

Copyright Exceptions and Limitations for Education

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The Debate on Education and Copyright

- Post Colonial Countries and the Context of Education in the 60's
- The Stockholm Protocol of 1960 and debate on exceptions for education
- The disagreement over “educational purposes”
- India's Position
 - “ the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would *freely allow* their books to be reprinted and translated by underdeveloped countries.”
- Rejected by the developed countries, and the sharpest differences arose over the question of exceptions for education

Status of Education in India

- Ranked 128th in the UNDP Education Index and Literacy rate at 64.8 %
- Growth rate of Educational Institutions
 - Primary Schools 3.87%
 - Secondary Schools 9.06%
 - Plus 2 5.29%
 - Colleges 6.33%

“We should seek not just functional literacy, but good quality education – education that is affordable, accessible, equitable – and available to every boy and girl who seeks to study”.

Manmohan Singh, 2007

Affordable

Accessible

Equitable

Available

A Good Standard by which we measure the Copyright policy of a country with respect to education

The Incentive argument is an incomplete index, if not balanced by Access as a standard of measurement

MHRD Report on Copyright Piracy in India

- *Book piracy, in India, primarily depends on two factors, namely, the price of the book and its popularity. These two factors positively contribute to piracy. Piracy is generally confined to foreign and good indigenous books. Because these books are demanded in large quantities and are also priced high. The types of books pirated mostly are medical, engineering and other professional books, encyclopaedia and popular fictions.*
- *Besides the above, piracy in the form of mass photocopying of books is largely prevalent in India, especially in and around educational institutions. Students borrow books from libraries and then get these photocopied from the photocopier kept at the institution where from the books are borrowed*

Country	The God of Small Things - Arundhati Roy (US\$)	Long Walk to Freedom - Nelson Mandela (US\$)	Oxford English Dictionary (US\$)
South Africa	16.23	24.30	47.00
India	6.60	15.40	14.10
USA	10.50	12.10	21.50

Country	God of Small Things	Long Walk to Freedom	Oxford English Dictionary
South Africa	0.0046%	0.0069%	0.0134%
India	0.0117%	0.0273%	0.025%
USA	0.0002%	0.0003%	0.0005%

Book	Projected cost in USA at South Africa proportions (US\$)	Projected cost in USA at India proportions (US\$)
The God of Small Things	173.00	440.50
Long Walk to Freedom	259.77	1027.80
Oxford English Dictionary	504.50	941.20

Showed that the difference between India and South Africa was the infrastructure of photocopying stores in India

ICT and Education Policy

- *Establishment of National Mission on Education Through Information and Communication Technology*
 - *To Address Education gap through distance education*
 - *“The Mission would create high quality e-content for the target groups.*
 - *The peer group assisted content development would utilise the Wikipedia type of collaborative platform under the supervision of a content advisory committee responsible for vetting the content.”*
 - *Making available of e-knowledge contents, free of cost to Indians*

Distance education eliminates physical space limitations, and entails the delivery of instruction via one or more analogue or digital communications technologies to traditional and non-traditional students or learners who are separated from the instructor by distance and/or time.

Instruction may be live or asynchronous, it may be through video or text, or multimedia based, or a combination. It may be interactive, and may be taken for credit as part of a degree or certificate of competency program, for a continuing education unit, to improve employability, or just for a student's personal enrichment

Challenges

- Availability of text books at affordable prices, especially for technical education
- Ability to make copies of books, articles as a part of education
- Provision of photocopies for students as a part of their course work
- Digitization of materials or provision of digital copies of articles as a part of course material or distance learning programs
- The use of digital and visual material including films and sound recordings
- All of these pose challenges to a copyright system

Copyright Implications

Upload of Material

A digital copy (reproduction) of the work is uploaded to the on-line university server (usually by the teacher), so that it can be accessed by students (making available to the public);

How many copies

Transmission (Communication)

A digital transmission, of multiple copies and display of the work on the recipient's computer, which involves both screen display and/or performance (through the speakers), as well as RAM copying;

Download

A permanent copy (reproduction) of the work on the student's hard disk, or portable disk, or in print.

Adaptation

Particularly relevant for cases of collaborative learning and syllabus generation

Copyright Law and Education

- The Statute of Anne: An Act for the Advancement of Learning
- Education as a Public Good and a pre requisite for creation of public goods
- The Balance and the Tilt in the balance
- Public Interest Concerns have always been at the normative core of Copyright Policy

- The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. (Art. 7 of TRIPS)
- "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement." (Art. 8)

From Right to Property to Access to Knowledge

- The Centrality of Framing in IP Policy
- The Emergence of the Access to Knowledge Agenda
- The WIPO Development Agenda and the Millennium Development Goals
- The Millennium Declaration and its implementing processes can and must inform the implementation of the WIPO Development Agenda.
- If education is essential to development, than the international IP regime must be guided by concerns respecting education. The implementation of the Development Agenda by WIPO provides an important opportunity for Member States to collectively discuss exceptions and limitations.

Exceptions and Limitations for Education

Developing countries should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws. The implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of the continuing high level of need for improving the availability of these products, and their crucial importance for social and economic development.

Commission on Intellectual Property Rights

In contrast the WTO panel decision in the IMRO case argues for limitations and exceptions that are narrow in its scope and reach

Vital Questions

- What is the scope of Sec. 52(1)(g), (h), (i) and (p), and how effective are they in addressing the education needs of India, especially as laid out in the National Mission on education and ICT, and the National Policy on Education?
- Are these provisions in consonance with our existing treaty obligations, and are they in line with Arts. 9 and 10(2) of the Berne Convention and Art. 13 of the TRIPS agreement?
- What is the scope of exceptions and limitations for education provided for in Art. 10(2) of the Berne Convention?
- What is the relationship between Art. 10(2) and the three step test laid down in Art. 9 and Art 13 of the TRIPS agreement?
- What new exceptions and limitations are needed to facilitate greater access, and to ensure that distance education programs and interventions using technology are provided for within Sec. 52
- Do new exceptions and limitations have to satisfy only the criteria established in Art. 10(2) or also the three step test

International Framework

Art. 10 (2) of the Berne Convention

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 that such utilization is compatible with fair practice."

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“Utilization”

- Utilization v. Reproduction
 - Art. 9 of Berne and Art. 13 of Trips uses the word reproduction
- For Distance Education, the right of communication is involved
- Art. 10(2) lays down the criteria by which such utilization is to be judged

“To the extent justified by the purpose”

- No quantitative restriction laid down
- The Test instead is Purpose and Fair Practice
- How do we gauge Purpose, if not through an examination of the development and educational needs of a country?
- Is there an Implied quantitative restriction because of the phrase “by way of illustration”
- Distinction should be made between the quotation exception granted in Art.10(1) and the teaching exception in Art. 10(2), otherwise the right of utilization granted in Art. 10(2) would be superfluous
- A similar distinction that exists in Sec. 52(1)(g) and Sec. 52(1)(h) of the Copyright Act
- Is the right of reproduction as radical as it sounds?

Recommendation of the CIPR

The UK government should work with British publishers (and other rights holders) and with the governments of least development countries to establish a new system under which the latter (and local non-profit institutions) are allowed free use , for an initial trial period of 20 years, of copyright-protected hard copy materials for all non-profit educational, research, public health, and other public interest related activities.

All literacy programmes and illiterate persons in whatever setting or situation—a library, a classroom, distance learning, local resource centre, individual user—should similarly be exempted from all copyright restrictions and receive free

“By Way of Illustration” “For Teaching”

- Teaching v. Education
- Discussion on Teaching in Stockholm Conference (Narrow Interpretation)

"The wish was expressed that it should be made clear in this Report that the word 'teaching' was to include teaching at all levels – in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded"

- How do we understand Teaching keeping in mind the aims of the National Mission on Education through Information and Communication Technology
- Art. 10(2) itself does not impose either a spatial or institutional understanding of teaching, and as long as the other criteria (justified, fair practice) are satisfied, there is no reason why teaching should be narrowed down to actual classroom instruction.

Relationship between Art. 10(2) and the Three Step Test

Art. 9(2) (Berne Convention)

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.

Art. 13 (TRIPS Agreement)

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

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Three Step Test

1. Special Cases
2. Conflict with Normal Exploitation
3. Unreasonably prejudice the legitimate interests

Teaching Exception in Art.10(2)

1. To the extent justified by the purpose
2. By way of illustration
3. Compatible with fair practice

It is by now fairly accepted that any new uncompensated exception that is created has to satisfy the three step test.

There is however some ambiguity about whether or not Art. 13 of the TRIPS agreement affects Art. 10(2) and exceptions created under Art. 10(2).

Some Important Questions :

1. Does the three step test affect Art. 10(2) in any manner or is Art. 10(2) independent of the three step test.
2. If there are new exceptions and limitations that are created for teaching purposes, does it have to satisfy the three step test, and
3. If there are exceptions for education that are created which are beyond the scope of Art. 10(2), would they be subject to the three step test.
4. Is the reference to “Fair Practice’ in Art. 10 (2) the same as the Three step test?

Conflicting Interpretations:

- Fair Amount of Ambiguity that exists in the area
- Mapping out the positions, and which interpretation would be most favourable for facilitating education in India
- IP maximalists following the *WTO Panel Decision in United States – Section 110(5) of the U.S. Copyright Act, claim*
 - Art. 13 applies to all exclusive rights
 - Any exception that is created is subject to the three step test
 - In other words, all exceptions created have to satisfy the internal standards (e.g. in 10(2) of Berne, as well as the three step test)
- Second possibility is looking at the overlap that exists between the conditions in Art. 10(2) and the three step test.
- Sam Ricketson argues that “Fair Practice” in Art. 10(2) corresponds to the second and third steps of the Three test (“Normal Exploitation” & “Prejudicial to interests”)

Ricketson observes that if there are any provisions that exceed the scope of the exceptions provided for in Berne, then even if they comply with Art. 13, they would be in violation of the non derogation clause (Art.2) of the Trips agreement, but states that a provision that restricts the scope of exceptions in Berne does not violate the non derogation clause.

This is on the assumption that there is consistency between the two

- However, other legal commentators read it more narrowly, as applying only on top of existing Berne exceptions, when the test is compatible with the requirements of those in the Berne Convention.
- The EFF claim that the history of the negotiation of the Stockholm Conference of the Berne Convention also supports the interpretation that the Three Step Test does not apply to those areas where discretion is given to Member States to create exceptions recognized in the Berne Convention, such as Articles 10 (1) and (2)
- They argue that that countries can create exceptions for teaching purposes under Article 10(2) of the Berne Convention that do not have to be conditioned on a decision about satisfaction of the Three Step Test.

The Three Step Test was also included in Art. 10 of the WIPO Copyright Treaty and Art. 16 of the WIPO Performances and Phonograms Treaty. During the negotiation of these treaties, there were concerns raised by developing countries that the provisions would affect their ability to introduce new exceptions for the purposes of education, including distance education.

Member states therefore adopted an Agreed Statement which shields the Berne Convention exceptions from the TRIPS agreement and the WCT.

The statement says (in relation to Art. 10 of WPPT) :

- “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor expands the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

- Thus, it could be concluded that policy makers in India who are interested in ensuring the greatest possible exceptions for educational access should go with the interpretation that exceptions for education only have to satisfy the criteria laid down in Art.10(2)
- They should assess whether Secs. 52(1)(g), (h), (i) & (p) as they stand at the moment, are adequate for ensuring the policy goals of education, especially distance education
- It is clear that some of these provisions have been drafted keeping the requirements of education in an offline world, and we would need to introduce provisions to ensure that the needs of distance education and digital access are enabled.
- If these new provisions are created under the purview of Art. 10(2) of the Berne Convention then they do not need to satisfy the three step test.

However it will be subject to the conditions of Art. 10(2) of the Berne Convention, namely it should fall within the parameters of

- utilization, to the extent justified by the purpose,
- by way of illustration
- for teaching, and
- such utilization is compatible with fair practice."

Adequacy of Existing Provisions

- 4 Kinds of restrictions on Copyright Exceptions
 - Actor
 - Purpose
 - Context
 - Action
- Keeping the goals of distance education in mind, the Aim should be to have provisions which minimize the restrictions posed by the 4 constraints
- And yet not fall foul of Art. 10(2)

Sec. 52(1)(g)

“Publication of two passages.... In a collection mainly comprised of non copyright works”

“not themselves published for the use of educational Institutions”

One of the aims of the National Mission is

"development of knowledge modules having the right content to . . . address to the personalized needs of the learners".

Fulfillment of that aim would require customized course packs and collections of copyrighted materials, possibly created from preexisting works including text books

Is Sec. 52(1)(g) adequate for this purpose?

Sec. 52(1)(h)

“Reproduction in the course of instruction”

- The need to include communication
- To extend to all works
- What happens to the idea of a teacher or educator in distance education or in collaborative forms of education
- “in the course of instruction” and the asynchronous nature of distance education

Sec. 52(1)(j)

“Performance in the course of the activities....”

- Territorial understanding and what happens to distance education with requirements of multi media
- “Directly connected with the activities of the institution”- narrow understanding of the role of institutions- adult education, open education, film festivals etc

Comparison with other Jurisdictions

- Details in Paper (US, Australia, China, Colombia, Ghana, South Africa)
- Case Law
 - Williams & Wilkins Co. v. United States (Although full articles were copied, the nonprofit nature of medical research outweighed any potential harm)
 - “There is, in short, no inflexible rule excluding an entire copyrighted work from the area of fair use.”
 - The court found that the nonprofit nature of the library and the absence of any intent to reduplicate for sale or general distribution weighed in the libraries’ favor.
 - Additionally, the court was not swayed by the plaintiffs’ argument that it suffered harm from the loss of licensing fees: It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. . . . In determining whether the company has been sufficiently hurt to cause these practices to become “unfair,” one cannot assume at the start the merit of the plaintiff’s position, i.e., that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is “unfair.”
- The decision was strongly influenced by the court’s concern that finding infringement would harm medical

Princeton University Press v. Michigan Document Service

- The court held that the copies made by MDS were not fair use since MDS did not obtain copyright permission, and it offered lower prices and obtained a competitive advantage over other copy services that did
- Dissenting Judgment by Ryan J.
 - educational nature of the photocopies and its importance for educational institutions
 - neither the students nor the professor were attempting to exploit the material for financial gain, and hence the use was noncommercial
 - when photocopying coursepacks, a presumption of fairness should favour the professor, not the copyright holder
 - A professor has no incentive to use more than what is fair and society benefits from professors exposing students to a broader range of information

