

Action needed to expand exceptions and limitations to copyright law

by Gwen Hinze

WIPO to consider copyright exceptions and limitations

On 10-12 March 2008, the World Intellectual Property Organization (WIPO)'s Standing Committee on Copyright and Related Rights (SCCR) met in Geneva to begin talking about exceptions to, and limitations on, rights granted to copyright holders by international instruments, a topic which is of vital importance to developing countries. WIPO member countries universally supported keeping the topic of exceptions and limitations on the Committee's agenda. The WIPO Secretariat was requested to organize an information session in conjunction with the next meeting of the Committee on 3-7 November 2008 to present on studies commissioned by WIPO on exceptions and limitations for the visually impaired and libraries and archives. The WIPO Secretariat was also asked to commission a new study on exceptions and limitations for the benefit of educational activities, including distance education and the trans-border aspect thereof. As a result, copyright exceptions and limitations will be an ongoing focus of the work of WIPO's Copyright Committee in the next year.

These discussions flowed from three proposals submitted to WIPO by the government of Chile at the initiative of the Chilean Ministry of Education. In November 2004, Chile asked WIPO to include the subject of exceptions and limitations to copyright and related rights for the purposes of education,

libraries and archives, and disabled persons on the agenda of the Committee and "to strengthen international understanding of the need to have adequate limitations, learning from existing models and moving towards agreement on exceptions and limitations for public interest purposes, which, like minimum standards, were to be envisaged in all legislation for the benefit of the international community" (WIPO document SCCR/12/3).

In November 2005, Chile suggested three types of work that the SCCR could undertake in this area (SCCR/13/5):

- "1. Identification, from the national intellectual property systems of WIPO Member States, of national models and practices concerning exceptions and limitations.
2. Analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming therefrom.
3. Establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors."

In March 2008, Brazil, Chile, Nicaragua and Uruguay presented a joint proposal that elaborated on ele-

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ments of the 2005 proposal. It called upon the WIPO Secretariat to organize an information session on exceptions and limitations and the various studies commissioned by WIPO on this issue, to commission a new study on exceptions and limitations for educational purposes, and to adopt a work plan to implement the 2005 proposal. Many countries' delegations expressed support for the proposal. The Group B (developed) countries, following the lead of the United States, expressed support for the exchange of information about national practices (i.e., paragraph one of the 2005 proposal) but opposed the other two paragraphs of the proposal dealing with comparative analysis of countries' existing exceptions and limitations and efforts to seek agreement on a set of minimum exceptions and limitations for the benefit of the public interest, and to give access to the most vulnerable and socially prioritized sectors of society.

In recent years WIPO has commissioned three studies on exceptions and limitations: Study on Copyright Limitations and Exceptions for the Visually Impaired by Judith Sullivan (SCCR/15/7); Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment by Professor Sam Ricketson (SCCR/9/7); and Automated Rights Management Systems and Copyright Limitations and Exceptions by Nic Garnett (SCCR/14/5).

A further study on exceptions and limitations for libraries and archives is being prepared by Professor Kenneth Crews, which will be presented at the information session taking place in November 2008. As noted above, the March 2008 SCCR also requested the WIPO Secretariat to commission a new study on exceptions and limitations for educational purposes.

Public policies served by exceptions and limitations

From the earliest days of the Berne Convention, the international copyright system has recognized exceptions and limitations to copyright. All copyright systems across the world, to varying degrees, are focused on promoting the creation and dissemination of knowledge. Exceptions and limitations are an important part of an efficiently functioning copyright system. They allow creators to access and build upon the knowledge generated by others. Without exceptions and limitations, the copyright system would not be able to achieve its fundamental purpose of spurring creation and innovation for the benefit of all humankind. Exceptions and limitations also serve a second critical function. They allow countries to create tailored access regimes to meet national needs and public priorities, such as exceptions for distance education to foster learning, capacity-building and development.

The international legal framework

Reflecting this, the Berne Convention contains various exceptions and permits signatories to set limitations on the scope of copyright protection. It contains a mandatory and uncompensated exception to copyright owners' exclusive rights, permitting quotation of copyrighted works in accordance with "fair practice", in Article 10(1). It also gives signatory countries the discretion to create uncompensated exceptions and limitations, subject to certain conditions, for use of copyrighted works for illustration in publications, broadcasts and sound recordings for teaching purposes (Article 10(2)); and news reporting on current events (Article 10bis(1) and (2)); and compensated exceptions and limitations for rebroadcasting (Article 11bis(1)) and for recording musical works (Article 13), and a special compulsory licence regime for reproduction and translation of texts by developing countries, subject to strict conditions (the Berne Appendix). These exceptions are available to signatories of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which incorporates the Berne Convention.

While the Berne Convention recognizes an exception for "teaching purposes" in Article 10(2), there is presently no recognition in the international copyright framework for exceptions to facilitate education (which includes both imparting knowledge by educators, and the ability of students to learn by accessing and interacting with information), nor specific exceptions for libraries and archives, or uses by persons with disabilities.

The Berne Convention also allows signatories to create additional uncompensated exceptions to rightsholders' reproduction right if they meet the controversial Three Step Test (Article 9(2)). Article 13 of the TRIPS Agreement adopted the same test for creation of exceptions to a broader set of rights, beyond the reproduction right. It 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."

To what exclusive rights Article 13 applies is still the subject of much debate. Legal commentators who take a maximalist approach claim that it applies to all exclusive rights of copyright owners, and conditions the creation of any new copyright exceptions and limitations on meeting that test (following the WTO Panel Decision in United States – Section 110(5) of the US Copyright Act, concerning section 110(5) of the US copyright legislation). However, other legal com-

mentators read it more narrowly, as applying only on top of existing Berne exceptions, when the test is compatible with the requirements of those in the Berne Convention. The history of the negotiation of the Stockholm Conference of the Berne Convention also supports the interpretation that the Three Step Test does not apply to those areas where discretion is given to member states to create exceptions recognized in the Berne Convention, such as Articles 10(1) and (2). That view is also supported by the standard principles of interpretation in international law. As a result, there is a sound argument that countries can create exceptions for teaching purposes under Article 10(2) of the Berne Convention that do not have to be conditioned on a decision about satisfaction of the Three Step Test.

The Three Step Test was included in the 1996 WIPO Copyright Treaty (WCT Article 10) and WIPO Performances and Phonograms Treaty (WPPT Article 16) and governs the creation of exceptions and limitations to rights newly granted under those treaties. The WCT and WPPT formulation also applies to existing exceptions under the Berne Convention. Developing countries expressed concern during the negotiations of the 1996 treaties about the impact of this provision on national sovereignty over national copyright law exceptions (which the Berne Convention had traditionally reserved to member states) and the ability of countries to create new exceptions and limitations to facilitate domestic needs. As a result, the following Agreed Statement was adopted by member states, to make clear that the intention was to preserve countries' existing copyright law exceptions and give countries the flexibility to introduce appropriate new copyright exceptions and limitations appropriate for the digital environment in order to meet domestic needs, such as distance education. The Agreed Statement also expressly shields Berne Convention exceptions from scrutiny under the TRIPS Agreement's Three Step Test, affirming that Article 10 of the WCT does not expand or reduce the scope of existing exceptions under the Berne Convention.

"It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

"It is also understood that Article 10(2) neither reduces nor expands the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

However, in practice, the uncertainty surrounding the interpretation of the Three Step Test and the linkage between national intellectual property regulation and trade law under the TRIPS Agreement, has resulted in the creation of relatively low levels of exceptions and limitations, particularly in developing countries' national copyright laws.

Expansion of the scope and depth of copyright law in the digital environment

A new multilateral instrument recognizing mandatory minimum exceptions and limitations to copyright law is required to provide guidance to developing countries and address political uncertainty surrounding the Three Step Test, and to rebalance the international copyright regime following the expansion of the scope and depth of international copyright law in recent years.

While there has been successful international harmonization of rightsholders' norms over the last 20 years, this has not been matched by a parallel harmonization of exceptions and limitations that serve the public interest. As a result, the international copyright regime is less balanced than it has been at any point in the past.

First, the range of rights granted to copyright owners has expanded. For instance, the TRIPS Agreement created a new right to control rental of copyrighted works and extended copyright to computer software. The 1996 WIPO Copyright and Performances and Phonograms Treaties created a new right of making available, expanded the right of communication to the public, and extended the right of reproduction into the storage of data in digital form.

Second, the length of copyright term has also expanded in recent years. Although the internationally harmonized term is 50 years after the life of the author, many countries have now adopted the higher term of life of author plus 70 years (or, in some cases, 95 years), as a result of recent bilateral trade agreements with the United States and/or the European Community.

Third, while also creating new opportunities for the creation and dissemination of copyrighted works, new developments in information and communication technologies (ICTs) have challenged the traditional balance embodied in the copyright system. The 1996 WIPO Internet Treaties required signatory countries to provide legal protection to technological protection measures (TPMs) – technologies that can be used by rightsholders to control access to, and use of, digital copyrighted works. Private rightsholders have been able to use legally enforced TPMs to control what level of access information users can have,

and on what terms. As the US experience with the 1998 Digital Millennium Copyright Act has made clear, over-broad TPM legal regimes can override existing national copyright law exceptions and limitations. They can also hamper countries' ability to create new exceptions and limitations to meet their domestic needs.

New ICTs could provide new opportunities for education, capacity-building and development

At the same time, the development of innovative new ICTs offers the possibility, for the first time in human history, of providing the world's citizens with access to the collective knowledge of humankind. New technologies are helping to digitize the collections of the world's great libraries. Volunteer efforts such as Project Gutenberg have made available on the Internet over 10,000 books in the public domain in the United States. Other new collaborative software technologies – wikis – have helped to create the world's most comprehensive and globally relevant free encyclopedia, Wikipedia (www.wikipedia.org). Any student who has access to the Internet anywhere in the world can now watch university lectures on content hosting platforms such as YouTube, and listen to free downloaded audio recordings of lectures on their mobile phones. Other new ICTs could provide access to global online education platforms, and to materials that could be used to create locally relevant curricula to help educate citizens who have no access to books.

However, all of these projects face obstacles because of current international copyright law. First, different countries have varying exceptions and limitations in their national copyright regime so students and teachers who want to use digital copyrighted information obtained from outside of their home country cannot be sure that they can use it legally within their country. Second, providers of information such as online libraries, Project Gutenberg, Wikipedia and content hosting platforms such as YouTube also face uncertainty about what information they can make available without fear of legal liability because of variations across national copyright laws, the national territorial limits of copyright regimes and uncertain scope of application of rules of private international law to cross-border communication on the Internet, and, most importantly, the lack of internationally harmonized copyright exceptions and limitations.

Appropriate exceptions and limitations to international copyright law are required in order to build internationally accessible digital libraries and archives, and make use of copyrighted works for cross-border education.

The need for internationally recognized mandatory minimum exceptions and limitations

A new multilateral means of creating mandatory minimum exceptions and limitations to international copyright law is required to foster education, libraries and archives and facilitate uses by disabled persons, and to rebalance the international copyright regime to serve the needs of all the world's citizens.

There are various mechanisms for providing formal recognition of an international consensus on mandatory minimum exceptions and limitations. The most ideal would be a treaty or other "hard" norm, which would provide clear guidance for developing countries and serve as a strong counterbalance to pressures from bilateral and regional fora outside of WIPO such as trade agreements. This could take the form of a treaty on copyright exceptions and limitations, or be part of a broader Access to Knowledge Treaty.

However, this could also be done by adoption of a "soft" norm, such as a Statement made by the WIPO Standing Committee on Copyright and Related Rights, adopted by the WIPO General Assembly, adoption of WIPO Guidelines, or a Joint Statement made by the WTO's TRIPS Council and WIPO SCCR, as recommended in a thoughtful study recently published by Professor Ruth Okediji of the University of Minnesota (USA) and Professor Bernt Hugenholtz of the Institute for Information Law at the University of Amsterdam (The Netherlands) (*Conceiving an International Instrument on Exceptions and Limitations to Copyright*, published 6 March 2008, available at www.ivir.nl/publicaties/hughenholtz/finalreport2008.pdf).

But the first step towards a multilateral instrument is increasing understanding in the international community of the need for such a rebalancing instrument, and the economic and social value that it would bring for all stakeholders. Hopefully, the November 2008 session of the WIPO SCCR and the information session being organized in conjunction with it on the studies of exceptions and limitations for the visually impaired and libraries and archives will provide the forum to start that important discussion.

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