

Shuttleworth Foundation Working Paper on Intellectual Property

Implementing the WIPO Development Agenda: Treaty
Provisions on Minimum Exceptions and Limitations for
Education

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Working Paper

2008

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The final version of this paper will appear as a chapter in "Implementing WIPO's Development Agenda" J De Beer (ed) (Waterloo, ON: Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre, 2009).



Abstract

Education is at the heart of development. The UN has recognized this fact for quite some time. Implementing the World Intellectual Property Organization's Development Agenda requires a special focus on how intellectual property rights interact with education. This chapter argues that the Development Agenda presents the right opportunity to create globally applicable minimum exceptions to copyrights for educational purposes. Absent such harmonization, educators and educational institutions around the world will face unnecessary hurdles to facilitating development.

This working paper was prepared for the EDGE (Emerging Dynamic Global Economies) Network, hosted by the University of Ottawa and funded in part by the International Development Research Centre.



1. Introduction

As its name suggests, the Development Agenda adopted by the World Intellectual Property Organization (WIPO), is designed to focus WIPO's efforts and resources on achieving a better balance between intellectual property rights and development. Education has been identified by the United Nations as essential to development. And while many domestic intellectual property (IP) regimes create exceptions and limitations on IP used in the educational sector, these exceptions vary from state to state. This variation presents serious challenges to the use of educational materials across borders.

This chapter argues in favour of the creation of minimum treaty standards with respect the use of IP in education. Such provisions would facilitate the cross-border sharing of educational resources, thus facilitating a key aspect of development. Existing rules with respect to exceptions and limitations are insufficient. What has emerged is a patchwork of varying exceptions that invariably created more obstacles than they remove. A harmonising approach of establishing minimum exceptions for education is required to adequately foster education vis-à-vis the Development Agenda.

2. Education in the Development Agenda

Issues and themes related to education were at the heart of proposals leading to adoption of the Development Agenda. The proposal submitted to WIPO by Argentina and Brazil (the Friends of Development) in August 2004 raised a number of concerns, including obstructions to the free flow of information, and "the ongoing controversy surrounding the use of technological protection measures in the digital environment" (WIPO 2004, 3). Of particular relevance to the education sector, the Friends of Development proposed:

- "an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries" (WIPO 2004, 3);
- imposing obligations as well as awarding rights to rights holders (WIPO 2004, 4);
- that "the social costs of IP protection are kept at a minimum" (WIPO 2004, 4); and
- "a proper balance is struck between the producers and users of technological knowledge, in a manner that fully services the public interest" (WIPO 2004, 5).

Building on these proposals, the recommendations for a Development Agenda adopted in October 2007 contain a number of education related mandates. These include:

- preservation and access to the public domain (WIPO 2007, Annex para. 16);
- norm-setting that takes account of development flexibilities, the Millennium Declaration, and include exceptions and limitations (WIPO 2007 paras. 17, 22);
- ensuring a balance of rights and obligations (WIPO 2007, Annex para. 45).

Different countries are at different stages of development and require different intellectual property schemes, with different mixes of exclusivity and access to provide appropriate incentives. This insight is critical to understanding the



Development Agenda. But how does a simple plan to set minimums exceptions and limitations for all WIPO members fit within this understanding?

The Development Agenda explicitly relies on the Millennium Declaration (UN 2000) to set policy direction. The Declaration states:

[g]lobal challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most (UN 2000, para. 6).

The Declaration and related Millennium Development Goals (MDG) point to the centrality of education to development in setting the goal of universal primary education (UN 2000, para. 19). Furthermore, the Declaration affirms a commitment to ensuring that “the benefits of new technologies, especially information and communication technologies” are available to all (UN 2000, para. 20).

Other UN documents have recognised the centrality of education to development (UN 1992, 442). According to the Johannesburg Plan of Implementation of the Millennium Declaration adopted by the World Summit on Sustainable Development, “[e]ducation is critical for promoting sustainable development” (UN 2002, 61). Leaders at the Summit agreed that it is essential to consider the resource constraints on educators, and mitigate the serious financial constraints faced by many institutions of higher learning (UN 2002, 61).

The Millennium Declaration and its implementing processes can and must inform the implementation of the WIPO Development Agenda. As a UN agency, WIPO is bound to observe the principles of the Millennium Declaration. If education is essential to development, then the international IP regime must be guided by concerns respecting education.

3. Minimum Exceptions and Limitations

Intellectual property law serves a public interest objective. Through rewarding creative activity by granting limited exclusive rights, IP law attempts to enable society to benefit from creative activity. Possible financial rewards create an incentive to create new works, or inventions, which may become available to members of a society through successful commercialisation of the work. While the exclusive rights granted to creators and inventors may result in some access to the work through market mechanisms, the exclusive rights preclude other access to the work. When works are not successfully commercialised and when commercialisation does not enable certain important uses, the public interest objectives of intellectual property are imperilled.

In order for intellectual property rights to serve the public interest countries have resorted to exceptions and limitations to exclusive rights in national intellectual property legislation. Limitations are often spoken of as if they are interchangeable with exceptions, and the distinction is a technical one. Limitations are legal provisions which limit the extent of a right of exclusivity, setting a boundary to the right. Exceptions are carve outs, which also reduce the scope of a right of exclusivity, but do so by granting user's a right to do something which would otherwise fall within the right to exclude others from that use.

Historically, international treaties have required minimum sets of exclusive rights which



vest in rights holders, while leaving exceptions and limitations to individual countries to regulate.¹ More recent international conventions have dealt with exceptions and limitations by restricting their scope (WIPO n.d., art. 9(2)). For example, The World Trade Organization's (WTO) TRIPS Agreement (WTO 2003, 321) refers extensively to limitations and exceptions. Although these references permit exceptions and limitations, many of the provisions restrict national sovereignty in respect of limitation and exceptions by delineating a notional maximum extent of such provisions.

Exceptions and limitations already exist in the laws of most developed countries, and many developing countries. Most of these exceptions comply with the 'three-step test' set out in the TRIPS Agreement (WTO 2003, 326, art. 13). This permits exceptions that constitute special cases, do not conflict with normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rights holder.

The implementation of the Development Agenda by WIPO provides an important opportunity for Member States to collectively discuss exceptions and limitations. The minimum exceptions and limitations which should be receive priority in these discussions are those which best advance the Development Agenda. These include exceptions and limitations in respect of education, libraries, translation, interoperability and access by sensory disabled persons.

This discussion is focused on the need for minimum exceptions and limitations in respect of education, especially the need to harmonise specific exceptions to resolve clashing jurisdictional schemes with a negative effect on education. However the focus on education is only one example of a broader challenge: the need to harmonise exceptions and limitations which are conducive to development. Exceptions and limitations that remove barriers so as to ensure that all developing countries benefit from increasing knowledge flows is an essential mandate of the Development Agenda.

The issue of minimum exceptions for education is discussed primarily in the context of copyright, focusing on the approaches found in fair dealing, fair use and similar provisions. The number and range of such provisions already in existence, as well as the pressing problem of removing barriers to global information flows points both to an opportunity and necessity to urgently address exceptions for education. The urgency of the work on copyright exceptions for education should not obscure the importance of exploring issues related to on copyright, or of minimum exceptions and limitations to other intellectual property schemes, such as patent and design, for education.

4. Exceptions for Education

It is both appropriate and necessary that that there should be copyright exceptions for education. The first modern copyright statute in the world, the *Statute of Anne*, was not only entitled an "Act for the Advancement of Learning," but contained provisions to ensure that works were available for education. The public interest in using copyright works is particularly compelling in respect of education, which is not only a public good in itself, but is a necessary pre-requisite for other public goods, such as the development of skills necessary for both the economy and the state, and an informed and empowered citizenry (UN 2002, 61). Exceptions and limitations for education also play an important

¹ One exception is found in Article 10 of the *Berne Convention*. Article 10(1) provides a mandatory exception for quotations, and article 10 (2) permits fair use of copyright material for illustrative or teaching purposes. (WIPO n.d.).



role within copyright schemes, since education is almost always necessary for the development of future creators and users of works and inventions.

A number of countries have minimum copyright exceptions for education. In jurisdictions that derive their copyright legislation from the United Kingdom, these exceptions often take the form of fair dealing provisions, which provide for the use of copyright works without seeking permission. By contrast jurisdictions influenced by US law tend to employ fair use provisions that are far more flexible, but are sometimes criticised for their generality. US fair use provisions have been criticised as insufficiently detailed to inform the public of their rights and obligations. One way of reconciling these approaches is through the statement of a general principle, similar to a fair use provision, followed by the enumeration of specific examples, not intended to be exhaustive of the general principle. The general principle can serve as a basis, at least in common law countries, for the development of more detailed jurisprudence in respect of enumerated examples and unanticipated situations.

Existing treaty norms do provide some basis for conceptualizing minimum exceptions to copyright for education. However, they do not adequately address the issue. For example Article 10(2) of the Berne Convention explicitly permits exceptions in respect of “teaching”:

“It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice” (WIPO n.d.).

This provision refers to use of copyright work only as illustration, and not other educational uses such as criticism, parody, re-engineering, and for purposes of assessment. Furthermore, the provision is limited to literary and artistic works, for the purposes of teaching. Education extends beyond formal teaching situations, such as self study, post graduate research, and peer group learning.

Minimum exceptions for education must also take into account recent technological advances, such as the increasing growth and centrality of the Internet. The Internet has provided new opportunities to a wide range of educational actors and profit motivated corporations to engage in education across borders. Some of these actors may have engaged in cross border education before the rise of the Internet. The Internet, however, allows interactions to take place without the mediation of other agencies, such as branches or partner institutions in recipient countries. More important is the difference in the scale of cross border education between the periods before and after the Internet, which amounts to a fundamentally different operating environment for education.

Educational materials are made available through the Internet either freely or as part of part of formal instruction, with or without out a fee. Although there are costs to providers for making material available over the Internet, they are often negligible. The costs of making material available through the Internet are distributed throughout the Internet, and are thus borne by providers and users alike. When someone makes material available through the Internet for her own purposes, for example a university professor making course materials available to her students, the materials are automatically available to anyone else connected to the Internet without any additional distribution



cost. Once material is available on the Internet there is no marginal cost for making it available to an additional user.

The necessity for exceptions to copyright in the educational context is best illustrated by an example. A professor creates an on-line course that includes a section on the historical significance of the release of Nelson Mandela from prison. If the professor writes her own material, she may then make it available for education. However if she needs to make use of a photograph showing Mandela's release, she must look to another source as she was not present to photograph the occasion of Mandela's release. Thus, there is a tension between copyright in the work, and an educational imperative.

Education requires that learning materials that include copyright works be available as examples, illustration and as the object of study, criticism, parody and re-mixing. Requiring permission for all of these uses is problematic as it may be prohibitively expensive for educators to obtain such permissions. Even if copyright holders were willing to grant permissions upon request, the sometimes onerous obligation to locate the owner, seek and obtain permission may deter educators from using essential copyright works. A exception provides for educational use without requiring permission.

In the pre-digital world many such uses either did not fall within the exclusive rights granted to rights holder or were allowed under detailed exceptions. However, in a digital environment every action, such as displaying something on a computer screen, browsing on an Internet website or incorporating an item into lesson notes, requires the making of a copy. Such uses may even require changes to the copyright materials that may constitute the making of a derivative work. Both reproduction and the making of a derivative work are exclusive rights, usually reserved for the rights holder. It is necessary to formulate exceptions that allow the use of copyright works for educational purposes in digital formats. Such exceptions should, as far as possible, allow at least the same exceptions as are allowed in the non-digital world.

5. Open Educational Resources

When material is subject to copyright it may be made available either under an "all rights reserved" rubric or as an open licence. The application of claims of all rights reserved in the context of the Internet raises difficult conceptual problems (Lessig 2004, 139-47), but that can be resolved by open licences.

The Cape Town Open Education Declaration (Open Society Institute 2007) signifies an important movement to make educational resources available under open licences. The potential of this movement to address the challenges faced by developing countries is far greater than the approaches used thus far. The Open Education movement aims to reduce barriers to sharing educational resources as far as possible. Open Education resources are intended by their creators, subsequent rights holders and distributors to be freely distributed. In other words they represent resources that are purposely devoted to development being made openly available across borders. Thus any barriers to open educational resources arising from copyright law that cannot be resolved by open licensing are especially pernicious and require urgent resolution.

In the example of the on-line course where the professor creates material, they may place it online under an open licence. Students and others may use the material under that open licence. The professor can incorporate material by others that is available



obtained under an open licence into the course. Others who wish to re-use the material for educational purposes will be able to do so within the broad terms of the open licence and without having to enquire whether they may also do so under an exception, although they do retain the ability to use the material within the narrower confines of whatever exceptions are available. However, returning again to the example above, because open licences of works other than software have only recently found widespread acceptance, there is likely no photograph of the release of Nelson Mandela available under an open licence.

It is necessary even with open educational resources to make use of copyright material for exceptional uses, such as by way of illustration. Learning materials available under an open licence and learning materials under an "all rights reserved" label both require exceptions for education.

6. Conflict of Laws

Since an open licence sets the conditions of re-use, and does not require further permission it is possible for someone in another country to use open educational material under the terms of that licence. The re-user need not enquire whether their re-use is permitted by an exception as long as the re-use is permitted by the broad confines of the open license.

In the example of the on-line course, a Mozambican teacher might choose to use a South African professor's on-line course. No problem will arise in respect of the open licence textual material. However in respect of the photograph of Nelson Mandela, the Mozambican teacher encounters a problem. Is there an exception for photographs for educational purposes in Mozambique? Does it apply to a digital environment? While the professor can licence material that she has created, the question of exceptional use of the material requires a separate determination of the law in every jurisdiction. Even if a particular use were to be allowed in a digital environment by a legislative provision in one country, that use may not be allowed in other countries that lack an exception in their law.

Exceptional uses of copyright works in open educational resources create a barrier to use of that open licensed work in other jurisdictions. In order to make use of the open licensed work a person would have to enquire whether the exceptional use is acceptable not only in the originating jurisdiction but in their own jurisdiction, requiring an inquiry into conflicting jurisdictional rules by every user. This dramatically raises the transaction costs of using learning materials, including open licensed materials. The creator or distributor of work who wishes to make her work available under an open licence in multiple jurisdictions would be confronted with a vast array of legal regimes if she simply wishes to make use of a copyright work for example or criticism. The situation would be further complicated if the user wishes to use a copyright work that was obtained via the Internet, which may potentially be regarded as situated in another jurisdiction.

The example of the on-line course would be further complicated if a US corporation wished to redistribute the professors work globally using the Internet. Once the corporation obtained the rights to exploit the work, whether under the open licence or a traditional copyright assignment, it would still be faced with a mammoth task. The corporation would have to determine what educational or equivalent exceptions apply in



respect of the photograph used by the teacher in all the jurisdictions where the resources would be available. Even a well resourced corporation would find this a prohibitively costly and time consuming exercise. Alternatively the corporation could attempt to obtain a commercial licence to re-use the photograph. However even this is not simple, especially since there is a great deal of difference between sourcing a stock image for illustrative purposes and obtaining global rights to re-use a famous photograph. If this issue arises in respect of multiple educational resources ,it becomes uneconomical for the corporation to distribute educational material on a global scale.

Similar issues arise for services that enable searching of scholarly and educational materials. Is this function, which is useful to teachers and learners across the world, permitted by the copyright law in each jurisdiction? The provider of such a service is currently required to determine whether its functions comply with the law of more than one hundred jurisdictions. Market based responses to the global need for educational materials are as imperilled as public responses.

7. Treaty Provisions

The example of the on-line course materials illustrates a larger problem. Although exceptions for educational use have a long history in copyright law, the conflict between differing exceptions is particularly glaring given that the Internet has reduced other barriers to sharing educational resources.

This problem can be resolved through harmonising national laws, by means of WIPO sponsored international provisions for minimum exceptions and limitations for education. Such provisions would outline only minimum exceptions and limitations, allowing countries to build upon the base rules, subject of course to the constraints of other international treaties. Both creators and users of learning materials who wished to make available or use learning materials across borders would have to contemplate one harmonious standard when sharing learning materials across borders. The result would be greater certainty for rights holders and users.

8. Conclusion: Educational Exceptions in the Development Agenda

Why should treaty provisions for exceptions and limitations for education form part of implementing the Development Agenda? WIPO has traditionally engaged in norm setting through treaties that prescribe minimums. These treaties have usually been minimum exclusive rights granted to rights holders. The Development Agenda seeks to bring about a balance of rights and obligations for rights holders. Minimum exceptions and limitations for education would constitute a balance to the extensive treaty provisions already in place that which grant rights to rights holders as required by the Development Agenda (WIPO 2007, Annex para. 22). Exceptions and limitations for education fit within the Development Agenda's priority on norm setting, which is supposed to take into account exceptions and limitations.

Treaty provisions are the WIPO's most powerful way of addressing issues. By setting minimum exceptions for education, WIPO can assist in significantly reducing the demands on the resources of educational institutions in developing countries, which would be in line with the Development Agenda and the Millennium Declaration's priorities. Educational institutions will be able to better fulfil their tasks through the greater use of educational materials.



There are other means of engaging in norm setting such as ministerial declarations or model laws. Either of these may also be able to mitigate the conflict of laws problems associated with the current exception and limitation regime. Why should treaty provisions required to address a conflict of laws problem not find favour? The rationale is the same as that for setting minimum standards for exclusive rights: that intellectual property actors are given certainty about the rules that apply across multiple jurisdictions. If, however, the rationale for harmonisation is rejected in this instance, that tends to give credence to the view of critics of the WIPO who claim that harmonisation is no more than the skewing of international trade rules in favour of developed countries.

Exceptions and limitations already exist in the laws of most developed countries, and many developing countries. They are an accepted part of intellectual property regimes and already comply with existing international treaties. The business models of creative industries already take into account that certain uses are permitted under exceptions and limitations. The incentives for creative industries will thus not be substantially affected by minimum exceptions and limitations for education since these are already factored in. What will be reduced will be the inefficiency created by differing exceptions and limitations. The result of the conflict of laws is that creative industries are unable to calculate what the effect of exceptions and limitations are on their businesses beyond their home countries. Instead of serving as a disincentive, the introduction of certainty via minimum standards will assist creative industries in operating in a global environment.

The negotiation of minimum exceptions and limitations for education is not intended to suggest that the Development Agenda should operate primarily through setting uniform standard for all countries. Different regimes are appropriate for different circumstances, which is why the proposal is that the standards for exceptions in the field of education should be minimum standards.. In order to allow beneficial knowledge to flow from one country to another, especially in the context of existing minimum standards for rights holders, it is necessary that there should be appropriate minimum exceptions and limitations.



Author Bibliography

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