

COPYRIGHT LIMITATIONS AND EXCEPTIONS – WHY WE HAVE THEM AND WHY THEY ARE IMPORTANT

At a lunch-time event that took place during WIPO’s Standing Committee on Copyright and Related Rights, 1-5 April 2019 (SCCR/38), EIFL’s Copyright and Libraries Programme Manager, Teresa Hackett, explained why we have copyright limitations and exceptions and why they are important.

The event, ‘Truths, Trends and Tropes: Unpacking the Debate around Copyright Exceptions and Limitations’ aimed to provide context and understanding to support government delegates engaging in the agenda item on limitations and exceptions at SCCR, and in the WIPO regional seminars on limitations and exceptions for libraries, archives and education taking place later in the year. It was co-sponsored by EIFL, IFLA and Education International and was well attended by government delegates, industry and NGOs.

Other panelists at the event addressed common misconceptions, such as ‘exceptions mean the end of markets’, ‘licences can solve it all’, and ‘there’s no need for global normative work on limitations and exceptions’.

Why we have copyright limitations and exceptions

We have L&Es for three key reasons.

1. Limitations and exceptions are an integral part of the international copyright system.

Limitations and exceptions (L&ES) have existed since the first international copyright treaty, the Berne Convention (1886). Berne has a mandatory exception for quotation, and exceptions for teaching, news reporting, and political speeches.

The writer Victor Hugo (1878), often known as the founding father of the Berne Convention, said, “... If one of these two rights, the right of the writer and the right of humankind had to be sacrificed, it would be that of the writer because the public interest is our sole concern and humankind, I declare, must come before us writers.”

The public interest was always meant to be part of the copyright system.

Public interest principles were carried forward in the TRIPS Agreement (1995). Article 7 of the TRIPS states that “IP rights should contribute to the mutual advantage of producers and users in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.

In 1996, WIPO Copyright Treaty (WCT) re-states the principle of balance particularly for education, research and access to information.

The Agreed Statement to Article 10 (Limitations and Exceptions) permits members to extend existing limitations and exceptions for the digital environment, and to devise new ones that are appropriate for the digital network age. They were also carried forward in the Beijing Treaty.

In 2013, the Marrakesh Treaty adopted was the first treaty to deal specifically with limitations and exceptions for blind and visually impaired people.

What does this tell us? Exceptions are part of the copyright system. They not something alien that exists outside the system.

When L&Es are adopted, they are not taking away from copyright, they are contributing to its objectives.

The mechanism that makes the copyright system work is the exceptions and limitations combined with adequate protection of the copyrighted material.

2. L&Es are essential for safeguarding fundamental user rights.

Just imagine a world without exceptions. Copyright owners would have a complete monopoly over every use of copyrighted material. Works in copyright could only be sold. Libraries, and the people who use libraries, could only view or read works in their collections. All other uses, such as making a copy of a few pages from a book, would require permission.

While this would be highly impractical for libraries and users, it would also have harmful side effects.

It would threaten the free flow of information in society.

It would harm fundamental user rights concerning freedom of expression and the right to privacy.

It would hamper competition and industry practice, such as reverse engineering of computer programs for interoperability and to develop new products.

In other words, it would undermine the purpose of copyright itself that is to encourage creativity, learning and innovation.

L&Es are essential for safeguarding fundamental user rights.

3. Why L&Es are important:

L&Es ensure that the legislator has a role in balancing interests in pursuit of public policy objectives.

Copyright law is decided by the legislature for the benefit of everyone in society.

During the legislative process, the views of different stakeholders are heard through public consultations, for example.

Legislators seek to balance the different views, while implementing policy objectives set by the government, for example, programmes on literacy or national targets for research and innovation.

L&Es are the mechanism to balance these interests.

If we didn't have exceptions, we would rely on licences for all basic uses. Licences are a very different game.

A licence is privately negotiated agreement between two or more parties. Apart from the fact that not all materials can be licensed, the important point here is the fact that exceptions can be unilaterally taken away by licence terms. In other words, efforts by policy-makers to balance the interests of stakeholders in copyright law are rendered meaningless in a licensing environment if licence terms can override exceptions in copyright law.

That's why exceptions must be protected in the digital environment.

Copyright law must continue to support how we access and use knowledge for education, research, creativity and innovation in the digital age.

Private licences cannot substitute for important societal objectives, such as access to information for private study, or preservation of endangered archives.

The legislator must not be cut out of this important role, as guardian of the public interest.

I will conclude with a quote from the distinguished Swiss delegate, Numa Droz during Berne negotiations who said "it should be remembered that limits to absolute protection are rightly set by the public interest".

That sums up why we have exceptions and limitations.

