

# WIPO



SCCR/19/6

ORIGINAL: French

DATE: October 7, 2009

WORLD INTELLECTUAL PROPERTY ORGANIZATION  
GENEVA

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## STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

**Nineteenth Session**  
**Geneva, December 14 to 18, 2009**

STUDY ON LIMITATIONS AND EXCEPTIONS FOR COPYRIGHT FOR  
EDUCATIONAL PURPOSES IN THE ARAB COUNTRIES

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\* The views and opinions expressed in this study are the sole responsibility of the author. The study is not intended to reflect the views of the Member States or of the WIPO Secretariat.

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## SUMMARY

This study is designed to provide details of the teaching or educational exceptions for copyright and neighboring rights in countries in the Arab region. It is primarily a *descriptive* and analytical study which is not intended to make recommendations to the countries concerned or to pass value judgments.

Of the 19 countries concerned (Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen), we have managed to obtain the laws of 17 of them. The copyright laws of Mauritania and Yemen have not, however, been examined, despite all the efforts made to obtain them.

At first sight, we are struck by the recent nature of the copyright laws in the region. Of the 17 legislative systems examined, 10 are less than 10 years old.

As the concept of an exception for educational purposes is not defined anywhere, we have taken the liberty of proposing a definition of it by combining a two-fold criterion: formal or verbatim, which flows from the actual text of the law, and functional, which takes account of the purpose of the exception envisaged.

In terms of the methodology and internal organization of the study, the analysis of the various laws mentioned has led us to divide the study into seven sections.

- I. The first section relates to exceptions to copyright concerning uses of works for teaching illustration purposes. These exceptions are based directly on Article 10(2) of the Berne Convention.
- II. A second section has been devoted to exceptions for purposes of quotations from works. They are also directly based on a provision of the Berne Convention, Article 10 (1).
- III. A third section deals with the exceptions relating to reprographic reproductions of works for teaching, research and examination purposes.
- IV. A fourth section relates to exceptions concerning the public performance of works as part of teaching activities.
- V. A fifth section has been reserved for exceptions in the area of neighboring or related rights.
- VI. A sixth section deals with the issue of whether exceptions exist for teaching as regards the obligations relating to technical measures.
- VII. A seventh and final section has been devoted to the Appendix to the Berne Convention containing Special Provisions regarding Developing Countries.

For reasons of clarity, each section has itself been divided into two parts: the first entitled "Analysis" deals with the subject in hand from a comparative point of view, in the light of the existing legislative systems. The second part entitled "Relevant Legislative Provisions" reproduces *in extenso* the texts of laws which were the subject of the analytical

section. That will allow the interested reader to become familiar with their full contents rather than in summary form.

The following three conclusions emerge from the study.

1. We can state that the Arab countries have in general availed themselves of the flexibilities allowed by the international conventions as regards teaching in its traditional forms, although to varying degrees.
2. Questions arise, however, as regards new teaching methods, using digital technology, in particular by means of distance learning. Of course, the provisions of certain national laws could have their scope extended to this kind of situation, in favor of an extensive interpretation of the exceptions. However, there remains a degree of uncertainty. We are obliged to note the lack of a concerted and systematic effort towards adapting the existing exceptions to new situations.
3. A significant number of Arab countries (a total of nine) have availed themselves, in their domestic laws, of the Appendix to the Berne Convention containing Special Provisions regarding Developing Countries. It should be noted that in general this Appendix is far from representing a panacea and that it has not kept the promises which, at first sight, developing countries might have expected. At best, it is a negotiating tool from which developing countries could benefit in order to obtain more advantageous contractual conditions.

## GENERAL INTRODUCTION AND PRELIMINARY REMARKS

As work on the Berne Convention came to a close in September 1884, Swiss Federal Counselor Numa Droz, the then President of the Swiss Confederation, had the following words for the members in attendance:

“Consideration had also to be given to the fact that limitations on absolute protection are dictated, and rightly so in my opinion, by the public interest. The ever-growing need for mass education could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses. These were the various viewpoints and interests that we have sought to reconcile in the draft Convention”.

The search for a balance between the rights of authors and their beneficiaries on the one hand, and the public interest on the other hand, has always been a matter of concern for national legislators as well as States when it comes to the negotiation and drafting of international standards.

Although everyone is in agreement with this premise, we must recognize that the notion of public interest is a delicate issue requiring a balancing act between opposing claims.

The utilization of works for teaching purposes is perhaps the ideal field which best illustrates the concern to use public interest to set limits on authors’ exclusive rights.

Moreover, this desire to promote access to knowledge through copyright exceptions is universally shared, in both developed and industrialized countries and in developing and least developed countries. A comparative analysis of national copyright laws reflects a widespread concern to make provision for exceptions to exclusive rights in order to meet educational needs.

Such exceptions have evolved with new teaching methods, which themselves depend on the new digital technologies. One of the issues at the heart of the current debate consists precisely in recognizing the importance of finding ways to tailor educational exceptions to fit the new pedagogical context.

### 1. DELIMITING THE TERMS OF REFERENCE

For purposes of clarity, it is important to define clearly the research framework and goals. According to the terms of reference, the present study is designed to present the “state of the art” with regard to exceptions to copyright and neighboring rights linked to activities of an educational or pedagogical nature or relating to teaching (“exceptions for educational activities”). This study will cover the countries in the Arab region.

The terms of reference feature three components:

- As for the nature of the work, what is sought is descriptive research;
- As for subject matter, the research will focus on exceptions concerning the educational sphere;
- As for the countries concerned, the study is to cover the countries in the Arab region.

As stated, the terms of reference call forth two initial observations, or pose two questions stemming from both the nature and subject matter of the research. This leads us to ask ourselves the following two questions: first of all, what do we mean by “descriptive study”? And second, what is meant by “educational exceptions”?

### 1.1. Descriptive study

Describing means painting a picture of what is, taking stock: the primary goal is to map out the overall situation in the Arab region, particularly from a legislative perspective. But the aim is also to say what could be, or could have been, given the flexibilities authorized by the relevant international conventions.

However, as the goal is to describe, it is pointless for the person signing this report to provide specific recommendations for action or make value judgments, let alone propose future directions in national laws relating to the subject dealt with. It will then be for the countries concerned by this study to draw the appropriate conclusions in terms of legislative policy or action, as need be.

### 1.2. Study on educational exceptions

What is meant by educational exceptions, or exceptions for educational or pedagogical purposes? This is a key question which determines the field of research. Hence our question: how does one recognize an educational exception or an exception for teaching purposes? What is the criterion that will guide us in our work to select the laws to be examined?

This is a delicate task, because the notion of educational exception or exception for pedagogical or teaching purposes is not spelled out anywhere. Nevertheless, we must make a choice. What then shall be the basis for such a choice?

We may refer first of all to a *formal or textual criterion*: in international conventions or national laws, we see exceptions here and there which are specifically designed for educational or pedagogical purposes.

As an example, one could refer to Article 10.2 of the Berne Convention, which authorizes the use of works “by way of illustration (...) for teaching”. Moreover, many national laws introduce exceptions for educational institutions or for activities of a pedagogical nature which take place in such institutions.

In this case, the intent and purpose are clear, because they appear in the very wording of the text: exceptions of this kind are singled out for the purposes of our report.

Yet this approach cannot cover all situations relating to exceptions with pedagogical repercussions. Exceptions may be closely linked to a pedagogical purpose without this being spelled out in the provisions of the law or treaty. The formal criterion would not suffice in this case to reflect adequately the nature of the exception. In addition to the formal criterion, it appears necessary to make provision also for a *functional criterion* which takes into consideration the purpose of the exception in question. Viewed from this perspective, if the exception considered is primarily or substantially designed for pedagogical or didactical purpose, it should be possible to single it out for the purposes of this report.

This is the case for example with the exception relating to quotations, which can be found in the Berne Convention (Article 10.1) and in many national laws. There is no reference to “pedagogical purposes” or “educational purposes” in Article 10.1 of the Berne Convention and in the relevant national texts. In practice, however, this exception is often applied in connection with activities linked to research or teaching. From this perspective, we feel that it must be an integral part of this study.

Other cases are problematic, such as exceptions which apply in the following two situations: first of all, exceptions authorizing libraries and archiving centers to make photocopies for users; and second, exceptions for private copying.

What about exceptions allowing libraries or archiving centers to make photocopies for users? Should they be covered by this study?

At first sight, this exception does not appear to apply strictly speaking to our field. The formal criterion derived from the wording would not apply to the case at hand.

Moreover, exceptions relating to libraries and archives were already covered by an exhaustive study commissioned by WIPO (Kenneth Crews, “Study on Copyright Limitations and Exceptions for Libraries and Archives”, [http://www.wipo.int/meetings/fr/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=109192)).

On the strength of the foregoing, we might be inclined to exclude this type of exception from the field of the study.

In our view, however, applying the functional criterion could and should lead to different conclusions.

It should be noted that in the vast majority of cases, libraries are attached to educational institutions. Clearly, some of the exceptions they enjoy are closely linked to the activities of the educational institution of which they are a part and thus have certain pedagogical repercussions.

This is the case for example with exceptions allowing libraries to make photocopies for their users. Granted, such users may be members of the general public. But the odds are that a large share of these users are themselves students or researchers doing work designed to meet pedagogical requirements (research, thesis, etc.) for an educational establishment in which they are registered. Nor should we forget that a substantial portion of libraries are attached to educational institutions and thereby participate in the educational mission of those institutions. In this context, it can be said that their activities satisfy the pedagogical aims and should be covered by this study. It would therefore be artificial and unjustified to exclude this type of exception from the field of this study. The functional criterion in this case should apply and lead to the inclusion of this category of exceptions in the field of this study.

Lastly, what about exceptions for private copying? In our view, such exceptions do not primarily apply to the educational field. Copying a CD or DVD for one’s own pleasure or convenience has no apparent link with activities of an educational or pedagogical nature in the strict sense of the term. From this perspective, there is no imperative reason to deal with such exceptions. In view of these observations, I have chosen not to cover exceptions dealing with

private copying in general in this study, as this would go quite a way beyond the scope of the study.

On the other hand, there are cases where private copies are made in an institutional framework for study or research purposes. Consequently, the provisions which include exceptions for private copying within educational institutions have been singled out.

## 2. THE COUNTRIES CONCERNED

The study deals with the Arab countries. Here is the list of countries concerned:

- Algeria
- Bahrain
- Djibouti
- Egypt
- Iraq
- Jordan
- Kuwait
- Lebanon
- Libya
- Mauritania
- Morocco
- Oman
- Qatar
- Saudi Arabia
- Sudan
- Syria
- Tunisia
- United Arab Emirates
- Yemen

Of the 19 countries selected, we are not able to obtain copies of the laws of Yemen and Mauritania, so these two laws are unfortunately not analyzed in this report.

As far as the other countries are concerned, here are the laws we were able to analyze.

### 2.1. Laws analyzed

Algeria	Ordinance No. 03-05 of 19 Jomada El Oula 1424 corresponding to July 19, 2003 relating to copyright and neighboring rights
Bahrain	Law No. 22 on Copyright and Neighboring Rights of June 25, 2006
Djibouti	Law No. 114/AN/96/3e L relating to Copyright Protection of September 3, 1996
Egypt	Law No. 82 on Intellectual Property of 2002

Iraq	Law No. 3 of 1971 on Copyright Protection, amended by order of the Coalition Provisional Authority on April 24, 2004: CPA/ORD/24 April 2004/83)
Jordan	Law on Copyright Protection No. 22 of 1992 as amended by Laws No. 14 of 1998, No. 29 of 1999 and No. 52 of 2001
Kuwait	Copyright, Government Decree, December 29, 1999 - 1420, No. 64
Lebanon	Copyright, Law of April 3, 1999, No. 75
Libya	Law No. 9 of 1968 relating to Copyright Protection
Morocco	Law No. 2-00 relating to Copyright and Neighboring Rights Protection, as amended and supplemented by Law No. 34-05 of February 14, 2006-1427
Qatar	Law No. 7 of 2002 on the Protection of Copyright and Neighboring Rights
Oman	Royal Decree 65/2008 enacting the Law on Copyright and Neighboring Rights
Saudi Arabia	Royal Decree No. M/41, 2 Rajab, 1424 (August 30, 2003) and Enabling Regulations for the Law on Copyright of June 22, 2005
Sudan	Law of December 12, 1996 on Protection of Copyright and Neighboring Rights
Syria	Law No. 12 of October 27, 2001 on Copyright Protection
Tunisia	Law No. 2009-33, amending and supplementing Law No. 94-36 of February 24, 1994, on Literary and Artistic Property
United Arab Emirates	Copyright law of July 1, 2002-1423, No. 7

Some remarks are in order. One cannot help but be struck by the fact that several of these laws were adopted recently. Moreover, the same trend can be seen at the global level: copyright laws are evolving and changing at a faster pace. The same holds true for the Arab region. Five of the laws analyzed were drafted or amended over the past five years. And if we look at the past ten years, the number of laws reworked comes to 13. That represents more than three quarters of the countries whose laws have been examined in this report.

## 2.2. Arab countries and international conventions

The point should also be made that a great many of these countries are party to international conventions on copyright or neighboring rights.

## BERNE CONVENTION

Algeria (1998), Bahrain (1997), Djibouti (2002), Egypt (1977), Jordan (1999), Lebanon (1947), Libya (1976), Mauritania (1973), Morocco (1917), Oman (1999), Qatar (2000), Saudi Arabia (2004), Sudan (2000), Syria (2004), Tunisia (1887), United Arab Emirates (2004), Yemen (2008).

## WTO

Members: Bahrain (1995), Djibouti (1995), Egypt (1995), Jordan (2000), Kuwait (1995), Morocco (1995), Oman (2000), Qatar (1996), Saudi Arabia (2005), Tunisia (1995), United Arab Emirates (1996).

Observers: Algeria, Iraq, Libya, Sudan, Yemen.

## WCT and WPPT

Bahrain (2005), Jordan (2004), Oman (2005), Qatar (2005), United Arab Emirates (2004).

## ROME CONVENTION

Bahrain (2006), Lebanon (1997), Syrian Arab Republic (2006) and United Arab Emirates (2005).

### 3. EDUCATIONAL EXCEPTIONS IN INTERNATIONAL CONVENTIONS

The above table showed us that at the time this report was prepared, a great many Arab countries were party to international conventions dealing with copyright or neighboring or related rights.

For example, the Berne Convention alone, the main instrument for copyright protection, has been signed by 18 Arab countries.

WTO, Annex 3 of which (TRIPS) deals with copyright and neighboring rights, has 11 member countries and five others with observer status in the region.

As far as WCT and WPPT are concerned, only five Arab countries are members.

The Rome Convention brings together four Arab member countries.

All of these conventions contain provisions authorizing the utilization of works, performances and phonograms for teaching or for educational purposes. "Exceptions" refer to the possibility of using a performance of a work or a phonogram without being obliged to obtain permission from the right holder and without financial compensation.

Such exceptions are usually incorporated in domestic law by the member countries. Consequently, they provide the basis justifying member countries' capacity to intervene with regard to exceptions. They also constitute the limit which must not be passed.

It may be useful to provide the overall context in which exceptions of an educational nature must be situated. Here, the purpose is to give an overview of the possibilities offered within the framework of international conventions. For an in-depth study of the subject, the reader is urged to consult the exhaustive study by Professor Ricketson: WIPO Study on Limitations and Exceptions to Copyright and Related Rights in a Digital Environment [http://www.wipo.int/meetings/eng/doc\\_details.jsp?doc\\_id=16805](http://www.wipo.int/meetings/eng/doc_details.jsp?doc_id=16805).

Very succinctly, it will be noted that the Berne Convention has three texts which are likely to underpin exceptions of an educational nature in national laws: Article 10.1 relates to quotations, while Article 10.2 allows the use of works as illustrations for teaching. Mention can also be made of Article 9, paragraph 2 which provides that it shall be a matter for legislation in the member countries of the Union to permit reproduction of works in special cases, provided that such reproduction does not conflict with normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. The “special cases” could apply to situations with educational or pedagogical consequences. Lastly, a reference should be made to the existence of an implicit exception, according to which member countries are reportedly allowed to introduce exceptions of very limited scope which have minimum impact, particularly in the field of the right of public performance.

As far as neighboring rights are concerned, the Rome Convention allows exceptions of a private nature, provided that the copy is used solely for the purposes of teaching or scientific research (Article 15.1). What is more, member countries may adopt exceptions of a similar nature as those which apply in the copyright field (Article 15.2).

TRIPS refers back to Articles 1 to 21 of the Berne Convention and therefore incorporates the exceptions listed in the Berne Convention. Moreover, Article 13 appears to bring into widespread use the conditions laid down in Article 9, paragraph 2 of the Berne Convention (three-stage test).

Lastly, WCT and WPPT contain relatively complex provisions governing exceptions in the digital world. In substance, member countries may provide for exceptions to the rights established under these treaties, whether this concerns copyright or neighboring rights, by meeting the three conditions of the three-stage test (see Article 10 of WCT and Article 16 of WPPT). Furthermore, common statements specify that the Contracting Parties may “devise new exceptions and limitations that are appropriate in the digital network environment” (see Agreed Statement No. 10 of WCT and No. 15 of WPPT). These Agreed Statements could have the effect of allowing the inclusion in national laws of new exceptions tailored to fit new forms of teaching promoted by digital technologies.

#### 4. METHODOLOGY

The study will be divided into seven sections:

- I. The first section will cover copyright exceptions relating to the utilization of works as illustrations for teaching. Such exceptions stem directly from Article 10.2 of the Berne Convention.
- II. A second section will be devoted to exceptions for purposes of quotations from works. These also flow directly from a provision in the Berne Convention, namely Article 10.1.

- III. A third section will deal with exceptions relating to reprographic reproductions of works for purposes of teaching, research and examinations.
- IV. A fourth section will take up the public performance of works in conjunction with pedagogical activities.
- V. A fifth section will focus on exceptions in the field of neighboring or related rights.
- VI. A sixth section will tackle the question of whether there are exceptions relating to teaching with regard to obligations concerning technical measures.
- VII. A seventh and last section will concentrate on the Appendix to the Berne Convention containing Special Provisions Regarding Developing Countries.

To enhance clarity, each section will itself be divided into two parts: the first part, called “Analysis”, will cover the subject dealt with from a comparative point of view, in the light of existing legislation.

The second part, entitled “Relevant Legal Provisions”, will reproduce in extenso the texts of laws covered by the analytical section. This will allow interested readers to become familiar with the full version rather than a summary. These texts will be provided in the French version when it exists or, failing this, in English.

It will, however, be noted that the internal division of each section into two parts will not be followed for sections 6 and 7, where only the analytical component will be covered. This is because the exceptions dealt with in section 7 are very rarely used and the corresponding texts are numerous and dense. In our view, it was pointless to clutter up this report with a considerable volume of texts of limited practical interest. As for section 6, none of the Arab countries except Morocco has introduced this type of exception. In view of the fact that the situation in Morocco is covered by a detailed examination in the analytical section, it seemed pointless to reproduce once again the articles examined in the analysis.

[Section I follows]

## SECTION I: UTILIZATION OF WORKS AS ILLUSTRATIONS FOR TEACHING

### A. ANALYSIS

Out of the 17 countries studied, we found 14 countries whose copyright laws contained an exception making possible the utilization of works as illustrations for teaching.

The countries are as follows:

- Algeria (Article 43),
- Bahrain (Article 21 (b)),
- Djibouti (Article 41(c)),
- Egypt (Article 171(6)),
- Iraq (Article 14 (2)),
- Jordan (Article 17(c)),
- Libya (Article 17),
- Morocco (Article 15)
- Qatar (Article 18(2)),
- Saudi Arabia (Articles 15 (3) and 15(9)),
- Sudan (Article 14(3) and 14(6)),
- Syrian Arab Republic (Article 37(1) c)),
- Tunisia (new Article 10),
- United Arab Emirates (Article 22(8)),

The copyright laws of Kuwait and Lebanon do not appear to contain provisions of this type, while the copyright laws of Oman are not clear in this respect. Article 20(2) allows a certain form of using works for teaching purposes in a classroom setting. However, its scope appears so limited that we are reluctant to include Oman in the list of countries which authorize the full application of the exception in question.

### 1. PRELIMINARY OBSERVATIONS

*Observation 1:* It should be noted first of all that this exception is based on Article 10(2) of the Berne Convention, which authorizes member countries 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”.

It will further be noted that the Berne Convention only offers a faculty of which Member States could avail themselves. Consequently, they are not under any obligation to incorporate this provision in their national legislation.

*Observation 2:* The point should also be made that the expression “utilization” in Article 10(2) is vague or even imprecise. It does not refer to any right in particular. Moreover, it is likely that

this word was chosen deliberately to ensure flexible interpretation of the exception and tailor-made application.

The word “utilization” could have an extension enabling it to cover several rights at once. This leads us to ponder acts likely to be performed freely by virtue of this exception for educational purposes. What rights is the exception meant to cover? What types of utilization are permitted?

## 2. RIGHTS COVERED BY THE EXCEPTION

### Preliminary remarks

First of all, it is appropriate to mention that it is standard legislative practice for a draft bill introducing an exception to refer to the right to which this exception is related. This is logical because the exception makes it possible to perform an act that is the subject matter of an exclusive right which the law recognizes for the author. By virtue of the exception, the beneficiary can perform the act in question without being obliged to obtain authorization from the claimant. It is therefore quite normal for the link between the exclusive right and the exception to be highlighted.

Moreover, the close relationship between right and exception is reflected in drafting in various ways, as dictated by the drafting techniques which are specific to each country. By way of example, two drafting models may be found below whose drafting technique is widely followed.

Model 1: “The fact of: (for example, making copies for teaching purposes or performing a work in a classroom) does not constitute an infringement of the right of (for example, reproduction or public reproduction)”;

Model 2: Notwithstanding Article X (which covers the right of public performance), it is permitted, without the author’s authorization and without payment of compensation, to perform a work publicly, in conjunction with the activities of an educational establishment”.

What is the situation in the Arab countries with regard to the exception based on Article 10(2) of the Berne Convention?

Our overview reveals two different and separate tendencies.

- The first tendency accounts for a majority (10 countries: Algeria, Bahrain, Djibouti, Jordan, Morocco, Qatar, Saudi Arabia, Sudan, Syria, Tunisia).
- In these countries, the exception in question covers “*utilizations*” of works as illustrations for teaching. Thus, the exception does not refer to a particular right. The notion of “*utilizations*” is rather vague and can be quite broad. These countries draw their inspiration from Article 10(2) of the Berne Convention.

- On the other hand, four countries (Egypt, Iraq, Libya and United Arab Emirates) limit this exception to acts of “*reproduction*”, which at first sight seems to be more restrictive than the notion of “*utilizations*”.

In this respect, we may ask ourselves if the latter four countries have taken full advantage of the flexibility offered by Article 10(2) of the Berne Convention because the word “*utilizations*”, which is broader in scope than the word “*reproduction*”, could offer more opportunities for free access to works.

To illustrate the minority tendency, we quote Article 171(6) of Egypt’s Law on Intellectual Property, which recognizes the following as lawful acts:

“*The reproduction of short extracts from works by way of illustration and explanation, and for teaching purposes, whether it be in writing, or in a sound, video or audiovisual format .....*”

This model is opposed to the majority model, which can be illustrated by an extract from Article 33 of the relevant law in Algeria, which allows:

“*The utilization of a literary or artistic work by way of illustration in publications, a sound or audiovisual recording or broadcast, for purposes of teaching or vocational training.....*”.

The question which arises at this point is determining to which rights this exception applies.

## 2.1. Right of reproduction

2.1.1. The point should be made that the question does not arise for those countries (Egypt, Iraq, Libya and United Arab Emirates) which specifically restrict the exception to reproduction. The law is clear in this respect.

2.1.2. But what about the other countries where the exception allows the “*utilization*” of works? We note that in these countries, the effect of the exception is to permit the utilization of literary and artistic works “*by way of illustration in publications, broadcasts or sound or visual recordings*”.

This enumeration (“*by way of illustration in publications, broadcasts or sound or visual recordings*”) is taken directly from Article 10(2) of the Berne Convention.

First of all, it should be noted that the utilization of a work, by way of illustration in publications, broadcasts or sound or visual recordings, implies its inclusion in a readable format (publications), an audible format (sound recording) or a visible format (visual recording). This requires the fixation of the work and hence its reproduction. Consequently, the “*utilizations*” allowed inevitably include the making of copies. The exception should therefore apply to the right of reproduction, without a specific reference thereto.

Yet what about utilization by means of a *broadcast*? One could theoretically conceive of a broadcast without a physical medium. However, current practice consists in systematically

recording television broadcasts, either in advance or as they are aired. Consequently, the utilization of a work in a broadcast also implies its reproduction *de facto*. Thus, the exception is broadened to include the right of reproduction in this case.

It can therefore be said that the utilizations covered in the laws of the Arab countries under the exception by way of illustration for teaching make it possible to carry out the act of reproduction of works.

2.1.3. But what types of reproductions are meant? More specifically, can *digital copies* be made?

To answer this question, we must first examine national legislation. In this respect, we see that 13 of the laws which provide for the exception based on Article 10(2) of the Berne Convention allow digital copies in connection with reproduction carried out by virtue of the exception. This holds true for the following countries: Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Libya, Morocco, Qatar, Saudi Arabia, Sudan, Tunisia and United Arab Emirates.

It may be added that the Syrian law should make it possible to achieve the same results, but indirectly.

Although the laws of 14 countries converge as far as the outcome is concerned, they get there in different ways.

Some deal with the question at the level of the very wording of the right of reproduction.

Others tackle the question from the viewpoint of the definition of the word “reproduction”, in the part of the law set aside for definitions.

2.1.3.1. As a reflection of the first approach, we see that national legislators opted for very general wording in order to delimit the contours of the right of reproduction. It is specified that this is done via the following:

- “By any procedure whatsoever”: Algeria (Article 27), Djibouti (Article 23(b)(1)), Sudan (Article 8(2)(b));
- “In any material form whatsoever”: Tunisia (Article 2(a));
- “In any manner or in any form whatsoever, permanent or temporary, including temporary archiving in electronic form”: Iraq (Article 8(1)) as amended by Order No. 5 of the Coalition Provisional Authority), Jordan (Article 9(a)), Morocco (Article 10(a));
- “By means of CDs or in an electronic memory or any other means of dissemination”: Saudi Arabia (Article 9(1)(a));
- “By means of photographic or cinematographic reproductions or other procedures” (Libya, Article 6, para 2).

2.1.3.2. Other laws clarify the notion of reproduction in the introductory article dealing with definitions. Thus, they qualify the notion of reproduction as an act consisting in making copies of the work:

- “By any procedure whatsoever”;
- “In any way or in any form whatsoever”;
- Some countries add the following clarifications to one or the other of these two formulas: “including permanent or temporary recording in an electronic memory”: Bahrain (Article 1), Egypt (Article 138(9)), Lebanon (Article 1), Qatar (Article 1), United Arab Emirates (Article 1).

This means that countries which have adopted the exception based on Article 10(2) of the Berne Convention can take advantage of this exception to perform acts of reproduction in a digital format.

## 2.2. Right of public performance and of communication to the public

The question which must be asked is whether the utilizations allowed by virtue of the exception could go beyond acts of reproduction. In particular, could the reproduction of works contained in publications, sound or visual recordings, or broadcasts, be *performed in public* (in a classroom, for example) or *communicated via broadcasting or otherwise*, to an audience made up of students?

There are major differences between laws in this respect:

- Only two laws deal directly with the question. In Djibouti, the law makes it possible to “communicate the work broadcast for teaching purposes”. Moreover, Tunisian law allows the utilization of the work by way of illustration for teaching in “performances and dramatic representations”.
- Four other laws limit the exception exclusively to the act of reproduction (Egypt, Iraq, Libya, United Arab Emirates), which would appear to rule out activities performed in public or broadcast.
- As for the laws of the other eight countries, they do not deal directly with the issue and remain silent in this respect. However, these laws apply the exception to “utilizations” of works.

To our mind, the expression “utilization” should be interpreted in such a way as to achieve the purpose of the exception. The aim is to allow the use of extracts from works recorded in various formats – books, CDs, DVDs, etc. – to be used as illustrations for teaching and thus to help achieve pedagogical goals.

In some cases, this implies acts of distribution of works in such formats to the students concerned.

Yet this also inevitably implies that one can stage public performances of the works fixed in these formats: for example, the possibility of playing in class a recording of extracts from musical works or a play fixed in a sound or audiovisual format by virtue of the exception. Refusing to allow the public performance in this case would be tantamount to truncating the exception by preventing it from fully serving its purpose.

The same reasoning should apply to a work recorded by virtue of the exception in a broadcast. For what would be the point of being able to include a work in a broadcast designed to serve as an illustration for teaching if it were not possible to ensure that it reached the target students?

In support of this hypothesis, it may be noted that the Tunis Model Law on Copyright for Developing Countries adopted in 1976 proposes in Section 7(c) wording to clarify the scope of Article 10(2) of the Berne Convention. Indeed, Section 7(c) includes in the exception by way of illustration for teaching the fact of “*communication for teaching purposes* of the work broadcast for use in schools, education, universities and professional training.”

In support of this view, one could also quote Claude Masouyé, who interprets the scope of Article 10(2) of the Berne Convention as follows: “It is also agreed that, if the broadcasting itself is permitted, the same applies to a performance in public of that broadcast if done for teaching purposes” (WIPO, Guide to the Berne Convention, page 60).

In the Arab countries, however, apart from the case of Djibouti and Tunisia, the exception does not specifically cover performances or broadcasts as illustrations for teaching. It is therefore difficult to predict whether a judge to whom this matter is referred will decide that the faculty of utilizing works for teaching purposes should also include their public performance or broadcast and the communication of the broadcast to the public. National judges could interpret the exception in accordance with its *raison d’être*, namely, facilitating teaching activities.

Does this mean that in the latter case the exception would go so far as to allow the communication of extracts utilized in digital form for distance learning courses? This latter method is becoming increasingly popular. More and more frequently, documents are made available to students on an Internet site for teaching purposes, where students can access them from their own computers using a password. Moreover, some courses are taught solely on a distance learning basis.

We do not have precise information on the extent to which these new teaching methods have penetrated the Arab countries. However, there are grounds to think that this is a trend which will gather momentum. No law specifically provides for these possibilities. Consequently, it is extremely difficult, or even risky, to venture to draw conclusions in this respect. Everything will depend on the way in which the national text is interpreted.

Of course, for laws where the exception covers “utilizations” of works, the word “utilization” could be interpreted in such a way as to encompass any activity dealt with by an exclusive right and thus extend to the rights of communication or making available to the public, and hence the activities covered by distance learning.

The point should, however, be made that some countries in other regions have been obliged to amend their laws with a view to broadening the field of educational exceptions to include these new forms of teaching. Accordingly, special texts have been enacted which contain a series of measures aimed at ensuring that the content communicated can only be received by the students signed up for the courses, and not by any member of the public.

The absence of any special regulations to this effect in the laws of the Arab countries leads us to think that the legislators probably did not have this type of pedagogical activity in mind when they drafted their national legislation. While it is therefore appropriate of course for the scope of the exception by way of illustration for teaching to include the new methods of distance learning, it appears to us that achieving this goal would require amendments to current legislation aimed at specifying its scope appropriately.

### 2.3. Right of translation

Finally, we may ask whether the exception of utilization would allow for a translation of the work to be used for teaching purposes.

None of the texts analyzed takes up the issue. It could therefore be concluded that the exception would only apply to the work in the original language in the Arab countries. However, and as concerns the countries whose exception extends to acts of use, the field of the exception may cover the works in their original or translated versions.

It will also be noted that the Tunis Model Law for developing countries broadens the field of this exception to “utilizations of a protected work, either in the original language or in translation” (Section 7 of the Tunis Model Law). It does not appear that the Arab countries have availed themselves of this possibility. Here as well, however, the word “utilization” could be put forward to cover this type of activity.

## 3. PURPOSE OF THE EXCEPTION: ILLUSTRATION FOR TEACHING

In general, the Arab countries reproduce the terminology of the Berne Convention, which stipulates that utilizations of works under the exception must serve by way of “illustration for teaching”.

This condition is expressed in various ways, all of which converge towards the same goal. Thus, and according to the laws, it is stipulated that the exception must be:

- “for use in schools, education, universities and professional training” (Djibouti);
- “for purposes of illustration, education or vocational training” (Jordan, United Arab Emirates);

- “for purposes of teaching” (Tunisia);
- “for education or general training” (Algeria);
- “for teaching purposes” (Bahrain, Egypt, Morocco, Qatar, Saudi Arabia).

This enumeration covers practically all levels of teaching, as was the intention of the drafters of the Berne Convention in the Stockholm version, of which Article 10, paragraph 2 was reworded. Here is what Svante Bergstrom, rapporteur for the Main Commission No. 1, had to say:

“The wish was expressed that it should be made clear in this Report that the word “teaching” was to include teaching at all levels – educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for example general teaching available to the public but not included in the above categories, should be excluded” (Report on the work of the Main Commission No. 1 of the Berne Convention: Articles 1 to 20. Records of the 1967 Stockholm Conference on Intellectual Property).

The question which arises is whether the exception can cover training courses for adults. In our view, given the content of the Arab laws in this field, broadly worded as to the educational goals of the exception, this type of teaching should not be excluded from the exception.

What about distance learning? Is the exception likely to apply to this type of teaching?

Nothing in Article 10(2) of the Berne Convention restricts the field of application of the exception to traditional forms of teaching where students and teachers are all present in the same room. This is an exception which is primarily designed to meet the needs of teaching. In our view, teaching must be interpreted in a changing, dynamic way and must include both traditional and contemporary forms (along similar lines, see Ricketson et Ginsburg, *The International Law of Copyright* p.793). This latter method is becoming increasingly popular. More and more frequently, documents are made available to students at an Internet address for teaching purposes, where students can access them using a password. Moreover, some courses are taught solely on a distance learning basis.

In addition, it will be noted that the Arab laws which deal with the exception for teaching illustration purposes use very broad terms and do not rule out distance learning. But the difficulty is the one we mentioned above (see 2.3): determining whether the communication to the public by making works available to students via distance learning is indeed covered. Doubts remain in this respect.

#### 4. LIMITS OF UTILIZATION

4.1. Article 10(2) of the Berne Convention, which provides the basis for the exception analyzed here, poses two conditions which limit the field of application of the exception. Utilization is permitted “*to the extent justified by the purpose*” and “*provided such utilization is compatible with fair practice*”.

Behind these requirements lies an implicit desire to safeguard the legitimate interests of the beneficiaries whose work has been used. In actual fact, these two requirements end up by limiting the quantity used to a fragment, within the necessary limits for the purposes of the illustration.

In practice, however, owing to the nature of the work, it is sometimes necessary to reproduce a work as a whole for the needs of illustration. This is the case for example with photographs or with a short poem a few lines long. Consequently, some authors consider that with borderline cases of this kind, the exception should be interpreted in such a way as to allow the utilization of the work as a whole (see Ricketson and Ginsburg, *The International Law of Copyright*).

4.2. The Arab countries have incorporated the limits imposed by Article 10(2) of the Berne Convention in their laws in various ways:

- A number of laws require the two conditions mentioned in Article 10(2) of the Berne Convention (Djibouti, Egypt);
- Others make do with one of the two, as they probably feel that the two conditions are synonymous. For example, Algeria, Jordan and the United Arab Emirates specify that utilization shall be permitted “to the extent justified by the purpose”, while Sudanese law allows the utilization of “short extracts”.
- Some countries do not mention either condition (Tunisia, Bahrain, Morocco). As far as Bahrain and Morocco are concerned, however, the law clearly stipulates that the exception allows utilizations by way of “illustration”, thus implying a judicious choice of the relevant passages for teaching needs rather than an appropriation of the work as a whole.
- Sometimes, certain laws are even more restrictive than the Berne Convention. For example, the Egyptian law permits the reproduction of “short extracts”, provided that such reproduction remains within reasonable limits and does not go beyond the goal set. This threefold requirement seems stringent. It could even go beyond the requirements of the Berne Convention, reducing the scope of the exception.

## 5. REFERENCE TO THE SOURCE AND THE NAME OF THE AUTHOR

This condition, which is taken from the Berne Convention (Article 10(3)), can be found in all of the laws studied except, as it appears, that of Tunisia.

## 6. OTHER CONDITIONS NOT REQUIRED BY ARTICLE 10(2) OF THE BERNE CONVENTION

It will be noted that certain laws stipulate other conditions which are not contained in the Berne Convention:

- The work utilized must have already been published lawfully (Bahrain and Morocco).
- Other laws focus on the impact of utilization on the exploitation of the works in question.
- For example, certain laws mention that the work cannot be used for purposes of commercial exploitation (Jordan, Qatar, Sudan and United Arab Emirates)
- With others, such as the law of Qatar, for the exception to be valid the utilization must not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. Moreover, Saudi Arabia requires assurances that the utilization permitted by the exception will not affect the exploitation of the work.
- Lastly, the law of the United Arab Emirates stipulates as a prior condition for the application of the exception that no license for reproduction has been obtained in accordance with the provisions of the law.

### B. RELEVANT LEGISLATIVE PROVISIONS

#### ALGERIA

Article 43:

The utilization of a literary or artistic work by way of illustration in publications, sound or audiovisual broadcasts or recordings for teaching or vocational training is permitted, to the extent justified by the purpose.

With such utilization, the source and name of the author must be indicated, in accordance with fair practice.

#### BAHRAIN

Article 21:

(a) It shall be permissible without the author's consent and without payment of compensation to do the following, provided that the source and author's name are mentioned if they are indicated in the source:

(b) Use of a certain literary or artistic work, which is legally published, in publications, wireless broadcasts and audiovisual recordings as illustrations for teaching, by non-profit educational institutions.

## DJIBOUTI

Article 41: Notwithstanding the provisions of Article 23 b, the following utilizations of a protected work, either in the original language or in translation, are lawful without the author's permission.

1. With regard to a work that has been lawfully published:

.....

(c) Utilizing the work as illustrations for teaching through the publication of broadcasts or sound or visual recordings, to the extent justified by the purpose, or communicating for teaching needs the broadcast work for school, educational, university or vocational training purposes, provided such utilization is compatible with fair practice and that the source and name of the author of the work used are mentioned in the publication, broadcast or recording.

## EGYPT

Article 171: Without prejudice to the moral rights of the author under this Law, the author may not, after the publication of the work, prevent third parties from carrying out any of the following acts:

...

(6) Reproduction of short extracts from a work for teaching purposes, by way of illustration and explanation, in a written form or through an audio, visual or audiovisual recording, provided that such reproduction is within reasonable limits and does not go beyond the desired purpose, and provided that the name of the author and the title of the work are mentioned on each copy whenever possible and practical.

## IRAQ

### Article 14

- (2) It is permitted to do the following in scholarly, history, literature, science and art books:
- (a) Copying of short extracts from the published works.
  - (b) Copying of works being published in painting, relieving or photographing arts, provided that copying shall be confined with what is necessary for explanation of the written. In all cases, the sources being copied and the names of the authors must be clearly mentioned.

## JORDAN

Article 17: It is permitted to use the published works without authorization of the author in the following cases

- (c) Use of the work by way of illustration in publications, broadcasts or sound and audiovisual recordings, for instructional, educational or religious purposes, or for vocational training, to the extent justified by those purposes; such use shall not, however, entail the realization of any material gain, and the work and the name of its author shall be mentioned.

## LIBYA

Article 17: It is lawful, in schoolbooks and works of literature, history, science or art:

- (b) to reproduce works published previously in the field of graphic and plastic arts or photography, provided that such publications or reproductions are limited to what is necessary for illustrating the text.

The sources and names of the authors must be mentioned clearly in all cases.

## MOROCCO

Article 15: Notwithstanding the provisions of Article 10..., it is permitted, without the author's authorization and without payment of remuneration, provided that the source is indicated and that the author's name is included in the reference to the source:

- (a) to use a lawfully published work for teaching purposes by way of illustration, in writings, or sound or visual broadcasts or recordings;

## OMAN

Article (20): Subject to the moral copyrights stipulated under this Law, the following uses of works shall be lawful even without the consent of the author, provided that the source and the name of the author are mentioned if listed in the work, and provided that free use is not allowed if the use conflicts with a normal exploitation of the work, performance, or phonogram or unreasonably prejudices the legitimate interests of the author, performer or producer of phonograms:

- (2) Use of the work in meetings within the family or through an educational institution for clarification during face-to-face educational or teaching purposes, within the limits justified by such purpose, provided that this is done with no direct or indirect compensation.

## QATAR

Article 18: The following uses of a protected work are permitted without the author's authorization:

- (2) Using the work by way of illustration for teaching, through publications, broadcasts, sound or visual recordings, films or by any other means, to the extent justified by the purpose, provided that the use is non-profit making and the source and the name of the author are indicated.

The uses provided for in the two preceding items shall not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author;

## SAUDI ARABIA

Article 15: The following uses of the copyrighted work, in its original language or in translation, are lawful without obtaining the permission of the copyright owner. These forms of use are:

- ...
- (3) Using the work by way of clarification for educational purposes, within the limits justified by the intended objective, or making a copy or two for public libraries or non-commercial documentation centers on the following conditions:
    - ( ) Shall not be commercial or for profit.
    - ( ) Copying shall be restricted to the requirements of activities.
    - ( ) Shall not impair the material benefit of the work.
    - ( ) The work is out of print or is lost or damaged.
  - (9) Copying short quotations from published works, drawings, pictures, designs or maps in school books prepared for educational curricula or in books of history, literature and art, provided that copying is within the limits of necessity and that the title of the work and the name of the author are mentioned.

## SUDAN

Article 14 (3): In connection with the publication of school textbooks or books prepared for educational purposes or books of history, literature or art, it shall be allowed:

- (a) to make short quotations from works already published;
- (b) to reproduce any published drawing, photograph, design, inscription or map, provided that such reproduction is restricted to what is necessary for the purpose of illustrating the written text;
- (c) in cases (a) and (b), the title of the work reproduced and the name of its author shall be mentioned.

Article 14 (6): Educational institutions shall be authorized to reproduce short works, articles or short parts of a published work as well as to incorporate them in school broadcasts or sound recordings for the non-commercial purpose of illustrating the teaching process.

## SYRIA

Article 37:

The following shall be considered as lawful:

- (1) For a work that has been lawfully published:
- (c) utilization of the work by way of illustration for teaching, in publications, broadcasts or sound or visual recordings, provided such utilization is compatible with fair practice.

## TUNISIA

Article 10 new:

The following utilizations of protected works which have been made available to the public shall be deemed lawful, without the author's authorization and without compensation...

- ...
- (b) utilization of the work by way of illustration for teaching in printed matter, performances including drama or sound or visual recordings.

UNITED ARAB EMIRATES

Article 22: Without prejudice to the literary rights of the author stipulated in this Law, the author after the publication of his work must not prohibit a third person from performing one of the following acts:

...

- (8) Reproduction of written, sound or audiovisual short excerpts for cultural, religious, educational or vocational training purposes, provided that copying is within the reasonable limits of its purpose and that the name of the author and the title of the work are mentioned wherever possible and that the copying authority does not aim at direct or indirect profit and that license for copying was unobtainable in accordance with the provisions of this Law.

[Section II follows]

## SECTION II: EXCEPTIONS FOR QUOTATIONS TAKEN FROM WORKS

### A. ANALYSIS

The copyright laws of the 17 Arab countries analyzed in this report all contain provisions dealing with the exception for purposes of quotation.

It will be recalled that the countries concerned are the following:

- Algeria (Article 42)
- Bahrain (Article 21(a))
- Djibouti (Article 41(1)(b))
- Egypt (Article 171(4))
- Iraq (Article 14 (1))
- Jordan (Article 17(d))
- Kuwait (Article 9)
- Lebanon (Article 25(2))
- Libya (Article 13)
- Morocco (Article 14)
- Qatar (Article 18(3))
- Oman (Article 20 (1))
- Saudi Arabia (Article 15(2))
- Sudan (Article 14(a) and (c))
- Syria (Article 37(1)(b))
- Tunisia (Article 11)
- United Arab Emirates (Article 22(5))

The practice of quotations is extremely widespread. Quotations are particularly useful in the world of education: papers, dissertations and research are sprinkled with references to excerpts, passages or fragments of works by others, with a view to commenting, criticizing, supporting an argument, etc.

It will also be recalled that this exception stems from the Berne Convention, Article 10(1) of which is worded as follows:

“It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”.

It should also be specified that this is a compulsory exception which is not left to the discretion of the member countries. Article 10(1) considers the practice of quotations to be fully lawful, whereas with other exceptions, each member country is free to adopt them or not (on this question, see Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, vol. 1 13.40, p.780. However, for a more nuanced opinion, see Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, article 10 BC-10.3).

May we further mention that this exception is not solely for teaching or uses for pedagogical purposes. The insertion of a quotation is designed to facilitate criticism, summary records, demonstration, refutation, explanation, commentary, and so on. Quotations can be included in any kind of work and a variety of situations. However, their use is often closely associated with teaching and research activities. This is why we consider that this exception should be an integral part of the study. Moreover, it is not by chance that certain laws (Jordan, Lebanon and Tunisia) take pains to mention that quotations can also be for “educational purposes”.

Our analysis will cover the following points:

1. Works likely to give rise to the exception
2. Rights to which the exception applies
3. The work quoted must have already been lawfully made available to the public
4. Limits placed on quotations
5. Conditions for exercising the exception: indication of the source

## 1. WORKS LIKELY TO GIVE RISE TO THE EXCEPTION: NATURE OF THE WORK QUOTED

It should be noted that, following the example of the Berne Convention, none of the Arab countries which had adopted this exception has limited the faculty of recourse to this option to a specific genre. One may therefore conclude that by virtue of the copyright laws from the 17 countries examined, *it is permissible to quote a work, regardless of its genre*. Even though the exception has traditionally been exercised with regard to written works, it could apply just as well to music, a photograph, a drawing or an audiovisual work as well as to any other work protected by copyright.

## 2. RIGHTS TO WHICH THE EXCEPTION APPLIES

### 2.1. Right of reproduction

As Claude Masouyé has quite rightly pointed out, the exception for quotations consists in “including one or more passages from someone else’s work in one’s own” (WIPO, Guide to the Berne Convention, p. 58). The exception thus makes it possible to reproduce the passage quoted in another work without having to obtain permission to do so. The only right which is directly involved under the exception is the right of reproduction.

Of all of the laws examined, only the Copyright Law of Bahrain specifically mentions the possibility of making “a reproduction of a short passage from a work... for purposes of quotation in another work”.

The other laws merely rely on expressions implying the performance of an activity of reproduction, even though it is not specifically mentioned. The following are deemed lawful: “quotations and borrowings” (Algeria); “insertions of quotations in another work” (Djibouti, Jordan, Morocco, Qatar); “quotations” (Egypt, Iraq, Kuwait, United Arab Emirates); “the utilization of short extracts from a work” (Lebanon). All of the activities described by these expressions are necessarily carried out by an act of reproduction.

It will be noted that the quotation may be reproduced in any format whatsoever: the work may be quoted in a book, a press article, a sound, visual or audiovisual recording, or a broadcast. There is no need for the reproduction to be made in a work of similar genre or a format identical to the one from which the quotation was taken.

## 2.2. Right of translation?

We may ask ourselves whether the quotation only applies to the work quoted in its original version or if it can also cover a *translation* of the work. Only Tunisia takes up this question. Article 11 of the Copyright Law states that “these quotations may be used in the original version or in translation”.

By doing so, Tunisia endorses Section 7 of the Tunis Model Law on Copyright, which broadens the field of exceptions to the works protected, “either in the original language or in translation”.

The other countries remain silent on this point and do not appear to have availed themselves of the flexibility offered by the Tunis Model Law.

## 2.3. Right of performance?

Finally, we may ask ourselves if quotations could not be used for activities other than reproduction and translation. One could indeed conceive of a quotation in the form of the performance of part of a work (literary, musical, choreographic) which would itself be included in the performance of another work, without however this performance being recorded simultaneously by some means. In this case, there would not be any reproduction of the part quoted, merely a reading, recitation or interpretation. In our view, nothing should prevent the author of a work performed (such as an improvisation) from using a quotation taken from another work to make his point. Nothing stipulates that the quotation must necessarily take the form of a reproduction.

## 3. MUST THE WORK QUOTED HAVE ALREADY BEEN LAWFULLY MADE AVAILABLE TO THE PUBLIC?

It will be recalled that this condition is required by the Berne Convention, which reads as follows: “It shall be permissible to make quotations from a work which has *already been lawfully made available to the public*...”.

3.1. The reason behind the requirement concerning the *lawful* character of the work’s availability is easy to understand. This is a measure aimed at protecting privacy. As Claude Masouyé explains “unpublished manuscripts or even works printed for a private circle may not, it is felt, be freely quoted from” (WIPO, Guide to the Berne Convention, page 58).

3.2. The requirement of “*availability to the public*” deserves some attention. It should be broadened to cover any act which has the effect of making the work available to the public. Naturally, this includes its publication. But it could also include other activities, such as its broadcast or public performance. In this respect, we endorse the view expressed by Ricketson and Ginsburg, who rightly note that: “The requirement of lawful availability under article 10(1)... includes the making available of works by any means, not simply through the

making available of copies of the work” (International Copyright and Neighbouring Rights: the Berne Convention and Beyond, volume II, 13.40, p.785).

The Arab countries have not all endorsed the requirement that the work must have already been lawfully made available. The approaches used differ greatly, and may be broken down into four trends:

- The first category contains those countries which make no reference to this requirement: Algeria, Qatar, Saudi Arabia, Sudan and Syria. In these countries, there is *no requirement* concerning the prior lawful publication or availability of the work from which the quotations are taken.
- The second category contains those countries which take up the requirement stipulated in the Berne Convention: Oman and Tunisia require that the work quoted be *lawfully made available* to the public.
- The countries in the third category, namely Bahrain, Djibouti and Morocco, require that the work must have been *lawfully published*, thereby limiting the scope of the exception allowed by the Berne Convention.
- Finally, the remaining countries – Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya and United Arab Emirates – merely require that the *work must already be published* without specifying that such publication must be lawful.

#### 4. LIMITS PLACED ON QUOTATIONS

4.1. A quotation is an operation which consists in including in a work passages or excerpts from another work. The quotation should therefore not replace the work from which it is taken. Accordingly, in the Berne Convention, the limits placed on quotations are determined by the *extent justified by the purpose* and by *fair practice* (see also Tunis Model Law on Copyright, 1976, Commentary No. 45).

It will be noted that the primary purpose of these limits is to ensure that the quantitative size of the portion does not exceed the needs strictly defined by the purpose. As a result, this imposes quantitative limits. But the notion of “the extent justified by the purpose” needs to be interpreted flexibly. The aim is not to set an objective arithmetic limit but rather to avoid exceeding what is required for the needs which justify the recourse to the quotation. Everything depends on the case at hand and on moderation, with the limit not to be exceeded to be determined by the courts in the event of a dispute. In certain cases, it may be necessary to quote a work in its entirety, such as a photograph, an artistic work or a short poem, for purposes of commentaries. This means that these limits must be interpreted flexibly.

4.2. In general, these limits appear *explicitly* in a number of laws of the Arab countries. Even though their wording differs, these laws all converge towards the Berne Convention. This is the case with the following countries: Algeria, Bahrain, Djibouti, Jordan, Libya, Morocco, Oman, Qatar, Saudi Arabia, Tunisia and United Arab Emirates.

In other countries – Egypt, Iraq, Kuwait and Sudan – limits are expressed *implicitly*. In these countries, it is permissible to quote “extracts” or “short passages” for the purpose of “criticism, study and discussion”. Here, we do not find the actual language of the Berne

Convention. However, it is clear that this way of proceeding gives the judge the power to assess the appropriateness of the borrowing in relation to the ends justifying it. Indeed, the court may deem the quotation unlawful if the extract chosen is too large for the purpose of criticism or illustration, notions which by definition set limits on the borrowed passage. This brings us back, albeit indirectly, to the goals of the Berne Convention.

It will be noted that the countries which have opted for the approach emphasizing “short passages” or “short extracts” may perhaps be depriving themselves of the flexibility offered by the looser wording of the Berne Convention which could, in our view, make it possible to quote the work in its entirety in certain cases

## 5 CONDITIONS FOR EXERCISING THE EXCEPTION: INDICATION OF THE SOURCE

Article 10(3) of the Berne Convention stipulates that “Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon”.

We find this requirement in all of the laws examined. Most of the laws contain a direct reference, while others adopt an indirect approach: for example, the copyright laws of Egypt and the United Arab Emirates take pains to mention that copyright exceptions apply without prejudice to the author’s moral rights. Consequently, this implies mentioning the name of the author whose work has been quoted. Moreover, it is not clear whether the provisions of these two countries would go so far as also to require a reference to the source.

## B. RELEVANT LEGAL PROVISIONS

### ALGERIA

Article 42: Pastiches, parodies and caricatures which do not constitute an infringement of the original work and do not imply discredit are lawful and do not violate copyright.

Quotations and borrowings from a work in another work are also lawful if they make proper use of the information and demonstration sought. However, if such borrowings and quotations are used, the name of the author and the source must always be indicated.

### BAHRAIN

Article 21: It shall be permissible without the author’s consent and without payment of compensation to do the following, provided that the source and author's name are mentioned if they are indicated in the source:

Reproduction of a brief section of a work, which is legally published, to be quoted in another work, provided that the quotation has been used for a legitimate purpose and to the extent necessary for the realization of such purpose.

## DJIBOUTI

Art. 41. – Notwithstanding the provisions of Article 23(b), the following utilizations of a protected work, either in the original language or in translation, shall be lawful without the author's permission.

1. In the case of a work which has been lawfully published:
  - (a) The reproduction, translation, adaptation, arrangement or other transformation of such work exclusively for the owner's own personal and private use;
  - (b) The inclusion of short quotations from another work, provided that such quotations are in accordance with fair practice, that they are made to the extent justified by the purpose and that the source and name of the author of the work are mentioned in the work in which the quotation is incorporated, including quotations from newspaper articles and periodicals in the form of press summaries.

## EGYPT

Article 171: Without prejudice to the moral rights of the author under this Law, the author may not, after the publication of the work, prevent third parties from carrying out any of the following acts:

- (4) Making an analysis of the work, or excerpts or quotations therefrom, for the purpose of criticism, discussion or information

## IRAQ

### Article 14

- (1) It is not permitted to the author, after publication of the work, to prevent short analysis and quotations if those were made for the purpose of criticism, argument, enlightenment, tuition or information as long as they refer to the name of the author, if it was known, or to the source.

## JORDAN

Article 17: Published works may be used without authorization from the author according to the conditions and in the cases that follow:

- (d) Insertion of quotations from the work in another work for the purpose of clarification, explanation, discussion, criticism, education or testing to the extent justified by that purpose, provided that the work and the name of its author are mentioned.

## LIBYA

Article 13: The author may not prevent summary records or brief quotations from the work published being made where the purpose thereof is criticism, discussion, development of the culture or information, provided that the title of the work and the name of its author, if it is known, are clearly mentioned.

## KUWAIT

Article 9: After publishing his literary work, the author may not prohibit the same analysis and short quotations from it where the purpose thereof is criticism, enlightenment, study or information, provided that the reference to the original literary work and the author are clearly mentioned.

## LEBANON

Article 25, paragraph 2

It shall also be permitted, without the authorization of the author and without obligation to pay him compensation, to use a limited part of any legally published work for purposes of criticism, argumentation or citation or for an educational purpose, provided that the part used does not exceed what is necessary and customary. However, the name of the author and the source shall always be indicated, if the name of the author is included in the work.

## MOROCCO

Article 14: Notwithstanding the provisions of Article 10 above, it shall be permitted, without the author's authorization and without payment of compensation, to quote a lawfully published work in another work, provided that the source and author's name are indicated if such name is contained in the source and provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose.

## QATAR

Article 18: The following uses of a protected work are permitted without the author's authorization:

- (3) Citing a paragraph of a work in another work for the purpose of illustration, demonstration or criticism, within the acceptable practice and as justified by the purpose, provided that the source and the name of the author are indicated.

## OMAN

Article 20: Subject to the moral copyrights stipulated under this Law, the following uses of works shall be lawful even without the consent of the author, provided that the source and the name of the author are mentioned if listed in the work, and provided that free use shall not be allowed if the use conflicts with a normal exploitation of the work, performance, or phonogram or unreasonably prejudices the legitimate interests of the author, performer or producer of phonograms:

Quoting paragraphs from a protected work lawfully made available to the public in another work for clarification, explanation, or criticism purposes, to the extent of the desired purpose and as much as justified by such goal.

#### SAUDI ARABIA

Article 15: The following uses of the copyrighted work, in its original language or in translation, are lawful without obtaining the permission of the copyright owner. These forms of use are:

- ...
- 2) Quoting passages from the work in another work, provided that such quotation is consistent with the conventional practice and within the limits justified by the intended objective, and provided that the source and name of author are mentioned in the work where the quotation is cited. This shall also apply to journalistic summaries abstracted from newspapers and periodicals

#### SUDAN

Article 14 – (1)

Notwithstanding the provisions of section 8(2) newspapers, magazines, periodicals, radio and television may:

- (a) publish a quotation, summary or brief announcement from a work for the purposes of analysis, study, culture or information;
- ...
- (c) in cases (a) and (b), the title of the work reproduced and the name of its author shall be mentioned.

#### **SYRIA**

Article 37: The following shall be deemed lawful for any work published lawfully:

- ...
- (b) Quotations taken from a work, provided that their making is compatible with fair practice, and their extent is that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries, and that the title of the work and the author's name are indicated.

#### TUNISIA

Article 11: Quotations and borrowings taken from a work which has already been lawfully made available to the public shall be authorized, provided that their making is compatible with fair practice and to the extent that they are justified by the scientific, educational or information purpose, including quotations and borrowings from articles in the form of press summaries.

Such quotations and borrowings may be used in the original version or in translation, and must be accompanied by a reference to the source and to the name of the author if it appears thereon.

UNITED ARAB EMIRATES

Article 22: Without prejudice to literary rights of the author stipulated in this Law, the author after the publication of his work must not prohibit a third person from performing one of the following acts:

- ...
- (5) Quotation of short paragraphs, derivation or reasonable analysis of the work for the purpose of criticism, discussion, or information, provided that the source and the author's name are mentioned.

[Section III follows]

### SECTION III: REPROGRAPHIC REPRODUCTIONS OF WORKS FOR TESTING, TEACHING AND RESEARCH

#### A. ANALYSIS

Out of the 17 countries studied, 12 make provisions for exception permitting educational establishments or research centers to reproduce copies of works, at the request of researchers or students, for purposes of teaching or research. Some countries also allow educational establishments to reproduce excerpts from works for exam questions.

The countries are as follows:

- Algeria (Article 45)
- Bahrain (Article 21(c) and 22(b))
- Djibouti (Article 41(d))
- Egypt (Article 171(7) and (8))
- Jordan (Article 20)
- Lebanon (Article 25(2))
- Morocco (Article 15(b))
- Oman (Article 20)
- Qatar (Article 18(2))
- Syria (Article 37(5))
- Tunisia (Article 10 (c) new and 12 (2) new)
- United Arab Emirates (Article 22(4)(b) and 22(8))

*Preliminary remark:* The Berne Convention does not make direct provision for this exception. However, one could claim that the justification can be found in Article 9(2) of the Berne Convention, according to which:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.

The following questions will be taken up:

1. The right in question
2. Works likely to give rise to the exception
3. Purpose of the exception
4. Beneficiaries of the exception
5. Conditions for exercising the exception.

## 1. THE RIGHT IN QUESTION: THE RIGHT OF REPRODUCTION

The majority of laws refer to *reproduction by reprographic processes*, that is, reproduction by photocopying. This is the case with the laws of Bahrain, Djibouti, Jordan, Lebanon, Morocco, Oman, Qatar and Syria. The provisions of these laws rule out digital copies.

Other laws, however, refer to *reproduction as such*, without limiting it to photocopying. This is the case with the laws of the following countries: Algeria, Egypt, Qatar, Tunisia and United Arab Emirates. Given that in these laws reproduction is broadly defined and is not limited to reprographic processes alone, digital copying remains an option in these countries.

As far as the latter countries are concerned, the question to be asked is whether digital copies can be transmitted to a research student by e-mail. That is not sure. Transmission via e-mail is an activity which would come under the right to make available to the public or the right to communicate to the public, which goes beyond the framework of mere reproduction. Given that exceptions are generally interpreted restrictively, we can only conclude that even for countries where laws allow digital copying under the exception of reproduction, it does not appear that this exception would cover the making available of the digital copy by e-mail. As a result, this could significantly limit the scope of the exception in practice.

## 2. WORKS LIKELY TO GIVE RISE TO THE EXCEPTION

The majority of laws refer to articles from summaries or periodicals, short extracts from a work or succinct works. This is the case with the laws of the following countries: Algeria, Bahrain, Djibouti, Egypt, Jordan, Lebanon, Morocco, Oman, Qatar and Tunisia.

Three comments are in order.

2.1. First of all, it will be noted that, except for press articles or so-called “succinct” works, the various laws do not allow the reproduction in full of a work. There is a very good reason for this, because these exceptions are to be seen in conjunction with Article 9(2) of the Berne Convention, which only authorizes reproductions within very strict limits.

This remark also holds true for Syria, even though the Syrian law does not at first sight seem to impose a limit on the size of the text reproduced. In fact, the Syrian law permits the reproduction of works, without however referring to articles, short works or extracts from works. Nevertheless, the point should be made that according to this law, the exception is only permissible if the reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. In practice, this comes down to limiting the scope of the reproduction allowed.

2.2. The second observation pertains to the nature of works which are likely to give rise to reproduction. For these countries, this can only concern written works or works available through graphic editions such as a musical score, a photograph, a drawing etc. Thus, certain countries allow the exception to be extended to illustrations accompanying written works (Algeria) and artistic works (Djibouti). Most simply refer to works.

This limitation concerning written works stems from both the wording of the various laws and from the fact that in some cases, the reproduction in question must consist of a reprographic reproduction, thereby inevitably excluding certain categories of works. For example, the exception would not apply to reproductions of short extracts from audiovisual or musical works recorded in phonograms.

2.3 Finally, most of the laws stipulate that the exception must concern articles or extracts that have been “legally published” or made “lawfully available to the public”.

### 3. PURPOSE OF THE EXCEPTION

The laws examined all state clearly that this exception is designed to allow photocopying for educational purposes and/or for purposes of research or private study. Some countries also permit reproduction in conjunction with testing.

### 4. BENEFICIARIES

The laws examined are designed to allow educational institutions and the libraries attached thereto to engage in reproduction for the benefit of the students or researchers who use them. However, some of the laws also extend the benefit of the exception to non-commercial documentation and archive centers, such as any public library, when such institutions make copies to meet the needs of users.

### 5. CONDITIONS FOR EXERCISING THE EXCEPTION

5.1. Conditions designed to ensure that photocopying practices do not conflict with a normal exploitation of the work

This concern is expressed in various ways, through a body of restrictions, some of which are cumulative. Among the main restrictions, the following conditions should be mentioned:

- (1) Some laws stipulate that photocopies must be made intermittently and separately rather than systematically. This is the case with the Algerian law: “the act of reproduction constitutes an isolated act occurring, if it is repeated, on separate, unrelated occasions”. The same holds true for the Tunisian law, which authorizes the reproduction “of isolated articles lawfully published in a newspaper or periodical, of short extracts from a lawfully published work or short work.”
- (2) This approach may be found with different wording in other laws (Bahrain, Egypt, Morocco, Oman, Qatar, Tunisia and United Arab Emirates).
- (3) In addition to this condition, a great many laws stipulate that the extent of the reproduction must not exceed that justified by the purpose (Bahrain, Djibouti, Jordan, Lebanon, Morocco, Oman, Qatar, Syria and Tunisia).

- (4) Other laws go as far as incorporating the conditions of Article 9(2) of the Berne Convention in the body of the law. For example, the laws of Djibouti, Jordan, Oman and Syria stipulate that the reproduction should not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.
- (5) Finally, some laws specify that reproduction may not be made for gain, profit or commercial purposes, either directly or indirectly (Oman, Qatar and Tunisia).

#### 5.2. Conditions linking the exercise of the exception to the lack of any management body operating in this field

For example, some laws make the exercise of the exception contingent upon the lack of any licenses granted by a collective management body (Algeria, Bahrain, Qatar, Oman and United Arab Emirates).

#### 5.3. Conditions designed to respect moral rights

A number of laws require an indication of the source and name of the author, if his name appears thereon (Egypt, Lebanon, Oman, Qatar and Tunisia).

### B. RELEVANT LEGAL PROVISIONS

#### ALGERIA

Article 45: Libraries and centralized archives may reproduce a work in the form of an article, another succinct work or a short extract of writing other than a computer program, with or without illustrations, published in a collection of works or in an issue of a newspaper or periodical, where the reproduction is designed to satisfy the request of a natural person, provided that:

- the copy made is used solely for the purpose of study, scholarship or private research;
- the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions;
- there is no collective license available for reproduction by the national office for copyright and related rights.

#### BAHRAIN

Article 21: It shall be permissible without the author's consent and without payment of compensation to do the following, provided that the source and author's name are mentioned if they are indicated in the source:

- ...
- (c) photocopying reproduction of an article or short extracts of a work or a short work, if they are legally published, for purposes of educational activities inside non-profit making educational institutions, whether directly or indirectly, provided that the reproduction is only once or in different cases and to the extent necessary for the realization of such purposes.

Article 22: It shall be permissible without the author's consent and without payment of compensation to produce a single copy of the work by photocopying facilities by an archive house or library that does not seek to make profits, whether directly or indirectly, in either of the following two cases:

...

- (b) reproduction shall be for a published article or brief extracts of a work or a short work if the concerned archive house or library estimates that the purpose of reproduction is to meet the requirements of a natural person for his use in a study or research work for a non-commercial purpose, provided that the reproduction is made once or in different cases and is not available for collective licensing, subject to which such reproduction shall be available.

#### DJIBOUTI

Article 41: Notwithstanding the provisions of Article 23(b), the following utilizations of a protected work, either in the original language or in translation, shall be lawful without the author's permission:

- (d) the reproduction, by public libraries, non-commercial documentation centers, scientific institutions and educational establishments, of literary, artistic or scientific works which have already been lawfully made available to the public, provided such reproduction and the number of copies are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the interests of the author.

#### EGYPT

Article 171(7): Reproduction, if necessary for teaching purposes in educational institutes, of an article, a short work or extracts therefrom, provided that:

- reproduction is made once or at different separate occasions;
- the name of the author and the title of the work are mentioned on each copy

171(8): Making a single copy of the work, through the intermediary of a documentation and archiving centre or through a bookshop not aiming at making any direct or indirect profit, and provided that:

- where the reproduced work is a published article, a short work or an extract of a work, the aim of reproduction is to satisfy the needs of a natural person, the copy will be used only for study or research purposes, and a single copy is made or at different occasions;
- where the reproduction is made with the aim of preserving the original copy or, when necessary, replacing a lost, destroyed or invalid copy and it was impossible to obtain such a substitute copy under reasonable conditions.

JORDAN

Article 20: It shall be permissible for public libraries, non-commercial documentation centers, educational institutes and scientific and cultural establishments to reproduce any work by a photographic process or otherwise without the authorization of the author, provided that the reproduction and the number of copies are limited to the needs of the establishment, and that the reproduction is not prejudicial to the rights of the author of the work and does not conflict with the normal exploitation of the work.

LEBANON

Article 26: The reprographic reproduction or making of copies of articles published in newspapers or summaries or short extracts of works shall be lawful, without the author's permission and without compensation, provided that the act of reproduction is for teaching purposes and is to the extent justified by the purpose. The name of the author(s) as well as that of the publisher must be mentioned in each utilization of a copy of the article or work, if such names appear in the original work.

MOROCCO

Article 15(b): It shall be permissible without the author's permission and without payment of compensation to do the following, provided that the source and author's name are indicated if such name appears in the source:

...

(b) To reproduce by reprographic means for teaching or testing within educational establishments whose activities are not directly or indirectly for commercial gain, to the extent necessary for the realization of such purposes, isolated articles lawfully published in a newspaper or periodical, short extracts from a lawfully published work or a lawfully published short work.

OMAN

Article 20: Subject to the moral copyrights stipulated under this Law, the following uses of works shall be lawful even without the consent of the author, provided that the source and the name of the author are mentioned if listed in the work, provided that free use shall not be allowed if the use conflicts with the normal exploitation of the work, performance, or phonogram or unreasonably prejudices the legitimate interests of the author, performer or producer of phonograms:

...

(3) reproduction, to the extent justified by the purpose and without the purpose of direct or indirect financial gain, of a single copy by reprographic means of protected works by public libraries, non-commercial documentation centers, *educational establishments* and scientific and cultural institutions, provided that such reproduction is:

(a) for a published article or short work whereas the purpose of reproduction is to meet the need of a natural person for use in a study or research and provided that reproduction shall be for one time, or at varying intervals. Reproduction shall also be considered if repeated, on

separate and unrelated occasions, and there is no collective license available under which such reproduction can be made;

#### QATAR

Article 21(1): Reproduction is allowed for teaching purposes in educational institutions, the activities of which do not serve direct or indirect commercial gain, of articles, short works or extracts of works, to the extent justified by the purpose provided that:

- (a) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions;
- (b) there is no collective license available for reproduction by a competent authority in the collective management of rights of which the educational institution is or should be aware;
- (c) the name of the author and the title of the work are indicated as far as practicable on all copies.

#### SYRIA

Article 37(5): The reproduction by reprographic or similar means of a literary, scientific or artistic work, lawfully made available to the public, by a public library or non-commercial archive service or by an educational institution, provided that the part reproduced and the number of copies are limited to the needs of the reproducing institutions and that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

#### TUNISIA

Article 10 new: The utilization indicated below of protected works which have been made available to the public shall be lawful without the author's permission and without payment of compensation, subject to the provisions of Article 37 of this Law:

- (c) the reproduction, for teaching or testing in educational establishments, in a non-commercial, non-profit-making aim and to the extent justified by the purpose, of isolated articles lawfully published in a newspaper or periodical, lawfully published short extracts of a work or a short work, on the following conditions:
  - 1) full indication of the source and the author's name, whenever the work is utilized;
  - 2) Utilization of the work for non-commercial or profit-making purposes (Article 12 (new), paragraph 2).

Public libraries, non-commercial archive centers and services and the libraries of educational and training establishments may also, without the author's permission and without payment of compensation, reproduce an article or short extract from a written work, other than a computer program, published in a collection of works or in an issue of a newspaper or periodical, if the purpose of the reproduction is to respond to a request from a natural person for the purpose of research and teaching.

#### UNITED ARAB EMIRATES

Article 22: Without prejudice to the literary rights of the author stipulated in this Law, the author after the publication of his work may not prohibit a third person from performing one of the following acts:

- (4) Taking a sole copy of the work with acknowledgement of records houses or archives, libraries, or documentation centers which do not seek direct or indirect profit in the following two cases:  
...
  - (b) The purpose for copying must be in reply to an application by a natural person to use it for research or study, provided that it is granted for one time or for interrupted periods of time, provided that obtaining a license became impossible in accordance with the provisions of this Law.

[Section IV follows]

## SECTION IV: PERFORMANCE OR COMMUNICATION OF WORKS IN EDUCATIONAL ESTABLISHMENTS

### A. ANALYSIS

Out of the 17 countries studied, we found 10 whose copyright laws contain an exception designed to allow the performance or communication of works in educational establishments:

- Algeria (Article 44)
- Bahrain (Article 27)
- Egypt (Article 171(1))
- Iraq (Article 12)
- Jordan (Article 17(1))
- Lebanon (Article 32)
- Morocco (Article 23(b))
- Oman (Article 20(6) (b))
- Saudi Arabia (Articles 15(8) of the Law and 14(1) of the Regulations)
- United Arab Emirates (Article 22(6))

The following points will be taken up:

1. The rights in question
2. Purpose and place of the performance or communication of a performance
3. Persons exempted
4. Works likely to give rise to the exception
5. Other conditions

#### 1. THE RIGHTS IN QUESTION

For all of the Arab countries whose laws make provision for this exception, it is the right of public performance that forms the subject matter of the exception.

#### 2. PURPOSE AND PLACE OF THE PERFORMANCE OR COMMUNICATION OF A PERFORMANCE

2.1. It is generally accepted explicitly or implicitly that the activity which forms the subject matter of the exception must be carried out *for purposes of teaching*.

2.2. All of the countries require explicitly or implicitly that the performance must take place *inside the educational establishment*, or even inside a classroom.

2.3. However, there appear to be some differences of opinion when it comes to determining whether the students and teachers must themselves stage the performance or if it is enough for a performance to take place in a classroom, regardless of whether or not the students or teachers are themselves the protagonists.

- One school of thought consists of those countries which require (explicitly or implicitly) that the performance be staged by the students or teachers (Bahrain, Egypt, Lebanon, Oman and United Arab Emirates).

An example of a law which represents this position is that of the United Arab Emirates, which applies the exception to “performing the work by...students in an educational institute....” (Article 22, para 6).

- A second school of thought takes in those countries which appear to be satisfied if a work is performed in class, without however requiring that the performance be staged by students or teachers (Algeria, Iraq, Jordan, Morocco, Saudi Arabia).

The law which best represents this trend is that of Morocco, which states: “It shall be permissible, without securing the author’s consent and without payment of compensation, to stage a public performance, within the framework of the activities of an educational establishment, of a work, for the staff and students of such an establishment, if the public is composed solely of the staff and students of the establishment or of the parents and supervisors or other persons directly linked to the activities of the establishment” (Article 23).

The difference between these two approaches offers a certain amount of practical interest. Indeed, the field of the exception can vary, depending on whether the law from the country considered falls into the first or the second group.

For advocates of the first group, works must be staged by students and/or teachers, thereby including “live” performances. As a result, this also limits the works which are likely to be used. These can be musical, choreographic, dramatic or literary works or pantomime. By contrast, they cannot be works recorded in a sound, visual or audiovisual format.

However, for countries in the second group, which merely require that the performance take place in a classroom without stipulating that it be staged directly by students or teachers, the field of the exception is broad. In this case, one could imagine that pre-recorded or live audiovisual works, music recordings or broadcasts could be performed for an audience composed of students and teachers inside a classroom. These activities would come under public performances, as with direct performances by students or teachers (see in the same vein Articles 11(1)(i) and 11ter (1)(i) of the Berne Convention, according to which the public performance or recitation of a work may extend to performances or recitations by any means or processes).

2.4. Some countries, such as Lebanon and Morocco, further require that the audience must be composed solely of teachers, students, parents of students and persons participating directly in the activities of the educational establishment.

### 3 BENEFICIARIES

3.1. The various laws examined do not take up this question directly. The wording used exempts an activity (the performance or communication of a work in a classroom) rather than persons in particular.

Notwithstanding, one can therefore assert that the person who carries out the exempted activity (student or teacher) should also enjoy the same status and not be held accountable. The scope of the exception should also cover the educational establishment within which the exempted activity has taken place.

### 4. EXEMPTED WORKS

4.1. The majority of laws dealing with this exception extend its application to works in general, without limiting the scope to works of a specific genre (Algeria, Egypt, Iraq, Jordan, Lebanon, Morocco, Saudi Arabia and United Arab Emirates).

However, two countries (Bahrain and Oman) specify that the exception must apply to dramatic, musical and choreographic works or pantomime, because in these countries, performances must be staged by the students or teachers themselves. This having been said, and even from this restrictive perspective, one cannot but wonder why the scope of the exception rules out the reading or recitation of a literary text which, as with the performance of a play, also implies the live staging of the work.

4.2. Yet despite the fact that with the majority of laws, all works, regardless of genre, are subject to the exception, in practice the answer is probably not as categorical. Here, we refer the reader to the arguments developed in paragraph 2.3 and to the resulting distinction which we shall recall briefly.

For countries which require that the performance be staged directly by the students and/or teachers, the exception could only apply in practice to works which can be performed live by human beings, as for example a literary work, a play, a choreography, a musical work or a pantomime. Accordingly, this eliminates sound recordings and phonograms, as well as audiovisual works that could be performed with appropriate equipment.

### 5. OTHER CONDITIONS

5.1. A number of countries stipulate that a performance staged in class may not lead to direct or indirect financial gain (Bahrain, Egypt, Iraq, Oman, Saudi Arabia and United Arab Emirates).

5.2. Two other countries (Jordan and Oman) require a reference to the source and the name of the author, if the name appears in the source.

## B. RELEVANT LEGAL PROVISIONS

### ALGERIA

#### Article 44

The free performance of the work shall be lawful:

- in educational or training establishments for their strictly pedagogical needs.

### BAHRAIN

#### Article 27

A public performance of a dramatic or musical work or a dramatic or musical work, or dance or pantomime work or any other artistic work created for dramatic performance shall be permitted, without obtaining permission from the author and without payment of compensation, in the following cases:

- ...
- (b) Purposes of face-to-face educational activities inside recognized and non-profit educational institutions in similar educational classes or places.

In all cases, it shall be required that no financial gain shall be achieved directly or indirectly.

### EGYPT

#### Article 171

Without prejudice to the moral rights of the author under this Law, the author may not, after the publication of the work, prevent third parties from carrying out any of the following acts:

- 1) Performing the work in a family context or student gathering within an educational institution, to the extent that no direct or indirect financial remuneration is obtained.

### IRAQ

#### Article 12

It is not permitted to the author, after the publication of his work, to prevent its rhythm, performance or addressing thereof, if such thing was made in family audience, or in a meeting of special society, club or school, if such meeting shall not produce directly or indirectly amounts of money.

JORDAN

Article 17

Published works may be used without authorization from the author according to the conditions and in the cases that follow:

- (1) Presenting, displaying, reciting, acting or performing the work if it occurs....at an educational....institution and for purposes of educational clarification, provided the performance does not generate any financial returns and that mention is made of the source and the name of the authors, if the name is in the source.

LEBANON

Article 32

The exhibition or public performance of a work shall be lawful without the author's permission and without payment of compensation during:

- the activities of educational establishments, when the work is used by the teachers or students, provided that the audience is composed solely of teachers, pupils, parents of pupils and persons participating directly in the activities of the educational establishment.

MOROCCO

Article 23

Notwithstanding the provisions of Article 10 above, it shall be permitted, without the author's consent and without payment of compensation, to stage a public performance of a work:

- ...
- (b) In conjunction with the activities of an educational establishment, for the staff and students of such an establishment, if the audience is composed solely of the staff and students of the establishment or the parents and supervisors or other persons directly linked to the activities of the establishment.

OMAN

Article 20

Subject to the moral copyrights stipulated under this Law, the following uses of works shall be lawful even without the author's consent, provided that the source and the name of the author are mentioned if listed in the work and provided that free use shall not be allowed if such use conflicts with the normal exploitation of the work, performance, or phonogram or unreasonably prejudices the legitimate interests of the author, performer, or producer of phonogram:

...

- (6) Public performance of a dramatic, musical or dramatic musical, choreographic, pantomime work or any other work, created for dramatic performance, if:
  - (a) religious ceremonies to the extent justified by the nature of these celebrations.
  - (b) purposes of face-to-face learning activities in approved non-profit educational institutions, in classrooms or similar places dedicated to education.

In both cases, it is provided that no financial gain may be obtained, directly or indirectly.

## SAUDI ARABIA

Copyright Law Royal Decree No. M/41 2 Rajab, 1424

### Article 15

The following uses of the copyrighted work, in its original language or in translation, are lawful without obtaining the permission of the copyright owner. These forms of use are:

- ...
- (8) Music playing, acting, performing or showing any work, after publication, by government troupes or public corporate entities or school theatre, as long as such playing, performance or acting does not lead to direct or indirect financial gains.

Copyright, Regulations (Consolidation), 29/05/2004 (22/06/2005), No. 1688/1 (No. 1640

### Article 14

It shall be deemed an infringement of performance rights if the work is performed in school theatres or the like unless the performer of the work obtains the prior approval of the owners. It shall be deemed lawful use in accordance with article 15 (8) of the law if the performance of the work is in the classroom for purposes of education.

## UNITED ARAB EMIRATES

### Article 22

Without prejudice to the literary rights of the author stipulated in this Law, the author after the publication of his work must not prohibit a third person from performing one of the following acts:

- (6) Performing the work in family meetings or by students in an educational institute for no direct or indirect remuneration.

[Section V follows]

## SECTION V: EXCEPTIONS APPLICABLE TO NEIGHBOURING RIGHTS (OR RELATED RIGHTS)

### A. ANALYSIS

Out of the 17 countries studied, we found nine whose copyright laws contain an exception for performances by artists, phonograms or broadcasts by broadcasting bodies, for educational uses:

- Algeria (Article 121)
- Bahrain (Article 29)
- Egypt (Article 14)
- Lebanon (Article 47)
- Morocco (Article 54)
- Qatar (Article 26)
- Sudan (Article 33(1)(c))
- Tunisia (Article 47decies)
- United Arab Emirates (Article 24)

Matters are less clear as far as Jordan and Oman are concerned. The authorities we were able to contact assured us that neighboring rights were subject to exceptions on the same basis as copyright. Nevertheless, the lack of a clear legal text leaves some doubt and we are reluctant to add these two countries to the above list.

The Arab countries adopt one of two approaches to deal with the question of exceptions in neighboring (or related) rights:

- The majority of countries tackle the question of exceptions in neighboring (or related) rights in a pithy style. The method chosen consists in purely and simply referring to the exceptions which apply to copyright, thereby extending the scope of these exceptions to neighboring rights.

One also finds such examples of wording as “exceptions which apply to copyright shall also apply *mutatis mutandis* to the field of neighboring rights” or “the rights recognized for the performer, producer of phonograms or videograms and sound or audiovisual broadcasting bodies shall be subject to the same limits as those placed on copyright” (Algeria, Bahrain, Egypt, Lebanon, Morocco, Qatar, Tunisia and United Arab Emirates).

- In other cases, specific provisions are made with regard to neighboring rights. For example, the law of Sudan provides that the exclusive rights provided by law for performers, producers of phonograms and broadcasting bodies shall not apply if the performances, phonograms or programs are used for educational or research purposes.

Morocco straddles the two systems. While permitting “utilizations constituting exceptions concerning protected works”, the Moroccan law introduces other exceptions specific to neighboring rights, in particular “reproduction solely for purposes of scientific

research”; “reproduction in conjunction with teaching activities, except when the performances and phonograms are published as teaching materials”; and the “quotation, in the form of short fragments, of a performance, phonogram or broadcast, provided that their making is compatible with fair practice and justified by their information-related purpose”.

## B. RELEVANT LEGAL PROVISIONS

### ALGERIA

#### Article 121

The rights recognized for the performer, producer of phonograms or videograms or sound or audiovisual broadcasting body shall be subject to the same limits as those placed on copyright and stipulated in Articles 41 to 53 of this Ordinance.

### BAHRAIN

#### Article 29

The provisions of Articles (19) to (24) of this Law shall apply to the free uses of sound performances and recordings and radio programs.

### EGYPT

#### Article 173

Restrictions on the author’s economic rights under this Law shall also apply to owners of related rights.

### MOROCCO

#### Article 54

Notwithstanding the provisions of Articles 50 to 53, the following acts shall be permissible without the authorization of the beneficiaries mentioned in these articles and without payment of compensation:

...

- (b) reproduction solely for purposes of scientific research;
- (c) reproduction in conjunction with teaching activities, except when the performances and phonograms are published as teaching materials;
- (d) quotation, in the form of short fragments, of a performance, phonogram or broadcast, provided that their making is compatible with fair practice and justified by their information-related purpose;
- (e) any other utilizations constituting exceptions concerning works protected under the provisions of this Law.

LEBANON

Article 47

The exceptions covered by Article 23 to 34 of this Law shall apply to the rights covered by Articles 35 to 45 of this Law.

QATAR

Article 26

The restrictions on economic rights provided for in this Chapter shall apply mutatis mutandis to the rights of performers, producers of sound recordings and broadcasting organizations.

SUDAN

Article 33

- (1) Sections 26, 31 and 32 shall not apply where the act referred to is made for:
  - ...
  - (c) use solely for the purpose of teaching or scientific research;

TUNISIA

Article 47decies

The limits and exceptions provided for under Articles 10 to 17 of this Law shall be applicable to performers, producers of sound or audiovisual recordings and broadcasting bodies.

UNITED ARAB EMIRATES

Article 24

The restrictions on the economic rights of the author stipulated in this Law shall apply to holders of neighboring rights.

[Section VI follows]

## SECTION VI: EXCEPTIONS TO TECHNICAL PROTECTION MEASURES

As we know, authors, performers and producers of phonograms who exploit their works, performances or phonograms in a digital format (particularly on the Internet) often resort to technological measures – access codes, jamming, encryption – with a view to controlling use and thereby preventing infringements of their rights.

Under the WCT and WPPT treaties, “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights” (see Article 11 of WCT and Article 18 of WPPT).

The application of these technological processes, some of which have the effect of limiting access to the work or phonogram, could end up by preventing members of the public from availing themselves of the exceptions to copyright or related rights. Consequently, various developed country laws set limits on technical protection measures in the form of exceptions designed to allow the public to benefit from these exceptions. Moreover, some of the limits are designed to enable those concerned to take advantage of educational exceptions.

What about the Arab countries?

Out of the 17 countries studied, only four countries have laws on copyright and neighboring (or related) rights, which contain provisions on technical protection measures:

- Bahrain
- Jordan
- Morocco
- Oman

It is interesting to note that only the Moroccan law provides for rules which are analogous to exceptions to provisions concerning technical protection measures. As this is the only case to our knowledge in the Arab countries, we deemed that it was justified to analyze it in greater depth.

First of all, the point should be made that under Article 65, the Moroccan Law on Copyright and Neighbouring Rights considers infringements of the system of technical protection measures as unlawful acts, equating them with violations of the rights of the authors, performers and producers of phonograms.

Under the Moroccan Law, any violation of copyright or neighboring rights entails civil and penal sanctions (for civil sanctions, see Article 62, paras 1 to 7, which provide for compensation for damages, the seizure of counterfeit copies and the cessation of the violation; for penal sanctions, see Article 64).

Consequently, anyone who has committed an infringement of the technical protection measures is liable to the civil and penal sanctions that would apply in case of a violation of rights.

However, the Moroccan Law provides in Article 65(1), that “the following non-profit entities: libraries, archive services, educational institutions or public broadcasting organizations shall not be subject to the provisions of Article 64 for the violations mentioned in Article 65, paragraphs (a), (d), (e), (f), (g) or (h).”

Moreover, Article 65.1, para 2 stipulates that non-profit entities covered in the previous paragraph “may not be ordered to pay damages under Article 62 for the violations mentioned in Article 65, paragraphs (a), (d), (e), (f), (g), (h) or (i) if they provide proof that they were not aware or had no reason to think that their acts constituted a prohibited activity”.

What does this mean? It means that a non-profit educational institution that circumvents or does away with an effective technical protection measure, or imports or rents a device or system to defeat the effective protection measure can neither be prosecuted nor ordered to pay damages if it were acting in good faith.

The Law does not, however, completely exempt educational institutions from the obligations relating to technical protection provisions. Nor does it declare that the fact that an educational institution is unaware of these provisions does not constitute an act of violation, which would have been the distinctive feature of a true exception. As a result, an educational institution which violates the provisions of the Law on Technical Protection Measures would remain liable to the other sanctions stipulated by law for acts of violation. In particular, it could be enjoined to cease the violation.

As a result, the exception that Moroccan legislators have created for the benefit of educational establishments is not a full exception.

This having been said, and in general, it would be useful to draw the attention of Arab legislators to the possibility of working out exceptions to the stringent regime of technical protection measures, if these countries feel that the time is ripe to introduce such exceptions. Naturally, this remark is meant first and foremost for the four countries which have already incorporated provisions concerning technical protection measures in their legislation. Yet the remark also applies to the other countries which are in the process of modernizing their legislation and might be giving thought to the inclusion of provisions of this kind.

[Section VII follows]

## SECTION VII: APPENDIX TO THE BERNE CONVENTION SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES

The Berne Convention contains an Appendix with special provisions regarding developing countries, which applies in two series of cases.

First of all, if a work has not been lawfully published in a developing country in a language in general use in that country, a license for translation may be granted for the purpose of teaching, scholarship or research (Article II of the Appendix to the Berne Convention).

The second situation covers the case of a developing country where lawful copies of a published work have not been put on sale, to meet the needs of the general public or in connection with systematic instructional activities. Any national of such a country may obtain a license to reproduce and publish such an edition at that or a lower price for use in connection with systematic instructional activities (Article III of the Appendix to the Berne Convention).

In both cases, and when certain prior conditions are met, a license for translation or reproduction may be granted by a competent national authority, even if the copyright holder refuses to authorize the envisaged utilization. This means that in reality, the provisions of the Appendix establish a regime of compulsory licenses, allowing certain uses of a work not agreed by the beneficiary but in exchange for compensation set by the national authority.

This Appendix, which proceeds from a generous intention, has been a disappointment in practice. Indeed, the prior conditions for the granting of the license are stringent: they bring into play excessive formalism and require respect for strict deadlines. They are so complex as to discourage any attempts at application. As a result, the Appendix has not produced the desired effect. In practice, with very few exceptions, it has remained a dead letter.

But what about the Arab region?

It is interesting to note that there has been keen interest in the Appendix in the Arab countries. For example, the following countries have incorporated enabling provisions in their legislation:

- Algeria
- Djibouti
- Egypt
- Iraq
- Jordan
- Saudi Arabia
- Syria
- Tunisia
- United Arab Emirates

Despite the legislative success, it would appear that both here and elsewhere, the practical results are scant or even non-existent. To our knowledge, there is no systematic study with verifiable statistics making it possible to arrive at a well-informed judgment on the real impact of efforts to incorporate the Appendix in the legislation of the Arab countries.

Yet in view of the information gathered here and there from various key figures we were able to interview on an anonymous basis, it would appear that these provisions have very rarely been applied. As far as the Arab region is concerned, the provisions of the Appendix have remained so to speak a dead letter.

Nevertheless, this does not mean that these provisions are completely useless. The same key figures interviewed assured us that the existence of compulsory licenses based on the Appendix to the Berne Convention can provide an interesting tool where a threat to use such an instrument would enable beneficiaries wishing to avail themselves of this faculty to obtain favorable and suitable terms in contracts negotiated freely with publishers. It would appear that the spectre of the application of the exception would encourage them to be more understanding or less demanding with regard to requests from developing countries.

[End of document]