

Standing Committee on Copyright and Related Rights

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PROPOSAL CONCERNING LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND
ARCHIVES AND LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL AND
RESEARCH INSTITUTIONS AND FOR PERSONS WITH OTHER DISABILITIES

document presented by Argentina

Introduction

In view of current developments in technology and communication, we are compelled to consider new ways of ensuring respect for and compliance with copyright and related rights. We understand that there is no contradiction between the objectives of promoting intellectual property and of the full development of the human person, having particular regard to the principles of non-discrimination, equal opportunities, accessibility and full participation in society (Art. 7, TRIPS Agreement).

The Republic of Argentina considers that the rationale for an international instrument on exceptions and limitations is that certain practices in the use of works by libraries for educational or research purposes cannot be settled internally by States. From this perspective, we understand that many of the proposals made during the discussions of the Standing Committee on Copyright and Related Rights (SCCR) can be resolved internally by States through legislative amendments or by implementing good practices.

Hence, an international instrument on exceptions should refer to very clear and well-defined elements, which inevitably require the collaboration and cooperation of other States. This will entail the harmonization of legislation through minimum standards (principle of uniformity) and the adoption of rules of coordination (principle of coordination).

Both sets of rules are necessary when the intention is to harmonize intellectual property rights with other rights of a humanitarian nature.

Purpose

We propose the establishment of a general scheme of exceptions and limitations to facilitate international harmonization in the use of works, mainly literary, by combining the principles of international uniformity and coordination.

The principle of uniformity

In the domain of exceptions and limitations, the principle of uniformity means seeking consensus on what uses of works in libraries and educational establishments do not affect normal exploitation and the legitimate interests of authors.

No doubt, in keeping this line of reasoning, the right of quotation referred to in Article 10 of the Berne Convention was an exception construed as universal, according to the status quo at the time of its establishment, to drive progress in science, culture and education.

Given the changes in technology and educational practices, both the right of quotation and other exceptions must expand in content and scope to take account of, for example, the Internet, with its characteristics of immediacy, ubiquity and almost zero transaction costs.

It appears reasonable to achieve a minimum consensus on exceptions and limitations for use by libraries and for educational or research purposes. States can make progress on a catalog of minimum exceptions for certain works and specific uses, in combination with a remunerative licensing system for other uses. These exceptions should be clearly defined as to scope, beneficiaries, acts and effects. The same should be established regarding remunerative licenses.

The principle of coordination

The principle of uniformity does not suffice, because even when States agree on the content of an exception, its scope will be interpreted or applied differently in each national jurisdiction. This is because the more precise the formulation of a rule, the better sense it makes in a given national legal system, with its many and varied peculiarities.

For this reason, it is necessary to introduce rules of coordination for intellectual property.

In short, the aim is to establish a clear legal environment that makes it possible to continue economic and social development in harmony, in a manner conducive to respect for and enforcement of intellectual property, overcoming the fragmentation of territorial jurisdictions.

This involves the introduction of rules of international law to mitigate the principle of territoriality, so that acts that are valid and legal in one jurisdiction, according to the terms of the treaty itself, are valid in another jurisdiction where they have effect. The scheme would apply to all possible instruments on exceptions and limitations under discussion within the purview of the SCCR.

For example, it is noteworthy that of the rules of coordination with positive effect, the best known in copyright and related rights is national treatment, provided for in Article 5.1 of the Berne Convention and Article 3 of the TRIPS Agreement. In the field of exceptions and limitations for cultural and educational purposes, it is possible to establish a positive rule of coordination, declaring valid in a country acts that have occurred abroad, when the objective sought by the conduct, scope and subject-matter in question is to pursue a supranational societal interest. The coordination rule will be designed to validate or invalidate the exceptions and limitations not uniformly defined in the treaty. In the alternative, it will serve for exceptions and limitations that have not been agreed.

As regards exceptions and limitations for educational purposes, it could be considered that a standard that meets the criteria of Berne, or that establishes a remunerative license, would be valid in another territory that is a party to the treaty, if this approach is extended to encompass the digital arena.

This rule would even favor the harmonization of exceptions designed within different legal systems, such as civil law and common law. For example, if a work is reproduced

within the scope of the educational purposes prescribed by the treaty, in a territory that has legislated such reproduction or making available as lawful, and meets the legal requirements in that territory, reproduction should be lawful in another territory that does not provide for such an exception.

A similar situation occurs in the field of cooperation between libraries. The sending library that assists a recipient located in another country should not doubt the validity of the recipient's acts of reproduction, if such acts are lawful within the jurisdiction of the sending library. Thus, if a sending library performs a lawful reproduction in its territory, and the institution complied with all the requirements of its own legislation to reproduce this work, neither the sending nor the receipt or use of the work by the receiving library could be unlawful acts in the destination country.

Proposed rule

Accordingly, within the scope of a treaty on limitations and exceptions, lawful conduct in one territory should not be illegal in another. If reproduction or making available is valid under the treaty, it cannot then be invalid under the rules of another State jurisdiction. The proper operation of a treaty on limitations and exceptions for educational or research purposes is incompatible with the jurisdictional divisions derived from the unfettered implementation of the principle of territoriality. Otherwise, transactional costs would greatly hamper the effective enforcement of the treaty. The proposed rule, in a general sense, should be structured as follows:

“Where performed in accordance with the exceptions and limitations set forth in this agreement, the reproduction or making available of a work shall be governed by the law of the country in which the reproduction or making available occur, without precluding the reproduced work from being delivered to or used by a person or institution benefitting from exceptions and limitations located in another Member State, provided that such delivery or use is consistent with the terms and conditions set forth in this agreement”.

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