

Standing Committee on Copyright and Related Rights

Thirty-Fifth Session
Geneva, November 13 to 17, 2017

UPDATED STUDY AND ADDITIONAL ANALYSIS OF STUDY ON COPYRIGHT LIMITATIONS
AND EXCEPTIONS FOR EDUCATIONAL ACTIVITIES

prepared by Professor Daniel Seng

Updated Study and Additional Analysis

1. Introduction

After the conclusion of the November 2016 study, WIPO member states requested that the existing study be extended to examine some additional issues to enhance our understanding of the operation of copyright limitations and exceptions as applied to educational institutions. These issues include:

- the application of limitations and exceptions to enable the use of adaptations and translations for educational activities, beyond the provisions of the Berne Appendix;
- the scope of provisions that restrict or limit the copyright liability of educational institutions;
- the application of provisions that limit the scope of contracts that seek to override the copyright limitations and exceptions for educational activities;
- the scope of digital copying and digital dissemination within the framework of the Berne Appendix; and
- the analysis of provisions on flexibilities, limitations and exceptions to TPM/RMI for educational activities, with a focus on the member states' memberships in the WIPO Copyright Treaty ('WCT') and the WIPO Performances and Phonograms Treaty ('WPPT').

While some of these issues were addressed in the earlier study (for instance, the earlier study captured the limitations and exceptions that allow for the use of adaptations and translations for educational activities within the context of the Berne Appendix, and also addressed some of the provisions that limit the liability of educational institutions and the scope of contracts within specific educational activities), this study update will take advantage of this opportunity to broaden the review and sharpen the analysis of the aforesaid issues. To this end, this updated study is based on a de novo review of the national copyright legislation of all 191 WIPO member states, based on the latest versions of their legislation available on the WIPOLex website. Considering that a number of WIPO member states have also updated their national legislation since the earlier study, this updated study has proved to be necessary and timely. The analysis that arises from this study follows.

WIPO member states have also requested that the study incorporate the Bangui Agreement, which is a regional intellectual property agreement among Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, and Togo. In addition, WIPO member states have also asked that the study reflect the ratification/accession status of the WCT and the WPPT for each member state.

The individual member state annexures have also been updated to reflect the Bangui Agreement and the ratification/accession status of WIPO member states to the Berne Convention, the WCT and the WPPT.

This study attempts to capture the copyright legislation of WIPO member states as of August 2017.

2. Adaptations and Translations

In the earlier study, an analysis of the provisions for adaptations and translations was done in relation to the provisions for licensing that concern the Berne Appendix. The request was made to broaden the analysis to those beyond the Berne Appendix.

This new study found that the limitations and exceptions enabling adaptations and translations for educational activities operate in principally three ways, through the use of three different formulations of the limitations and exceptions: the "adaptation or translation" formulation, the "source work" formulation and the "use" formulation.

Limitations and Exceptions	No. of "adaptation or translation" formulation Provisions (No. of member states)	No. of "source work" formulation Provisions (No. of member states)	No. of "use" formulation Provisions (No. of member states)
Private/Personal Use	42 (40)	29 (24)	44 (42)
Quotations	24 (21)	34 (30)	23 (21)
Reproduction	36 (23)	33 (18)	68 (58)
Publications	9 (8)	24 (22)	42 (37)
Performances	6 (5)	11 (9)	28 (26)
Broadcasts, Communications and Recordings	11 (6)	22 (14)	78 (63)
Total	128 (66)	153 (33)	283 (96)

Table 1: Summary of Adaptation and Translation Provisions, Source Work Provisions and Educational "Use" Provisions in Copyright Legislation of WIPO Member States

First, the provisions could, as part of their scope, enable the adaptation or translation of the work, in addition to the excepted activity such as reproduction or communication of the work ("adaptation or translation" formulation).¹ This study has found 128 provisions (66 member states) that adopt this formulation. Most of these provisions are provisions that enable the private use of works (42 provisions, 40 member states), the reproduction of works for educational purposes (36 provisions, 23 member states) and the use of the works for quotations (24 provisions, 21 member states).

The following examples illustrate this. For instance, Article 71M of Chile's Law on Intellectual Property provides that:

It shall be lawful, without remunerating or seeking the authorization of the author, to reproduce and *translate* for educational purposes, within the framework of formal education or with the consent of the Ministry of Education, small fragments of works or isolated works of a three-dimensional, photographic or figurative nature, excluding school textbooks and university manuals, where such acts are performed solely to illustrate educational activities, insofar as this is warranted and is not for profit, provided that the works in question have already been disclosed and include the name of the author and the source, except in cases where this is impossible. [emphasis added]²

Similarly, section 12 of the Copyright and Neighbouring Rights Act, 1999 of the United Republic of Tanzania provides that:

(2) In the case of any work except computer programs and architectural works, that has been lawfully published-

¹ These provisions were captured in the earlier study but were not reviewed as such as this fell outside the mandate of the earlier study.

² Chile Law No. 17.336 on Intellectual Property, as revised by Law No. 20.435 (Apr. 23, 2010), Art. 71M.

(a) the production, *translation, adaptation, arrangement or other transformation* of such work exclusively for the user's own personal and private use [shall be permissible]³ provided that such reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author; [emphasis added]⁴

Another common implementation of the "adaptation or translation" formulation adopted by a number of member states is to tag activities such as adaptations, translations and transformations onto the existing limitations and exceptions. A good example of this can be found in the Japanese Copyright Act:

(Exploitation by means of translation, adaptation, etc.)

Article 43.

The exploitation of works permitted under the provisions mentioned below shall include that made by the following means:

(i) Article 30, paragraph (1) [reproduction for private use] or Article 33, paragraph (1) (including the case where its application *mutatis mutandis* is provided for under the provision of paragraph (4) of the same Article) [reproduction in school textbooks], Article 34, paragraph (1) [broadcasting in school education programs] or Article 35 [reproduction in schools and other educational institutions]: translation, musical arrangement, transformation, and adaptation;

(ii) Article 31, paragraph (1), item (i) on the second sentence of paragraph(3), Article 32 [quotations] or 36 [reproduction etc. in examination questions], Article 37, paragraph (1) or (2), Article 39, paragraph (1), Article 40, paragraph (2), or Article 41 or 42: translation;

(iii) Article 33bis, paragraph (1): transformation, and adaptation;

(iv) Article 37, paragraph (3): translation, transformation, and adaptation;

(v) Article 37bis: translation, and adaptation.⁵

A similar example can be found in section 106 of the Copyright and Related Rights Act, 2000 (No. 28 of 2000) (as amended up to the Copyright and Related Rights (Amendment) Act 2007 (S.I. No. 39 of 2007)) of Ireland:

Adaptation of a work

106. It is not an infringement of the copyright in a work to make an adaptation of the work by any act which may otherwise be done without infringing the copyright in a work under this Chapter.

Second, the provisions could also enable the reproduction or use of, or other excepted activity with, the original source work, in addition to enabling the excepted activity with the translated work ("source work" formulation). A total of 153 such provisions (33 member states) were found in this study. What this entails is that the limitations and exceptions operate to absolve the beneficiary of copyright liability in an action from not only the translator of the work, but also the original author whose work has been translated. Not unexpectedly, this formulation is most widely found in the provisions that enable quotations (34 provisions, 30 member states), but this formulation has also been adopted for limitations and exceptions that enable research and educational reproductions (33 provisions, 18 member states) and private and personal use (29 provisions, 24 member states).

The following examples illustrate this. For instance, section 40 of the Australian Copyright Act provides that:

Fair dealing for purpose of research or study

(1) A fair dealing with a literary, dramatic, musical or artistic work, or with *an adaptation of a literary, dramatic or musical work*, for the purpose of research or study does not constitute an infringement of the copyright in the work.⁶ [emphasis added]

³ United Republic of Tanzania Copyright and Neighbouring Rights Act, 1999, s. 12(1).

⁴ United Republic of Tanzania Copyright and Neighbouring Rights Act, 1999, s. 12(2)(a).

⁵ Japan Copyright Act (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010), Art. 43.

The Copyright Order 1989 from Lesotho illustrates a similar approach, wherein the limitation or exception enables an adaptation of the source work, which could itself be an adapted work:

Free use

9. Notwithstanding section 7, the following uses of a protected work, *either in the original language or in translation*, shall be permissible without the author's consent and without the obligation to pay remuneration for the use of the work,

(a) in the case of any work that has been made whether or not that work has been lawfully published,

(i) the reproduction, *translation, adaptation, arrangement or other transformation* of such work exclusively for the user's personal and private use;

(ii) the inclusion, subject to mention of the source and the name of the author, of *quotations* from such work in another work: Provided that such quotations are 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; and

(iii) the *utilization* of the work by way of illustration in publications, broadcasts, distribution by cable, sound or visual recordings for teaching, to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast or distributed by cable for use in schools, education, universities and professional training: Provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast, the programme distributed by cable or the recording;

... [emphasis added]⁷

The "adaptation or translation" formulation may be used in conjunction with the "source work" formulation, to broaden the scope of the limitation or exception. For instance, notwithstanding the use of the "adaptation or translation" formulation in section 12(2) of the Copyright and Neighbouring Rights Act, 1999 of the United Republic of Tanzania, section 12(1) reads:

12.-(1) Notwithstanding provisions of section 1, the following uses of a protected work, *either in the original or in translation*, shall be permissible without the authors' consent and the obligation to pay remuneration for the use of the work.

In other words, by section 12, it is permissible to translate, adapt, arrange or transform a work for a user's own personal and private use, and this scope of permissible private and personal use extends not only to the protected work in its translated version, but also to the original protected work.

Thirdly, the "adaptation or translation" formulation and the "source work" formulation should be contrasted with the provisions that enable "use" of the work. The "use" formulation is drawn from the language of Art. 10(2) of the Berne Convention, which reads:

Article 10. Certain Free Uses of Works:

2. Illustrations for teaching;

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

At first sight, it may seem that both the "adaptation or translation" formulation, which creates an exception to the right of adaptation/translation, and the "source work" formulation, which relieves the exception beneficiary from securing prior consent from the author of the original work, are not encompassed within the "use" formulation. However, a careful reading of the *travaux préparatoires* of the Berne Convention (Stockholm Act), where the current language of Art. 10 originates, leads

⁶ Australia Copyright Act Copyright Act 1968 (consolidated as of June 27, 2015), s 40(1).

⁷ Lesotho Copyright Order 1989 (Order No.13 of 1989), s 9(a).

one to the conclusion that the delegates accepted that the "use" formulation in Art. 10(2) of the Berne Convention has to apply to create an exception to the right of adaptation/translation, provided the conditions for the original exception are met⁸ - the "adaptation or translation" formulation. While there was some dissent, the delegates also accepted that the Art. 10(2) as formulated is wide enough to encompass use of a work not only in its original version but also in translation⁹ - the "source work" formulation. As many of the delegates at the Stockholm Conference observed, in relation to Art. 10(2), the utility behind a "use" formulation will be largely lost if the limitation or exception is limited to the translated work, and permission is still required from the author of the original work.¹⁰ In other words, the effect of the deliberations from the Stockholm Conference is that the current "use" formulation is a fusion of the "adaptation or translation" formulation *and* the "source work" formulation.

Therefore, a careful examination of the "use" formulation is required. As illustrated in Table 1, the "use" formulation in provisions predominates, particularly in relation to research and educational reproductions (69 provisions, 59 member states) and educational broadcasts and communications (77 provisions, 62 member states). This is unsurprising, because this formulation is directly derived from the language of Art. 10(2). Many member states closely follow this formulation in their laws. For instance, section 15(4) of the Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994) of Namibia reads:

- (4) The copyright in a literary or musical work shall not be infringed by the *use of such work by way of illustration* in a *publication, broadcast or sound or visual recording for teaching purposes*, provided-
- (a) such use is *compatible with fair practice*;
 - (b) the *extent* of such use does not exceed that *justified by the purpose*; and
 - (c) the source and the name of the author, if that name appears on the work, are mentioned. [emphasis added for elements drawn from Art. 10(2)]

Other member states adapt the Art. 10(2) "use" formulation in their provisions. For instance, Article 71Q of Chile's Law on Intellectual Property follows the "use of a protected work" formulation, but qualifies it with the expression "incidental or exceptional":

The *incidental or exceptional use* of a protected work, shall be permitted for purposes of criticism, commentary, caricature, teaching, academic or research interest, provided that such use does not constitute disguised use of the protected work. The exception laid down in this Article shall not apply to audiovisual works of a documentary nature. [emphasis added]¹¹

Some member states have taken this approach one step further, by combining the "source work" formulation with the "use" formulation. For instance, Art. 27 of the Act No. 83 of February 4, 1994, on Copyright and Neighboring Rights (as amended up to the Act of July, 19, 2016) of Poland reads:

Research and educational institutions shall be allowed, for teaching purposes or in order to conduct their own research, to *use disseminated works in original and in translation*, and to make copies of fragments of the disseminated work. [emphasis added]

A similar approach which combines the "adaptation or translation" formulation, the "source work" formulation and the "use" formulation can be found in section 12 of the Copyright Act, 1978 (Act No. 98 of 1978, as amended up to Copyright Amendment Act 2002) of South Africa. The relevant provisions read:

⁸ Records of the Stockholm Conference, 1967, p 921-922, paras. 1565.1 et seq (stating that the Main Committee unanimously approved S/248 para. (1), which states, in relation to, among others, Art. 10(1) and (2), "it seems normal that the exceptions introduced into the provisions for the right of reproduction should also apply to the right of translation, that is to say, should also apply to the translated version of the work.").

⁹ Records of the Stockholm Conference, 1967, pp 922, paras. 1570-1581, 926, paras. 1652.2, p. 927, para. 1662 (stating that the Main Committee approved S/269 Addendum, with 2 abstentions).

¹⁰ Records of the Stockholm Conference, 1967, p 926, paras. 1652.2, 1653.1, 1655.

¹¹ Chile Law No. 17.336 on Intellectual Property, as revised by Law No. 20.435 (Apr. 23, 2010), Art. 71Q.

(4) The copyright in a literary or musical work shall not be infringed by *using* such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(9) The provisions of subsections (1) to (7) inclusive shall apply also with reference to the *making or use of an adaptation* of a work.

(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question *either in its original language or in a different language*, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.

[emphasis added]

So as noted in Table 1, the "use" formulation has been applied to the private and personal use provisions (44 provisions, 42 member states), educational reproduction provisions (69 provisions, 59 member states) and educational broadcast, communications and recording provisions (77 provisions, 62 member states).

In sum, WIPO member states have broadly implemented provisions to enable the making of adaptations and translations of works, and also the use of such works where the works in question are adaptations and translations themselves, with a view to educational purposes and objectives.

3. Restricting or Limiting the Copyright Liability of Educational Institutions

The issue sought to be reviewed here is as regards provisions that restrict or limit the liability of educational institutions. In a sense, the scheme of limitations and exceptions for *particular* activities that have been examined in the existing study already operate to restrict or limit the liability of educational institutions, by sanctioning the educational activities that would otherwise require the authorization of the copyright holder. What the updated study seeks to do is to review and analyze the provisions that *generally* restrict or limit the liability of educational institutions.¹² Given the breadth of the copyright limitations and exceptions, it is therefore no surprise that this analysis only found 8 such general provisions in the copyright legislation of WIPO member states.

These 8 provisions can be grouped as follows: 2 provisions exempt educational institutions for infringement from the automatic or transient storage of copyright material on networks for teaching purposes (Australia and the U.S.),¹³ 1 provision exempts educational institutions from the indictable offence of commercial-scale copyright infringement (Australia),¹⁴ 1 provision absolves the educational institution from being attributed with the infringing acts and knowledge of infringing activities of its faculty member or graduate student (the U.S.),¹⁵ and 4 provisions limit or remit the statutory damages that would otherwise be payable by an educational institution for activities associated with its teaching functions (Bahamas, Canada and the U.S.).¹⁶

To illustrate from these groups of provisions, the explanatory proviso to section 110(2) of the U.S. Copyright Act states, after spelling out the exception that the performance or display of a nondramatic literary or musical work by or in the course of a transmission by an accredited nonprofit educational institution as part of teaching content is not an infringement of copyright, that:

¹² Example of limitations and exceptions for specific educational activities can be found in the provisions that exempt educational institutions from liability for circumventing TPMs and removal of RMIs pursuant to their educational activities. See e.g., Australia Copyright Act, ss 132APC(8), 132APD, 132APE, 132AT (removal of RMIs and circumvention of TPMs); Singapore Copyright Act, ss 260(7), 261C(9) (removal of RMIs and circumvention of TPMs).

¹³ Australia Copyright Act, s 200AAA; U.S. Copyright Act, s. 110(2) proviso.

¹⁴ Australia Copyright Act, s 132AC.

¹⁵ U.S. Copyright Act, s. 512(e).

¹⁶ Bahamas Copyright Act, 1988, s 41(3)(d); Canada Copyright Act, s 38.1(6), 38.2(1); U.S. Copyright Act, s 504.

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.¹⁷

Section 132AC of the Australian Copyright Act provides that:

Commercial-scale infringement prejudicing copyright owner Indictable offence

(1) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the conduct results in one or more infringements of the copyright in a work or other subject-matter; and
- (c) the infringement or infringements have a substantial prejudicial impact on the owner of the copyright; and
- (d) the infringement or infringements occur on a commercial scale.

...

(7) This section does not apply in respect of anything lawfully done by the following in performing their functions:

- (a) a library (other than a library that is conducted for the profit, direct or indirect, of an individual or individuals);
- (b) a body mentioned in:
 - (i) paragraph (a) of the definition of archives in subsection 10(1); or
 - (ii) subsection 10(4);
- (c) *an educational institution*;
- (d) a public non-commercial broadcaster, including:
 - (i) a body that provides a national broadcasting service within the meaning of the Broadcasting Services Act 1992; and
 - (ii) a body that holds a community broadcasting licence within the meaning of that Act.

Note 1: A library that is owned by a person conducting a business for profit might not itself be conducted for profit (see section 18).

Note 2: A defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the Criminal Code).¹⁸

Section 38.1 of the Canadian Copyright Act provides as follows:

(6) No statutory damages may be awarded against

- (a) an educational institution or a person acting under its authority that has committed an act referred to in section 29.6 or 29.7 and has not paid any royalties or complied with any terms and conditions fixed under this Act in relation to the commission of the act;
- (b) an educational institution, library, archive or museum that is sued in the circumstances referred to in section 38.2;

¹⁷ U.S. Copyright Act, s. 110(2) proviso.

¹⁸ Australia Copyright Act, s. 132AC.

(c) a person who infringes copyright under paragraph 27(2)(e) or section 27.1, where the copy in question was made with the consent of the copyright owner in the country where the copy was made; or

(d) an educational institution that is sued in the circumstances referred to in subsection 30.02(7) or a person acting under its authority who is sued in the circumstances referred to in subsection 30.02(8).¹⁹

4. Licences that Override Copyright Limitations and Exceptions

The issue here is as to the treatment of copyright licensing terms that seek to limit or even override the application of copyright limitations and exceptions for educational activities. In many jurisdictions, there are general provisions on treating contractual provisions as illegal, unconscionable, or contrary to public policy, and ruled unenforceable on that basis,²⁰ and these might apply to such contractual provisions or licensing terms.

However, absent judicial intercession, content providers could ostensibly use the device of the copyright licence to circumscribe the various copyright limitations and exceptions. To this end, some member states have enacted provisions to explicitly provide that licensing terms that limit or override copyright limitations and exceptions are unenforceable. This study has found 14 such provisions in the copyright laws of 8 member states. These provisions in the copyright laws of Antigua and Barbuda,²¹ Barbados,²² Belize,²³ Brunei,²⁴ Jamaica,²⁵ Saint Kitts and Nevis,²⁶ Saint Vincent and the Grenadines²⁷ and the United Kingdom,²⁸ provide that licensing terms and conditions that authorize the activities which are exempted in the limitations and exceptions cannot be narrower or more restrictive than the scope of the legal limitations and exceptions. Using the United Kingdom Copyright, Designs and Patents Act 1988 (c. 48) as an example, these provisions provide as follows:

32 Illustration for instruction

(1) Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work provided that the dealing is—

(a) for a non-commercial purpose,

(b) by a person giving or receiving instruction (or preparing for giving or receiving instruction), and

(c) accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(2) For the purposes of subsection (1), “giving or receiving instruction” includes setting examination questions, communicating the questions to pupils and answering the questions.

¹⁹ Canada Copyright Act (R.S.C., 1985, c. C-42) (as amended up to June 22, 2016), s. 38.1(6).

²⁰ See e.g. *Bovard v. American Horse Enterprises*, 201 Cal. App. 3d 832, 247 Cal. Rptr. 340 (1988); *Royal Bank of Canada v. Newell*, 147 D.L.R. (4th) 268 (N.S.C.A.); French Civil Code, Art. 1172 (“Toute condition d’une chose impossible, ou contraire aux bonnes mœurs, ou prohibée par la loi est nulle, et rend nulle la convention qui en dépend.” or, as translated in English “Any condition providing for an impossible thing, or contrary to public morals, or prohibited by law, is null and renders the agreement itself that depends upon it null.”); German Civil Code (last amended by Article 4 para. 5 of the Act of 1 October 2013), Section 138 (“(1) A legal transaction which is contrary to public policy is void. (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.”).

²¹ Antigua and Barbuda Copyright Act 2003, s 59.

²² Barbados Copyright Act, 1998 (Cap. 300) (as revised up to 2006), s 58.

²³ Belize Copyright Act (Cap. 252, Revised Edition 2000), s 64.

²⁴ Brunei Darussalam Emergency (Copyright) Order, 1999, s 40.

²⁵ Jamaica Copyright Act - Act 5 of 1993, s 59.

²⁶ Saint Kitts and Nevis Copyright Act (Cap. 18.08), s 59.

²⁷ Saint Vincent and the Grenadines Copyright Act 2003 (Act No. 21 of 2003), s 60.

²⁸ United Kingdom Copyright, Designs and Patents Act 1988 (c. 48), revised and updated as of (as of Jul. 29, 2017), s 32; Schedule 2, para. 4.

(3) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, *that term is unenforceable.* [emphasis added]

In its most recent revisions to its copyright legislation,²⁹ the United Kingdom has taken this approach further and applied it to render unenforceable the terms of any contract³⁰ that may purport to prevent or restrict fair dealing for private use,³¹ quotations,³² reproductions for data analytics³³ and educational communications.³⁴ The objective behind this is clear: since many of these works, particularly works in digital media, come with terms of use that license the users to access the works in question, the users' entitlement to exercise the activities sanctioned in copyright legislation cannot be circumscribed by the terms of the contract or licence. Users of copyright works should be enabled to use "works in ways which do not directly trade on the underlying creative and expressive purpose of the work".³⁵ As explained in the Hargreaves report, rendering the terms of such contracts unenforceable "ensure[s] that these and other copyright exceptions are protected from override by contract."³⁶

Applying the same principles, another class of provisions in copyright legislation provides that any such contractual provisions that contradict the limitations or exceptions are null and void and are of no effect. These are different from the previous class of provisions because they are not specific to a particular limitation or exception, but are of general application. Perhaps these provisions are inspired by similar provisions found in the EU Database Directive³⁷ and the EU Software Directive.³⁸ This study found 8 such provisions can be found in the copyright legislation of the following 7 member states: Cook Islands,³⁹ Ireland,⁴² Montenegro,⁴³ Portugal,⁴⁴ Republic of Moldova,⁴⁵ and Sao Tome and Principe.⁴⁶ For instance, the following provisions are found in the Cook Islands Copyright Act 2013:

11 Transmission and licensing of copyright

(1) The copyright in a work-

²⁹ United Kingdom, The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (S.I. 2014/2361); The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372); The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356).

³⁰ Explanatory Memorandum to the Copyright and Rights In Performances (Personal Copies For Private Use) Regulations 2014, The Copyright And Rights In Performances (Research, Education, Libraries And Archives) Regulations 2014, The Copyright And Rights In Performances (Quotation And Parody) Regulations 2014, The Copyright And Rights In Performances (Disability) Regulations 2014 And The Copyright (Public Administration) Regulations 2014, para. 7.7.4.

³¹ United Kingdom Copyright, Designs and Patents Act 1988 (c. 48), revised and updated as of (as of Jul. 29, 2017), ss 28B, 29(1), (1C); Schedule 2, paras. 1B, 1C(1), (2).

³² United Kingdom Copyright, Designs and Patents Act 1988 (c. 48), revised and updated as of (as of Jul. 29, 2017), s 30(1ZA), Schedule 2, para. 2(1ZA).

³³ United Kingdom Copyright, Designs and Patents Act 1988 (c. 48), revised and updated as of (as of Jul. 29, 2017), s 29A, Schedule 2, para. 1D.

³⁴ United Kingdom Copyright, Designs and Patents Act 1988 (c. 48), revised and updated as of (as of Jul. 29, 2017), s 32; Schedule 2, para. 4.

³⁵ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 99, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf.

³⁶ *Id.*

³⁷ Directive 96/9/EC of The European Parliament and of The Council of 11 March 1996 on the legal protection of databases, Art. 15.

³⁸ Directive 2009/24/EC of The European Parliament and of The Council of 23 April 2009 on the legal protection of computer programs, Art. 8(2).

³⁹ Cook Islands Copyright Act 2013, s 38(5).

⁴⁰ Finland Copyright Act (Act No. 404 of July 8, 1961, as amended up to 1494/2016 of December 29, 2016), s 49(4).

⁴¹ Germany Act on Copyright and Related Rights (Copyright Act, as amended up to Law of October 1, 2013), Art. 69g.

⁴² Ireland Copyright and Related Rights Act, 2000 (No. 28 of 2000), s 2(10).

⁴³ Montenegro Law No. 07-1/11-1/15 of July 12, 2011, on Copyright and Related Rights (promulgated by Decree No. 01-933/2 of July 25, 2011, and as amended up to No. 53/2016), Art. 45 paras. 2, 3.

⁴⁴ Portugal Code of Copyright and Related Rights (as last amended by Law No. 16/2008 of April 1, 2008), Art. 75.5.

⁴⁵ Republic of Moldova Law No. 139 of July 2, 2010, on Copyright and Neighbouring Rights (as amended by Law No. 212 of July 29, 2016), Art. 31(4).

⁴⁶ Sao Tome and Principe Code of Copyright and Related Rights (approved by Decree-Law No. 02/2017), Art. 75.5.

(a) is transmissible as personal or moveable property by assignment, testamentary disposition, or operation of law; and

(b) may be subject to a licensing regime whereby the owner of the copyright authorises another person to exercise 1 or more of the owner's economic rights in relation to the work.

...

(5) Any *contractual provision* contained in an agreement for the assignment or licensing of a work that is *contrary to any of the exceptions* to copyright infringement set out in sections 14 to 25 has *no lawful effect*. [emphasis added]

38 Transmission and licensing of rights

(1) The rights conferred on a performer, producer of a sound recording, and broadcaster under sections 28, 32, and 35-

(a) are transmissible as personal or moveable property by assignment, testamentary disposition, or operation of law; and

(b) may be subject to a licensing regime, whereby the owner of the rights authorizes another person to exercise 1 or more of the owner's rights in relation to the performance, sound recording, or communication to the public.

...

(5) Any *contractual provision* contained in an agreement for the assignment or licensing that is *contrary to any of the exceptions* set out in section 37 has, to the extent that it is inconsistent with the exceptions, *no lawful effect*. [emphasis added]⁴⁷

The Irish Copyright and Related Rights Act, 2000 (No. 28 of 2000) sets out this rule as a rule of interpretation:

2(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is *irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act*. [emphasis added]⁴⁸

And the Montenegro Law on Copyright and Related Rights affirms that the limitations and exceptions are rules of policy which may neither be waived by the user nor circumvented by the licensee:

Permitted limitations

Article 45

Limitations to copyright shall only be permitted in the cases referred to in Articles 43, 46-61, 76, 113, 114 and 144 of this Act, provided they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The *limitations to copyright* referred to in Par. (1) of this Article *may not be waived*.

The *provisions of a contract or other legal act stipulating the user's waiver of the permitted limitations* referred to in Par. (1) of this Article, shall be *null and void*. [emphasis added]⁴⁹

5. Digital Copying and Digital Dissemination within the Framework of the Berne Appendix

To recap, the earlier study examines the various provisions in national copyright legislation that provide for compulsory licences for translation and reproduction for educational purposes, based on Articles III and II of the Appendix to the Paris Act of the Berne Convention respectively. In particular, the relevant parts of Articles III and II read as follows:

⁴⁷ Cook Islands Copyright Act 2013, s 38(5).

⁴⁸ Ireland Copyright and Related Rights Act, 2000 (No. 28 of 2000), s 2(10).

⁴⁹ Montenegro Law No. 07-1/11-1/15 of July 12, 2011, on Copyright and Related Rights (promulgated by Decree No. 01-933/2 of July 25, 2011, and as amended up to No. 53/2016), Art. 45 paras. 2, 3.

Article II

Limitations on the Right of Translation:

(2) (a) Subject to paragraph (3), if, after the expiration of a period of three years, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to *make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.*

Article III

Limitation on the Right of Reproduction:

(2) (a) If, in relation to a work to which this Article applies by virtue of paragraph (7), after the expiration of

(i) the relevant period specified in paragraph (3), commencing on the date of first publication of a particular edition of the work, or

(ii) any longer period determined by national legislation of the country referred to in paragraph (1), commencing on the same date,

copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any national of such country may obtain a license to *reproduce and publish such edition* at that or a lower price for use in connection with systematic instructional activities.

This study update additionally addresses the question as to the scope of digital copying and digital dissemination of works within the scope of the compulsory licence provisions in national legislation that implement Articles II and III of the Berne Appendix.

To review this question, which calls for a substantive analysis of the national laws of member states, reference is made exclusively to the definition provisions in the member states' copyright legislation, to resolve the scope of the reproduction right, the publication right, and the right of communication to the public (and the right of making available a work⁵⁰) as enabling digital dissemination. In this review, the definitions are examined for the feasibility that the rights in national legislation will encompass digital reproductions, digital publications and digital disseminations.

This exercise is undertaken with a fair measure of diffidence because it has not been possible, under the circumstances of this updated study, to consult with the member states' legal experts. It is also made difficult because the non-uniform treatment of digital copying and digital dissemination as in national legislation. For instance, in some member states, the right of distribution connotes the circulation of physical copies of works, but in other member states, the right of distribution includes the right of dissemination, and thereby includes the circulation and communication of works, without the necessary circulation of physical copies. The analytical considerations are further compounded by the fact that in many member states, the definition provisions are limited or make no reference to the digital medium or digital transmission.

These difficulties may be illustrated with a few examples from the legislation of member states. For instance, Article 4 of the Angola Law on Author's Rights defines the following:

⁵⁰ WIPO Copyright Treaty, Art. 8 (defining "right of communication to the public" as including "the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"). See also, the Agreed Statements concerning the WIPO Copyright Treaty, Concerning Arts. 6 and 7 (providing that the right of distribution refers exclusively to fixed copies that can be put into circulation as tangible objects). Cf. WIPO Performances and Phonograms Treaty, Arts. 10, 14.

- (a) "published work" means a work published with the consent of its author, whatever the mode of manufacture of the copies, where, taking into account the nature of the work, the number of copies made available to the public adequately satisfies the needs of the public;
- (h) "communication to the public" means the act by which a work is made available to the public;
- (i) "reproduction" means the making of one or more copies of a literary, artistic or scientific work in any material form whatsoever including any sound or visual recording;⁵¹

So by these definitions, a published work can take digital form, since a reproduction can be "in any material form" and a published work is a work published "whatever the mode of manufacture of the copies". A digital work may be arguably communicated to the public by making it available to the public, although no reference is made to digital works or the electronic mode of such communication. However, no reference is made to the right to communicate a digital work in Article 30 of the Angola Law on Author's Rights, which reads:

Article 30.(1) For the purposes of teaching or scientific research exclusively, it shall also be lawful, without the consent of the author, to obtain a non-exclusive license to *translate and publish* in Portuguese or in one of the national languages of Angola a work already lawfully disclosed and which its author has not withdrawn from circulation or *to reproduce such work* in those cases where the following conditions are met:... [emphasis added]

Hence, the conclusion is reached that the compulsory licence provisions for translation for educational purposes does not encompass digital disseminations.

By way of comparison, the same conclusion is reached in relation to the Bangladesh Copyright Act, but for different reasons. Section 2 of the Act defines the following:

- (1) "copy" means a reproduction in the form of words, picture, sounds, letters, written form or in the form of sound recordings, cinematograph film, graphic picture or in the *material or nonmaterial form, digital code (fixed or moving)* or whether in two or three or surrealistic dimensions;
- (15) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public through wire and wireless means directly or by any means of display or diffusion other than by issuing copies of such work regardless by any member of the public actually sees, hears or otherwise enjoys the work made available in this manner;
- Explanation: For the purposes of this clause, communication through satellite or cables or any other means of simultaneous communication to more than one household or any place of residence including office, club, and community centre etc, residential room of any house or hostel shall be deemed to be communication to the public.
- (43) "broadcast" means communication to the public by means of wireless diffusion, whether in any one or more of the forms of signals, signs, sounds, computer with internet connections satellites or visual images including telecast or broadcast by wire or wireless devices or by both; and it also includes a re-broadcast/re-telecast;⁵²

Section 3 in turn defines "publication" as follows:

3. Meaning of publication. For the purposes of this Act, "publication" means making a work available to the public *by issuing of copies or by communicating the work to the public*:

Provided that if there is nothing contrary to this Act, the following works *shall not* come within the meaning of publication, namely:

- (a) dramatic, dramatic-musical, cinematograph film or musical works;
- (b) recitation of a literary work in public;
- (c) communication through wire, wireless and any other medium, broadcasting of a literary or an artistic work;
- (d) exhibition of artistic works;

⁵¹ Angola Law No. 4/90 of March 10, 1990, on Author's Rights, Art. 4.

⁵² Bangladesh Copyright Act, 2000 (Act No. 28 of 2000, as amended up to 2005), s 2.

(e) construction of a work of architecture.⁵³

So by these definitions, a publication encompasses the issuance of copies or communication of the work to the public, but does not encompass communication "through wire, wireless and any other medium, broadcasting" of a literary or artistic work and broadcast of the same work. Hence even though section 52 of the Bangladesh Copyright Act refers to a licence to produce and "publish" a translation or reproduction of a work, the publication does not connote a digital dissemination of the work, and there is nothing in the context of section 52 which suggests that this interpretation should be varied.

In contrast, the opposite conclusion is reached in relation to the Colombia Law on Copyright. The operative provisions, Articles 45, 46 and 58, refer the grant of a licence for reproduction/translation and publication of the work "in printed or analogous forms of reproduction". Article 8 defines the following terms:

(p) "publication" means communication to the public by any method or system;

(q) "publisher" means the person, natural or legal, who is economically and legally responsible for the publication of a work and who, on his own account or under a contract concluded with the author or authors of the said work, undertakes to reproduce it by printing or any other means of reproduction and to distribute it;

The definition of "publication" encompasses a communication to the public "by any method or system". That, coupled with the reference in Articles 45, 46 and 58 to reproduction/translation and publication "in printed or analogous forms of reproduction", suggests that "publication" encompasses digital dissemination. However, the definition of "publisher" arguably seems to connote a physical distribution of a reproduced work ("printing or other means of reproduction"), which seems separate from the right of "communication to the public". The definitions notwithstanding, this appears to be how Article 76 enumerates the exclusive economic rights of copyright of the authors of works:

Article 76. The authors of scientific, literary or artistic works and their successors in title shall have the exclusive right to authorize or prohibit:

(a) *publication*, or any other form of reproduction;

(b) translation, arrangement or any other form of adaptation;

(c) incorporation on cinematograph film, videogram, videotape, phonogram or any other medium of fixation;

(d) *communication to the public by any process or means*, including:

(i) performance, recitation or declamation;

(ii) sound or audiovisual broadcasting;

(iii) *dissemination* by loudspeakers or wire or wireless telephony, or by means of phonographs, sound or recording equipment and comparable apparatus;

(iv) *public use by any other known or future medium of communication or reproduction*.

Having considered all these provisions, for purposes of this study, the licensing provisions herein were classified as *probably* encompassing digital dissemination.

Yet another example can be found in the Syrian Law on the Protection of Copyright and Related Rights (2013). Article 1 defines the following terms:

In applying the provisions of this Law, the following expressions and words shall have the meanings stated next to each one of them:

⁵³ Bangladesh Copyright Act, 2000 (Act No. 28 of 2000, as amended up to 2005), s 3.

Electronic means: The electronic, electrical, magnetic, electromagnetic, optical or digital means, or any similar means used for the generation, gathering, preservation, or storage of data or information, or else for the access, processing, transmission, or exchange of such data or information.

Publication: Making the work or copies thereof or copies of the sound or visual recording available to the public with the consent of the author or the producer of the recording, in a reasonable quantity that satisfies the needs of the public, through sale or rental, or by any other means which transfers the ownership or the possession of the copy of the work or the recording, or the right to their use, or else making copies of the work or the recording available to the public by any electronic means. The presentation of a drama work, a musical drama work, a cinematographic work, the playing of a musical work, the public recitation of a literary work, the transmission or broadcasting of artistic or literary works, the exhibition of a work of art, the construction of a work of architecture, or the presentation of a recording through any device or means or its broadcasting shall not be considered a publication.

Reproduction: Reproduction of a copy or copies of a literary, artistic or scientific work in any form whatsoever, including sound or visual recordings, or recordings transmitted by electronic or optical means, or by any other means.

A close examination of these provisions leads to the conclusion that in Syria, electronic "reproduction", "publication" and "dissemination" are all allowed. "Reproduction" is broadly defined to encompass the copying of a work "in any form whatsoever". "Publication" is in turn defined to refer to the making available to the public of copies, or reproductions as previously defined (but does not encompass transmission or broadcasting of artistic or literary works). More importantly, both the "reproduction" and the "publication" definitions envisage the reproduction and publication of electronic copies to include the transmission of such copies "by [any] electronic ... means", which connotes the acceptance of "digital dissemination" of the works, and illustrate the inextricably-linked nature of these rights.

Thus, within the limits of this rather limited and artificial review, and bereft of the advantage of considered opinion from national experts, this study attempts to resolve these questions, and summarizes them in the following table:

- reproduction, publication or dissemination in the digital medium is enabled
- no reproduction, publication or dissemination in the digital medium is permissible
- with some diffidence, reproduction, publication or dissemination in the digital medium is probably possible

On these bases the analysis proceeds as follows.

Licensing Type	No. of Provisions Enabling Digital Reproduction (No. of member states)			No. of Provisions Enabling Digital Publication (No. of member states)			No. of Provisions Enabling Digital Dissemination (No. of member states)			Total No. of Provisions (No. of member states)
	Yes	Probable	No	Yes	Probable	No	Yes	Probable	No	All
Licences for reproduction	31 (29)	6 (6)	3 (3)	26 (24)	11 (11)	3 (3)	6 (6)	6 (6)	28 (26)	40 (36)
Licences for translation	35 (31)	10 (9)	5 (5)	32 (28)	12 (12)	6 (6)	5 (4)	7 (7)	38 (32)	50 (42)
Total	66 (36)	16 (11)	8 (7)	58 (31)	23 (14)	9 (8)	11 (6)	13 (8)	66 (34)	90 (44)

Table 2: Scope of Compulsory Licence Provisions for Digital Reproduction, Digital Publication and Digital Dissemination under the Framework of the Berne Appendix by No. of Provisions (No. of Member States).

The study found that by and large, the licensing provisions based on the Berne Appendix seem to be ready for digital reproduction and digital publication. For instance, 31 provisions (29 member states) and 26 provisions (24 member states) pertaining to licences for reproduction clearly enable digital reproduction and digital publication respectively. Similarly, 35 provisions (31 member states) and 32 provisions (28 member states) pertaining to licences for translation clearly enable digital reproduction and digital publication respectively. The provisions which probably enable digital reproduction or digital publication (16 provisions in 11 member states, and 23 provisions in 14 member states respectively) are in the minority, and there are even fewer provisions which do not enable digital reproduction or publication (8 provisions in 7 member states, and 9 provisions in 8 member states respectively).

However, the scenario changes with respect to digital dissemination, where member states' licensing provisions appear not to have fully embraced the digital medium. Only 6 provisions (6 member states) and 5 provisions (4 member states) enable digital dissemination for licences for reproductions and for translations respectively. The majority of provisions (28 provisions in 26 member states and 38 provisions in 32 member states respectively) do not provide for digital dissemination in their reproduction and translation licences respectively.

6. TPM/RMI Flexibilities, Limitations or Exceptions for Educational Purposes

Since the 2016 study, the WCT and WPPT have gained new members. This updated study reviews the national legislation of these new members and takes into account the results from this review.

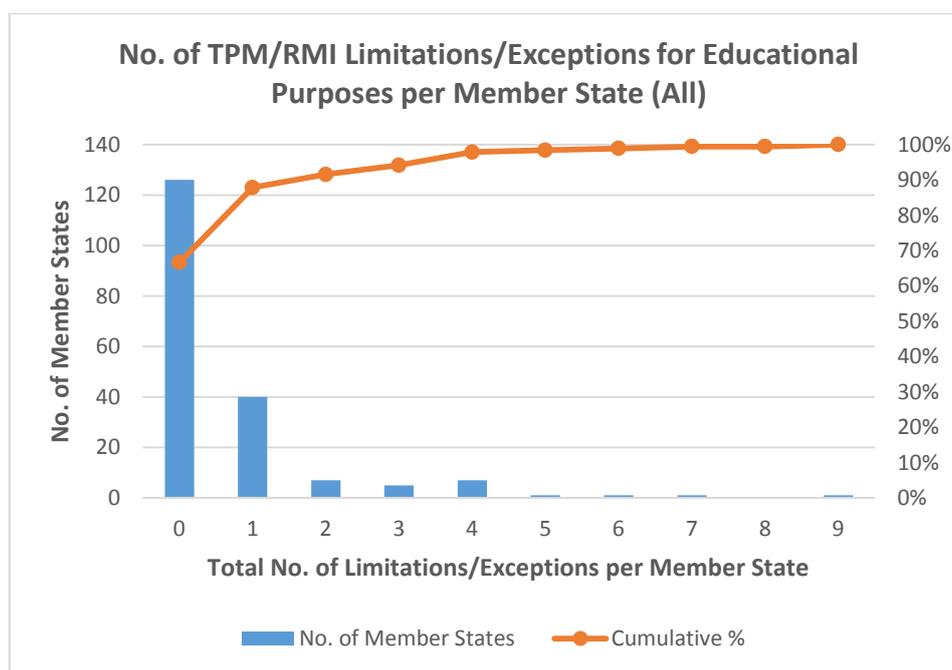


Figure 1: Distribution of Number of TPM/RMI Limitations/Exceptions for Educational Purposes per Member State

63 member states (33.3%) have enacted 124 provisions that provide for limitations or exceptions to TPM and RMI protection for educational purposes. 48 of these member states have ratified or acceded to the WCT and WPPT. (See Figure 1.) It is therefore interesting to find the following 15 member states that are not WCT and WPPT members, but nonetheless have these limitations or exceptions in their national legislation: Cook Islands, Grenada, Holy See, Iceland, India, Liberia,

Malawi, Mauritius, New Zealand, Norway, Rwanda, Sao Tome and Principe, Seychelles, Thailand and Zimbabwe.

Of these 124 provisions, 105 provisions from 59 member states pertain to flexibilities, limitations or exceptions to TPM protection to facilitate educational activities. 46 of these 59 member states are also members of WCT and WPPT. In contrast, there are only 16 provisions⁵⁴ from 14 member states that permit the removal and alteration of RMI for educational purposes. 11 of these 14 member states are also members of WCT and WPPT. The WCT/WPPT status of these member states is noteworthy, because these member states have not only enacted flexibilities, limitations or exceptions to TPM or RMI protection, but they have also done so specifically to facilitate educational activities, notwithstanding the absence of explicit obligations to enact the same in the WCT and WPPT.

This is borne out in part by examining the number of such flexibilities, limitations or exceptions enacted by WIPO member states. As can be seen from Figure 1, the average number of such provisions per member state is 0.66,⁵⁵ suggesting a low rate of acceptance of these flexibilities, limitations and exceptions among WIPO member states. However, among member states that have enacted such provisions, the average number of provisions rises to 1.971. In other words, member states that have enacted flexibilities, limitations or exceptions to TPM or RMI protection to facilitate educational activities have seen it necessary to enact two such flexibilities, limitations or exceptions per member state.

Limiting the analysis to only provisions that clearly provide for exceptions to TPM protection, the average number of such provisions per member state is 1.76 (standard deviation is 1.36, median is 1). Interestingly, confining this analysis to those provisions enacted by WIPO member states who are also members of the WCT or WPPT results in no changes to the aforesaid statistics. This strongly suggests that member states ascribe to the utility of enacting at least 1 flexibility, limitation, or exception (that applies to educational activities) to TPM protection, and that this policy was adopted independent of the member states' membership in the WCT or WPPT.

The purposes for the flexibilities, limitations and exceptions identified in these provisions include: teaching (7 provisions), private or personal use (5 provisions), educational purchase or acquisition decisions (11 provisions), encryption research (18 provisions), security testing (17 provisions), interoperability (9 provisions), legitimate access (17 provisions) and realization for beneficiaries of the limitations and exceptions enacted for their benefit (30 provisions).

The manner in which each provision provides that TPM/RMI may be circumvented, removed, or disabled, or access granted, varies. 43 provisions oblige or require the rightholder to lift the TPMs, alter their works or make available appropriate means to enable the purposes to be achieved. Many of these provisions further require the aggrieved beneficiary to engage the rightholder to negotiate a solution to the impasse. 73 provisions entitle the beneficiary to simply circumvent, remove, disable or destroy the TPMs or RMI without penalty or damages. The rest of the provisions variously entitle the beneficiary to reproduce or conduct activities on the work and be absolved of infringement.

The most typical conditions imposed on the exercise of these provisions are that the source work in question be a lawfully acquired copy of the work (14 provisions), and that the beneficiary act in good faith or without an intent to infringe copyright (28 provisions).

⁵⁴ The rest of the provisions are drafted widely and not specifically with respect to TPM or RMI, but have the effect of enabling specific types of activities such as interoperability, encryption, security research which would not be possible if TPM or RMI were applied to the work.

⁵⁵ The standard deviation is 1.33, median is 0.

7. Further Analysis and Conclusions

This updated study and extended analysis did not arrive at any conclusions that are substantially different from the earlier study. In summary, the findings of this updated study are as follows.

First, while this study has identified two separate and distinct formulations adopted by member states for limitations and exceptions that enable "adaptations" or "translations" – the "adaptation or translation" formulation and the "source work" formulation – as explained above, both formulations are actually complementary aspects of the third formulation – the "use" formulation adopted by many member states. Thus, the total number of states that have adopted the "adaptation or translation" formulation and the "source work" formulation and the total number of such provisions (80 states, 267 provisions) are about the same as the total number of states with provisions that adopt the "use" formulation and the total number of such provisions (96 member states, 283 provisions). The "adaptation or translation" formulation and the "source work" formulation address different aspects of the issues relating to adaptations or translations, which the Stockholm Conference clearly sought to address these issues by way of the "use" formulation. Member states may thus find it useful to look more closely at these formulations to see which formulation better reflects the wide range of educational activities sought to be enabled by the exceptions and limitations in their legislation.

Second, only very few member states have provisions in their copyright legislation to restrict or limit the copyright liability of educational institutions (4 member states, 8 provisions). Of those that do, the objectives served by the provisions are to absolve educational institutions from liability for indirect copyright infringement,⁵⁶ to absolve educational institutions from criminal liability,⁵⁷ and to limit their exposure to statutory damages.⁵⁸ And of these, the objective of limiting the exposure of educational institutions to the effects of statutory damages appears to be of greatest concern to the policy makers of the respective member states, because of the relatively autochthonous recognition of indirect copyright liability and statutory damages in the copyright legislation of member states.⁵⁹

Third, 15 member states have 22 provisions in their copyright legislation that provide that contractual provisions that contradict the limitations or exceptions are unenforceable or null and void. While this represents only a minority of WIPO member states, the enactment of these provisions appears to be part of a move by legislators to protect the limitations and exceptions from the effects of overriding contractual licences. These measures are often justified as methods to encourage higher granularity and greater certainty and transparency in licensing terms, especially for digital content,⁶⁰ and this is a subject that could be explored further.

Fourth, based on an exclusively literal review of the definition provisions of the provisions of WIPO member states, within the framework of the Berne Appendix, it is found that a majority of the provisions recognize digital reproduction and digital publication of works, regardless of whether these are pursuant to licences for reproduction or for translation. However, a majority of the same provisions do not recognize digital dissemination of works. The reason is probably because the Berne Appendix only refers to a licence for "reproduction/translation" and "publication" of the work, and makes no reference to the "dissemination" of the said work, which could be "in printed or

⁵⁶ E.g. Australia Copyright Act, s 200AAA; U.S. Copyright Act, s. 110(2) proviso; U.S. Copyright Act, s. 512(e).

⁵⁷ E.g. Australia Copyright Act, s 132AC.

⁵⁸ E.g. Bahamas Copyright Act, 1988, s 41(3)(d); Canada Copyright Act, s 38.1(6), 38.2(1); U.S. Copyright Act, s 504.

⁵⁹ Subject to the recognition of indirect copyright liability and statutory damages in the free trade agreements which the U.S. government has entered into with its trading partners worldwide.

⁶⁰ HM Government, Modernising Copyright: A modern, robust and flexible framework – Government response to consultation on copyright exceptions and clarifying copyright law (2012), at 19, available at <http://copyright-debate.co.uk/wp-content/uploads/Modernising-Copyright-a-modern-robust-and-flexible-framework-Government-response.pdf>.

analogous forms of reproduction".⁶¹ That said, those member states whose compulsory licensing provisions were found to enable the digital dissemination of works made it possible by deviating from the norm⁶² and defining a "publication" as encompassing a "communication". If it is intended for the Berne Appendix to unambiguously apply to the digital dissemination of reproduced or translated works for educational purposes, perhaps this issue would need to be revisited.

Finally, as previously noted, 63 WIPO member states have enacted provisions in national legislation to provide for flexibilities, limitations and exceptions to the protection of TPM and RMI. Of these 63 member states, almost all of them (59 member states) saw the necessity to enact TPM flexibilities, limitations or exceptions to facilitate educational activities, but only a small number (14 member states) have done the same in relation to RMI. The statistics are telling because they suggest that notwithstanding the absence of guidance in the WCT and WPPT, member states have deemed it necessary to enact flexibilities, limitations and exceptions, especially as regards the protection of TPM (and to a lesser extent, RMI), with reference to the use of works for educational activities. Where national legislation has interceded to fill the perceived lacuna in the WCT and WPPT, this suggests that international consensus may be developing around the necessity for flexibilities, limitations and exceptions to the protection of TPM and RMI, especially for educational purposes. A new role has to be found for such flexibilities, limitations and exceptions, even as TPM and RMI have been increasingly deployed by publishers to make possible the use of content for educational purposes in the digital environment.

Daniel Seng

October 2017

⁶¹ See Art. II, Berne Convention.

⁶² See e.g. Art. 3(3), Berne Convention; Agreed Statements concerning the WIPO Copyright Treaty, Concerning Arts. 6 and 7.