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Copyright exceptions for the visually impaired international perspective

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1. The purpose of this note is to provide an informal overview of the copyright¹ exceptions for the visually impaired and libraries for the blind at international level.

Importance of copyright limitations

2. Copyright, like other kinds of intellectual property rights, is basically limited in time, scope as well as exercise. From earliest times in copyright history, it has been recognized that copyright does not continue indefinitely, does not apply to certain categories of material and, in certain cases, is limited in its exercise. The primary reason behind such limitations is the need to protect the public interest for citizens to be supplied with information and knowledge, thereby encouraging both learning and progress of science. This need must be carefully balanced with the need to reward creators for their works, and to stimulate them to continue producing new creative materials.

3. Being based on the particular social or economic needs that apply, limitations to the duration, scope and exercise of copyright vary from one country to another. Such diversity has been permitted at international level, notably by the standards provided by the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and

¹ The term “copyright” in this note includes related rights. Similarly, the term “works” also includes objects of related rights.

more recently by the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (also called the WIPO Internet Treaties).

Limits on duration

4. In terms of time limits, the period or duration of copyright begins from the moment when the work has been created, or, under some national laws, when it has been expressed in a tangible form, and continues until some time after the death of the author. At international level, the duration of copyright is, as a general rule, the life of the author and not less than 50 years after the author's death. There are also periods of protection for works in respect of which the duration cannot be based on the life of a single human author, but on the moment of publication.

Limits on scope

5. As regards the scope of copyrights, the principal limitation is the exclusion from copyright protection of certain categories of works. In some countries, works are excluded from protection if they are not fixed in tangible form; for example, a work of choreography would only be protected once the movements were written down in dance notation or recorded on videotape. In some countries, moreover, the texts of laws, court and administrative decisions are excluded from copyright protection.

Limits on the exercise of rights

6. A further category of limitations on the rights of authors and other owners of copyright concerns particular acts of exploitation, normally requiring the authorization of the owner of rights, which may, under circumstances specified in the law, be undertaken without authorization. There are two basic types of limitations in this category: (1) "free uses" which are acts of exploitation of works which may be carried out without authorization and without an obligation to compensate the owner of rights for the use, and (2) "non-voluntary licenses", under which the acts of exploitation may be carried out without authorization, but with the obligation to compensate the owner of rights.

7. Examples of free uses include the making of quotations from a protected work, provided that the source of the quotation, including the name of the author, is mentioned and that the extent of the quotation is compatible with fair practice; use of works by way of illustration for teaching purposes; and use of works for the purpose of news reporting. In respect of free use for reproduction, the Berne Convention contains a general rule, rather than a list of explicit limitations, called the three-step test: countries may provide for free reproduction in "certain special cases," where the acts do not conflict with normal exploitation of the work, and where these do not unreasonably prejudice the legitimate interests of the author. This test has been taken up in other international instruments, namely the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the WIPO Internet Treaties.

8. Numerous laws contain provisions allowing reproduction of a work exclusively for the personal, private and non-commercial use of individuals; the ease and quality of individual copying made possible by recent technology has led some countries to narrow the scope of such provisions, including through systems which allow certain copying but incorporate a

payment mechanism to compensate rightholders for the prejudice to their economic interests resulting from the copying.

9. In addition to specific free uses enumerated in all national laws, the law may also recognize the concept known as “fair use”, which allows use of works without the authorization of the owner of rights, taking into account factors such as the following: the nature and purpose of the use, including whether it is for commercial purposes; the nature of the work used; the proportion of the work used in relation to the work as a whole; and the likely effect of the use on the potential commercial value of the work.

10. As noted above, “non-voluntary licenses” allow use of works in certain circumstances without the authorization of the owner of rights, but require that compensation be paid in respect of the use. Such licenses are called “non-voluntary” because they are allowed in law, and do not result from the exercise of the exclusive right of the copyright owner to authorize particular acts. Non-voluntary licenses have usually been created in circumstances where a new technology for the dissemination of works to the public had emerged, and where the national legislator feared that owners of rights would prevent the development of the new technology by refusing to authorize use of works or where the difficulties in obtaining the required permissions would be unreasonable. This was true of two non-voluntary licenses recognized in the Berne Convention, which allow the mechanical reproduction of musical works and broadcasting. Similarly, many countries have established limitations permitting photocopying in educational institutions. It should be noted, however, that the justification for non-voluntary licenses is increasingly called into question, since effective alternatives now exist for making works available to the public based on authorizations given by the owners of rights, in particular in the form of collective management of rights.

Copyright exceptions for the visually impaired

11. The copyright exception for the visually impaired, like other exceptions for the benefit of those with other disability types, constitutes a prominent example of the categories cited above. Being enshrined in international instruments, in particular the United Nations Universal Declaration on Human Rights and the United Nations Standard Rules on the Equalisation of Opportunity for Disabled People, this exception aims at securing the right of blind or partially sighted people to access information and knowledge.

12. From a copyright viewpoint, any exception for the visually impaired must pass the three-step test as outlined in the Berne Convention, the TRIPS Agreement and the WIPO Internet Treaties. The first step appears to be covered, as it applies to certain special cases limited to specified groups of users and covering certain kinds of works and uses. The second step must be satisfied in the sense that such uses may not have the potential to conflict with a normal exploitation of the work. Finally, as to the third step, the question of unreasonable prejudice needs to be considered in order to determine if the exception should be subject to a requirement to pay equitable remuneration, or qualified as a free use.

13. A number of national copyright laws today include specific provisions that address this particular exception, among them:

- Australia, Part V Division 3 of the Copyright Act of 1968;
- Canada, Section 32 of the Copyright Act of 1997;

- United States of America, Section 121 (the Chafee Amendment of 1996) of the Copyright Law;
- European Union, Article 5(3)(b) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society of 2001;
- United Kingdom, the Copyright (Visually Impaired Persons) Act of 2003;
- Denmark, Section 17 of the Danish Copyright Act of 2003;
- Japan, Article 33*bis* of the Copyright Law of 2003;
- Republic of Korea, Article 30 of the Copyright Act of 1995;
- Latin American region: Brazil, Article 46 of Law 9.610 of 1998; Nicaragua, Article 34 of Copyright Law of 1999; Paraguay, Article 39 of Law 1328/98 of 1998; El Salvador, Article 44 of the Law on Promotion and Protection of Intellectual Property of 1993; Panama, Article 17 of Law 15 of 1994; and Dominican Republic, Article 44 of Law 65 of 2000.

14. Although the above-cited provisions are based on the same fundamental principle, the scope of the exception vary from one law to another. In some laws, the exception is restricted to certain types of works or rights. In some cases, it is extended to governmental organizations, authorized entities or individuals acting on behalf of the visually impaired. Some laws provide that copies in an alternative format may not be produced if such versions already exist and are commercially available, or stipulate that copyright is not infringed when the alternative format is produced on a non-commercial basis for the visually impaired. Furthermore, some laws permit that agencies charge for the sale of alternative formats, but provide that the price cannot exceed the cost of production plus a reasonable amount for overhead. Finally, although the Braille system is the format most commonly allowed free of charge, certain countries appear to extend this exception to other formats, such as audio formats, while others impose a compulsory license system; the latter system appears also to apply to other formats such as large print, electronic formats or disks.

15. As noted above, these divergences between the visually impaired exceptions in national laws stem from the differences in the particular social and economic conditions and needs as these have developed in each country.

Changes and challenges in the digital era

16. The development of new technologies has brought new challenges and opportunities for the blind and partially sighted to access creative material, as well as for those organizations considered among the most important intermediaries in the provision of access to information and knowledge to this community, the libraries for the blind. The emergence of digital information technologies and networks, particularly the Internet, has brought about significant transformations in the role of these institutions. Libraries have transcended their traditional collection building, provision and preservation of printed material activities to become providers of material in alternative formats, such as audio books or digitized material.

17. In certain cases the exercise of exceptions for the benefit of the visually impaired, including the operation of the libraries for the blind, has been affected by important shifts regarding the copyright protection of works in the global information infrastructure. Some of these are worth mentioning in particular:

Digital rights management

18. The WIPO Internet Treaties introduced the protection of technological measures of protection and rights management information through a set of obligations for the countries that adhere to these treaties. These obligations are designed to ensure that rightholders may effectively use technology to protect their rights and to license their works online. The first obligation requires countries to provide adequate legal protection and effective remedies against the circumvention of technological measures, such as conditional access systems and encryption used by rightholders to protect their rights. The second type of technological safeguards enhance the reliability and integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic information which accompanies any protected material, and which identifies the work, right owners, and the terms and conditions for its use, among other things.

19. These two types of technological accessories to the rights, and the operation of the new set of rights acknowledged by the Treaties, have added complexity to the traditional balancing of the interests of rightholders and users. In this regard, copyright must yield appropriately to the public interest, including the needs of the visually impaired and the services of the libraries for the blind, but striking the right balance with the legitimate interests of right owners is not a straightforward process when it comes to digital uses of works. One contemporary example is the use of the so-called “digital rights management” technologies, or DRMs, offering technical processes to secure content in a digital form and supporting the exchange of rights and content on digital networks.

20. The visually impaired community has raised concerns that DRMs might thwart certain legitimate uses of works. In their view, DRMs may hinder the simple access to content in electronic form or hamper the conversion process of works into alternative formats or, in general, weaken the exercise of limitations and exceptions to copyright, namely fair use, or statutory limitations to copyright such as exceptions for reasons of preservation and archiving.

21. A uniformly workable solution to these concerns does not seem easy to find since, first, DRM technologies so far are neutral in that they do not discriminate between a circumvention of a technological measure of protection in the pursuit of legitimate uses and a circumvention in outright breach of copyright law. Second, permitting circumvention of such digital controls for legitimate use may prove ineffective, since this task by and large relies on the use of expensive equipment and highly technologically-skilled labor, usually not affordable by the above communities. Besides, trafficking in tools that defeat access or copy control devices is expressly prohibited by most national copyright laws implementing the WIPO Internet Treaties. In this regard, rightholders point out that any exception to the prohibitions on circumvention carries the risk of enabling uncontrolled access to and dissemination of works.

22. In an attempt to find means to accommodate public purpose exceptions, rather than permitting circumvention by creating exceptions to the prohibitions on circumvention, certain national laws have incorporated a mechanism to ensure that the visually impaired community normally deprived of the enjoyment of the legitimate exceptions by the use of technological measures, can benefit from these exceptions.

Contractual agreements

23. Another concern voiced by the visually impaired community is that the advent of DRM systems often restricts their possibilities of negotiating licensing agreements with content providers. When purchasing products through “click-on” or “shrink wrap” licenses, as opposed to the traditional contracts or licensing agreements to obtain copyrighted materials, this community usually finds that the terms of the agreement restrict uses that are otherwise allowed under copyright exceptions.

24. A related question that remains controversial, even regarding uses in the analog environment, is whether exceptions may be overridden by contractual means, a matter that has become particularly acute in light of the impact of the application of DRM technologies, and the sometimes uneven bargaining powers of content providers and licensees. The answer seems to vary from one legislation to another, depending to a large extent on the freedom of contract permitted by the applicable domestic law.

Digital delivery

25. Compared to document delivery services of libraries in the printed environment, digital delivery services entail potentially greater consequences for copyright protection, particularly with regard to authorized reproduction and applicable exceptions. The traditional limitations and exceptions to copyright, such as private use, use for information and teaching purposes, and fair use, which have served as the grounds for the legitimate provision of paper copies in the analog environment, might not be found to be in full compliance with the three-step test when it comes to providing electronic copies to patrons or students. Digital delivery presents a serious potential of uncontrolled wide-scale reproduction and dissemination that may affect the market for, or value of, the copyrighted work, as well as otherwise harm the legitimate interests of rightholders.

Digital loans and conversion into alternative formats

26. Similar considerations apply to digital loans to remote-location users, interlibrary loans and digitization processes. The right of distribution of copies of works is usually subject to exhaustion upon first sale or other transfer of ownership of a particular copy, which means that, after the rightholder has sold or otherwise transferred ownership of a particular copy of a work, the owner of that copy may dispose over it without the rightholder’s further permission, for example, by giving it away or even by reselling it. Closely related to the right of distribution are the rights of rental, lending and importation, which are protected under certain national laws.

27. The lending right and the principle of exhaustion of the right of distribution are not directly applicable to non-physical products and their electronic dissemination, as it is generally recognized that distribution refers exclusively to tangible copies that can be put into circulation as physical objects. Moreover, the provision of electronic versions of works to remote users through library lending services involves the exercise of certain rights exclusively reserved to the creator, namely the right of reproduction and the right of making available.

28. Digitization, or the process of converting printed material into electronic format, is an important challenge affecting the visually impaired community today. Some libraries strive to

digitize material in their collections, not only for the purpose of collection building, preservation or storage, but also to facilitate resource sharing with other institutions. Usually, as a type of reproduction, digitization or any other conversion of material into alternative format requires authorization from the right owner of the work that is being converted, unless a specific exception exists. If the digitized material is uploaded in interactive networks, the right to make available must also be obtained from the right owner.

Licensing schemes

29. The legal status of the above-cited uses of works, as is the case for many other forms of use in the digital environment, is subject to national legislation. As noted, copyright exemptions for the visually impaired or libraries for the blind vary from country to country. Such new uses may take the form of free use, or may be subject of licensing schemes, whether compulsory or voluntary. As to free uses, many are of the view that if digital versions of works are often as good as or better than the original work, can be replicated an infinite number of times without loss of quality, and can be distributed electronically worldwide with no limits, unauthorized digital uses can destroy the value of copyrighted works. It is therefore considered unfair to make new digital uses free, unless strict conditions are also set so as to limit such likely adverse effects.

30. Unlike the case with free use, the key to digital licensing schemes is to ensure adequate compensation for rightsholders for the use of their material, either statutorily or voluntarily. So far, few countries have adopted compulsory licensing for digital use, that is to say, permission to use against remuneration with no requirement of right owner consent. Such a system may take the form of an extended licensing system, providing for licenses issued by a copyright organization to also cover the rights of non-represented right holders.

31. Voluntary licensing of digital uses is the most common system in place today. Licensing is thereby based on individual permission agreements and governed by the principle of freedom of contract, without statutory involvement or statutory management of licensing.

WIPO's recent work

32. WIPO has recently been engaged in the resolution of issues left open by the 1996 Diplomatic Conference that adopted the WIPO Internet Treaties. In terms of the implementation of these treaties in national laws, the most important issues to be resolved involve questions relating to technological measures, rights management information, fair use and exceptions and limitations, including such use in libraries and by disabled persons, and the right of access to information, especially for library users.

33. In the framework of the tenth session of the Standing Committee on Copyright and Related Rights (SCCR), the main WIPO expert body on copyright matters, held in November 2003, WIPO organized an Information Meeting on Digital Content for the Visually Impaired in order to provide an overview of the present situation regarding the provision of works to visually impaired people, taking into account the main interests at stake. This meeting contributed to a better understanding of the technical, economical and legal aspects of this issue, thereby promoting later substantive discussions in the SCCR with regard to the insertion of particular provisions for these beneficiaries in national copyright laws.

34. Recently, WIPO has fostered debate on a range of issues related to other aspects of limitations and exceptions of copyright and related rights, as well as technological measures of protection, particularly regarding the interests of certain beneficiaries such as libraries, educational institutions and users in general.

35. An important study commissioned by WIPO is the Study on Current Developments in the Field of DRM. With a holistic and pragmatic approach, this study covers the technologies upon which DRM is based, the legal framework in which it operates and the business processes that are being deployed in different countries. Moreover it identifies a number of outstanding legal and policy issues. National laws governing the deployment and use of DRM technologies are of recent vintage, and there is still comparatively little jurisprudence. Therefore, the study is to be considered a snapshot in time rather than a definitive statement that can be relied on in future.

36. A further step in the analysis of DRM, now being considered by WIPO, is to examine possible ways to address the interplay between limitations and exceptions and DRM-protected content, and to undertake a survey on national legislation regarding exceptions for the visually impaired with particular reference to the distribution right.

37. Another important aspect of WIPO's recent work is the provision of legal advice to developing countries, in particular as regards the preparation of draft legislation and advice on draft laws prepared by national governments. This is not a control function or obligatory review; WIPO does not impose views on countries, but provides comments on national legislation at the request of the Government of the country in question. Another WIPO function concentrates on the support to developing countries regarding the establishment and functioning of collective rights management organizations.

Final consideration

38. Copyright law is constantly evolving and new agreements are shaped as new technologies develop. Inevitably, the creative community, libraries and users will continue to be affected by this ever-changing process. The digital information environment has increased the opportunities for all these parties and has made copyright protection a major challenge. Issues such as private copying, timeshifting and spaceshifting, not to mention the mass exchange and reproduction of protected works by users, on the one hand, and the need to serve the public interest in education, research and access to information and knowledge, on the other hand, give rise to a broad challenge: how to achieve balance in the global information infrastructure between the protection of works so as to ensure that rightholders are rewarded for their creative efforts and the creation of new works is encouraged, and the assurance that certain communities and groups of the public, including the visually impaired, can benefit from reasonable exceptions – a balance which all stakeholders recognize as being indispensable for human justice and progress –.

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