

BRIEFING PAPER

A TREATY ON COPYRIGHT EXCEPTIONS AND LIMITATIONS FOR EDUCATIONAL AND RESEARCH ACTIVITIES (TERA)

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The World Intellectual Property Organization (“WIPO”) has long recognized the importance of copyright exceptions to education and research. Article 10(1) of the Berne Convention contains a mandatory exception for quotations; quotations are essential for meaningful research, commentary and criticism. Article 10(2) permits the adoption of exceptions allowing the utilization of works by way of illustration for teaching purposes. However, there is great disparity in WIPO member states concerning the adequacy of exceptions for education and research. In particular, the exceptions in many developing countries are insufficient to meet their pressing needs, in accordance with the United Nation’s sustainable development goal of quality education. Accordingly, a treaty on copyright exceptions and limitations for educational and research activities is necessary to establish global norms in this critical area.

Background

Limitations and exceptions related to education and research have been long been on the agenda of the WIPO Standing Committee on Copyright and Related Rights (“SCCR”):

- The 1971 Paris Act of the Berne Convention contains in Article 10(1) a mandatory exception for quotations. Furthermore, the Paris Act provides that it shall be a matter for legislation in the countries of the Union, and for special agreements between them, to permit the utilization of artistic and literary works by way of illustration for teaching in publications, broadcasts, or sound or visual recordings.
- The Tunis Model Law on Copyright for Developing Countries, released by WIPO in 1976, permitted “the utilization of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching...or the communication for teaching purposes of the work broadcast for use in schools, education, universities and professional training.”
- In November 2005, Chile proposed that SCCR undertake work in the area of copyright exceptions and limitations (SCCR/13/5). This work would lead to “agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors.”
- In March 2008, Brazil, Chile, Nicaragua, and Uruguay proposed a work plan for SCCR on exceptions and limitations, including for educational activities (SCCR/16/2). The work plan called for “formal recognition of, and commitment to creating mandatory minimum exceptions and limitations....”

- In June 2011, the African Group proposed a WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (SCCR/22/12).
- In December 2013, the SCCR Secretariat prepared a Provisional Working Document Towards an Appropriate International Legal Instrument (in Whatever Form) On Limitations and Exceptions for Educational, Teaching, and Research Institutions and Persons with Other Disabilities Containing Comments and Textual Suggestions (SCCR/26/4 Prov.).
- In 2014, the United States proposed Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions (SCCR/27/8).
- In November 2016, Professor Daniel Seng presented to SCCR/33 his Study on Copyright Limitations and Exceptions for Educational Activities (SCCR/33/6). This study updated and consolidated five regional studies on educational activities prepared for WIPO in 2009. The Seng Study referred to the “axiomatic importance of education in any society.” It notes that the UN Universal Declaration of Human Rights asserts that “everyone has the right to education.” It observed that the first modern copyright legislation, the Statute of Anne of 1709, was entitled “An Act for the Encouragement of Learning.” The Seng Study also noted that Article 10(2) of the Berne Convention enables Berne Union members to permit the utilization of works by way of illustration for teaching.” He concluded that his study “shows quite a variegated collection of limitations and exceptions provisions for educational activities.”
- In November 2017, Professor Seng presented to SCCR/35 an Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities (SCCR/35/5 Rev.).

The Treaty on Copyright Exceptions and Limitations for Educational and Research Activities (“TERA”) takes the next step in this progression. It incorporates the concepts articulated in these previous SCCR documents into a treaty that would establish minimum standards for exceptions for educational and research purposes, while at the same time affording Contracting Parties significant flexibility in how to implement their obligations.

What is in TERA?

The 2016 Seng Study identified eight categories of educational limitations and exceptions: private or personal use; quotations; reproduction; anthologies; performances; broadcasts; compulsory licenses for reproduction or translation; educational exceptions relating to technological protection measures. The 2017 updated study further considered restrictions on the liability of educational institutions; the overriding of contractual restrictions on exceptions; and digital copying and dissemination under the Berne Appendix.

TERA reflects all these categories. Significantly, like the Seng Studies, TERA addresses educational and research *activities*, not just educational and research *institutions*. The African Group treaty proposal (SCCR/22/12) and the Provisional Working Document (SCCR/26/4 Prov.) focused on educational and research institutions. An important insight of the Seng Studies is that it “recognizes and acknowledges the private and self-actualization aspect of education and research as an individually-driven and self-edification process.” Thus, exceptions must extend beyond institutions to students, researchers and the creators of educational materials.

TERA’s core is Articles 4 through 6. Article 4(1) provides that Contracting Parties shall take all appropriate measures to respect, protect, fulfill the right to receive education and conduct research through appropriate exceptions, as specified in greater detail in Article 5. Article 4(2) states that Contracting Parties may fulfill their rights in obligations under this Treaty through specific exceptions for educational or research purposes; more general exceptions; or a combination of the two. Article 4(2) is based on Article 10(3) of the Marrakesh Treaty.

Article 5 sets forth guiding principles for Contracting Parties when fulfilling their rights and obligations under TERA. These include recognizing the valuable contributions of authors and publishers in the creation and dissemination of works that benefit the educational community and the public overall; the necessity of exceptions at all levels of education; and the importance of extending exceptions to the digital environment. These principles are based on Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions, submitted by the United States (SCCR/27/8).

Article 6 addresses permitted uses. Article 6(1) states that it shall be permissible to use a work for educational or research purposes to the extent justified by the purpose, provided that such utilization is compatible with fair practice. Article 6(2) then provides a non-exhaustive list of uses that fall within the scope of Article 6(1). Article 6(2) identifies four categories of uses: uses in the course of teaching activities; uses in the course of learning activities; use in the course of creating educational materials; and uses in the course of research activities. Within each category, TERA further identifies examples of permitted uses.

- Use in the course of teaching activities include uses such as: making private copies in preparation of a course of instructions; performing a work by way of illustration in the course of instruction; and making and distributing multiple copies for use in a course of instruction.
- Uses in the course of learning activities include uses such as: private copies for purposes of study; including images in assignments; and performing a work in an educational context.
- Uses in the course of creating educational materials include uses such as: using works by way of illustration in publications; including short works and excerpts of longer works in anthologies; and translating works when they are not available in languages required by users.
- Uses in the course of research activities include uses such as: making private copies for research purposes; making quotations of a work for the purpose of illustration or comment; and using a work for text and data-mining.

Many of these uses appear in the Seng Studies or proposals made by the African Group or Brazil in SCCR/26/4 Prov.

Article 7 provides that exceptions adopted pursuant to Articles 4 and 6 shall permit cross-border uses.

Article 8 permits a Contracting Party to authorize uses beyond those permitted under Articles 4 and 6, *e.g.*, uses that exceed fair practice, subject to adequate remuneration.

Other important articles include: Article 9 rendering unenforceable contractual provisions that restrict the exercise of exceptions adopted under Article 4 or 6; Article 10 requiring Contracting Parties to ensure that prohibitions on circumvention of technological measures do not prevent the uses provided by exceptions adopted pursuant to Article 4 or 6 (based on Article 7 of the Marrakesh Treaty); and Article 11, limiting the liability of a person using a work for educational or research purposes.