

## Submission # 9

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**Country/Region:**USA

**How would you define the stakeholder community or communities to which you belong?**

Civil society

**Are there any suggestions that you wish to make in respect of the proposed themes, questions and indicators which are included in the framework as it stands?**

Theme B, Freedom of Expression, should include additional questions that cover the impacts of copyright law on freedom of expression online. The copyright laws of almost all countries already meet the minimum criteria laid out in the Berne Convention, which provide the authors of literary, scientific and artistic works with exclusive control over uses such as the reproduction or the public performance of those works, for a minimum duration of 50 years after the death of the author.

But although there is a lot of commonality in the minimum copyright standards that apply, there is much more variance between countries in the areas of enforcement of those rights, and the flexibilities that allow the free use of copyright works that remain subject to copyright. These place important constraints on freedom of expression that we believe should be part of the Internet Universality framework.

This calls for two new questions. The first would be something like, "Do adequate flexibilities in copyright law exist to allow users to exercise their right of freedom of expression online in ways that make fair use of copyright works?" This question would provide evidence of the extent to which uses such as journalism, criticism, parody, private study, education, transformative re-use (eg. mash-ups), and adaptation of works for users with disabilities, are permitted by limitations or exceptions to copyright law.

The second new question would be something like "Do copyright enforcement measures place disproportionate constraints on users exercising their right of freedom of expression online?" This would capture the extent to which freedom of expression is chilled by disproportionate enforcement measures such as "three strikes" policies that disconnect users from the Internet, DRM anti-circumvention laws that prevent personal copying, backup, and repair of digital products, and "commercial scale" deeming provisions that apply massive penalties for acts such as sharing scholarly papers.

**What sources and means of verification would you recommend, from your experience, in relation to any of the questions and indicators that have been proposed?**

We believe that two indicators are needed for verification of the answer to the new question on copyright that we have suggested be added to Theme B. These are an indicator on copyright flexibility or openness, and an indicator on strength of copyright enforcement measures.

The Global Expert Network on Copyright User Rights hosted at American University has developed an econometric measure of copyright openness that establishes whether a country's copyright law is well balanced, in that it includes exceptions that are open, flexible, and general—such as the "fair use" right that exists in U.S. law.

This indicator has been found to be positively related to a country's economic development as well as to its creativity – as measured by firm performance and scholarly output controlled for firm size, national wealth, population, and time. As such, this would be a suitable indicator of copyright flexibility or openness. More information on this indicator can be found in this summary paper: [http://infojustice.org/wp-content/uploads/2017/11/PIJIP-Handout-10302017\\_english.pdf](http://infojustice.org/wp-content/uploads/2017/11/PIJIP-Handout-10302017_english.pdf)

In addition, an indicator of enforcement strength would be needed. In this regard, UNESCO could look at the data on copyright enforcement from the Taylor Wessing Global Intellectual Property Index (available at [https://united-kingdom.taylorwessing.com/global-ip-index/executive\\_summary](https://united-kingdom.taylorwessing.com/global-ip-index/executive_summary)), and those from the U.S. Chamber International IP Index (available at <http://www.theglobalipcenter.com/ipindex2017/>). However as these documents analyze the strength of copyright enforcement from the perspective of benefits to creators, some care would be needed to extract from the underlying data those aspects of the enforcement regimes that are harmful to consumers.