

Considerations for an International Instrument on Limitations and Exceptions to Copyright

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In the last decade, the delineation of the conditions of access to copyrighted works, as well as the integration of viable access mechanisms into the international copyright regulatory framework, have become one of the most controversial topics in international copyright law.

The emergence of technological protection mechanisms, often reinforced by one-sided contractual provisions, has enabled copyright owners to exercise an unprecedented level of control over both the access to, and the utilisation of, creative works worldwide, resulting in what some have labelled as the ‘privatisation’ of copyright law. In effect, while new technologies have spurred an extraordinary increase in creative activity and afforded owners of knowledge goods a myriad of novel opportunities to disseminate their works to the public, it has also facilitated new access-inhibiting mechanisms recognised and protected by the international copyright system. The combined effects have provided copyright owners with near-absolute power over the contents of their works and hindered the welfare ideals recognised in both national and international copyright law.

The task of developing a global approach to limitations and exceptions (L&Es) is one of the major challenges facing the international copyright system today. It is widely recognised that the unlimited grant or exercise of rights by copyright holders without corresponding and appropriate L&Es has serious adverse long-term implications not only for development priorities, but indeed for the creative and innovation process itself.

Most innovation occurs incrementally by building on preceding technologies or existing knowledge, and empirical evidence in some developed countries suggests a strong correlation between the free dissemination of technological developments and know-how to growth and innovation.

Limitations and exceptions to copyrights contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal advancement. Appropriately designed L&Es can respond to the needs of people who still lack access to books and other educational materials, as well as also open up rapid advances in the technologies that are fundamentally transforming the processes of production, dissemination and storage of information.

Why an International Instrument?

As new technologies challenge copyright’s internal balance and the costs of globalisation heighten the vital need for innovation and knowledge dissemination, a multilateral instrument is necessary to effectively harness various national L&E practices and to provide a framework for dynamic evaluation of how global copyright norms can be most effectively translated into a credible system that appropriately values author and user rights. Such an instrument offers a unique opportunity to co-ordinate, harmonise and balance the height-

ened (and new) standards of protection set forth in the successive Berne Convention revisions, the TRIPS Agreement and the WIPO internet treaties.

International harmonisation of L&Es present in national copyright laws would diminish the reliance on national courts for the interpretation of multilateral accords. For example, a new international instrument on L&Es could help eliminate diverging interpretations

of the Berne/TRIPS three-step test across national jurisdictions and thus provide coherence and predictability in an environment of dynamic innovation. A new international instrument would also offset the TRIPS restriction of the three-step test (see box below), as well as the nascent jurisprudence of WTO dispute panels, which elevates economic benefits of control over economic benefits of diffusion and fails to accommodate the dynamic nature of creative enterprise.

A global approach to L&Es would help to:

- facilitate transborder trade, both online and in traditional media, by eliminating inconsistency and uncertainty and encouraging uniformity of standards of protection and transparency;
- alleviate institutional weakness of states (mostly developing and least-developed countries) that need diffusion most;
- counteract the recent shift to bilateralism and regionalism in international copyright policy-making, and;
- constrain unilateral ratcheting up of global standards.

Finally, a new international instrument with a broad membership would offer an opportunity to eliminate anticompetitive effects associated with differing levels of protection across national jurisdictions while consolidating recent gains in integrating public interest goals in the international copyright system – as seen, for instance, in the preamble to the TRIPS Agreement.

Situating an International Instrument

Ideally, a new international instrument on L&Es should be compatible with the standards set by the international copyright *acquis*, while optimally exploiting the flexibilities that exist within the current multilateral framework. In search of these flexibilities, it is important to understand the mechanics of the copyright system.

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The Three-step Test on Limitations

The TRIPS Agreement requires WTO Members to confine limitations and 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 rights holder.

Statutory limitations and exceptions are but one, albeit important, way of creating balance inside copyright. The tool-box of copyright law consists of several other balancing instruments, including, for example, the concept of a ‘work of authorship,’ which features a requirement of ‘originality’; the idea/expression dichotomy, which delineates the border between protected subject matter and the public domain; the delineation of economic rights of the right holder, such as the right of reproduction and the right of communication to the public; general limits to copyright, such as the exhaustion rule (first-sale doctrine) and the term of protection; and, finally, limitations and exceptions proper. In addition, outside the copyright tool-box, certain limits to copyright can be directly sourced in fundamental rights and freedoms, such as freedom of expression and the right to privacy, and others in competition law, such as the use of compulsory licenses.

Despite an unmistakable ratcheting up of levels of copyright protection at the international, regional and bilateral levels, enough ‘wiggle room’ appears to be left to the parties to the main multilateral copyright agreements to make framing an international instrument on L&Es within the confines of the international *acquis* a worthwhile exercise. One could imagine such an instrument as containing a preamble and a number of provisions, divided into several chapters, including headings such as:

- exclusions from protection (excluding, for instance, facts, ideas, laws and government works);
- limits to economic rights (permitting, for instance, exhaustion and various non-public acts of communication), and;
- limitations and exceptions proper.

For an exemplary catalogue of limitations and exceptions that are presumably compliant with the international copyright *acquis*, one need to look no further than the large number of limitations and exceptions enumerated in the EU Information Society Directive of 2001. Like that regulation, an international L&E instrument could provide a list of (mandatory and optional) limitations. A preamble might offer guidance to the contracting parties in implementing these limitations consistent with both national priorities and copyright objectives.

Designing an International Instrument

Among the principal motivations for an international instrument on L&Es is the need to recognise the limitations to copyright as internal to the copyright system and core to its effective functioning. Such an instrument would provide states a coherent framework within which the principle of maximum protection might otherwise constrain unilateral efforts that undermine copyright’s foundational commitment to the public good.

The minimum goals of an international approach to L&Es would include:

- the elimination of barriers to trade, particularly with regard to activities of information service providers;
- facilitation of access to tangible information products;
- promotion of innovation and competition;
- support to mechanisms that promote/reinforce fundamental freedoms, and;
- the provision of consistency and stability in the international copyright framework by the explicit promotion of the normative balance necessary to support knowledge diffusion.

Three other vital attributes should be reflected in an international instrument on L&Es: it must be flexible, judicially manageable and leave ample space for national cultural autonomy.

We believe that to restore balance to the international copyright regime a multilateral solution is called for. While, for example, the strategic utility and relative simplicity of alternative options, such as a moratorium on the further expansion of IP rights, or an agreement by developed countries not to sanction (or threaten to sanction) developing countries who employ existing access mechanisms, are useful, we feel strongly that in the digital age, welfare gains from dynamic competition and diffusion of information goods require positive access norms as integral features of an effective international copyright system.

Multilateralism in the area of L&Es has important functional, facilitative and normative advantages. As a functional matter, multilateralism invariably fosters centralisation which is a key factor in promoting international co-operation, particularly when there is a desire for broad-based membership in the regime. A multilateral accord also offers protection against ‘forum-shopping’ by owners of proprietary rights who may be willing to sacrifice long-term dynamic gains of access for short-term monopoly gains from rent payments. While we underscore the value of multilateralism, regional experimentation during the early stages of the multilateral exercise, such as those underway in Mercosur and ASEAN, may be an important step in beginning the work toward a coherent global framework for L&Es. Regional incubators for harmonised, minimum L&Es offer the advantage of incremental development of L&Es among like-minded countries. A string of regional successes with such experimentation over time could undoubtedly pave the way for a more general multilateral instrument.

Finally, we recommend a global instrument on L&Es to be cast, at least initially, in soft law. Soft law agreements are easier to negotiate and adapt to future circumstances as the need arises. Moreover, the norms of a soft law instrument might in the course of time evolve into a hard law treaty. A joint initiative between WIPO and the WTO could be an ideal expression of a soft-law modality with a real impact for collective action on an international L&E instrument.

Conclusion

Limitations and exceptions to copyright figures prominently on the agenda of international lawmakers today. At issue is the restoration of fundamental elements of the copyright system which were historically designed to require accountability to goals and purposes far beyond individual economic gain. The time is clearly ripe to consider how an international instrument on L&Es might be legally and institutionally conceived to accomplish welfare objectives that benefit human and economic development aspirations of citizens around the world.

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