

Copyright Limitations and Exceptions for Educational Activities

Executive Summary

The importance of education in any society is axiomatic. Even where copyright legislation and international treaties seek to protect the rights of authors in their works and intellectual creations, the special status of the use of works to promote and facilitate education has been preserved.

It is in this context that this study undertakes a review of the limitations and exceptions to national legislation that deal with educational activities, to better understand how national legislatures have balanced the public interest in advancing education with the interests of authors and artists in their intellectual creations. The copyright legislation of all 189 member states of WIPO¹ that pertains to educational activities is the focus of this review.

This study focuses on eight categories of limitations and exceptions that pertain to educational activities. These are provisions that relate to private or personal use (to reflect the individual and self-edification aspect of personal education and research), quotations (since learning and instruction involve illustration, argumentation, referral, comments and criticisms), the use of reproductions for educational purposes (including both single and multiple copies, by both reprographic and non-reprographic means, with or without collective licensing), educational publications (as instructional material for use by educational institutions), school performances (to enable performances as part of educational curricula), educational communications (which encompass broadcasts, cable transmissions, the making of recordings of such communications and performances and online distance learning via the “making available” right), compulsory licences for reproduction and translation of works for educational purposes (which are special provisions for developing countries that are based on Articles II and III of the Appendix to the Berne Convention), and restrictions to the protection of technological protection measures and rights management information (where digital rights management has to be circumvented in the interests of conducting educational activities).

Of the 1,723 provisions extracted from the 2,048 reviewed pieces of copyright legislation of 189 member states, 1,553 of them are limitations and exceptions that fall into the first six categories outlined above, 77 provisions pertain to compulsory licences for reproduction and translation, and 93 provisions pertain to the restriction of digital rights management for, *inter alia*, educational purposes. Of the 1,553 limitations and exceptions provisions, 332 provisions from 189 member states relate to private and personal use, 251 provisions from 183 member states relate to quotations, 379 provisions from 154 member states relate to educational reproductions, 149 provisions from 127 member states relate to educational publications, 189 provisions from 123 member states relate to educational performances, and 257 provisions from 135 member states relate to educational broadcasts, communications and recordings. The significant number of provisions that relate to private and personal use confirms their relevance as they sanction the self-edification and personal instruction perspective of education. Likewise, the breadth of different formulations for the 379 educational reproduction and 257 educational communication provisions reflects the diversity of educational activities that could be characterized as reproductions and communications. However, to the extent that the activities involve the

¹ As of October 2016.

reproduction of multiple copies of works, which could have an unreasonably prejudicial effect on the legitimate interests of the authors of such works, many such reproduction provisions are subject to the requirement that the copyright owners are entitled to equitable remuneration.

Also significant are the provisions that permit the use of quotations, since teaching is often conducted through illustration, argumentation, referral, comments and criticisms.

What are less used are the provisions for compulsory licenses for translations and reproductions (77 provisions from 37 member states), which are used by developing countries to make works available and accessible for educational purposes. The status and current utility of many of these provisions is also called into doubt because many member states have allowed their Berne Appendix Article I declarations to lapse.

While there are currently only a few provisions (93 provisions from 49 member states) that restrict the protection of digital rights management where it relates to, *inter alia*, educational activities, it is noteworthy that these provisions have evolved in the presence of minimal guidance from international treaties.

It is difficult for a study with such limited resources and encompassing such diverse sources to draw definitive conclusions about the state of limitations and exceptions for educational activities on an international level. However, it would be obtuse not to make certain observations which can be drawn from this large scale analysis of these provisions, with a view to affording member states and policy makers some guidance in law reform, both at a national level as well as at an international level. In this regard, five observations may be made.

First, any discussion of educational limitations and exceptions will be incomplete without proper consideration being given to the private or personal use provisions as well as the quotation provisions.

Second, quotations, educational publications and school performances provisions receive generally uniform implementation in member states, both by way of their general acceptance in the national legislation of member states that have these provisions, and also in their implementational details. Remuneration is generally not required in relation to quotations and school performances, but some member states have enacted provisions to prescribe remuneration for source works incorporated into educational publications. Nonetheless, as these categories of provisions are not as widely implemented as the other categories, there is room for member states who have not implemented such provisions to reform their national legislation accordingly.

Third, the implementation of limitations and exceptions for educational reproductions, and educational broadcasts, communications, and recordings, are considerably varied. The stated purposes, behind these provisions, however, are generally clear (for teaching, education, instruction, science and research). For educational reproductions, the primary restriction is that the reproductions not be conducted for commercial gain or advantage, or the unavailability of a commercial licence or lack of awareness of its availability for educational reproduction. To the extent that the scope of the reproduction right is contingent on the availability and scope of commercial licences, this is a matter that has to be investigated further as it is beyond the scope of this study. The reproduction provisions also prescribe qualitative and quantitative limits and restrictions placed on educational reproductions. On the other hand, the broadcast, communications and recordings provisions exhibit a larger spectrum of implementational

variations, as few member states use the “by way of illustration” language or even its variations in Article 10(2) of the Berne Convention to formulate their educational broadcasts, communications and recordings provisions.

For the most part, educational reproduction, broadcast, communications and recordings provisions do not attract the payment of equitable remuneration to the authors and rightholders. However, while educational reproduction provisions that do prescribe equitable remuneration are primarily directed at the making of multiple copies, the use of reprographic equipment and the reproduction of source works by third parties, no such clear patterns have been observed in relation to the provisions requiring equitable remuneration for educational broadcasts, communications and recordings.

Fourth, on the issue of online distance learning, very few member states have specifically provided for *sui generis* provisions that explicitly address the distribution of online content for instructional purposes. However, this does not mean that other member states do not have provisions that address the issue. But whether or not member states’ “communication to the public” or “making available” rights encompass the online dissemination of digital content is largely a matter for substantive legal treatment in the respective member states. In addition, online distance learning will invariably engage in some form of reproduction of the source works that are being communicated, by virtue of the fact that the electronic medium is involved; provisions that enable online distance learning will also have to take this issue into consideration.

Finally, the reason why member states have not renewed their Article I declarations under the Appendix should be investigated. At the same time, the enactment of provisions in member states’ national legislation to provide for exceptions to the protection of TPM and RMI, either directly or indirectly for educational purposes, demonstrates an interesting trend.

Daniel Seng
Singapore
October 2016