

12: Limitations and Exceptions

Article 13 Limitations and Exceptions

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.

1. Introduction: terminology, definition and scope

The question of exceptions and limitations to copyright strikes directly at the issue of the appropriate balance between the rights of creators and the public interest in access to copyrighted works. If a country adopts too many exceptions and limitations (this would likely be inconsistent with TRIPS Article 13) it could adversely affect the incentives to create by reducing the economic rewards to right holders. Conversely, some limitations are necessary to effectuate copyright's broader purpose of advancing the public good. Thus, limitations to facilitate private use, teaching, research and other socially valuable purposes are generally considered to be an important aspect of copyright regulation. In continental law jurisdictions, national copyright laws provide case-specific exceptions to copyright in the above areas.¹⁵⁹ Common law jurisdictions follow the fair use or the fair dealing doctrines, on the basis of which similar exceptions have been developed through case law.¹⁶⁰

¹⁵⁹ See, for instance, Part 1, Section 6, §§ 44a *et seq.* of the German Copyright Act, providing detailed exceptions to copyright in clearly defined areas.

¹⁶⁰ See C. Correa, *Fair use in the digital era*, International Review of Industrial Property and Copyright Law (IIC), vol. 33, No. 5/2002. For an analysis of this doctrine in the U.S. legal system, see R. Okediji, *Toward an International Fair Use Doctrine*, Columbia Journal of Transnational Law, vol. 39, 2000–2001, pp. 75 *et seq.* Many cases of fair use relate to copying for non-commercial purposes such as education, research, personal use, archival and library uses, and news reporting (see below, Section 3, and the report of the IPR Commission, p. 173). On the fair dealing doctrine, see W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th ed. 2003), pp. 440–443. In addition, both international and domestic continental and common law recognize other exemptions and immunities for educational and social purposes as well as, in some countries, compulsory licences for recorded musical work and broadcasts. Still other limitations arise from the states' general exercise of its police powers and from abuses of the statutory monopoly, whether or not rising to the level of antitrust violations. In some countries, even the protection of moral rights assumes a public-interest character by enabling State authorities

2. History of the provision

187

The fair use and fair dealing doctrines as well as codified case-specific exceptions under continental law permit certain unauthorized but socially beneficial uses, either because transaction costs might otherwise stand in the way of negotiated licences, or because the resulting public benefit is thought to outweigh the loss of private gain.

2. History of the provision

2.1 Situation pre-TRIPS

Before the entry into force of TRIPS, exceptions to and limitations of copyrights were contained in the Berne Convention.

There is explicit mention under the Berne Convention that countries may provide exceptions for the following activities:

- Reproduction by the press or broadcasters of lectures, addresses and other works of the same nature. (Article 2*bis*(2));
- Reproduction of works in certain special cases, provided that the reproduction does not unreasonably prejudice the legitimate interests of the author. (Article 9(2));¹⁶¹
- Quotations from a work that has already been lawfully made available to the public, so long as the quoting is compatible with fair practice and its extent does not exceed the justified purpose of the quotation. (Article 10(1));
- Use of literary or artistic works for teaching provided that the use is compatible with fair practice. (Article 10(2));
- Reproduction by the press, the broadcasting or communication to the public of articles published in newspapers or periodicals on current economic, political or religious topics. The source of the work must always be clearly indicated. (Article 10*bis*(1));
- Reproduction of works for the purpose of reporting current events to the extent justified by the informatory purpose. (Article 10*bis* (2)).

Article 9(2), Berne Convention, represents a general exception (which language resembles Article 13, TRIPS Agreement), while the other above provisions refer to specific exceptions for certain uses of a copyrighted work. All these exceptions are incorporated into TRIPS by way of reference under Article 9.1. The pivotal issue is whether Article 13 enlarges upon these exceptions, codifies the *status quo* or limits the exceptions.

In this context, the history of the general exception embodied in Berne Convention Article 9(2) is useful since the language of TRIPS Article 13 is derived from this provision.

to preserve the integrity of cultural goods beyond the lifetimes of their creator or, in the case of folklore, in the absence of a specifically identifiable author (see UNCTAD 1996, para. 178).

¹⁶¹ This provision reads as follows: "(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [i.e. literary and artistic] 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."

Article 9(2) was introduced into the Berne Convention during the 1967 revision, and then adopted in the 1971 Paris Text. Many states had different exceptions to the reproduction right; consequently, an agreement on the acceptable scope of limitations was difficult to negotiate. The problem facing the negotiators was how best to accommodate all the existing exceptions in Member States and at the same time impose constraints on the creation of additional exceptions. Evidence from a report of the Swedish government and the Bureau for the Protection of Intellectual Property (BIRPI)¹⁶² regarding an initial proposal for the scope of Berne Convention Article 9(2) indicates that a major consideration for exceptions in national laws was that such exceptions not enter into economic competition with the right holder. Berne Convention Article 9(2) requires a three-step analysis to evaluate the Berne consistency of any exception to copyright contained in national laws.

First, is the exception limited to “certain special cases”? Second, does the exception conflict with the “normal exploitation” of the copyrighted work? And third, does the exception “unreasonably prejudice the legitimate interests” of the right holder? These three important clauses are reproduced in Article 13, reinforcing the argument that the interpretation of Berne Convention Article 9(2) must have an effect on the interpretive scope of Article 13.

2.2 Negotiating history

2.2.1 The Anell Draft

“8. Limitations, Exemptions and Compulsory Licensing

8A.1 In respect of the rights provided for at point 3, the limitations and exemptions, including compulsory licensing, recognised under the Berne Convention (1971) shall also apply *mutatis mutandis*. [Limitations made to the rights in favour of private use shall not apply to computer software.] [PARTIES may also provide for other limited exceptions to rights in respect of computer programs, consistent with the special nature of these works.]

8A.2 PARTIES shall confine any limitations or exemptions to exclusive rights (including any limitations or exceptions that restrict such rights to “public” activity) to clearly and carefully defined special cases which do not impair an actual or potential market for or the value of a protected work.

8A.3 Translation and reproduction licensing systems permitted in the Appendix to the Berne Convention (1971):

8A.3.1 shall not be established where legitimate local needs are being met by voluntary actions of copyright owners or could be met by such action but for intervening factors outside the copyright owner’s control; and

8A.3.2 shall provide an effective opportunity for the copyright owner to be heard prior to the grant of any such licences.

8A.4 Any compulsory licence (or any restriction of exclusive rights to a right of remuneration) shall provide mechanisms to ensure prompt payment and

¹⁶² BIRPI was the predecessor organization to WIPO.

3. Possible interpretations

189

remittance of royalties at a level consistent with what would be negotiated on a voluntary basis.

8B (See Sections 8 and 9 below.)”

2.2.2 The Brussels Draft

“1. [essentially identical to Article 13 TRIPS]

[2. Translation and reproduction licences permitted under the Appendix to the Berne Convention (1971) shall not be granted where the legitimate local needs of a PARTY could be met by voluntary actions of right holders but for obstacles resulting from measures taken by the government of that PARTY.]”

The bracketed second paragraph is very similar to proposal 8A.3.1 under the Anell Draft, as quoted above. This provision would have limited developing countries’ possibilities to have recourse to the compulsory licensing systems provided for in the Appendix to the Berne Convention, in particular with respect to the reproduction of copyrighted works and their translation into local languages. This limitation was, however, not taken over into the final version of Article 13. As made obvious in Article 9.1, Members agreed to make the Appendix available without any limitations (except of course for the requirements made in the Appendix itself).

3. Possible interpretations

The terminology employed in Article 13 is substantially similar to Berne Convention Article 9(2) which prescribes the scope of limitations to the right of reproduction. Given the incorporation of Articles 1–21 of the Berne Convention in TRIPS, any interpretation of Article 13 requires consistency with Berne Convention provisions that regulate limitations and exceptions to copyright.

Article 9 of the Berne Convention: [*Right of Reproduction*: 1. Generally; 2. Possible exceptions; Sound and visual recordings]

“(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) 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.

(3) [...]”

In the following, the three separate conditions of legality of copyright exceptions as provided under Article 13 will be examined.

3.1 Certain special cases

Members shall confine limitations or exceptions to exclusive rights to certain special cases. . .

According to Professor Ricketson, in particular regard to the first step of the test, the phrase “certain special cases” should be interpreted as requiring an exception for a specific purpose.¹⁶³ Broad exceptions covering a wide range of subject matter or uses would not be consistent with the provision. In addition, the exception should be justified by a clear public policy or other exceptional circumstances.¹⁶⁴ With regard to this latter element proposed by Professor Ricketson, a WTO panel has rejected this interpretation.¹⁶⁵ The WTO panel held that with respect to the first step, TRIPS Article 13 prohibits broad exceptions of general application, rejecting an interpretation based on the subjective goals of the national legislation.

A panel decision has effect only between the parties to the dispute and does not constitute a binding precedent in the relations between other WTO Members.¹⁶⁶ Because the Appellate Body might disagree with the legal analysis of a panel, a non-appealed panel report should be treated with some caution. It is nevertheless important to note that the above panel treated a dispute between two developed Members, the U.S. and the EC. Even though it refused to take any public policy considerations into account, it would not have neglected the Appendix to the Berne Convention in case the dispute had involved a developing country Member. This Appendix has become an integral part of TRIPS, by way of reference in Article 9.1. The Appendix *inter alia* permits developing countries to issue compulsory licenses for the reproduction of copyrighted material. The conditions are that the respective Member has notified the other Members of its intention to avail itself of the facilities provided under the Appendix.¹⁶⁷ In addition, compulsory licenses are only authorized if the respective work has not been distributed after a certain period of time to the general public of the affected country “at a price reasonably related to that normally charged in the country for comparable works”.¹⁶⁸ The required time period normally amounts to five years, but only three years in respect of natural and physical sciences, mathematics and technology.¹⁶⁹

¹⁶³ See Ricketson. Note that this interpretation referred to Article 9(2), Berne Convention. Since both Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement rely on the same three conditions, the following analysis will be subsumed under the pertinent parts of Article 13 of the TRIPS Agreement.

¹⁶⁴ *Id.* at para. 9.6.

¹⁶⁵ See WTO panel report, Section 110(5) of the U.S. Copyright Act, June 15, 2000, NT/DS160/R, para. 6. 111–112.

¹⁶⁶ Another panel would thus be free to adopt a different interpretation of Article 13 of the TRIPS Agreement.

¹⁶⁷ See Article I (1) of the Appendix to the Berne Convention.

¹⁶⁸ See Article III (2) (a) (i) of the Appendix.

¹⁶⁹ See Article III (3) (i) of the Appendix.

3. Possible interpretations

191

Under such circumstances, “any national” of the affected country “may obtain a license to reproduce and publish such edition [i.e. meeting the above criteria] at that or a lower price for use in connection with systematic instructional activities.”¹⁷⁰

This possibility must not be denied to developing countries via an overly strict interpretation of Article 13. This would be contrary to Members’ obligation under Article 9.2 to give full effect to the Berne Appendix. Also, a domestic legislation that conditioned the unauthorized printing of schoolbooks and other teaching material on the respect of the criteria referred to under the Berne Appendix would actually be confined to “certain special cases” within the meaning of Article 13.

In addition, it should be noted that despite the rather narrow scope of Article 13, developed countries also provide for the unauthorized use of copyrighted material. In that respect, several approaches exist. Countries may list exceptions and limitations, or they may choose to utilize a broad statement that defines when and under what circumstances a right holder’s rights will be limited. A third possibility is that a country may combine both approaches. In most countries, this is the dominant model.¹⁷¹ For example, the 1976 U.S. Copyright Act contains explicit limitations on a copyright owner’s rights¹⁷² as well as a general “fair use” provision that may be used as a defence to a claim of infringement by a right holder. The United Kingdom as well as the French and German copyright legislations adopt this model.

Examples of limitations to the reproduction and adaptation right commonly found in domestic legislation include:

- Copies made for the purposes of scholarly and private use. With regard to software, Articles 5(3) and 6 of the EC Software Directive specifically exempt back up copies, black box analyses and decompilation. The 1976 U.S. Copyright Act does not have a specific exemption for software decompilation (or “reverse engineering”) but the fair use provision has been extended to such activity.¹⁷³
- Parody;
- Media (press) uses for current events or news of the day;
- Uses in educational institutions, including for teaching;¹⁷⁴
- Research;¹⁷⁵

¹⁷⁰ See Article III (2) (a) (ii) of the Appendix.

¹⁷¹ This approach is also reflected in the Berne Convention. Recall for example that Article 10 lists some specific exceptions while Art. 9(2) contains a general clause dealing with exceptions to the rights of reproduction.

¹⁷² See e.g., U.S. Copyright Act, § 114(d) which permits certain types of digital audio transmissions of sound recordings; § 111 which allows for certain broadcast retransmissions; § 512 which allows certain temporary copies to be created by on-line service providers.

¹⁷³ See *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F. 2d 1510 (9th Cir. 1993); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F. 3d 596 (9th Cir. 2000).

¹⁷⁴ See, e.g., the recent U.S. TEACH Act. For details, see under Section 6.1 of this chapter.

¹⁷⁵ See, e.g., § 52a of the German Copyright Act, providing for the unauthorized use of copyrighted works for purposes of research and university teaching (as opposed to teaching in primary and secondary schools).

- Quotation;
- Ephemeral copies.

The copyright laws of some countries, such as the United States, include significant mechanisms for the compulsory licensing of copyrighted works. For example, the U.S. Copyright Act, Section 114, establishes an arrangement under which digital audio transmissions of sound recordings are authorized under statutory license subject, in some cases, to payment of a royalty. Section 115 establishes an arrangement under which copyrighted non-dramatic musical works may be recorded on phonograms and distributed, also subject to payment of a royalty.

3.2 Conflict with the normal exploitation of the work

which do not conflict with a normal exploitation of the work . . .

With regard to the second step of the test, the WTO panel held that “normal” includes both an empirical and a normative component. Thus, the evaluation of an exception under this second step requires an analysis of the way a work is in fact exploited as well as whether the nature of the exploitation is permissible or desirable.¹⁷⁶ The panel held that, while not every commercial use of a work is necessarily in conflict with a normal exploitation, such a conflict will arise if uses of the work pursuant to the exception or limitation “enter into competition with the ways that right holders normally extract economic value from that right.”¹⁷⁷

This second step should not pose too much of a burden to any development policy seeking to promote the dissemination of knowledge through the free availability of copyrighted material. One of the main characteristics of fair dealing provisions or statutory exceptions is that they are limited to non-commercial uses. In case documents are copied for private, research or teaching purposes in less advanced countries, these copies will not “enter into competition with the ways that right holders extract economic value” from that copyright, as expressed in the terms of the panel. Copies made for the above purposes will not be sold in the market, cutting off sales opportunities for the copyright holder. It could of course be argued that fair dealing provisions prevent the right holder from selling the needed material to those people or institutions using them for learning purposes. But such argumentation neglects the fact that the people benefiting from the free availability of unauthorized copies do not dispose of the financial means to purchase these copies. From the right holder’s perspective, there is thus no lost opportunity. Such opportunity simply does not exist.

¹⁷⁶ See the panel report at paragraph 6.166.

¹⁷⁷ *Id.* at paragraph 6.183.

3. Possible interpretations

193

3.3 Unreasonable prejudice to the legitimate interests of the right holder

and do not unreasonably prejudice the legitimate interests of the right holder.

As to the meaning of “interests,” the above panel determined that both economic and non-economic advantage or detriment are covered. With regard to “legitimate” the panel noted that this means an interest authorized by law in the legal positivist sense, as well as a normative concern for protecting those interests that are justifiable in light of the objectives that motivate copyright protection.¹⁷⁸ This suggests that there could be some public policy interests that potentially might weigh in the analysis of what constitutes a “legitimate” interest of the right holder. For example, the free speech objectives that underlie copyright in many countries might suggest that a right holder who wants to use copyright to suppress the communication of certain works may not be exercising the right in a legitimate way. In other words, such an author may not have a “legitimate” right to suppress the communication of his works. Likewise, it could be argued that a right holder who wishes to prevent the free distribution of copies of his work for non-commercial purposes lacks any legitimacy in doing so. While in the case of non-commercial use, the right holder does not run the risk of important economic losses, she/he would at the same time prevent the implementation of a policy that offers a promising potential for the development of a knowledge-based society in less advanced countries.

Finally, with regard to the term “prejudice” the panel held that an exception or limitation that “has the potential to cause an unreasonable loss of income to the copyright owner”¹⁷⁹ is unreasonable and rises to the level of prejudice against the author.

In the case of fair use exceptions that are limited to teaching or research purposes, the chances of the right holder’s encountering an “unreasonable loss” appear rather low. However, this condition depends on a careful case-by-case examination.

The three-step test of TRIPS Article 13 (and Berne Convention Article 9(2)) is cumulative. In other words, the exception or limitation in question must satisfy each of the three elements before it can be held to be consistent with TRIPS.¹⁸⁰

¹⁷⁸ *Id.* at paragraph 6.224.

¹⁷⁹ *Id.* at paragraph 6.229.

¹⁸⁰ Note that Article 13 is very similar to Article 30, the exception to patent rights. The wording being slightly different, the three-step analysis appears to be almost identical under both provisions. The first step under Article 30 is to examine if the exception at issue is “limited”. This is similar to the Article 13 condition of “certain special cases”, which equally denotes the limited character of a possible exception. The second condition under Article 30 refers to the “normal exploitation” of the patent right, the only difference with Article 13 being that the exception shall not “unreasonably” conflict with such exploitation. At this point, the copyrights exception appears stricter, prohibiting any conflict whatsoever, arguably including reasonable ones. Finally, the third condition under both provisions refers to the legitimate interests of the right holder, which must not be unreasonably prejudiced. However, the patents exception contains a fourth condition which is not part of the express language of TRIPS Article 13 or Berne Convention Article 9(2): the legitimate interests of third parties have to be taken into account when examining the interests of the patent

Thus, if an exception or limitation is found to be broad or general (i.e., not limited to “certain special cases”) there is no practical need to continue the analysis. The exception or limitation would be in that case inconsistent with Article 13.

4. WTO jurisprudence

On January 29, 1999, the WTO Secretariat received notification from the European Communities requesting consultations with the United States pursuant to Article 4 of the Dispute Settlement Understanding (DSU) and Article 64 of TRIPS, contending that Section 110(5) of the U.S. Copyright Act is inconsistent with Article 9.1 of TRIPS which requires Members to comply with Articles 1-21 of the Berne Convention. On April 15, 1999, the European Communities requested the establishment of a WTO panel under Article 6 of the DSU and Article 64.1 of TRIPS, alleging that Section 110(5), also known as the Fairness in Music Licensing Act (FIMLA), violates U.S. obligations under TRIPS and cannot be justified under any of the permitted exceptions or limitations.¹⁸¹ In its defence, the United States argued, *inter alia*, that FIMLA is fully consistent with TRIPS and that it meets the standard of Article 13.¹⁸²

In evaluating the scope of Article 13, the panel noted two differences between this provision and Berne Convention Article 9(2).¹⁸³ First, the latter provides that countries may in their national legislation “permit” the reproduction of works, while TRIPS Article 13 states that Members should “confine” limitations and exceptions.¹⁸⁴ The EC argued in part that this language should be read as a restriction on the permissible exceptions under the Berne Convention, since the principal objective of TRIPS is to heighten intellectual property protection.¹⁸⁵ The panel held that the application of Article 13 need not lead to different standards from those applicable under the Berne Convention.¹⁸⁶ In other words, it did not follow the EC’s view that Article 13 is intended to restrict the exceptions permitted under the Berne Convention.

holder. However, the same test is arguably implied in examining, under Article 13, whether any prejudice to the right holder’s interests is unreasonable. In this sense, the practical differences in the application of both exceptions appear to be marginal. For a thorough analysis of the Article 30 exception, see Chapter 23.

¹⁸¹ See First Submission of the European Communities and Their Member States to the Panel, United States–Section 110(5) of the U.S. Copyright Act, Oct. 5, 1999, WTO Doc. WT/DS. See also panel report on Section 110(5), para. 3.1 (see above, Section 3 of this chapter). The European Community challenged both the “business exemption” (see 17 U.S.C. § 110(5)(B)) and the “home style exemption” (see 17 U.S.C. § 110(5)(A)).

¹⁸² See First Submission of the United States of America, United States–Section 110(5) of the U.S. Copyright Act, Oct. 26, 1999, WTO Doc. WT/DS. See also panel report on Section 110(5), para. 3.3.

¹⁸³ Panel report on Section 110(5), at 27.

¹⁸⁴ *Id.* at 26, para. 6.71–6.72.

¹⁸⁵ *Id.* at 28, para. 6.78.

¹⁸⁶ *Id.*, at para. 6.81. The EC had also contested the general applicability of Article 13 TRIPS to the provisions of the Berne Convention (*id.*, at para. 6.75). The panel rejected this argument by stating that nothing in the express language of Article 13 TRIPS (or any other provision of the TRIPS Agreement) leads to a conclusion that the scope of Article 13 is limited to the new rights under the TRIPS Agreement (*id.*, at para. 6.80).

5. Relationship with other international instruments

195

The second distinction the panel noted between the Berne Convention and TRIPS is that the exceptions permitted under Berne Convention Article 9(2) are limited to the reproduction right while Article 13 is potentially applicable to all the copyright rights.¹⁸⁷ In all other respects the two provisions mirror each other in that limitations or exceptions are to be confined to (i) special cases; (ii) which do not conflict with a normal exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the right holder.¹⁸⁸ Both the EU and the United States agreed that these three conditions apply cumulatively under Article 13.¹⁸⁹ This cumulative interpretation has also been generally accepted with regard to Article 9(2) of the Berne Convention.¹⁹⁰

5. Relationship with other international instruments

5.1 WTO Agreements

Among the WTO Agreements, TRIPS is the only one dealing with exceptions to copyright. Under GATT Article XX, there is a reference to copyright, but not to any exception thereto.¹⁹¹

5.2 Other international instruments

As stated earlier, Article 13 is derived substantially from Article 9(2), Berne Convention. Both the WCT¹⁹² and the WIPO Performances and Phonograms Treaty¹⁹³ have incorporated this same three-step test as the standard for evaluating limitations and exceptions to the exclusive rights recognized in those treaties. It is expected that the interpretation of the three-step test will be consistent under all of the treaties that have incorporated it.

The Rome Convention, as partly incorporated by reference into TRIPS,¹⁹⁴ allows the domestic laws to exempt both private use and uses for the purpose of teaching or scientific research.¹⁹⁵ Such exemptions also extend to computer programs “as literary works” under the Berne Convention.

Finally, the concessions granted to developing countries under the Appendix to the Berne Convention (i.e. the possibility to issue compulsory licenses for the

¹⁸⁷ *Id.* at 27, para. 6.74.

¹⁸⁸ *Id.* See Berne Convention, Article 9(2); TRIPS Agreement, Article 13.

¹⁸⁹ Panel report on Section 110(5), para. 6.74.

¹⁹⁰ See Ricketson. The panel accepted this interpretation and noted that both parties agreed to this standard. Panel report on Section 110(5), para. 6.74.

¹⁹¹ This is because the GATT follows a different approach towards intellectual property rights: they are considered as exceptions to the basic GATT rules. See Chapter 7.

¹⁹² See Article 10.

¹⁹³ See Article 16(2).

¹⁹⁴ See Article 2.2 of the TRIPS Agreement, which obligates WTO Members not to take their TRIPS obligations as an excuse to derogate from obligations existing among them under, *inter alia*, the Rome Convention. As opposed to the Paris Convention (see Article 2.1 TRIPS), the Berne Convention (see Article 9.1 TRIPS), and the Washington Treaty (see Article 35 TRIPS), the TRIPS Agreement does not make the provisions of the Rome Convention mandatory for those WTO Members that are no parties to the Rome Convention. For this reason, the Rome Convention is only “partly incorporated” into TRIPS. For details, see Chapter 3.

¹⁹⁵ See Article 15.1(a) and (d).

reproduction of copyrighted material) require express renewals by qualifying developing countries at periodic intervals. New adherents to the Berne Convention remain entitled to these concessions, if they so request.¹⁹⁶

6. New developments

6.1 National laws

In 2002, the U.S. Congress enacted the TEACH Act, extending the possibilities for unauthorized use of copyrighted material from conventional classroom teaching to distance learning activities. Provided a range of requirements is respected, the TEACH Act authorizes non-profit educational institutions to use copyrighted materials in distance education without permission from the copyright holder and without payment of royalties.¹⁹⁷

6.2 International instruments

6.3 Regional and bilateral contexts

7. Comments, including economic and social implications

Limited exceptions to the minimum levels of copyright protection required by TRIPS are permitted. Such exceptions serve the purpose of ensuring that the protection of exclusive rights in copyrighted works does not harm the public interest. The exclusivity granted to authors reflects the necessity to provide creators of expressions with financial incentives for their activity. However, the ultimate purpose of copyright is not to ensure the material wealth of authors, but rather to promote intellectual creativity for the cultural enrichment of society. The author is conferred an exclusive right for the marketing of his works in exchange for his cultural contribution to society. In case society cannot benefit from the author's works to a satisfying degree, e.g. because the author charges excessive prices, this would disturb the mutual exchange between the author on the one hand and society on the other. This justifies the authorization of third parties to reproduce the copyrighted materials without the author's consent. On the other hand, in order to keep up the incentive for the author to engage in creative expression, the exception should be limited to what is absolutely required in the public interest, and the economic interests of the right holder should not be affected. This requires a delicate balancing test between the competing interests of the public and the author.

From a development perspective, it is essential to construe exceptions to copyright in a way allowing governments to pursue the policy objective of closing the knowledge gap *vis-à-vis* developed countries. Fair use provisions or statutory exceptions determine the extent to which third parties may make unauthorized use of protected copyright works. This is particularly important for the purposes of teaching, research, private use and technology transfer. Through the recourse to fair use provisions or specific exceptions, domestic legislators seek to strike an

¹⁹⁶ See UNCTAD 1996, para. 179.

¹⁹⁷ See the "Technology, Education and Copyright Harmonization Act" (the "TEACH Act"). For a summary of this legislation, see <http://www.ala.org/Template.cfm?Section=Distance_Education_and_the_TEACH_Act&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939>.

7. Comments, including economic and social implications

197

appropriate balance between the encouragement of creative activity on the one hand and the dissemination of knowledge to the public on the other hand.

In this context, the IPR Commission equally considered the importance of copyright exceptions to development goals by recommending that:

“In order to improve access to copyrighted works and achieve their goals for education and knowledge transfer, developing countries should adopt pro-competitive measures under copyright laws. 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.”¹⁹⁸

While a country may enact very narrow exceptions or limitations, calibrating the interests of rights holders and the public is typically the responsibility of domestic courts who must interpret the limitations in a manner that reflects that country's copyright policy keeping in mind, of course, international obligations such as those imposed by Article 13.

Finally, it is important to note that compulsory licensing with regard to the right of reproduction continues to be a possibility under TRIPS.¹⁹⁹

¹⁹⁸ See the IPR Commission report, p. 104. The Commission also encourages free on-line access to all academic journals, see *ibid.*, p. 102.

¹⁹⁹ However countries wishing to preserve their right to invoke the Appendix were required to take steps to preserve the possibility of doing so. Thailand was the first country to do so in 1996. Note that this Appendix to the Berne Convention *inter alia* allows for limited compulsory licensing to enable the translation of works into local languages. However, this option has not been very successful, with only a few developing countries having made use of it (see the IPR Commission report, p. 99).