigenous.gov.au* < https://www.indigenous.gov.au/news-and-media/stories/lifting-literacy-levels-and-instilling-lifelong-love-reading>.

[61] See Nakata supra note 49 at 5.

[62] *The Statute of Anne 1710*, 8 Anne, c 19.

[63] Craig Joyce, "The Statute of Anne: Yesterday and Today" (2010) 47:4 Houston Law Review 779 at 784. See also Anindya Bhukta, *Protecting Traditional Knowledge: Ways and Means* (Emerald Publishing, 2020) 82.

and not an end in itself.[64] It was important at the time to grant copyright to authors to encourage them to write useful books as a means to an end – the end being the availability of books for learning (education). As such, the monopoly granted to copyright authors was limited and by also granting the initial copyright to authors, the statute also weakened the monopoly of the Stationers' Company, which had exclusive printing rights and misused them.[65] Several provisions of the *Statute of Anne* clearly point to copyright grant as a means. For instance, the term of the copyright grant was limited to a period of fourteen years,[66] renewable for an additional term of fourteen years.[67] This means that copyright grant was not to exist in perpetuity or even for a long time, but rather copyright was meant to be granted for a short time while works were to fall into and remain in the public domain for the longest of time. The falling of works into the public domain after a short period of copyright monopoly was of significant consequence for learning and liberty since members of the public are free to copy and reproduce public domain works.[68]

Most notably, the *Statute of Anne* only granted copyright owners, a reproduction right; authors were not granted an exclusive right to control the translation of their works.[69] The exclusive right of translation was not clearly recognized in the United Kingdom until the beginning of the 20th century.[70] This is not surprising as from the outset, translation had been recognized as instrumental to the dissemination of knowledge, information, and culture across jurisdictions and languages.[71] The lack of copyright restriction on the translation of works led to the distribution of knowledge across borders at a faster pace.[72] The restriction of the scope of copyright to reproduction while giving members of the public wide powers to carry out acts, such as translation, without the need for a copyright licence in the Statute of Anne further points to the fact that copyright was meant to serve the public interest. The Statute of Anne also included a legal deposit scheme under which publishers were required to deposit nine copies of every book for the use of certain libraries.[73]

In a 2009 decision, the High Court of Australia described copyright as envisaged under the *Statute of Anne* as a form of social contract between the public and an author; the import of the contract being that 'an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.'[74] The court still considers this social contract as underlying the current Australian *Copyright Act 1968* (Cth),[75] especially in light of the historical connection

[64] Ariel Katz, "Competition Policy in Copyright Law", in Anderson, Robert D., Nuno Ferreira de Carvalho, and Antony Taubman (eds) *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press, 2021) 423 at 424-25 ('copyright law was not born as a response to a world of free copying. Quite the contrary, as much as it was responsive to publishers' demands for statutory exclusive rights, copyright law was also a countermeasure against an oppressive regime of press control in which censorship and exclusive print privileges were conflated.')
[65] Ibid at 425.
[66] *Statute of Anne 1710* (n 62) s II.
[67] Ibid s XI.
[68] Joyce, supra note 63 at 784.
[69] *Statute of Anne 1710* (n 62) s II.
[70] David Vaver, "Translation and Copyright: A Canadian Focus" (1994) 16:4 European Intellectual Property Review 159 at 164.
[71] Tong King Lee, "Translation and Copyright: Towards a Distributed View of Originality and Authorship" (2020) 26:3 The Translator 241 at 243.
[72] Vaver, supra note 70 at 165.
[73] *Statute of Anne 1710* (n 62) V.
[74] *IceTV Pty Limited v Nine Network Australia Pty Limited*, 2009 HCA 14 at para 25.
[75] Ibid.

of the Australian copyright framework to the English copyright framework.[76] However, copyright today in Australia as in many other countries lasts much longer than the duration granted to works under the Statute of Anne (generally now the life of the author plus at least 50 years after the death of the author). While the historical goal of the Statute of Anne that copyright is for the encouragement of learning remains paramount today, it is not very much reflected in the Act and needs to be defended.

More importantly, for the purpose of this paper, unlike the *Statute of Anne*, the Australian *Copyright Act* and the copyright laws of most countries now confer on authors, the right to control the translation of their works, amongst other rights within the copyright bundle.[77] During the 19th century, there was a growing movement to acknowledge and respect authors' rights over translations, driven by the rising demand from literate middle classes to access literature from different parts of the world.[78] European writers of the time pushed strongly for exclusive translation rights and were oblivious to the unmet access needs of readers and knowledge seekers in far-flung places.[79] In 1886, the first international copyright treaty – the Berne Convention, a treaty chiefly between European countries, granted an exclusive right to translation to authors for the full duration of the copyright in the original work.[80] The implication of this was and is that no one can translate a work made in a Berne Convention member country without the prior consent of the copyright owner. By 1911, through the Imperial Copyright Act, the UK began to grant exclusive translation rights to authors of all works[81] and the Act extended to its colonies,[82] including Australia, and remains a part of Australian copyright law.[83]

Given the recognition of an exclusive right of translation for copyright owners, translating works into other languages, including Indigenous languages, will therefore depend on the scope and length of copyright control in translations as well as the presence of limitations and exceptions on such copyright control. In Australia, the monopoly over the translation of works subsists in the copyright owner for the life of the author plus 70 years post-death.[84] At the end of this term, the protected works will automatically fall into the public domain and be free of all copyright restrictions on use and adaptation. However, the excessively long term of copyright protection and the wide gap in the educational and developmental outcomes of Indigenous and non-Indigenous Australians makes waiting until the end of the copyright term to translate useful works into Indigenous languages highly undesirable.

Although the Australian *Copyright Act* contains a few provisions that seek to promote the social ends of copyright protection by limiting the scope of copyright control over literary works,[85] none of the provisions within the Act specifically seeks to promote and facilitate access to translations for Indigenous Australians. The statutory licensing provisions under the *Copyright*

[76] Mark J Davison, Ann L Monotti & Leanne Wiseman, *Australian Intellectual Property Law*, 4th ed (Cambridge University Press, 2016) at 198.
[77] *Copyright Act* (n 9) pt 3 div 1 s 31.
[78] Vaver, supra note 70 at 165.
[79] Ibid.
[80] For commentary on international developments at Berne relating to the right of translation, see Lee supra note 71 at 243-45.
[81] *Copyright Act 1911* c. 46, s 1(2).
[82] See section 25(1) of the 1911 Copyright Act which extended the provisions of the Act to British Colonies and Order-in-Council Extending the Copyright Act, 1911 (1 & 2 Geo. V, c. 46) to Certain British Protectorates (Statutory Rules and Orders, 1912, No. 912).
[83] See *Copyright Act* (n 9) pt 3 div 1 s 31.
[84] Ibid s 33(2).
[85] Ibid pt 3 div 3 s 40- 44F.

Act, which permits educational institutions in Australia to copy and communicate copyright material for educational purposes subject to the payment of an agreed equitable remuneration to a collecting society, do not cover the translation of copyrighted materials for educational purposes.[86] Since there is no specific exception to the translation right that can be relied on to translate works into Indigenous languages for educational purposes, it may be possible to rely on the "miscellaneous" exception in section 200AB of the *Copyright Act*.

Access to Translations and the Section 200AB exception

Section 200AB(1) provides that:

> (1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:
> (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
> (b) the use is covered by subsection (2) or (3);
> (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
> (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

Section 200AB(1) is an adaptation of the three-step test in Article 13 of the *TRIPS Agreement*.[87] Unsurprisingly, section 200AB(7) provides that the following phrases in section 200AB(1) have the same meaning as in article 13 of the *TRIPS Agreement*: "special case", "conflict with a normal exploitation" and "unreasonably prejudice the legitimate interests". Section 200AB(1) introduces one more step to its adaptation of the *TRIPS'* three-step test – the use of the work must be covered by section 200AB(2) or (3). Section 200AB(2) covers uses of a work that:

> (a) is made by or on behalf of the body administering a library or archives; and
> (b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
> (c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

Section 200AB(3) covers a use that:

> (a) is made by or on behalf of a body administering an educational institution; and
> (b) is made for the purpose of giving educational instruction; and
> (c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

[86] Ibid pt 4 div 7 s 113N-113U.

[87] *Agreement on Trade Related Aspects of Intellectual Property Rights* (15 April 1994, adopted 23 January 2017) art 13: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'.

Section 200AB exception only covers 'any act that would infringe copyright' if section 200AB were not in the *Copyright Act*.[88] In order to distribute works in Indigenous languages to support education among Indigenous students, it may be necessary to rely on section 200AB of the Australian Copyright Act. While translating without consent from the copyright owner would be considered infringement, section 200AB offers a legal avenue for translation if all requirements are met. Translating works into Indigenous languages serves the purpose of providing educational instruction. Therefore, the requirement that the use of the work for educational instruction in section 200AB(3)(b) can be easily met. Also, the requirement in section 200AB(3)(a) that the use of work is made by or on behalf of a body administering an educational institution is not difficult to satisfy. The entity translating for Indigenous Australians may be an educational institution or it may be a public/private institution that decides to embark on the translation of educational resources into Indigenous languages for use in educational institutions, thereby qualifying as a use made on behalf of an educational institution. In any of these cases, section 200AB(3)(a) would have been satisfied. Further, public institutions, educational institutions, and institutions serving the interests of Indigenous peoples are not likely to embark on the translation of works to support the education of Indigenous peoples to obtain a commercial advantage or profit, thereby satisfying section 200AB(3)(c). Moreover, the translation of works into these languages would not fail to meet the section 200AB(3)(c) requirement merely because of the charging of a fee for the translated copy that is no more than the nominal cost of production.[89]

As the requirements of section 200AB(3) can be easily navigated and satisfied to provide access to translations to Indigenous peoples for educational purposes, it follows that the other requirement in section 200AB that remains to be examined is the iteration of *TRIPS Agreement's* three-step test. The three-step test in the *TRIPS Agreement* operates both to enable states to devise copyright exceptions and limitations in national copyright law and to limit the exceptions and limitations to those that satisfy each of the three steps in the test.[90] In the context of section 200AB, the three-step test can be construed as a set of guidelines that can be used to determine if a use of work that is not expressly covered by any other section of the Australian *Copyright Act* as an acceptable use of a copyrighted work is nonetheless non-infringing. While it is limited to uses made by or on behalf of a body administering a library, archive, or educational institution, section 200AB provides a somewhat open, flexible, and broader exception to copyright protection. Section 200AB covers any use of a work made by or on behalf of these institutions, thereby making it a provision that can potentially be relied on to translate works into Indigenous languages to support the education of Indigenous peoples and bypass the requirement of obtaining the copyright owner's permission. However, it is a very complex provision to navigate, as the use of the work must satisfy the three-step test incorporated into the section.

To be protected by section 200AB, the translation of a copyrighted work into an Indigenous language for educational instruction must (a) amount to a special case; (b) not conflict with the normal exploitation of the work or subject matter; and (c) not unreasonably prejudice the legitimate

[88] *Copyright Act*, supra note 9, s 200AB(7).
[89] Ibid, s 200AB(6A).
[90] Christophe Geiger et al, "Declaration on a Balanced Interpretation of the "Three-step Test" in Copyright Law" (2008) 39:6 *IIC International Review of Intellectual Property and Competition Law* 707 at 710; P Bernt Hugenholtz & Ruth L Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (March 2008) online: Open Society Foundations at 25 < https://www.opensocietyfoundations.org/publications/conceiving-international-instrument-limitations-and-exceptions-copyright>.

interests of the owner of the copyright.[91] Since section 200AB provides that these three phrases have the same meaning as in article 13 of the *TRIPS Agreement*, it is important to consider how the three-step test in the *TRIPS Agreement* has been judicially interpreted by the World Trade Organization's (WTO) Dispute Settlement Panel. The only case in which the three-step test in Article 13 of the *TRIPS Agreement* has been interpreted and applied by the WTO Dispute Settlement Panel is the *United States – Section 110(5) of the US Copyright Act* ('*IMRO Decision*').[92]

The European Communities, acting on behalf of the Irish Music Rights Organisation (IMRO), against the United States (US), initiated the dispute that led to the WTO Panel's decision.[93] The case of the European Communities was that section 110(5) of the *US Copyright Act* of 1976, as amended by the *Fairness in Music Licencing Act*, violated the US obligations under Article 13 of the *TRIPS Agreement*.[94] They argued that the copyright exemptions under section 110(5) were prejudicial to the legitimate interests of rightsholders, while the US argued that limitations on exclusive rights in the *US Copyright Act* are justified under Article 13 of the *TRIPS Agreement*.[95] The main issue was whether the two exemptions provided in section 110(5) are compatible with the three-step test in Article 13 of the *TRIPS Agreement*. The first exemption, "homestyle exemption", in section 110(5)(A) allows transmission of dramatic musical works on a single receiving device commonly used in private homes. The second exemption, "business exemption", in section 110(5)(B) permits the playing of music in retail shops, bars, and restaurants, under certain conditions, without the payment of royalties. The WTO Panel found that the homestyle exemption met the requirements of Article 13 of the *TRIPS Agreement* while the business exemption did not.[96] In coming to this conclusion, the WTO Panel considered the exemptions against each step of the three-step test. While the *IMRO Decision* focuses on copyrights in music, the WTO Panel gave general interpretations of the three-step test that apply to E&Ls to copyrights in literary works. The following headings present the interpretation of the WTO Panel on each step of the *TRIPS Agreement's* three-step test.

Step 1: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases'

The relevant phrase here is "certain special cases". The WTO Panel consulted dictionaries and adopted the ordinary meaning of 'certain' in the Oxford English Dictionary as '"known and particularised, but not explicitly identified", "determined, fixed, not variable; definitive, precise, exact"'.[97] According to the Panel, the word "certain" in the first step implies that 'an exception or limitation in national legislation must be clearly defined' to an extent that guarantees a sufficient degree of legal certainty.[98]

Concerning the term "special", the Panel stated that:

[91] *Copyright Act*, supra note 9, s 200AB(1).
[92] Panel Report, *United States – Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (15 May 2000) [*United States - Section 110(5)*].
[93] Ibid at para 1.2.
[94] Ibid at para 3.1.
[95] Ibid at paras 3.1- 3.3.
[96] Ibid at para 7.1.
[97] Ibid at para 6.108.
[98] Ibid.

> The term "special" connotes "having an individual or limited application or purpose", "containing details; precise, specific", "exceptional in quality or degree; unusual; out of the ordinary" or "distinctive in some way". This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition ("no conflict with a normal exploitation"), an exception or limitation should be the opposite of a non-special, i.e., a normal case.[99]

The Panel found that the homestyle exemption in the *US Copyright Act* was confined to "certain special cases" because it was well-defined and limited in its scope as only about 13 to 18 percent of establishments were covered by the exemption.[100] On the other hand, the Panel found that the business exemption was not so confined because its scope in terms of potential users was substantially large.[101]

Applying the above interpretation and holding on step 1 in interpreting section 200AB(1)(a) of the *Copyright Act* in the context of making and distributing translations of copyrighted works for the educational instruction of Indigenous Australians, the question is whether the circumstances of the translation amounts to a special case. The circumstances would likely be considered as amounting to a "special case" within the meaning given to the phrase by the WTO Panel in the *IMRO Decision.* The translation use proposed in this paper is quite specific to a particular group of people – Indigenous Australians – and the languages in which the works can be translated are limited to Indigenous Australian languages. This makes the circumstance of the use quite specific and the scope of its intended beneficiaries is well defined and narrow. Indigenous Australians represent 3.2% of the total Australian population.[102] For these reasons, it is more likely than not that section 200AB(1)(a) would be satisfied if a copyrighted work is translated into an Indigenous language for educational use by Indigenous peoples.

Step 2: 'which do not conflict with a normal exploitation of the work'

The Panel interpreted exploitation of the work as 'the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works.'[103] The term "normal" was given two connotations – empirical and normative. It was empirically interpreted as what is 'regular, usual, typical or ordinary'.[104] It means 'conforming to a type or standard' in normative terms.[105] Normal exploitation was interpreted to mean 'those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire

[99] Ibid at para 6.109.
[100] Ibid at para 6.160.
[101] Ibid at para 6.133. About 70 percent of eating and drinking establishments and 45 percent of retail establishments in the US were covered by the exemption: at paras 6.125-6.126.
[102] Australian Bureau of Statistics, supra note 17.
[103] Ibid at para 6.164.
[104] Ibid at para 6.166.
[105] Ibid.

considerable economic or practical importance'.[106] Accordingly, to pass the second test, an exception must not deprive the rightsholder of an actual or potential economic return that is significant. An exception would be presumed not to conflict with a normal exploitation of works if it is confined to a scope that does not enter 'economic competition with non-exempted uses'[107] that the right holder may want to exploit.

Concerning step 2, the Panel consequently found that the homestyle exemption did not conflict with a normal exploitation of the work because there was little or no direct licencing by individual rightsholders for the works covered by the exemption.[108] By contrast, the Panel found that the business style exemption did not meet the requirements of step 2 because it deprived rightsholders of the royalties that would otherwise have been paid for the use of their work by these businesses.[109]

Applying the interpretation in step 2 to the context of the use advocated in this paper, it is arguable that the translation of a copyrighted work into Indigenous languages for educational purposes would not conflict with a normal exploitation of the work. There is a shortage of works in Indigenous Australian languages for educational purposes,[110] and the market for works in Indigenous languages is not commercially viable enough for copyright owners to exploit. Given the absence of exploitation of that market and the evidence that commercial publishers do not normally respond to non-affluent markets, it is very unlikely that rightsholders would consider the Indigenous Australian market as one of considerable economic importance which would deprive them of a significant potential economic return. Furthermore, considering that Indigenous Australians who will be the beneficiaries of permitted translations of copyrighted works into their languages make up a very small percentage of the total Australian population, the translation of works into their languages will not cause economic competition with works in other dominant languages that are being commercially exploited by copyright owners in Australia. For example, it is very unlikely that a native English speaker in Australia or someone who has primarily only learned in English would consider translated editions of works in Indigenous languages a viable substitute for educational purposes.

Overall, it is highly unlikely that the translation of a copyrighted work into Indigenous Australian languages for educational purposes would conflict with a normal exploitation of the work in Australia.

Step 3: 'do not unreasonably prejudice the legitimate interests of the right holder'

The third step appears to have many similarities with the second step and the fact that the WTO Panel repeated much of their analysis on the second step supports this. It has been suggested that the WTO Panel confused the two steps.[111] Notwithstanding this, the Panel gave some guidance on the interpretation of this step. The term "prejudice" means harm or injury.[112] "Legitimate interests" was interpreted as 'the economic value of the exclusive rights conferred by copyright on

[106] Ibid at para 6.180.
[107] Ibid at para 6.181.
[108] Ibid at para 6.219.
[109] Ibid at para 6.211.
[110] Jenn Korff, *Barriers to Aboriginal education* (August 2021) online: Creative Spirits <https://www.creativespirits.info/aboriginalculture/education/barriers-to-aboriginal-education>.

[111] Hugenholtz & Okediji, supra note 90, at 24.
[112] *United States – Section 110(5)*, supra note 92, at para 6.225.

their holders.'[113] However, it was suggested that the legitimate interest of a rightsholder is not limited to economic value.[114] According to the Panel, 'prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner'.[115]

The Panel found that the homestyle exemption did not cause unreasonable prejudice to the legitimate interests of rightsholders because of its limited scope and lack of evidence of direct licensing by individual rightsholders for the works covered by the exemption.[116] On the other hand, the Panel found that the US failed to show that the business exemption did not unreasonably prejudice the legitimate interests of rightsholders considering the broad scope of establishments covered by the exemption.[117]

Applying the reasoning of the court on the third step to the case of translation of works into Indigenous Australian languages, it is arguable that the translation would not unreasonably prejudice the legitimate interests of the owner of the copyright in the works that would be translated. Copyright owners in Australia do not translate their works into Indigenous languages for commercial exploitation, and as such permitting translations of their works into these languages under section 200AB will not lead to a loss of income, whether actual or potential. The general attitude of commercial publishers is to respond to economically affluent markets and given that Indigenous Australians represent 3.3% of the Australian population and speak diverse languages, it is unlikely that commercial publishers would find the market, particularly a lucrative one to cater to now or in the future. In fact, it is the high unlikelihood of commercial publishers catering to this market that strongly necessitates a legal intervention in the form of an exception to prevent copyright from limiting access to educational materials in accessible languages for a population that would otherwise not be considered by commercial publishers. It is therefore hard to think of how permitting translations into Indigenous Australian languages will harm or prejudice the economic interests of copyright owners in Australia. Although because the consideration under the third step is not limited to economic interests, there may be other non-economic interests that could be significant in the case of translations, such as the preservation of the literary value and meaning of a work in the course of translation. However, this should not negatively impact the recognition of translation for educational purposes as an exempted use under section 200AB since the possibility of improper translation is not synonymous with a high likelihood of improper translation of works by persons other than the copyright owner or their authorized translator.

The above analysis points strongly to the fact that translating copyrighted works into Indigenous Australian languages for educational instruction would most likely satisfy the requirements of section 200AB of the *Copyright Act* and therefore be legally permissible. However, one of the downsides of provisions like section 200AB is the fact that one cannot be too certain of the interpretation of the provision until it is judicially interpreted by an Australian court.[118] The correct import of the provisions in section 200AB and the full range of activities that

[113] Ibid at para 6.227.
[114] Ibid.
[115] Ibid at para 6.229.
[116] Ibid at para 6.272.
[117] Ibid at paras 6.265-6.266.
[118] Emily Hudson, "The Copyright Amended Act 2006: The Scope and Likely Impact of New Library Exceptions" (2006) 14:4 *Australian Law Librarian* 25, at 32-33; Amanda Bellenger & Helen Balfour, "Copyright in the Time of COVID-19: An Australian Perspective" (2021) 5:1 *Journal of Copyright in Education and Librarianship* 1, at 4: 'Although s200AB is supposed to be a flexible dealing exception for educational institutions and libraries, it has proved to be difficult to apply because of its drafting choices that incorporate the "three-step test" with unclear terms.'

are permitted under the section can be very difficult for users of copyrighted works to ascertain with sufficient precision. This uncertainty, no matter how small, can have some chilling effects, especially in a world where many people have copyright anxiety.[119] The fear of possible copyright infringement, even in the face of clear exemption clauses in copyright law often deters people from using copyrighted works in ways that they would otherwise have wanted to.[120] It is, therefore, not too far-fetched to assume that despite the provision of section 200AB and the high possibility that translations into Indigenous languages for educational purposes would satisfy the requirements of the section, many organizations and institutions would refrain from embarking on altruistic translation projects for the benefit of the Indigenous peoples if there is a risk of copyright infringement liability. For this reason, it is more access-enabling to have a specific exception within the Australian *Copyright Act* tailored to permit translations of copyrighted works into Indigenous Australian languages for educational purposes.

Proposed National Law Reform for Access to Translations

The absence of any specific and clear exception that can be relied on for access to translation in Australia is further worsened by the fact that the traditional publishing industry cannot be relied upon to cater to the lack of translations in Indigenous languages because of the low purchasing power of persons who may be interested in works in Indigenous languages. Publishing industries are mainly for-profit entities and respond primarily to the needs of economically advantaged groups,[121] making it unlikely that they will create a market for translated editions of their works in Indigenous languages. There is no viable commercial market for works in Indigenous languages that can serve as sufficient motivation for authors and publishers who cater to the more affluent and economically advantaged linguistic groups. Thus, persons who have non-economic motivation in providing access to literary works, especially persons and groups working for the benefit of Indigenous peoples, would most likely be more interested in the translation of useful copyrighted works to Indigenous languages than copyright owners and commercial publishers.

However, in the absence of any clear exception or limitation within the *Copyright Act* that can be relied on as the legal basis for translating copyright-protected works, such persons or groups wishing to embark on the translation of works to support access to education in Indigenous languages must seek and obtain translation licenses from the copyright owners. This is a strong disincentive and invariably increases the costs associated with translation since the translation licences are usually negotiated for a fee.[122] Arguably, a rational publisher would be willing to grant a licence at a low fee for the translation of works into Indigenous languages because they have

[119] Inga-Lill Nilsson, "Developing New Copyright Services in Academic Libraries" (2016) 29:1 *Insights: The UKSG Journal* 7, at 81: Copyright anxiety is used to describe a situation where users of copyright works are afraid 'that everything they do violates the law instead of trying to find best practice in handling copyright issues'.

[120] Emily Hudson, supra note 118, at 32; Amanda Wakaruk, Céline Gareau-Brennan & Matthew Pietrosanu, "Introducing the Copyright Anxiety Scale" (2021) 5:1 *Journal of Copyright in Education and Librarianship* 1, at 1-38.

[121] Franklin, supra note 6.

[122] Arts Law Centre of Australia, *Translations*, (September 2001), online: *Arts Law* < https://www.artslaw.com.au/article/translations/>. ARC Industrial Transformation Training Centre for Uniquely Australian Foods, *Copyright, Open Access and Translation for Scientific and Academic Research* (2020) online: *Uniquely Australian Foods*, at 2 < https://uniquelyaustralianfoods.org/wp-content/uploads/2020/03/UAF22-Copyright-Open-Access-and-Translation-Fact-Sheet.pdf>.

nothing to lose and perhaps a lot to gain from the extended readership of their work to Indigenous communities. However, there is no evidence that copyright owners would charge low licensing fees and what is low is relative to the economic power of the Indigenous community or person seeking the licence.

Furthermore, the actual licensing fee is one of many copyright-related translation costs that may be incurred. Other transaction costs may include the costs of seeking the copyright owner, negotiating a license and drawing up a licensing contract. Often copyright exceptions and limitations have been justified by the existence of various transaction costs of copyright licencing[123] and the case of translation licence for Indigenous persons need not be different. Furthermore, Indigenous peoples have faced historic discrimination and one cannot assume that such discrimination would not arise in cases of direct license requests to translate works into Indigenous languages. Racism is still very much in the fabric of our society. Some authors might just be unwilling to grant a licence for no reasonably justifiable reason.

Where the costs of licensing are high and persons seeking to obtain translation licenses either do not have a means of recouping the licensing costs or seek translation for altruistic purposes, this can deter them from embarking on translation exercises which will result in complete unavailability or extreme shortage of books in Indigenous languages. It is expected that educational institutions, public institutions, and some not-for-profit institutions will most likely take up the translation of existing works into Indigenous languages. Since there are other significant costs associated with translation beyond the costs of obtaining copyright licenses to be borne by these institutions, it would be more socially desirable for these institutions to take on the project of translating existing works if the overall costs and expenses involved in translating are subsidized through the copyright system. Without such subsidization, the expenses involved in getting works translated and accessible in Indigenous languages may be grossly unmanageable.

Although it may be argued that copyright owners should not be required to subsidize translation activities, copyright is a state grant and the state can and should define and redefine the contours of that grant in a way that balances the interests of copyright owners and the public interest, including the interests of marginalized groups. Exempting or limiting copyright protection in favour of translation into Indigenous languages is one of the ways of ensuring a balanced copyright system preventing the use of copyright law, whether consciously or unconsciously, as a tool for furthering inequality in society. Moreover, the market of translation into Indigenous languages is largely underexploited by copyright owners and as such, the economic impact of such exemption or limitation on copyright owners might be minimal, if felt at all.

As emphasized earlier, a primary goal of the copyright system is or should be to facilitate access to works for educational purposes. Considering the absence of any provision in the current Australian *Copyright Act* that can be confidently leveraged to translate copyrighted works without the need to negotiate and obtain copyright licences from copyright owners or their agents and the significant connection between access to translations and education for Indigenous Australians, there is a genuine need to reform the Act to facilitate inclusive education and development for Indigenous Australians. We propose that a specific and clear exception to copyright control in translation be included in the Australian *Copyright Act* for the benefit of Indigenous Australians.

A translation exception for the benefit of Indigenous Australians should permit any entity recognized by the government to provide education, instructional training, or literary materials to Indigenous peoples on a non-profit basis to translate, without the authorization of the copyright owner, published works into an accessible Indigenous language, and supply translated copies of

[123] See Katz, supra note 64 at 434-35

the works to Indigenous persons by any means. This exception should be subject to the following conditions:

1. The entity must respect the moral rights of the author as contained in Part IX of the *Copyright Act* in translating the work and publishing the translated edition of the work, including the author's rights of attribution and integrity of authorship. This requirement could ensure that those embarking on translation activities under this exception respect the integrity of the expression of the author of the work in rendering their translation and acknowledge the creative work of the author in conceiving and producing the original edition.
2. The translated edition of the work should be subject to an open licence[124] that permits the non-commercial use (including adaptation) of the work for the benefit of Indigenous peoples without the authorization of the copyright holder of the translated edition. Subjecting the translated edition to an open licence would further the dissemination of the translations since a translated work enjoys a separate copyright that could, in the absence of an open licence, hinder the wide dissemination of the translated work.
3. The translated edition of the work must not be distributed to obtain a commercial advantage or profit. However, the distributor of the work may charge a fee that does not exceed the nominal costs of production if the work is distributed in print. Copyright owners are more likely not to oppose an exception that does not lead to commercial exploitation of their work in a way that deprives them of any significant revenue accruing from that exploitation.

The recognition of a translation exception for the benefit of Indigenous Australians will no doubt facilitate access to useful works of knowledge and enhance the opportunities for Indigenous Australians to enjoy their right to education on an equal basis with others in Australia. In addition to equitable access to education, access to translated works will also expand the human development capabilities of Indigenous peoples.

IV. INTERNATIONATIONAL COPYRIGHT FRAMEWORK FOR ACCESS TO TRANSLATIONS

There are almost 476 million Indigenous peoples in the world, living across 90 countries, making Indigenous peoples represent about 6% of the world population.[125] There are thousands of Indigenous languages spoken by Indigenous peoples around the world, many of which are on the verge of extinction.[126] Whether in Australia, Canada, America, or different parts of Africa and Asia, Indigenous languages are key to the identity of Indigenous peoples everywhere and play a significant role in their educational development. Access to books in Indigenous languages is therefore not necessary only for the educational development of Indigenous peoples in Australia,

[124] Creative Commons Australia, *Open Licenses* (2017), online: *Australasian Open Access Strategy Group* at 1 < https://aoasg.files.wordpress.com/2013/12/aoasg-factsheet_cclicensing-0021.pdf>. An 'open license' is a license that can be placed on a work to make the work accessible and available to use under certain conditions outlined in the license.

[125] World Bank Group, 'Indigenous Peoples', *The World Bank* (Web Page, 14 April 2022).

[126] Lim, supra note 43.

but also for Indigenous peoples everywhere. Translations of works into a language that a group of people are conversant with are key for providing access to knowledge for that group.

Notwithstanding the above, there is no general translation flexibility within international copyright laws that may be appropriated for the benefit of Indigenous peoples. The *Berne Convention for the Protection of Literary and Artistic Works* (‘*Berne Convention’*) which is the primary international copyright treaty provides for the grant of translation rights to authors for a minimum term of the life of the author plus 50 years post-death, similar to the term of protected for reproduction right.[127] Historically, the *Berne Convention* offered a shorter term of protection for translation rights. Article 5 of the 1886 text of the *Berne Convention* granted authors a translation right for a maximum term of 10 years from the publication of the original edition of the work.[128] The 10-year term was chosen to meet the needs of developing nations, particularly Scandinavian countries in Europe, who were primarily importing literary works from developed countries like France and England.[129] These countries also produced their own literary works but had limited access to those produced by developed nations, which could only be made available by translating them into languages that their citizens could understand. As such, a liberal translation right would hamper access to many valuable foreign works for those developing countries and limit the dissemination of knowledge for education and learning. The moratorium on the translation right did not however last for long as the developed countries of the time fought for the grant of the same term to the translation right as the reproduction right.[130]

A subsequent revision of the *Berne Convention* at Paris in 1896 saw a gradual increase in the term of the translation right. Authors were granted translation right for the same term as the reproduction right with the exception that the translation right in a work expires for the purpose of a language for which protection is claimed if a translation of the work has not been published in the ten years from the publication of the original edition of the work.[131] This allowed the translation of works into languages that would not be catered to by the copyright owners. This flexibility in the 1896 Act was however short-lived by another revision of the Convention at Berlin in 1908 (‘*Berlin Act 1908’*). The *Berlin Act* granted authors full term of copyright protection in the translation of their works without the possible ten-year expiration allowed in the 1896 iteration of the Convention.[132] Since then, the minimum term of protection required for translation rights under the Berne Convention has been the life of the author plus fifty years post-death.[133] The stipulation within the Berne Convention, which obliges member countries to safeguard translation rights for the same duration as other copyrights in a work, can be viewed as posing challenges to the timely and cost-effective translation endeavours needed to foster access to knowledge, particularly in developing nations.[134]

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[127] *Berne Convention for the Protection of Literary and Artistic Works*, 28 September 1979, (entered into force 19 November 1984) art 12 [‘*Berne Convention*’].
[128] Ibid art 5.
[129] See Chamila S. Talagala, *Copyright Law and Translation: Access to Knowledge in Developing Economies* (Routledge 2021) 126-128; Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2006) vol 1, 80-95.
[130] Ibid.
[131] *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act 1896), 4 May 1896.
[132] *Berne Convention for the Protection of Literary and Artistic Works* (Berlin Act 1908), opened for signature 9 September 1908 (entered into force 13 November 1910) art 8.
[133] *Berne Convention* (n 130) art 2 & 7.
[134] See Talagala, supra note 129 at 126.

Following concerns over access to knowledge through translations in developing countries, the 1971 Paris revision of the *Berne Convention* introduced an Appendix to the Convention that provides flexibility that can be appropriated to translate foreign works into local languages to meet the education and research needs of developing countries.[135] However, as will be shown, this flexibility is limited in many regards and cannot significantly cater to the translation needs of Indigenous peoples globally.

The *Berne Appendix* permits a developing country to adopt a system of compulsory licenses for the translation of literary works under certain conditions for teaching, scholarship, and research.[136]

To be able to use the *Berne Appendix* flexibility to translate foreign works, a country must be regarded as a developing country according to the established practice of the UN General Assembly.[137] This is the first major restriction on the use of the flexibility. Countries that are not recognized as developing countries with the UN framework cannot appropriate the translation flexibility in the Appendix. This is notwithstanding the huge need for translated works by Indigenous peoples in developed countries like Australia, Canada, and the United States. Therefore, the Berne Convention's obligation regarding translation rights impedes affordable and timely access to knowledge in developing and linguistic minority communities within developed countries without providing any flexibility to cushion its effect.

Even for developing countries, the compulsory licensing system in the Berne Appendix cannot be automatically adopted. A country that desires to adopt the compulsory licensing system for translations must make a declaration to the Director-General of the World Intellectual Property Organization that it wishes to adopt the system.[138] This declaration gives the country the right to adopt the system for a ten-year term, renewable by the deposit of another declaration at least three months and at most 15 months before the end of the ten-year term.[139] Where a country has an effective declaration in place, it may then grant compulsory licences for the translation of a work, but only if a translation of the work sought to be translated by the applicant has not been published in 'a language in general use' in that country or where all the editions of the translation are out of print.[140]

In essence, the availability of a translation of a work in a language in general use in a country precludes a grant of a compulsory license for translation into languages that are not in general use and even for translation into other languages that may be in general use. While the Appendix does not define 'a language in general use', the General Report of the Paris Conference that led to the development of the Berne Appendix provides an authoritative interpretation for this requirement. According to the Report, 'it was understood that the notion of "a language in general use" in a country included languages in general use by less than the totality of the country's population. Thus, such a language could be a language in general use in a given geographic region of the country, the language of an ethnic group of the population, or a language generally used for

[135] *Paris Act 1971*, 24 July 1971, (entered into force 10 October 1974) art II [*Berne Appendix*]. See Salah Basalamah, "The Thorn of Translation in the Side of the Law: Toward Ethical Copyright and Translation Rights" (2001) 7:2 The Translator 155 at 156-7.
[136] Ibid art II sub-s (5).
[137] Ibid art I sub-s (1).
[138] Ibid art I sub-s (1)-(2).
[139] Ibid.
[140] Ibid art II sub-s (2).

particular purposes, such as government administration or education.'[141] This interpretation makes clear that "a" language in general use might not be spoken by everyone in the country and yet, once a work is available in such language, a translation licence cannot be obtained for translation into other languages that may be in use in the country. The flexibility in the *Berne Appendix*, therefore, provides no solution to the access needs of Indigenous peoples in developing countries where copyrighted works are available in a language in general use in the country they are geographically located in. Yet, as Cerda Silva points out, "When copyright blocks the translation of works into a minority language, its native speakers are forced to adopt a more generally used language, possibly condemning the minority language to extinction."[142]

If the developing country and availability of translation in a language in general use hurdles are successfully scaled, a person would be able to apply for the grant of a compulsory license for translation but not before the end of three years after the publication of the original edition of the work.[143] Even after this, the license cannot be issued until a further period of six months has elapsed from the date when the requirements as to notifications to the rightsholder are met.[144] If during this further six-month waiting time the rightsholder makes the translation of the work available in the language for which the translation licence is sought, the licence application must not be granted.[145] There is no requirement that copies of the translated work made by the rightsholder be widely available and/or affordable before the compulsory licence request is denied. A rightsholder can therefore act in bad faith to sabotage the compulsory licensing process without meaningfully catering to the market for translations by providing widespread and affordable access. Although Article 40 of the TRIPS Agreement allows Member States to specify in their national laws 'licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition', this provision only pertains to contractual licenses and not compulsory licenses. There is, however, no reason why countries may not apply such measures to prevent abuses of intellectual property rights under compulsory licensing schemes.

Where the rightsholder does not make a translated edition of the work available during the further waiting period, the translation licence would be granted subject to the payment of just compensation to the rightsholder.[146] It is required under the *Berne Appendix* that the compensation must be 'consistent with standards of royalties normally operating on licences freely negotiated between persons in the two countries concerned'.[147] The requirement to pay compensation makes it more expensive to embark on translation exercises for the benefit of Indigenous peoples and linguistic minorities. This is especially so in cases where the applicant for the compulsory license

[141] World Intellectual Property Organisation, *Records of the Diplomatic Conference for the Revision of the Berne Convention* (Paris, July 5 to 24, 1971), "General Report" (unanimously adopted on July 22, 1971 by the Plenary Conference) para 30.

[142] Alberto Cerda Silva, "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright" (2012) PIJIP Research Paper No. 2012-08 at 25.

[143] *Berne Appendix* art II sub-s (2)(a). It is only in circumstances where the language sought to be translated to is not a language in general use in any of the developed countries within the Berne Union can the three-year waiting period be reduced to one-year. See *Berne Appendix* art II sub-s (3)(a).

[144] Ibid art II sub-s (4)(a). In terms of notifications to the rightsholder, an applicant must establish that a request to translate a work has been made to the rightsholder and been denied, or that after due diligence by the applicant, the rightsholder cannot be found. The applicant must also inform any pre-designated information centre in the country in which the publisher of the work carries on business. See *Berne Appendix* art IV sub-s (2).

[145] Ibid art II sub-s(4)(b).

[146] Ibid art IV sub-s (6).

[147] Ibid.

seeks to make translations of a work available on a not-for-profit basis. Considering that for a compulsory license to translate to be granted under the Appendix, there must be a decline by the rightsholder to directly cater to the market that needs access to translations, it seems quite unreasonable to require such rightsholder to be compensated for a market they are uninterested in and for such compensation to be at the same rate as freely negotiated licenses. It may be argued in the alternative that the requirement of paying royalties to the copyright owner should be retained while whether a work translated under a compulsory licence would be published and distributed on a non-profit basis should be a factor in determining the quantum of royalties. In this case, it would be expected that a licensee who hopes to make a profit would be willing to pay higher royalties than a licensee who has no such plan. However, the non-payment of royalties for persons who seek to make translations available on a non-profit basis must still be strongly considered as an incentive for the making of translations in Indigenous languages. This will further subsidize the costs of translations.

The many limitations and hurdles within the *Berne Appendix* make it ineffective as a tool for facilitating access to Indigenous peoples globally.[148] Perhaps the most significant of these limitations in the context of this paper is the inaccessibility of the flexibility in the Appendix to Indigenous peoples in developed countries who face similar challenges in accessing translation of useful works of knowledge for educational and other development purposes. Also important is the unavailability of the compulsory license for other local languages once a work has been translated into a language considered to be in general use in a country. These and other limitations and hurdles to enjoying the flexibility in the *Berne Appendix* necessitate a reform of the international copyright framework for access to translations. Even for developing countries, the Berne Appendix has been a failure as a framework for access.[149] As Silva pointed out, 'the Appendix comes across as an obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries'.[150]

The other flexibility for translations within the *Berne Convention* is contained in Art 30(2)(b) and is known as the 'ten-year regime'. By the provision of art 30(2)(b), a developing country is allowed to terminate the exclusive right of translation of a copyright owner if the work in which copyright subsists is not available in a language of general use in that country within ten years of the work's first publication. After ten years, the work falls into the public domain as far as the right of translation into a language of general use in that country is concerned, and translation can be freely done. In addition to being fraught with the developing country limitation, most countries cannot adopt the ten-year regime, because only countries that made a reservation to take advantage of this flexibility when ratifying or acceding to the *Paris Act* of the *Berne Convention* can have this exception in their domestic legislation. As such, since the adoption of the *Paris Act* of the *Berne Convention*, only four developing countries have reserved the right to adopt the ten-year regime.[151]

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[148] For a detailed review of the Berne Appendix and its limitations, see Basalamah, supra note 135 at 157-61 and Cerda Silva, supra note 142.

[149] Ruth L Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries" (Issue Paper No. 15, International Centre for Trade and Sustainable Development, March 2006) 15-16; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Queen Mary College 1987) 663.

[150] Cerda Silva, supra note 142 at 11.

[151] Since the adoption of the Berne Convention, only the following countries have reserved this right: Slovenia, Bosnia and Herzegovina, Croatia, and Serbia. See WIPO, WIPO Administered Treaties <https://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&treaty_id=15>.

The irrelevance of the ten-year regime further strengthens the argument that the international copyright system is in dire need of a viable legal framework for supporting access to translations for Indigenous peoples. While states have some autonomy to include an exception or limitation on copyright protection in their national copyright, the exception must meet the three-step test in Article 13 of the *TRIPS Agreement*.[152] Given the uncertainty around what exceptions will be interpreted as complying with the three-step test, it is important to have a more useful and certain mechanism for facilitating access to translations for Indigenous peoples within the international copyright system. Also, the importance of translations to education and human development necessitates incorporating mandatory exceptions in international copyright law that states must include in domestic copyright laws for the benefit of Indigenous peoples.

To facilitate access to translations for Indigenous peoples globally, it is recommended that a set of specific mandatory provisions that will serve as exceptions to the exclusive right of translation be introduced within the international copyright corpus. This should be similar to the legal intervention within the international copyright system for access to published works for visually impaired persons and other print-disabled persons.[153] At a minimum, the translation of a work into any Indigenous language in which such work is not hitherto available should be permitted by persons representing or working for the benefit of Indigenous peoples, without the authorization of the copyright owner. However, copies of such translation must be distributed to Indigenous peoples at no cost (other than the nominal cost of production) and the translated edition must be subject to an open licence. The moral rights of the author of the original edition of the work must be respected in the making, publication, and distribution of the translated edition.

Like the exceptions and limitations for access to published works for the benefit of print-disabled persons in the *Marrakesh Treaty*, there is human rights justification for the inclusion of a translation exception for the benefit of Indigenous groups in a country. The acute shortage or total lack of access to published works in Indigenous languages for the benefit of Indigenous peoples limits the ability of these persons to receive ideas, knowledge, and information in languages understandable to them. This invariably affects their enjoyment of the fundamental human right to education which is recognized in several international human rights instruments,[154] including the *UN Declaration on the Rights of Indigenous Peoples*.[155] The language barriers to access to published works suffered by Indigenous groups in developing and developed countries and the impact of that on the rights to education and the overall development of Indigenous peoples make it imperative to improve access to published works in Indigenous languages by exempting translations into such languages from the scope of the exclusive translation right granted to a copyright owner.

V. CONCLUSION

Australian Indigenous languages are on the verge of extinction. Incorporating Indigenous languages into the Australian educational curriculum will help preserve Indigenous languages. The

[152] Article 13 of the *TRIPS Agreement* provides that: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

[153] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled*, (entered into force 30 September 2016) art 2-4.

[154] *Universal Declaration of Human Rights*, supra note 16, art 26; *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A(XXI) UNTS 993 (16 December 1966) art 13.

[155] *United Nations Declaration on the Rights of Indigenous Peoples*, supra note 54, art 14.

problem with this strategy is that the relevant educational contents required for learning are unavailable and inaccessible in Indigenous Australian languages. A solution would be to translate the relevant works from the original language to Indigenous languages. This strategy is however met with translation legal restrictions based on international and local copyright legislation, which restrict the translation of works without authorization. This paper emphasizes the importance of preserving Indigenous identity and argues for a translation exception at both national and international levels to overcome the current access and translation restrictions.

Translation facilitates access to knowledge, which is crucial to quality education for Indigenous peoples. For all to have equal access to knowledge embedded in copyrighted works, access must be possible in a language beyond the language in which the work was originally published. While copyright owners have translation rights that may be used to facilitate the translation of their works into other languages, it is impractical to expect that they would publish works in all languages of the world (particularly in the non-dominant and non-affluent languages) or grant translation licenses to every applicant. The transactional costs and administrative expenses involved in seeking a copyright owner for every work that is useful for education and learning and concluding a translation licensing contract with them make it more undesirable to rely on the translation right as a tool for facilitating translation for Indigenous peoples.

A mechanism that allows the translation of works into Indigenous languages for non-commercial purposes is essential to facilitate equal and inclusive access to education and development for Indigenous language speakers. In Australia, there is no specific translation exception that can be appropriated to promote access to translations for Indigenous Australians, and the blanket exception in section 200AB of the *Copyright Act* does not offer much support given the uncertainty surrounding the exact meaning of the exception and what uses will be permitted thereunder. It is therefore imperative that future law reform efforts be directed at including a translation exception into the *Copyright Act* for the benefit of Indigenous Australians. Efforts to close the development gap between Indigenous and non-Indigenous Australians, including notable gaps in educational outcomes, must necessarily include access to education and educational materials in Indigenous languages. A translation exception that facilitates access to useful works in these languages is an essential step toward closing the gap and promoting access to quality education amongst Indigenous peoples.

The need for access to translation is not limited to the Indigenous peoples of Australia. As shown in this paper, access to education in one's mother tongue is significant to great educational outcomes. The hundreds of millions of people who speak Indigenous languages must not be left behind in the global pursuit of quality education and learning for all, as outlined in the UN SDG4. An international response is required to address the existing challenge of access to translation. This challenge is worsened by the exclusive rights to translation that copyright owners hold for a long period. We argue that such an international response should take the form of a specific mandatory translation exception to facilitate access to published works in Indigenous languages in all countries within the international copyright system.