



Establishing a flexible legal framework for limitations and exceptions to copyright at international level

Statement made by Christophe Geiger, Director General of the Centre for International Intellectual Property Studies (CEIPI), at the Twenty-Third Session of the Standing Committee on Copyright and Related Rights (SCCR) of WIPO*

The Centre for International Intellectual Property Studies (CEIPI) welcomes the work that is being undertaken at present by the WIPO Standing Committee on Copyright and Related Rights on the issue of limitations and exceptions. As an academic institution, CEIPI is particularly concerned with the need to strike a fair balance within copyright legislation at the international level. Limitations and exceptions are key elements to guarantee such a balance. Appropriate limitations and exceptions are essential for the coherence and legitimacy of the copyright system. Thus far, at the international level, sufficient attention has not been paid to this issue, which has led to some concerns being expressed by a number of colleagues in academic circles. It is therefore a significant step forward that the topic of limitations and exceptions was included on the agenda of the SCCR of WIPO and is being actively discussed. This needs to be acknowledged and supported.

Thus, these discussions followed by concrete text-based proposals put forward by some of the Member States of WIPO are surely the sign of a very positive evolution. Progress on the issue of limitations and exceptions for the benefit of visually impaired persons/persons with print disabilities has undoubtedly been significant and the discussions on the limitations and exceptions for libraries and archives are promising. The important work leading to an appropriate international framework on limitations and exceptions for these persons needs to be supported. A result on this matter would therefore be a great

* The oral form of the Statement has been preserved.

success. Notwithstanding the important steps already taken, we would like to stress the fact that this probably needs to go far beyond and that the aim should be to establish a more ambitious international instrument on limitations and exceptions¹. There are other limitations and exceptions that carry essential values that need to be guaranteed within the copyright system. It would seem strange and/or unjust that only certain categories of legitimate interests are served while others are left out. Of course, the question is delicate and an international consensus on the issue will most probably not be easy to achieve. At the very least, we have to ensure that the flexibility that at present exists within national legislation is preserved. It is essential that countries are able to introduce limitations and exceptions in accordance with the fundamental rights of their citizens and domestic needs in regard to access to knowledge – a key element for their development and for innovation². Many delegates made this point in their statements during the first day of the discussions at this session.

Access to knowledge is something that the copyright system always intended to promote and therefore it should be secured. It seems that international copyright law has so far not been very efficient in this regard: unless there are precise provisions about limitations and exceptions, it is hard for Member States to know what they can or cannot do in their national legislation. At present, the provisions of WIPO-administered treaties operating within the current context, for instance, Article 10 of WIPO Copyright Treaty and Article 16(2) of WIPO Performances and Phonograms Treaty or Article 9(2) of the Berne Convention, set out a general rule with very unclear, very imprecise criteria, called the “Three-Step Test”. It is necessary to have something much more precise than these criteria to be applied to national rules on limitations and exceptions. At least, it needs to be secured that this provision is interpreted in a balanced way and does not preclude lawmakers from taking into account important public interests. In fact, attempts of national legislators to adapt their legislation to meet the needs of their citizens are currently systematically opposed on the ground of this rule called the “Three-Step Test”. In this context, we would like to draw the attention of the Standing Committee to the fact that over 30 academics, under the auspices of the Max Planck Institute, Munich, and Queen Mary University of London, have issued a declaration calling for a balanced interpretation of the “Three-Step Test”³, in order to allow a certain

¹ See for example P.B. Hugenoltz and R. Okediji, “Conceiving an International Instrument on Limitations and Exceptions to Copyright, Final Report”, March 2008.

² See also in this sense for example the “Washington Declaration on Intellectual Property and the Public Interest”, 2011, stressing the need “to assure that international law is interpreted in ways that give countries the greatest possible flexibility in adopting limitations and exceptions that are appropriate to their cultural and economic circumstances”: <<http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration-Print.pdf>>.

³ Declaration – A Balanced Interpretation of the “Three-Step Test” in Copyright Law: <http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf>. On this text, see C. Geiger, J. Griffiths and

amount of flexibility to be assured. This document elaborated by eminent academics in the field could be useful in the present context and could serve as a basis for a statement that could be made by the Standing Committee clarifying the understanding of the so-called “Three-Step Test”. Being more ambitious, it could also serve as a basis to elaborate a soft law instrument (such as a joint recommendation, a resolution or guidelines) to secure flexible interpretation of international copyright law with respect to limitations and exceptions⁴. We do think it is extremely important to retain flexibility within the international framework because its absence can underpin the overall legitimacy of the copyright system⁵. Thank you.

The Delegation of CEIPI was composed of:

Christophe Geiger, Associate Professor, Director General and Director of the Research Department of CEIPI, University of Strasbourg;

François Curchod, Permanent Representative of CEIPI at WIPO;

Oleksandr Bulayenko, Research Assistant at CEIPI, University of Strasbourg.

R.M. Hilty, “Towards a Balanced Interpretation of the ‘Three-step test’ in Copyright Law”, EIPR 2008, 489. The Declaration has been translated into French, German, Spanish, Portuguese, Italian, Chinese and Japanese.

⁴ More detailed on this proposal, *see* C. Geiger, “Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions”, IIC 2009, 627.

⁵ *See* for example A. Kur, “Of Oceans, Islands, and Inland Water – How much Room for Exceptions and Limitations under the Three-step Test?”, Max Planck Institute for Intellectual Property Research Paper Series No. 08-04; P.B. Hugenholtz and R. Okediji, *supra*, 11 *sq*; C. Geiger, “Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law”, IIC 2008, 196; “Exploring the Flexibilities of the TRIPS Agreement Provisions on Limitations and Exceptions”, in: A. Kur and V. Mizaras (eds.), “The Structure of Intellectual Property Law: Can One Size Fit All?”, 287 (Cheltenham, UK / Northampton, MA, USA, Edward Elgar, 2011). Examining flexibilities from the perspective of EU, international and national law, *see* P.B. Hugenholtz and M. Senftleben, “Fair Use in Europe. In Search for Flexibilities”, Amsterdam, November 2011: <<http://www.ivir.nl>>.

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