

ANALYSIS OF WIPO SCCR DRAFT REPORT ON REGIONAL SEMINARS AND
INTERNATIONAL CONFERENCE ON LIMITATIONS AND EXCEPTIONS (SCCR/40/2)

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At the 40th Session of the Standing Committee on Copyright and Related Rights, the Secretariat released a Report (SCCR/40/2) summarizing the year of work on the Action Plans on Limitations and Exceptions. That Report is subject to comment by Member States. This Note provides analysis of the Report that may be useful to Delegates and stakeholders participating in the meetings of the SCCR.

The Report helpfully summarizes a large amount of agreement about the main problems and solutions that need to be addressed by the international system.¹ These problems include a lack of exceptions in a majority of countries for:

- Preservation for cultural heritage;
- Communications in online learning and research;
- Cross border uses for education, research, and the activities of libraries, archives and museums.

The Way Forward and Take-Away Considerations (pages 63-72) do not adequately reflect these priorities. The section on “WIPO’s role” is particularly deficient as it fails to mention any of the extensive discussion on the useful role WIPO could play in facilitating the promulgation of “instruments (whether model law, joint recommendation, treaty and/or other forms),” as mandated by the General Assembly. UN Doc. WO/GA/41/14 (Aug. 13, 2012). In particular, it fails to identify the proposals of members, experts and stakeholders for WIPO work toward model laws, tool kits, and treaty provisions that promote minimum levels of exceptions for these purposes.

A. Preservation for Cultural Heritage

The highest priority issue for libraries, archives and museums described in the Report, seminars and conference is the need for all countries to include exceptions to copyright for the preservation activities of libraries, archives and museums. Preservation of works for cultural heritage uses “was identified as a priority and Member States generally agreed that reproductions and other uses of works for preservation should be permitted under exceptions in national copyright laws. Nevertheless, the most recent SCCR study (from 2017) finds that only 102 Member states, or about 53%, have a statutory provision explicitly addressing preservation.”

The Report and meetings record a number of actions that WIPO could take to guide countries, including to draft model laws and tool kits and to engage in

¹ See, e.g., Para 364 (reporting view of Delegate from Colombia that the last 12 years of WIPO discussion “enabled countries to realize and identify what the problems were”).

normative work toward a Treaty on Preservation for Cultural Heritage as recommended by Civil Society groups.

B. Prioritizing online and digital uses for education

The highest priority issue for education mentioned in the Report, seminars and conference is the need to adapt exceptions to permit teaching and learning through digital and online tools.² Online uses require exceptions to cover communication and distribution-related rights,³ as well as to apply to all types of protected works.⁴

The Report and meetings record a number of actions that WIPO could take to guide countries, including to draft model laws and tool kits and to engage in normative work toward a Treaty on Education and Research Activities, as recommended by Civil Society groups.

C. Prioritization of cross border uses

Cross border uses of lawfully created works from one jurisdiction to the next was frequently identified as a cross-cutting issue that international action is uniquely situated to address.⁵

² See Para 309 (reporting view of Delegate from Burkina Faso that “national copyright legislations needed to be strengthened to cover online teaching and research activities”); Para 319 (reporting views of expert from University of Cape Town that exceptions “for face to face teaching” leave it “not clear that you can take the materials online nationally”); Para 355 (reporting view of Delegate from Burkina Faso that countries need to “adapt the exceptions to the digital domain,” including “specifically to cover teaching in the digital sector”); Para 373 (reporting view of WIPO expert Dr. Crews that “digital should be normal” and countries “should take the steps that are necessary to review and change their laws” immediately); Para 374 (reporting view of WIPO expert Dr. Xalabarder that “digital should be normal” and “[c]ountries would go backwards if they did not expand exceptions and limitations into the digital uses, particularly regarding education and research”); Para 381 (reporting view of Delegate from Malawi on “the need to reform national copyright laws by taking into account the digital elements and online uses”); Para 134 (reporting Dr. Xalabarder’s view that “National laws needed to integrate limitations and exceptions so that they could respond to the needs of online teaching”).

³ See para 133 (reporting Daniel Seng’s finding that many exceptions are “limited ... to the sole act of reproduction of copies, provided qualitative and quantitative limits, restricted multiple copies, limited reprographic copies so they did not extend to digital uses, did not include translations or adaptation, or failed to take into account new technologies or online classroom activities”).

⁴ See Para 108 (recording that some provisions only cover “access to physical / analogue works or for access only to text-based works”). The Report usefully summarized these issues as follows: “For instance, an exception that permits the making of copies for educational uses ... might not permit the transmission of these copies (i.e., by email to students) and their making available online (i.e., posting on an intranet), because the exception is only meant to cover acts of reproduction.” Para 105.

⁵ See para 33 (“in some countries cross-border exchanges take place for both digital and physical works”); Para 371 (reporting view of Delegate from Finland that “cross border uses should become the new normal”); Para 35 (“international lending would require international standards when there are disparate legal regimes.”); Para 374 (reporting view of Dr. Xalabarder that issues “better addressed at an international level” include “the cross-border issue”); Para 377 (reporting on view of Delegate

The Report and meetings record a number of actions that WIPO could take to guide countries, including to draft model laws and tool kits and to engage in normative work toward a provision protecting cross border uses as included in Civil Society proposals for a treaties on Preservation as well as on Education and Research Activities recommended by Civil Society groups. Members specifically identified the possibility of an treaty provision “to extend the provisions of the Marrakesh Treaty for cross-border” uses.⁶ Such an extension of the Marrakesh cross-border use right could broadly serve the interests of education and research as well as the knowledge and heritage work of libraries, archives, museums, and interests of other institutions.⁷

C. Other issues for guidance and norm setting

A number of other technical issues were discussed that would benefit from international guidance for implementing policies at the local level. These issues appear particularly well-suited for “tool kits” or other instruments of soft-law guidance for Member States. These issues include:

- “overridability of limitations and exceptions by contracts,”
- “safe harbor protections for educational and research institutions (and their agents),⁸”
- “provisions regarding exceptions and technical measures of protection and rights management information”⁹
- the need for libraries to make and share reproductions for individuals for research or education purposes.¹⁰

from Finland that “there were many kinds of cross border uses ... capable of being readily resolved through legal measures including the ones applied in Europe such as legal fictions, mutual recognition, reciprocity rules, etc.”).

⁶ Para 117 (“While some Member States recommended that it would be good to legislate in this field to cover these issues, a few Member States thought that it would be relevant to extend the provisions of the Marrakesh Treaty for cross-border teaching purposes: a copy made and made available (or sent) lawfully for teaching purposes in the country where the institution is located may be accessed from another country where students are located. a copy made and made available (or sent) lawfully for teaching purposes in the country where the institution is located may be accessed from another country where students are located.”).

⁷ See, e.g., Para 378 (reporting views of phd candidate and LIBER official Ben White, describing research activities as increasingly involving international collaborations across borders).

⁸ Such provisions could also benefit other institutions, offering greater certainty when acting in good faith, as suggested by Professor Benhamou (Para 372)

⁹ Para 133 (reporting views of Professor Seng); para 359 (referring to study by the British Library that “98 per cent of exceptions were undermined” by contractual provisions).

¹⁰ Para 18 (reporting that only 105, or 55% of WIPO members, allow a library to make a copy for a patron).

D. Coexistence of exceptions and licensing

There was a broad view throughout the activities that licensing and exceptions are not exclusive but rather are part of the same enabling environment. Exceptions are user rights – they set the mandatory baseline for what users can do at a minimum, often to serve fundamental rights and core values of society. Licensing gives parties certainty when used in the context of acts beyond the minimum protected by user rights. As such, the two are part of the same system and one cannot substitute for the other. A system that relied only on licensing would deny fundamental rights and important social values. A system that relied only on exceptions would deny many valuable uses beyond those minimums which the market can and should supply. The two must work together.¹¹

E. The role of WIPO and international instruments

The Report notes a large amount of agreement on the proper role of WIPO and of international instruments.

The role of binding international instruments should be to establish the minimum baseline for all countries. These minimum baselines are especially necessary where they are needed to promote human right and fundamental social values, including to promote education, research, and cultural heritage.

There was wide agreement that the minimum international baseline for exceptions should address, as a priority, preservation, digital and cross-border issues, as noted above.¹² International instruments should permit “flexibility in the implementation” and not be “highly specific and highly tied to today's technology.”¹³

¹¹ See Para 363 (reporting view of Delegate that “stressed that exceptions and limitations together with licensing were not mutually exclusive”); Para 364 (reporting view of Delegate from Colombia that “collective management ... was an area that was not exempted of challenges[;] for example, there was no collective association for visual artists” in Colombia); Para. 165 (reporting view of Delegate from the University of the West Indies that many of the works in archives are outside the scope of any license).

¹² See Para 374 (reporting view of Dr. Xalabarder that “[d]espite believing that solutions would be better found at national level, she agreed that a few issues would be better addressed at an international level: such as the cross-border issue and the national legislators’ guidance and assistance”).

¹³ Para 326 (reporting on view of expert). See also Para 363 (reporting on view of Delegate from Antigua and Barbuda that there are “problems and challenges that were similar to other nations but not identical” and “one shoe size did not fit all, but all needed shoes”; “There was a need to have a sort of foundation or baseline similar in each of the Member States so that they could build their own framework”); Para 368 (reporting view of the United States that SCCR should “develop high-level principles and objectives for national policy makers” and that US is “very open for different formats and approaches”).

One issue on which there is a great deal of variety between countries is on the extent to which exceptions are remunerated. See Para 21 (noting that some library exceptions are remunerated); Para 371 (reporting view of Delegate from Finland that “[t]here was place for full uncompensated limitations, because there were uses that did not have economic significance for rightsholders and did

Avenues for addressing the uneven state of laws permitting educational and research uses could be assisted by numerous international mechanisms, including:

- the “reformulation of Article 10(2) of the Berne Convention or a proposed treaty on educational and research activities.”¹⁴
- interpretations, declarations, resolutions or other instruments interpreting flexibilities in the current international instruments.¹⁵
- “manuals, guidelines or ... practices” to help countries fit “international principles and conventions” to their specific countries.¹⁶

One benefit of using a binding instrument for the most important baseline commitments is the positive effect that they may have on local reform, as evidenced by the experience with the Marrakesh Treaty.¹⁷

not present a risk of negative market interference”; “there was a place for limitations that were compensated depending on their market effects and economic relevance for rightsholders”).

¹⁴ Para 133 (view of Dr. Seng).

¹⁵ See Para 372 (reporting view of WIPO expert Dr. Benhamou that SCCR could “develop guidelines of interpretation of norms, such as the Berne Convention” and “consider joint recommendations or other instruments, in particular in areas where there is a common foundation on which Governments could start concrete action”); Para 385 (reporting view of Delegate from Indonesia that “high-level principles on limitations and exceptions” could be effective if all Member States are made aware of them, “while also mainstreaming it with the work of WIPO,” like the Sustainable Development Goals”).

¹⁶ Para 364 (reporting view of Delegate from Colombia; Para 369 (reporting view of UK Delegate that “[t]here was a need for some countries in particular to take on board the scope of flexibilities already allowed in the current treaties” and calling for “some kind of toolbox or toolkit” to see “the various options that were on the table”).

¹⁷ See Para 388 (reporting view of Representative from the Library of the National University of Science and Technology of Zimbabwe that “Zimbabwe looked at implementing the Marrakesh Treaty, despite the prevailing social conditions in the country, only because it came from an external environment”); Para 385 (reporting that Delegate from Indonesia “gave the example of the Marrakesh Treaty to suggest that there could have been a difference in its implementation at the national level if it was a declaration and not a treaty,” but that “it is not the form of the instrument ... that would make a difference,” but rather “the need for a widespread acceptance of the solutions that may be agreed upon”).