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International copyright reform in support of open legal information
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Abstract: This paper analyzes the status of legal information under international and national copyright laws. It argues that the current uncertainties with respect to the copyright status of primary legal materials (legislation, court decisions) and secondary legal materials such as parliamentary records and other official texts relevant to the interpretation of law, constitute a barrier to access and use. The time has come for reform of the international copyright system in WIPO. International law should recognize explicitly that primary and secondary legal materials are public domain and thus not subject to copyright or related rights. This will bring outdated copyright norms across the world up to date with current developments: the trend towards universal recognition of the right to access government information as part of human rights, the UN's sustainable development goals with respect to access to law, and the rapid growth of open government policies worldwide, supported by the Open Government Partnership (OGP).

Keywords: law, right to know, copyright, access to law, fundamental right, freedom of expression, open government

1. Introduction

The rule of law requires that the public have access to law, that is, to all the binding norms and authoritative interpretations of them. Such legal information includes statutes, case law and the official records indispensable for the interpretation of law, notably texts produced by public institutions in the course of legislative procedures. The statement that public access to legal information is a critical requirement for democracy to function properly is uncontroversial. Indeed, one would be forgiven to assume that such legal information is in the public domain. That assumption is in many cases incorrect, as we shall see when we explore the status of legal information as intellectual property protected subject-matter below.

A number of global developments lead us to ask the question whether the time has not come for reform of the international copyright system, so that it adequately reflects the public interest in unfettered access to law. One such development is the adoption of the UN's Sustainable Development Goals (in effect as of January 2016). [1] Among many other things, these target access to information. Further, in recent years international courts have started to explicitly recognize that the human right to freedom of expression incorporates rights to access information held by public authorities. This development is connected to the enactment of enforceable rights to government information across the world. The past decade has seen an incredible surge in such 'freedom of information' or 'right to information' laws at the national level.[2]
In addition, the rise of the Open Government Partnership[3] as a global vehicle for policy change aimed at making public authorities more accountable and participative has bearing on exclusive rights in information held by them. Open data programs are an integral part of the action plans developed in the context of the OGP. The OGP argues we are in fact at a 'tipping point': 'Governments that do not adapt and embrace the prevailing trend of more openness risk being voted out or even overthrown'.[4]

A final relevant development worth noting is that the continuing increase in cross-border movement of persons, goods, capital and services, produces a growing need in legal practice for access to foreign law. The Hague Conference on Private international law is the leading international forum for the conclusion of treaties on rules governing jurisdiction and applicable law in trans-border relations in e.g. civil and commercial matters, on the recognition of foreign judgments and cooperation between courts. In the context of its work on a possible instrument to facilitate access to foreign law, it adopted guiding principles. These encourage states 'to make their legal materials available in open and re-usable formats and with such metadata as available', to provide access for free to any person and to facilitate reproduction and re-use. Access to foreign law is 'an important component of access to justice, strengthens the rule of law, and is fundamental to the proper administration of justice'.[5]

In sharp contrast to these developments, with respect to exclusive rights to control the exploitation and use of government information, international copyright law has been at a standstill for half a century. Norm making in copyright law has long taken place at the international level. The first large multilateral convention dates from the 19th century. The Berne Convention for the protection of literary and artistic works (1886) remains the key instrument in international copyright, although expansion and reform of intellectual property norms (i.e. copyright, related rights, patents) also takes place in multilateral trade agreements. The revisions of the Berne Convention in 1928, 1948 and 1967 resulted in a number of special provisions on official and political texts. Basically, these provisions leave it to contracting states to regulate how they protect legal information. Not surprisingly then, there is substantial diversity among jurisdictions, but in some respects also there is common ground.

In sum, while we see a development towards universal rights to information and global convergence of policies aimed at fostering transparency and free (online) access and use, the question what the law says about how that information may be used remains a decidedly local affair.

This paper examines how existing international norms on copyright and related rights might be reformed to aid the development of open legal information.

To answer the question, we follow both a descriptive and normative approach. First, in section 2 we briefly sketch how access to legal information has developed over time. Based on doctrinal analysis of the treaties and policy documents on international human rights we distill in section 3 the normative backdrop for active dissemination duties with respect to legal information. Then, in section 4, we analyze the existing copyright framework. First, a teleological and historical analysis of the pertinent provisions of the Berne Convention and other relevant instruments gives us insight into the possibilities and limitations under current international law. Second, we draw a comparative legal analysis of national situations, with examples from different regions, to scope the variety of national treatments of legal information. In the concluding section 5, we compare the desired outcome with the current legal situation and suggest ways forward. This includes the issue of how access to justice might be integrated in WIPOs own development agenda (which includes efforts to ensure a rich and accessible public domain of information and knowledge) and in its commitment to the Sustainable Development Goals.

2. Background

For centuries, in many countries the provision of access to legal information has been the near exclusive domain of commercial publishers, either privately or state owned. Contract law and copyright secured publishers with control over access and use. Laws and parliamentary records would be freely accessible to the general public in physical libraries, archives and government reading rooms. To get access to judicial decisions might require a trip to the courthouse[6] or the filing of a request

complete with a statement detailing the particular interest in access. Public access was thus limited by physical and procedural constraints. The prevailing dissemination model for even basic legal information was through commercially priced subscription models. With respect to legislation and (to a lesser extent) case law, this started to change in the 1990s.

The advent of digitization and networked communications created many possibilities for improved public access. However, it was only after the web penetrated most households that states moved to pro-actively publish legislation and preparatory materials online. It happened at a very slow pace, in part because some governments had locked themselves in by contracting out to commercial publishers. Of course, the *ability* to provide electronic public access critically depends on the *availability* of information in useable form within government. In this key area, the efforts by many public authorities to optimize internal information systems have played an essential role in facilitating public access.[7]

Countries follow different trajectories of course, and in a number of them actors outside government set up comprehensive programs. Dissatisfied with the status quo and eager to tap into the possibilities of internet, universities and law societies in a number of countries set up legal information institutes ('LIIs') that provide free access to essential legal materials (laws, case-law) in a fairly comprehensive manner. The US, Australia, Great Britain and Canada were among the first countries to have such institutes (1995-2000), but the free access to law movement, also known under the acronym 'FALM'. It has since spread to South East Asia, Africa, the Pacific and the Americas. Some 14 LIIs cooperate in the World Legal Information Institute. Their core values are expressed in the 'Montreal Declaration on Free Access to Law' (2002, since amended). It states that public legal information is the 'common heritage of humanity' and that 'maximising access to this information promotes justice and the rule of law'. Governments should therefore provide free access to public legal information so others –including LII's– can (re)publish it.[8]

Indeed, since the late 1990s a growing number of states have made primary legal materials and other official texts accessible online. For example, the Dutch government made that decision in 1996 but needed five years to release itself from the (self-inflicted) hold of commercial publishers. The French government set up Légifrance in 2002[9] (with free access to bulk data from 2013) and in the UK, the government's database with all statute law was made available to the public free of charge in late 2006.[10] The EU has changed tack too; where before 2003 it charged for case law (the Celex database), it since provides free online access to all EU legislation and case law, in 24 official languages. Re-use is free and a bulk-download option exists. The EU's publications office uses no licence, in contrast to the countries mentioned above. Each uses a different open license: the Dutch government eventually opted for the pre-existing Creative Commons Zero Universal Declaration; the French and UK governments developed their own.[11] All licenses allow re-use of the information free of charge. Although the countries in the above example were clearly committed to use licenses that are compatible, that is, do not contain contradictory terms, the proliferation of licensing models poses the risk of transaction cost for users who want to combine data from different jurisdictions.[12]

Modern governments across the world play a role in every domain of their citizen's lives. The amount of regulation involved is staggering. For the past decade, the EU institutions alone produce between 2000 and 2400 legal acts (regulations, directives, council decisions, etc.) per year.[13] A good portion of these lead to further legislative action in the 27 member states. With respect to case law, the numbers are much larger. For example, in the Netherlands, the official website rechtspraak.nl is in operation since 1999 and currently contains nearly one million court decisions. Yet according to the selection criteria used, most decisions do not qualify for publication, notably because they are routine. Of those that are deemed of interest to the public (including practitioners), about a quarter of the cases are

published by the Courts.[14] The Netherlands have 17 million inhabitants. The Canadian Law Institute's public database contains more than one-and-a-half million court decisions,[15] on a population of around 35 million.

In view of such quantities of data, and the fact that knowledge of the law cannot be derived from isolated pieces of legal text (a specific Act, a judgment) but requires insight in related laws or authoritative interpretations by courts, it is obvious that the plain publication of legal texts does not do much to improve functional access to law. This is why a growing number of countries move towards publication of legislation, case law and parliamentary records as 'open data'.

Open data in open government

Increasingly they do so as part of an open government agenda. Of note, the concept of 'open government' is quite nebulous. It is an umbrella term that shields a broad range of policies, political theories and initiatives. Roughly, one can distinguish three result areas that are also advanced as underpinning open data policy. The first concerns (political) accountability and democratic participation. Publishing more information in re-usable form is thought to promote accountability and good governance, while also enabling better informed citizen participation in decision-making. The second is innovation and economic growth, through the creation of new businesses and innovative services that use public sector data. The third area of positive outcomes is public sector efficiency. Making more data available is said to save resources and improve public services. To what extent an open government agenda actually can actually produce all said outcomes is a matter of debate. With respect to primary legal information (legislation, court and administrative decisions) and secondary legal information emanating from public authorities (e.g. parliamentary records, policy documents used for in the preparatory stages of lawmaking such as impact assessments, white papers) we assume that since such information is at the heart of democratic states and the rule of law, and for that reason alone maximum access combined with minimal use restrictions is the golden standard.

Two observations are in order at this point. In this paper, we do not distinguish sharply between 'data' and 'information'. Also, it is important to remember that the term 'open' in 'open government' is different from the term 'open' as in 'open data'. The latter concept has been developed initially by technologists and civil society actors who focus on enabling redistribution and re-use by limiting legal and technical restrictions. The 'Open Definition' from Open Knowledge lists a number of criteria that must be met for information or data to qualify as 'open'. It include criteria for legal openness, e.g. use allowed for any purpose, free from constraints based on copyright or other intellectual property rights, and for technical openness, such as bulk downloadability, machine-readability and the use of open formats.[16] The '8 Principles of Open Government Data' (2007),[17] and the Sunlight Foundation's 2010 'Ten Principles for Opening up Government Information'[18] use similar elements. The W3C's 'Five Stars of Linked Open Data' (2010) do so too, but in the context of enabling *linked* data.[19] Examples in the legal domain of initiatives that enable linking are the European Case Law Identifier (ECLI) and the European Legislation Identifier (ELI). The former is already in use by the EU institutions and a growing number of EU member states, the latter is at an earlier stage of implementation.[20]

That legal information should be 'open' is uncontroversial. It seems that the strong focus on licenses as an instrument to ensure openness has buried the more fundamental question on why legal information emanating from public authorities is not public domain to start with, doing away with the need for licenses. We find it striking that the international copyright framework and many national laws have not kept pace with the changes towards more comprehensive rights to information and open government. It might be because in the copyright domain reform agendas are shaped to a large degree

by stakeholder lobbying. In all likelihood, no particular group (or at least powerful group) has had the issue of copyright in legal materials on its agenda. That being said, in the E.U., when the Database directive was negotiated, for a while policymakers entertained the idea that information held by public authorities should be subject to compulsory licensing schemes. Previously, commercial publishers had argued that government public bodies engaged in anti-competitive behaviors. In their view, the private sector should be given a right of access to government data, so as to be able to create value added products and services. Some argued that copyright in public sector data should be abolished to stimulate re-use. This did not come to pass. The Database directive treats the public and private sectors in the same manner, no consideration was given to the fact that there may be sound reasons to keep databases with basic materials (such as legislation) in the public domain.[21] In the 25 years of harmonization of copyright at EU level, the status of government-produced information has not been the subject of debate.[22]

It is only in the context of EU re-use policy that limits are set to the exercise of intellectual property rights by public sector bodies.[23] The Public Sector Information Directive itself however promotes rather than requires the use of open licenses for public sector information (which includes legal information). The European Commission's Guidelines[24] on licensing obviously favour open licenses, that is, terms of use that do not restrict how the information is used, where or when. From a practical point of view one might argue that there is little difference between the situation in which a public authority grants an open licence on legal information, and the situation in which that information is public domain. We will revisit that argument in section 5.

For now, we turn to the more principled question of what the law says about duties to publish and rights to access. Compared to only a few years ago, there is a clear trend towards the pro-active publication of law on the internet. This goes hand in hand with the recognition of rights to access government information, both in national statutes and as an element of human rights, especially the right to freedom of expression.

3. Access to legal information in the human rights framework

From the UN's human rights and cultural rights fora, a growing body of Recommendations and reports elaborates the importance of open access to key sources of legal information. These policy documents are mainly informed by the rights to freedom of expression and the 'right to know' as indispensable for accountability of public institutions, participation in public decision-making and access to justice.

The fundamental right to freedom of expression is recognized in several international law instruments. The Universal Declaration of Human Rights (1948) and the United Nations International Covenant on Civil and Political Rights (ICCPR) both protect everyone's right to seek, receive and impart information and ideas (art. 19). According to General Comment No. 34, article 19 of the Covenant embraces a right of access to information held by public bodies.[25] General Comments have authority because they are given by the Human Rights Committee, the body of independent experts set up to monitor the implementation of the ICCPR.

Most states in Middle and South America are party to the American Convention on Human Rights (ACHR), which was concluded in 1968 in the ambit of the Organisation of American States (OAS). Article 13 provides that 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.' The Inter-American Court of Human Rights held in *Claude-Reyes* that article 13 includes a

general right to access state-held information. States have a positive obligation to provide access, subject only to access restrictions that are proportionate and for reasons permitted by the Convention.[26]

In Europe, more than 40 states are bound by the European Convention on Human Rights (ECHR). The European Court of Human Rights is the highest interpreting court. Article 10 (1) ECHR provides that 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…'

In the past decade, the ECHR has handed down a number of judgments in which it changed it earlier position that article 10 does not imply a right of access.[27] In TASZ v. Hungary, the Court conceded it 'has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' and thereby towards the recognition of a right of access to information.'[28] The Court was not as bold as the ACtHR. It 'merely' ruled that the decision of the Hungarian constitutional court to withhold information on a constitutional complaint bought by a member of parliament was a disproportionate interference with the civil society organisation that has sought access. The fact that the authorities are the only source of certain information on issues of public interest played a major role.

Since TASZ the Court has revisited the issue on two occasions and in both those instances, the applicants were NGOs with a public mission. Youth Initiative for Human Rights v. Serbia,29 the applicant NGO complained of the persistent refusal of the intelligence agency of Serbia to provide it with information on how many people were subject to electronic surveillance, even though the Serbian Information Commissioner had given a binding (and final) decision in its favour. The Court found this to be a breach of the NGOs right to free speech.

Perhaps the most relevant case is also the most recent. In the case of OVESSG the Court held: 'The applicant association was (...) involved in the legitimate gathering of information of public interest. Its aim was to carry out research and to submit comments on draft laws, thereby contributing to public debate. Consequently, there has been an interference with the applicant association's right to receive and to impart information as enshrined in Article 10 § 1 of the Convention' [30] In the circumstances, the association sought access to decisions from a public authority (a land commission) that was tasked with approving the sale of land and real-estate. The Court, found it 'striking that none of the Commission's decisions was published, whether in an electronic database or in any other form'[31] considering it is a public authority with the powers to decide disputes.

Of note, the Court did not follow the applicant association in its claim that the State had an obligation to publish all decisions of the Commission in an electronic database. Again then, the EctHR shies away from recognizing a positive obligation for states to publish legally binding materials.

In the wake of the Reyes judgment, the OAS General Assembly adopted a Model Inter-American Law on Access to Public Information (2010). It also launched a program calling on member states to inter alia introduce flexible, modern disclosure schemes, identification and pro-active publication of 'key information' in the summer of 2016.[32]

In Europe, a similar development is visible. The Council of Europe Convention on Access to Official documents (Tromsø 18 June 2009, awaiting the required number of ratifications for it to enter into force) sets out minimum obligations with respect to (national) freedom of information laws. It covers a broad array of information held by the public sector, including the legislature and courts. It has the

look and feel of traditional freedom of information instruments. This also shows in its provision on active publication duties: it is drafted in vague terms and leaves contracting states much discretion as to which information is actively published, how and when. The explanatory report clarifies that what underpins the convention is the idea that public access to government information is essential for the exercise of fundamental rights, that it enhances transparency and accountability of the public sector, and enables informed participation by citizens in the democratic process. [33]

Access rights exist as stand-alone constitutional rights, [34] and in addition are set out in dedicated laws. As was noted above the adoption rate of freedom of information laws has accelerated on all continents over the past decade. Today nearly 100 countries have enacted freedom of information laws.

The United Nations rapporteur on Human Rights typifies the right to access government information as 'one of the central components of the right to freedom of opinion and expression'.[35] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression speak in unison. In their 2006 joint declaration, they stress that 'Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.'[36]

Pro-active disclosure policies are also advocated. The Human Rights Committee of ICPPR states that 'parties should proactively put in the public domain Government information of public interest' and 'make every effort to ensure easy, prompt, effective and practical access to such information'. [37]

The UNs Sustainable Development Goals (in effect 1 Jan. 2016) include the promotion of just, peaceful and inclusive societies (Goal 16). According to the UN, the 'rule of law and development have a significant interrelation and are mutually reinforcing, making it essential for sustainable development at the national and international level'. Relevant to the issue of access to legal information are especially the following specific sub-goals of Goal 16:

- Develop effective, accountable and transparent institutions at all levels
- Ensure responsive, inclusive, participatory and representative decision-making at all levels
- Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.

The message of the UN then can be summarized as: public access to law is part of the fundamental right to freedom of expression, and States must play an active role in enabling such access. The pro-active release of legal information as open data is not an obligation under international law; it is certainly a means to honour the right to access in a generous way.

4. Copyright Law Framework

Recognizing the importance of legal information from a fundamental rights perspective says little about its accessibility and usability in practice. Several factors play a role in a country's decisions on how to organize public access to legal information, and how information may be used. Considerations relating to transparency and the promotion of a participatory democracy, as well as concerns regarding limited financial and human resources, technical feasibility, path dependencies with publishers and in certain cases of national security and individual privacy,[38] all shape a government's policy on access and reuse of legal information. Depending on their content, the rules of copyright law can serve, in the hands of governments, to either support or curb the public's reuse of legal information. For, if legal information is excluded from copyright protection, everyone is in principle free to use the information

without restriction. On the other hand, if legal information falls under the scope of copyright law, conditions of use may be attached. In fact, licenses of use of legal information, where applicable, vary widely in their permissiveness. Enabling (re)use of legal information is one thing ensuring access is another. Copyright law does not regulate access to protected material proper. Nevertheless, although the decision to grant access to legal information is basically independent from the level of copyright protection afforded to legal information, ownership of rights may influence a government's policy decision regarding access.

International copyright law instruments offer little guidance on the normative grounds for protecting legal information emanating from public authorities. Legal doctrine generally distinguishes various justifications for granting protection to original works of authorship, none of which is particularly convincing for legal materials. Broadly speaking copyright rationales can be divided between those that follow an instrumentalist approach and those that follow a personality rights approach. Taken from an instrumentalist perspective, copyright serves to incentivize the creation and dissemination of works by enabling the author to recoup investment. Obviously, legislatures and courts 'produce' texts regardless of the prospect of intellectual property; there is no need to monetize these texts. Rights-based justifications look to natural justice, according to which the author has a legitimate claim to the fruit of her labour. This justification too, does not hold. The persons that produce legal texts within the public sector do so as civil servants, members of parliament or officers of the courts. They fulfill a public task and are remunerated for it, so it is difficult to argue they have a moral claim to ownership (quite apart from the fact legal texts have multiple authors). An alternative rights-based justification of copyright focuses on integrity. The author produces an original work, expresses her personality in it; copyright serves to protect the bond that exists between author and work. This line of argument might have force in the arts, but it does not convince with respect to legal texts that are of a factual and objective nature. Surely, there is a clear public interest in safeguarding the authenticity of legal texts and copyright might be a potential instrument to achieve this. However, it is not a justification for the recognition of copyright on legal materials.

Below we analyze the copyright status of legal information under the international copyright law framework, followed by a survey of the treatment of legal information under the laws of a number of countries worldwide. As we will see, the legal uncertainty at the international level surrounding the status of legal information as protected works gives rise to a mosaic of solutions at the national level. Fortunately, we also see some common grounds regarding the public interest rationale behind the exclusion of legal texts from copyright protection.

Legal information in International Conventions

The copyright status of legal information in intellectual property laws is governed at the international level only by the Berne Convention on the protection of literary and artistic works (BC). The Convention explicitly leaves it to contracting states to determine the copyright status of official texts. Surprisingly perhaps in view of their importance for the democratic process, the relevant provisions were not part of the initial text of the Berne Convention in 1886. The current provisions relating to the protection of legal texts were introduced later on, in three stages during the Rome Revision (1928), the Brussels Revision (1948) and the Stockholm Revision (1967). The Rome Revision saw the adoption of Article 2bis according to which it is 'a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings'. The then single paragraph article recognized the importance of allowing states to regulate the protection of oral manifestations of legal information, in the form of political speeches and judicial debates.

The next step in the legislative process was set in 1948 when the delegations to the Brussels Conference introduced Article 2(2). The second sentence of this Article concerned translations official texts of a legislative, administrative and legal nature, leaving it to the members of the Union to determine the level of protection of such translations. It is interesting to note that the delegations indeed first addressed the issue of translations of (presumably foreign) official texts rather than national texts in local language. One could argue that the adoption of this text relied on the implicit assumption that since legal texts are not protected in the public interest, their translation should not be protected either.[39] According to Ficsor, some historical reasons explain the focus of Article 2(2) on translations: 'Until the 1967 Stockholm revision, the Convention only contained a provision on the possibility of excluding the copyright protection of translations (not only official translations) of official texts, due to the fact that, while the right of translation was explicitly recognized by the Convention, the right of reproduction was not yet'.[40]

The final step towards the international regulation of the copyright status of legal information occurred at the Stockholm Conference in 1967, when delegations introduced Article 2(4) and abrogated the second sentence of Article 2(2). Today Article 2(4) BC complements Article 2bis (1) which has remained unmodified since its adoption. Article 2(4) states that 'It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.' Legal scholars agree that limitations and exceptions to authors' rights are justified by the existence of non-economic public policy considerations, in this case on considerations of freedom of information and 'participatory democracy'. Subsequent intellectual property treaties concluded through the World Intellectual Property Organisation (WIPO) or the World Trade Organisation (WTO) in the context of international trade agreements brought no change. It is worth pointing out that the Berne Convention governs the minimum standards of protection that are guaranteed to foreign authors in the countries of the Union. It therefore creates no obstacle to the adoption of rules applicable to a country's own nationals. [41]

Not only are the two relevant provisions of the Berne Convention not mandatory for the members of the Union, but a certain degree of uncertainty arises as to their interpretation. How should the expression 'official texts of a legislative, administrative and legal nature' be interpreted? What types of documents are or should be covered by the exclusion? Since the Berne Convention was elaborated in times of a more classic nation state with more limited public tasks, could Article 2(4) BC be reasonably interpreted as encompassing a broader array of legal information than only truly official texts? For instance, if the text of a statute is excluded from protection, should it not also be the case for parliamentary records and policy-documents leading up to its adoption, like white papers and impact assessments? Presumably parliamentary records would be covered by article 2bis BC. Knowing how modern governments across the world play a role in every domain of their citizen's lives and how important access to and use of legal information are in a democratic society, should the provisions not apply generally to works created in the course of or for the exercise of public tasks?

The two provisions of the Berne Convention should be interpreted in the light of the rules of interpretation laid down in the Vienna Convention on the Law of Treaties (1969). Article 31 of the Vienna Convention deals specifically with the interpretation of treaties. It states that a treaty should be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The question that remains unanswered here is whether the meaning of the terms, the object and purpose of the provision should be assessed as they were at the time of adoption of the Convention or at the time a dispute arises. In other words, should the interpretation stay fixed in time at the moment of adoption of the Stockholm Revision in

1967 or should it evolve and be given a contemporary meaning? Would a contemporary view on the government's role in society justify a broader interpretation of the expression 'official texts of a legislative, administrative and legal nature'?

Legal Information in National Copyright Law

In view of the leeway afforded to members of the Berne Union with respect to the exclusion of official texts from copyright protection, it not surprising to observe significant disparities between countries in their protection of legal information. Among the most striking examples, let us mention the United States of America where works created by the Federal Government are exempt from copyright. This exemption goes much beyond mere legislation and court decisions. At the same time, the official texts produced at State level are not exempted from protection. In many other countries, only laws and court decisions do not attract copyright. Often the wording of national copyright laws suggests the existence of grey areas, e.g. on rights in 'metadata' accompanying laws, or the status of preparatory materials and reports. Other countries – open data champion, the United Kingdom among them – recognize a government monopoly on all public sector works. In the EU, arguably the region where intellectual property laws have been most extensively harmonized, the status of public sector information has not been addressed in harmonization instruments to date. National laws diverge widely in terms of scope of exemptions (broader or narrower ones), layered systems (some works exempt, others conditional), explicit/implicit systems (e.g. France implicit).

Based on a survey of the primary documents found on the Internet (in the original language or in translation)[42], we can draw a table depicting the copyright status of legal information in the following countries:

Country	Legislative acts	Judicial and administrative decisions	Official decrees and notices	Other official government publications[43]	Official translations of official texts
Austria	x	x	x		
Belgium				x	
Denmark	x	x			
Estonia	x	x	x		x
Finland	x	x	x		x
France					
Germany	x	x	x		
Greece	x	x		x	
Hungary	x	x			
Italy				x	
Latvia	x	x			x
Netherlands	x	x	x		
Romania	x	x			x
Slovenia	x	x			
Spain	x			x	
Sweden	x	x	x	x	x
Switzerland	x	x		x	x
China	x	x			x
Japan	x	x	x		x
Korea	x	x	x		x
Thailand	x	x	x	x	x
Mexico	x	x			
Brazil					x
Ecuador	x	x			x
Nicaragua	x	x	x		x

Country	Legislative acts	Judicial and administrative decisions	Official decrees and notices	Other official government publications[43]	Official translations of official texts
Panama	x	x			x
Paraguay	x	x			x
Peru	x	x			x
Venezuela	x	x	x		
Egypt	x	x		x	x
Lesotho		x			x
Israel	x	x			
Ivory Coast					
Republic of Congo				x	
Morocco	x	x			x
Niger	x	x			x
Rwanda	x	x			x

As the table shows, Article 2(4) BC serves as a broad common basis for a vast number of national laws dealing with the protection of official texts. Still, some nuances can be observed. The copyright laws of the countries of the European Union show some differences: in France, for example, the Intellectual Property Code makes no mention of the status of official texts. It is generally assumed by French jurisprudence official texts are not subject to protection. In Norway, Sweden and Finland, the copyright acts specify that 'legal statutes, administrative regulations, court decisions and other decisions by public authorities are not protected by this Act. This is also the case with proposals, reports and other statements which concern the public exercise of authority, and which are made by a public authority, a publicly appointed council or committee, or published by the public authorities. The Spanish Consolidated Code on Intellectual Property contains in Article 13 a slightly narrower provision that the Nordic counterparts, although it is broader than Article 2(4) BC. In addition to laws or regulations, resolutions of the courts and official translations of all such texts, the Spanish provision also excludes the laws' corresponding projects as well as acts, agreements, deliberations and rulings of public bodies.

The countries of Central and Latin America offer a clear illustration of the diversity in approaches towards the protection of legal information, ranging from no mention at all in the act, to a literal implementation of Article 2(4) BC, to the creation of an exception allowing the unauthorized reproduction and communication of official texts, to the designation of the State as owner of rights on all government works.[44] Indeed the copyright laws of a number of countries are silent with respect to the eligibility of legal information for copyright protection. This is the case of the laws of Argentina, Bolivia, Chile, Costa Rica, Cuba, and El Salvador. By contrast the laws of Colombia (art. 41 of the Copyright Act) and Guatemala (art. 68 of the Copyright Act) rather than excluding official texts from copyright protection, create an exception according to which laws, decrees, regulations, orders, resolutions, court decisions and administrative bodies as well as official translations of such texts *may be freely published*, provided that only the official publication is used. Another approach is that of Nicaragua, which like Spain, specifies that in addition to laws or regulations, resolutions of the courts and official translations of all such texts, legislative proposals are excluded from protection. The copyright acts of the Dominican Republic and Honduras state that 'the State, public entities, and moral or legal persons may exercise the copyright and related rights holders as derivatives, in accordance with the rules of this law'. Finally, the Uruguayan Copyright Act simply lists the State among the possible owners of rights on protected works.

Unlike other the countries of Africa listed in the table, the Algerian Copyright Act contains a provision according to which 'the works of the state lawfully made publicly available may be freely used for non-commercial purposes, subject to respect of the integrity of the work and the indication of source.

It is understood by works of the State within the meaning of this Article, the works produced and published by various organs of the State, local authorities and the public institutions with administrative character'. Although this allows reuse of government works, it does set conditions on such reuse.

Also not listed in the table above are the countries of the Commonwealth of England, including the United Kingdom, Australia (art. 8A), Canada (art. 12), Kenya (art. 25), India (art. 2(k) & 17(d)), Nigeria (art. 4) and South Africa (art. 5 & 21), which all have inherited and still apply a regime known as 'Crown copyright' or nowadays as 'Copyright in works of Government'. According to this rule, the government is recognized as the first owner of copyright in a work prepared or published by or under direction of a government employee, subject to any agreement with the author. The government being the rights owner on the legal information emanating from the public authorities is competent to set the conditions of use of these works. As a result, the countries of the Commonwealth have developed wide-ranging practices in relation to the licensing of all types of official texts and government works. For example, Canada allows anyone, without charge or request for permission, to reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.[45] In the United Kingdom, permission must be sought and obtained before reproducing and communicating Government works; with the adoption of open government licenses as default instruments this has become easy to do.

As mentioned above, the United States Copyright Act of 1976 explicitly exempts works created by the Federal Government from copyright. This exemption goes much beyond mere legislation and court decisions. At the same time, the official texts produced at State level are not exempted from protection. As a result the collection, annotation and publication of State level official documents, including legislation and case law, are often entrusted to commercial publishers. American scholars have pointed out the dichotomy between the Federal and State regimes, denouncing the obstacles created at State level for the access to and use of official documents.[46] As Ford reports, 'State contracts with LexisNexis and West often provide full intellectual property rights in the codes resulting from the codification process'.[47]

This account of the copyright status of legal information worldwide highlights the main distinctions between countries, but mostly evidences the uncertainty regarding the protection of legal information. As a result, access to primary legal documents is achieved on different grounds, through different means, under different conditions. In some countries, like the United States, the service is offered through one or more commercial entities that tend to set restrictive access and reuse conditions. In less developed countries the legal information services operate in a haphazard manner without guarantee of accuracy, completeness or timeliness. The publication of case-law is generally more diverse and arbitrary than is the case for legislation. They are typically a mix of officially published court decisions and decisions published unofficially in law journals or other media. Vast quantities of court decisions go unreported.[48]

5. Increasing Access to Legal Information through Copyright Reform

The fundamental rights foundation of the right to have access to and reuse legal information was established in section 3. The link with the Goals of the United Nations Sustainable Development Goals that came into effect as of January 2016) is obvious as well: the need to access and use legal information is an integral part of promoting just, peaceful and inclusive societies. This implies the

development of effective, accountable and transparent institutions at all levels to ensure responsive, inclusive, participatory and representative decision-making.

We have noted above that making explicit that legal information is public domain is only one block in the building of open law, albeit a fundamental one. The best solution would be the one that ensures the highest degree of foreseeability and legal certainty (no detailed interpretation of national copyright law necessary), highest degree of 'interoperability' of information used across borders.

On the face of it, the BC is indifferent to how contracting states regulate access to legal information. However, the mere fact that official texts are singled out is testimony to their awkward position. The proceedings of the various diplomatic conferences show that in the late 19th century there was awareness of the particular public interest in unfettered access to official texts. The analysis of a broad selection of national copyright acts shows that there is near universal agreement that legislation and case law should be public domain. In addition, many states exclude other types of official texts from copyright, e.g. parliamentary records. In light of the universal recognition that access to legal information is of fundamental importance in contemporary democratic society and that compared to the era of print, today's ICT makes it possible to provide public access at much lower costs, there is no sound justification for having exclusive rights in legal information.

It is time to make this explicit in international copyright law by amending the Berne Convention. WIPO is committed to integrating Sustainable Development Goals in its work programme. It has a sustainable development agenda, but currently it does not seem to include the issue of addressing intellectual property based barriers to access to law.[49] Putting it on the development agenda is one option, but a more direct route to change if is the topic is taken on by the so-called Standing Committee on Copyright and Related Rights (SCCR). The SCCR is tasked with the development of new law, among other things.

Of note, considering the large number of members of the Berne Union, any reform is a difficult and lengthy process; a revision requires unanimity. In the alternative therefore, a special instrument within the meaning of Article 20 BC might be concluded between countries. Those that have adopted open data agendas and show their commitment in the Open Government Partnership for example might be willing to take the lead. Such a treaty would be open to ratification by others. Ratification could even be made an obligation under future multilateral trade agreements that include intellectual property matters.

What should a new provision look like? A good starting point for discussion is the text put forward in the Wittem Group's European Copyright Code, a draft produced by a group of expert copyright scholars. It proposes that 'the following works are not protected by copyright:
(a) Official texts of a legislative, administrative and judicial nature, including international treaties, as well as official translations of such texts;
(b) Official documents published by the public authorities.'[50]

Our concern in this paper is with the impact of copyright on access to law, but that does not make us blind to the fact that barriers to broader access to law are not just legal, but can be technical, bureaucratic, and economic.[51] As such, public domain status does not guarantee that legal materials become available sustainably, in a form that facilitates re-use. The public domain does not equal universal access. However, as a matter of principle and as a matter or practice, it is high time that the international intellectual property framework is brought up to date with contemporary values about access to law. No ambiguity should continue to persist about the public domain status of primary legal

materials and (at a minimum) of secondary materials that are produced by public authorities and are relevant to the understanding of law.

[1] See Goal 16 <http://www.un.org/sustainabledevelopment/peace-justice/> [Visted Aug. 2016]
[2] See the overview of laws by the Global Right to Information Rating project (run by Access Info Europe and the Centre for Law and Democracy), at <http://www.rti-rating.org/>. Launched in 2011 with a rating of (then) 89 national access laws, by 2016 it listed more than 100. [Visted Aug. 2016]
[3] According to the Open Government Declaration (endorsed by more than 70 states), their ambition is to 'foster a global culture of open government that empowers and delivers for citizens, and advances the ideals of open and participatory 21st century government', see http://www.opengovpartnership.org/about/open-government-declaration. [Visted Aug. 2016]
[4] Open Government Partnership: Four Year Strategy 2015-2018, p. 6. < http://www.opengovpartnership.org/sites/default/files/attachments/OGP%204-year%20Strategy%20FINAL%20ONLINE.pdf> [Visted Aug. 2016]
[5] Access to Foreign Law in Civil and Commercial Matters (Joint Conference of the European Commission and the Hague Conference on Private International Law, February 2012): Meeting Report | Conclusions & Recommendations.
[6] 'Public Access to Court Electronic Records' <https://www.pacer.gov/findcase.html> [Visted Aug. 2016]; Vera Eidelman and Amul Kalia, *Right to Know: The PACER Mess And How to Clean It*, ELECTRONIC FRONTIER FOUNDATION (Sept. 2, 2014). https://www.eff.org/deeplinks/2014/09/right-know-pacer-mess-and-how-clean-it. [Visted Aug. 2016]
[7] Improving access to law can be set in the wider domain of 'E-government', i.e. the use of ICTs to improve public service delivery and internal efficiency. For a critical discussion of ambitions v reality, see Homburg, Vincent. Understanding E-Government: Information Systems in Public Administration. London: Routledge, 2008.
[8] 'WorldLII: Declaration on Free Access to Law' <http://www.worldlii.org/worldlii/declaration/montreal_en.html> [visited Sept. 2016].
[9] https://www.legifrance.gouv.fr/.[visited Sept. 2016]
[10] Heather Brook, 'At Last, the Price Is Right for Access to Our Laws', *The Guardian*, 19 October 2006, section Technology <https://www.theguardian.com/technology/2006/oct/19/epublic.guardianweeklytechnologysection> [visited Sept. 2016].
[11] See the French 'licence ouverte régime de droit commun de réutilisation des données juridiques' < http://rip.journal-officiel.gouv.fr/index.php/pages/LO>, the UK Open government licence < http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/> and Creative Commons zero (public domain dedication) <https://creativecommons.org/publicdomain/zero/1.0/> [visited Sep. 2016].
[12] For a problem analysis and ways to overcome incompatibilities in public sector information licenses, see LAPSI 2.0 Thematic Network, D5.2. Licensing Guidelines (2014), <http://cordis.europa.eu/docs/projects/cnect/1/325171/080/deliverables/001-D52LicensingGuidelinesPOAres2014499090.pdf> [Visited Sep. 2016]
[13] See statistics at <http://eur-lex.europa.eu/statistics > [visited Sep. 2016]
[14] M. van Opijnen, 'Rechtspraakdata: Open, Linked En Big', *Rechtstreeks*, no. 2 (2014): 12–39; Raad voor de Rechtspraak, 'Kengetallen 2014' (Raad voor de Rechtspraak, 2015), https://www.rechtspraak.nl/SiteCollectionDocuments/Kengetallen-2014.pdf. [visited Sept. 2016]
[15] See http://www.canlii.org/en/databases.html#ond [visited Sep. 2016].
[16] Open Knowledge, *Open Definition Version 2.0*, OPEN DEFINITION (Oct. 07, 2014), http://opendefinition.org/od/ [Visted Aug. 2016]
[17] Open Data Working Group, *The 8 Principles of Open Government Data*, OPENGOVDATA.ORG (Dec. 08, 2007), http://opengovdata.org/ [Visted Aug. 2016]

[18] Sunlight Foundation, *Ten Principles for Opening Up Government Information*, SUNLIGHTFOUNDATION.COM (Aug. 11, 2010), <http://sunlightfoundation.com/policy/documents/ten-open-data-principles/> [Visted Aug. 2016]
[19] Tim Berners-Lee, *Linked Data*, W3.ORG (Jun. 18, 2009), http://www.w3.org/DesignIssues/LinkedData.html
[20] See for an overview of implementation < http://eur-lex.europa.eu/eli-register/implementation.html> [visited Aug. 2016].
[21] For a history of public sector information policy at EU level and the interface with database rights, see M. van Eechoud. 'Open data values: Calculating and monitoring the benefits of public sector information re-use'. In: T. Dreier et al., *Informationen der öffentlichen Hand - Zugang und Nutzung*, Baden: Nomos 2016.
[22] M. van Eechoud, 'Along the Road to Uniformity: Diverse Readings of the Court of Justice Judgments on Copyright Works', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 3, no. 1 (2012): 60–80.
[23] M. van Eechoud, 'Friends or Foes? Creative Commons, Freedom of Information Law and the EU Framework for Reuse of Public Sector Information', in *Open Content Licensing*, ed. L. Guibault and Christina Angelopoulos (Amsterdam University Press, 2011), http://hdl.handle.net/11245/1.361041.
[24] 'Commission Notice: Guidelines on Recommended Standard Licences, Datasets and Charging for the Re-Use of Documents', OJ 2014 C 240/1–10.
[25] Human Rights Committee, General Comment No. 34, document CCPR/C/GC/34 (12 Sept. 2011), para 18.
26 Inter-American Court of Human Rights 9 Sep. 2006 (Claude-Reyes et al. v. Chile), para 77.
[27] In TASZ v. Hungary (14 Apr. 2009) the ECtHR conceded it 'has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' (see Sdružení Jihočeské Matky c. la République tchèque (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information.' Previously it had rejected the claim that Article 10 ECHR includes a right to access government information, or a positive obligation for states to collect and disseminate information, see e.g. Guerra v. Italy, ECtHR19 Feb. 1998, RJD 1998-I.
[28] ECtHR *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 35 to 39, 14 April 2009. The Court referred to its earlier decision in *Matky c. la République tchèque* (dec.), no. 19101/03, 10 July 2006)
[29] ECtHR (2nd S.) 25 June 2013, *Youth Initiative for Human Rights v. Serbia,* Application no. 48135/06.
[30] ECtHR 28 November 2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirt-schaftlichen Grundbesitzes v. Austria* (OVESSG), Application no. 39534/07.
[31] Ibid.
[32] Inter-American Program on Access to Public Information, OAS General Assembly, Resolution AG/RES. 2885 (XLVI-O/16), adopted the on June 14, 2016.
[33] Explanatory report, paras 11-14 < http://www.conventions.coe.int/Treaty/EN/Reports/Html/205.htm> [Visted Aug. 2016].
[34] E.g., Art. 42 of the Charter of Fundamental Rights of the E.U. provides that any citizen of the Union has a right of access to documents held by E.U. institutions. OJ 2010, C 83/389. For an in depth analysis of access rights of a wider openness agenda, see Alberto Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy* (July 30, 2013). HEC Paris Research Paper No. LAW-2013-1003. Available at SSRN: http://ssrn.com/abstract=2303644. [Visted Aug. 2016]
[35] See also Resolution 12/12 adopted by the UN Human Rights Council, Right to the truth, 12 Oct. 2009, 'Emphasizing that the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government, within the framework of each State's domestic legal system'; Inter American Commission on Human Rights, *The Right to Truth in the Americas* (2014).
[36] Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression of December 2006. See also Access to Information and Fundamental Freedoms - This Is Your Right! See also the UNESCO Finlandia Declaration adopted at World Press Freedom Day 2016; it stresses that 'the right to information encompasses access to information held by or on behalf of public authorities..' < https://en.unesco.org/sites/default/files/finlandia_declaration_3_may_2016.pdf> [Visited Aug. 2016]. UNESCO 2015 Resolution declaring 28 September as International Day for Universal Access to Information.
[37] Human Rights Committee, 102nd session, Geneva, 11-29 July 2011. *General comment No. 34 on Article 19: Freedoms of opinion and expression (CCPR/C/GC/34)*, at 19.

[38] See for a discussion of privacy aspects of open data: Borgesius, Zuiderveen, Frederik J, Van Eechoud, Mireille, and Jonathan Gray. 'Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework'. *Berkeley Technology Law J.* 2015 (3).
[39] S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford University Press, 2006, p. 771.
[40] M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, Geneva, World Intellectual Property Organisation, 2003, B.2.49-B2.51.
[41] M. van Eechoud, 'Government Works', in P.B. Hugenholtz, A. Quaedvlieg, and D. Visser (eds.), *A Century of Dutch Copyright Law*, Amsterdam, deLex, 2012, pp. 141-175, at p. 144.
[42] The national copyright acts were found most often on official government websites, in the WIPO CLEA Database, or other source that appeared reasonably trustworthy.
[43] The category 'Other Official Government Publication' is a broad, catch-all category that encompasses various subject matter, subject to a big variety of conditions of use depending on the wording of the national law.
[44] See the collection of laws : http://www.cerlalc.org/derechoenlinea/dar/leyes.htm; see also Marisol Florén Romero, 'Open Access To Legal Information: Mapping The Digital Legal Information Of Mexico, Central America, The Spanish Speaking Caribbean And Haiti', 40 I*nt'l J. Legal Info* 2012*:* 417-514.
[45] Reproduction of Federal Law Order, Statutory Instrument/97-5, http://laws.justice.gc.ca/eng/regulations/SI-97-5/FullText.html [Visted Aug. 2016].
[46] Ford, Beth (2014) 'Open Wide The Gates Of Legal Access', 93 *Or. L. Rev.* 539-569; Elizabeth Scheibel (2016) 'No Copyright In The Law: A Basic Principle, Yet A Continuing Battle' 7 *Cybaris An Intell. Prop. L. Rev.* 350-377
[47] Ford (2014), p. 552.
[48] For an overview of the state in a number of EU countries, see EUCases (European and National Legislation and Case Law Linked in Open Data Stack) project, deliverable D1.1 Report on the state-of-the-art and user needs (2014) < http://eucases.eu/deliverables.html. [visited Sep. 2016]; Marisol Florén Romero, 'Open Access To Legal Information: Mapping The Digital Legal Information Of Mexico, Central America, The Spanish Speaking Caribbean And Haiti' *40 Int'l J. Legal Info* 2012. 417-514.
[49] For WIPO development agenda see <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=272263> [Visited Aug 2016].
[50] http://www.copyrightcode.eu/ [Visited Sep. 2016].
[51] C. Marsden, Cave, Hoorens (2006), 'Better Re-Use of Public Sector Information: Evaluating the Proposal for a Government Data Mashing Lab' <http://dx.doi.org/10.2139/ssrn.2142023> [Visted Aug. 2016].