

Teaching and Research Exceptions/*Exceptions à des fins pédagogiques et de recherche*

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**(Panel 11. La flexibilité des exceptions : test en 3 étapes, fair use, exceptions à des fins pédagogiques et de recherche, exception d'actualité, evolution/
*The flexibility of Exceptions: 3 step test, fair use, teaching and research exception, news report, evolution, chaired by Prof. Séverine DUSOLLIER)***

SUMMARY OF PRESENTATION¹

1. Introduction

The presentation on teaching and research exception demonstrated that there is a need to rethink the whole issue of limitations and exceptions. I started off by exploring the flexibility or lack of it, of the two exceptions in international instruments. Since there was substantial focus during the Seminar on the EU copyright system, the presentation deliberately avoided reference to the EU, and (to be fair) any regional copyright instruments. Next, I demonstrated the flexibility of the two exceptions in practice. Taking the case of developing countries in general and African Countries in particular, I defined the teaching and research exceptions in light of the educational and research needs of these countries and their social economic circumstances. In the third part of the presentation, I describe the current negotiations for an international instrument on limitations and exceptions for educational and research institutions. The presentation ended with, rather provocative, concluding thoughts.

2. The flexibility of Teaching and Research Exception in International Instruments

Drawing on the theme of the seminar and the title of the panel, the presentation started by mapping out the teaching and research exception in international instruments, with a view to demonstrating the extent to which these exceptions were flexible. I demonstrated that unremunerated teaching exception is only provided for under article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works. It is not flexible, as it only allows uses of a work by way of illustration in teaching, with several conditions attached, i.e the work must be utilized to the extent justified by the purpose, and must be compatible with fair practice.

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¹ The presentation is attached at PDF.

An unremunerated research exception is not expressly provided for in international copyright instruments. However, it is alluded to in the preamble of the WIPO Copyright Treaty, where State parties recognize the need to maintain a balance between the rights of authors and the larger public interest, **particularly education, research** and access to information, as reflected in the Berne Convention. The preamble refers to “education,” which is broader than teaching. Reference to the Berne Convention is ironical since the Convention does not contain flexible unremunerated research or teaching exceptions.

The lack of a specific research exception strongly suggests that one has to refer to the general three-step test provided for in articles 9(2) of the Berne Convention, 13 of the TRIPS Agreement and 10 of the WCT. The test, which allows contracting parties to provide or limit limitations and exceptions to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author/rightsholder is not flexible, both on normative and on policy level.

The Berne Convention, however contains a remunerated research and teaching exceptions. The Appendix to the Convention allows compulsory licensing for translation for purpose of **teaching**, scholarship, **research** (article II(5)). The appendix also allows compulsory licensing for reproduction and publication for **use in systematic instructional activities**. These activities have to be remunerated. As has been widely commented, the complex procedural and substantive requirements for use of the Appendix render it inflexible and the whole system too expensive to use.

It is important to understand the political background to the Berne Appendix in order to appreciate why, the legal instrument designed to help countries with financial constraints access copyrighted works for educational and research purposes, does not facilitate such access. In the history of the Berne Convention, there were earlier attempts to provide exceptions for educational or scholastic purposes (and not teaching or research). This led to the negotiation of the Stockholm Protocol, providing for exceptions for works used for exclusively educational or scholastic purposes and a compulsory licensing system for translation and reproduction for general educational uses.

However, the Protocol was rejected by developed countries so it never came into force. This was to be expected since in the first place, the negotiation of the Protocol was triggered by political interests – to prevent developing countries, especially India and African countries from abandoning the Berne Convention and join the Universal Copyright Treaty which provided less protection for copyright. The moment there was no fear of developing countries abandoning the Berne Union developed countries did not feel compelled to agree to an instrument that allows exceptions for education and research. Instead, the Berne Members negotiated the Berne Appendix as a compromise solution.

3. Beyond legislation: Teaching and research exception in practice in developing countries

In practice, developing countries have not used the research and teaching exceptions. The scope of use is so limited that they do not respond to the economic and social realities of developing countries. As a result, developing countries are “doing it their way”. Access to educational and research materials is achieved largely through “pervasive informality,”

often entailing illegal copying. But enforcement of copyright is picking up in developing countries. This calls for a search for a permanent solution for access to research and educational.

4. Some reflections on an international instrument on L&Es for educational and research institutions

Developing countries at WIPO, spearheaded by the African Group have proposed an international instrument for limitations and exceptions for libraries and archives, educational and research institutions and people with other disabilities. The focus is not on teaching, but education, which is a broader coverage. The proponents are asking for international harmonization of L&Es, to provide for minimum mandatory L&Es for the various purposes and beneficiaries described in the instrument, as a way of achieving a balanced copyright system – balancing protection with access. They are inspired by various national legislations and best practices.

In the presentation, I pointed out that there is need for a deeper rethinking of the international copyright system. But I also cautioned against the risk of trying to negotiate an “unbalanced” instrument. There are lessons to be learnt from the failed efforts with SOPA and PIPA and the current struggles against ACTA. There are also history lessons to take from the failed Stockholm Protocol and the Berne Appendix. These failed efforts all point to the need for a balanced instrument, achieved by negotiations between those interested in strong copyright protection and those interested in strong access. Either extreme is doomed to backfire.

5. Some concluding thoughts

The Teaching and/research exceptions are not flexible. But these two exceptions only reflect the fundamental problem in the international copyright system which provides very strict and limited limitations and exceptions to copyright while increasingly providing more rights for copyright owners.

This has called for a rethinking of the international copyright system as manifested in, *inter alia*, the current demands and negotiations at WIPO for various international instruments on limitations and exceptions, including an international instrument for limitations and exceptions for libraries and archives, education and research institutions and people with other disabilities. But the real solution is neither one of strong enforcement of copyright or strong/massive access, but of comprehensive copyright reform.