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STUDY ON THE LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND RELATED
RIGHTS FOR THE PURPOSES OF EDUCATIONAL AND RESEARCH ACTIVITIES IN
LATIN AMERICA AND THE CARIBBEAN

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* The views and opinions expressed in this Study are the sole responsibility of the author. The Study is not intended to reflect the views of the Member States or the WIPO Secretariat .

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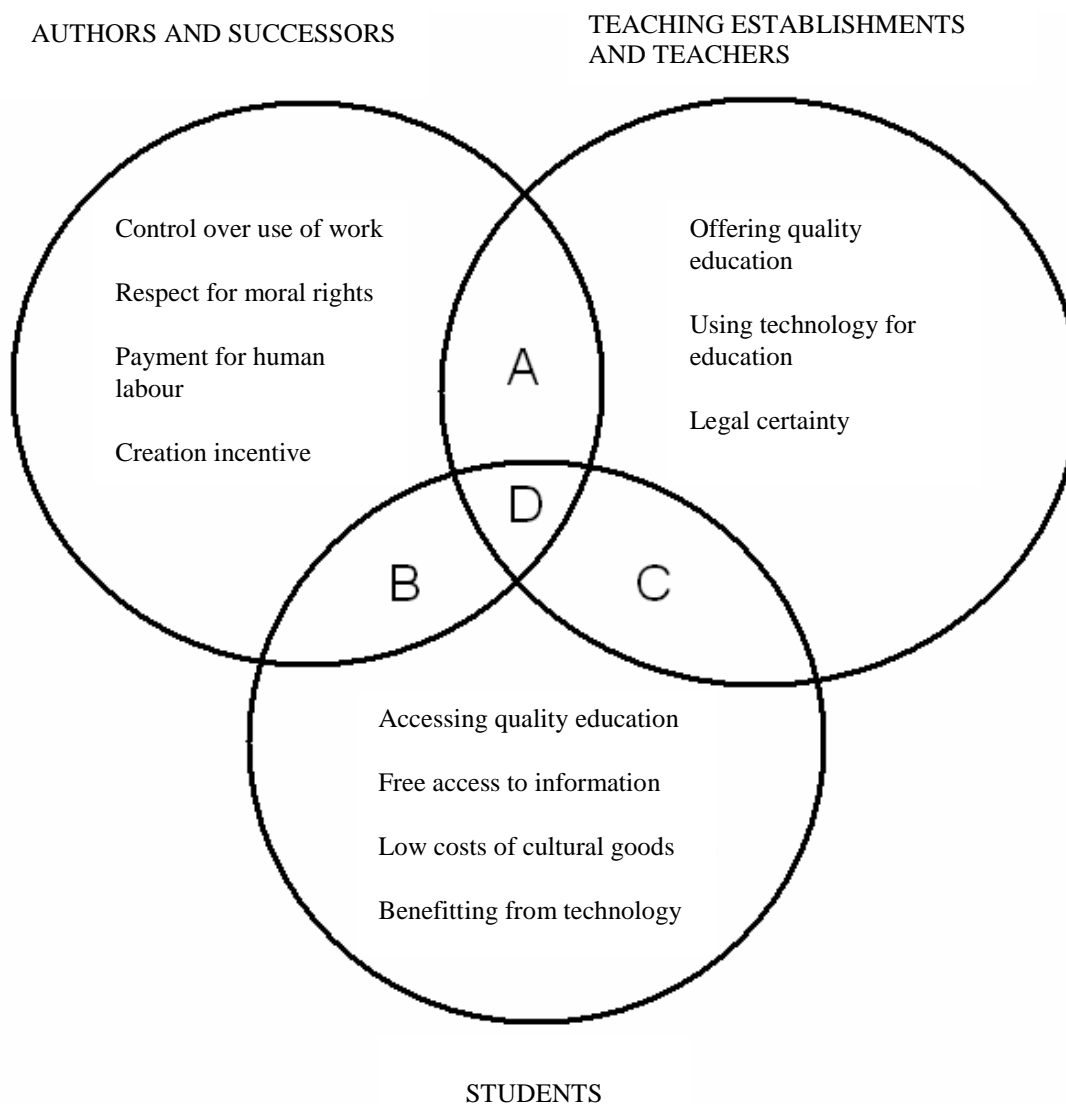
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SUMMARY

The present study aims to analyze whether the limitations or exceptions established in Latin American and Caribbean countries respond to the current requirements of copyright and the interaction with the right to education and access to research, or whether it is in fact necessary to change the existing limitations or exceptions or create new ones, so as to re-establish the vital balance between rights and interests, in keeping with current social and economic phenomena resulting from technological developments.

An outline is given of the national and international regulatory framework, followed by an analysis of the way in which rights and interests come together around copyright and the right to education and access to knowledge.

For the purposes of this summary, the rights and interests of authors and their successors, teachers and teaching establishments and the various options for solutions are represented in the following diagrams:



In the diagram above, each circle represents the set of interests embodied by the copyright of authors and their successors, as well as the interests resulting from the right to education for those who provide and receive it.

The areas of overlap between the circles (A, B, C and D) represent issues, problems or points where rights and interest clash and where a solution or a specific legal treatment is required – and this is where it is vital to strike a fair balance. For instance, there are issues where the interests of the author or successor clash with the interests of the teaching establishment or teacher (such as teachers being able to digitize works to be used in distance education). This issue corresponds to Intersection A in the diagram.

For each of the issues raised in chapter 3, a solution is developed in chapter 4, as follows:

Clash of rights and interests between authors/successors on the one hand and teaching establishments/teachers on the other (Intersection A)	
ISSUES	SOLUTIONS
Impact of mass reprographic reproduction in academia (see 3.1)	Providing solutions in terms of licensing reprographic reproduction in educational institutions (see 4.1)
Difficulty in accessing audio-visual works to use them for teaching purposes (see 3.2)	Facilitating the use of audio-visual works and media for teaching purposes (4.2)
Difficulty in digitizing works and subject matter for use in virtual education (see 3.3)	Facilitating the digitization of works and subject matter for use in virtual education (see 4.3)
Difficulty in the digital transmission of works and subject matter for use in digital distance education (see 3.4)	Facilitating the digital transmission of works and subject matter for use in digital distance education (see 4.4)
Insufficient works and content available for use in digital distance education (see 3.5)	The use for educational purposes of works covered by alternative licensing models: free licenses and Open Educational Resources (OER) (see 4.5)

In terms of the clashes of rights and interests identified in this section, the options currently available can be represented as follows:

	Voluntary license	Compulsory license	Payment in compensation	Alternative license scheme	Exception (use free & without payment)
Providing solutions in terms of licensing reprographic reproduction in educational institutions (see 4.1)	X			X	X
Use of audio-visual works and media for teaching purposes	X			X	

(see 4.2)

Digitization of works and subject matter for use in virtual education (see 4.3)	X	X	O
Digital transmission of works and subject matter for use in digital distance education (see 3.10)	X	X	O
Production and reuse of digital educational resources (see 3.11)	X	X	O

X = Currently exists in at least one of the region's countries.

O = Could be introduced to contribute to the balance.

Clash of rights and interests between authors/successors on the one hand and students on the other (Intersection B)	
ISSUES	SOLUTIONS
The need for the digital manipulation or transformation of works by students completing academic work (see 3.6)	Creating a limitation or exception that allows the digital manipulation or transformation of works by students completing academic work (see 4.6)
The issue of private copies and access to education (see 3.7)	Facilitating private copying while ensuring the balance of rights and interests (see 4.7)
The issue of private copies in the digital environment (see 3.8)	Creating a limitation or exception for private copying in the digital environment (see 4.8)

In terms of the clashes of rights and interests identified in this section, the options currently available can be represented as follows:

	Voluntary license	Compulsory license	Payment in compensation	Alternative license scheme	Exception (use free & without payment)
Digital manipulation or transformation of works by students completing academic work (see 3.3)	X			X	O
Private copies and access to education (see 3.5)	X		O		X
Private copies in the digital environment (see 3.12)	X		O		O

X = Currently exists in at least one of the region's countries.

O = Could be introduced to contribute to the balance.

Clash of rights and interests between teaching establishments/teachers on the one hand and students on the other (Intersection C)	
ISSUES	SOLUTIONS
As note taking is covered by a limitation or exception, should it also be possible to record or film freely? (see 3.9)	Updating or adapting exceptions on note taking, or the recording or filming of classes or lessons (see 4.9)
Responsibility before third parties for copyright infringements committed by students using the institution's resources (see 3.10)	Providing legal certainty to teaching establishments regarding their responsibility for copyright infringements committed by students (see 4.10)

In terms of the clashes of rights and interests identified in this section, the options currently available can be represented as follows:

	Voluntary license	Compulsory license	Payment in compensation	Alternative license scheme	Exception (use free & without payment)
Notes and class recordings (see 3.2)					X
Responsibility before third parties for copyright infringements committed by students using the institution's resources (see 3.14)					Not applicable: this issue can be regulated by other types of rule

X = Currently exists in at least one of the region's countries.

O = Could be introduced to contribute to the balance.

Clash of rights and interests between authors/successors on the one hand and teaching establishments/teachers (and also students) on the other (Intersection D)	
ISSUES	SOLUTIONS
Availability of works in the public domain and the impact on education and research (see 3.11)	Obtaining effective access to works in the public domain and resolving the issue of orphaned works (see 4.11)
Technological measures to restrict use for teaching purposes (see 3.12)	Developing rules around exceptions to technological measures, in order to facilitate education, as well as the interface with exceptions in favor of education and research (see 4.12)
The price of cultural goods as an obstacle to	Initiatives to facilitate free access or reduce

accessing quality education (see 3.13)	the cost of cultural goods (see 4.14) The use for teaching purposes of works covered by alternative licensing models: free licenses and Open Educational Resources (OER) (see 4.5)
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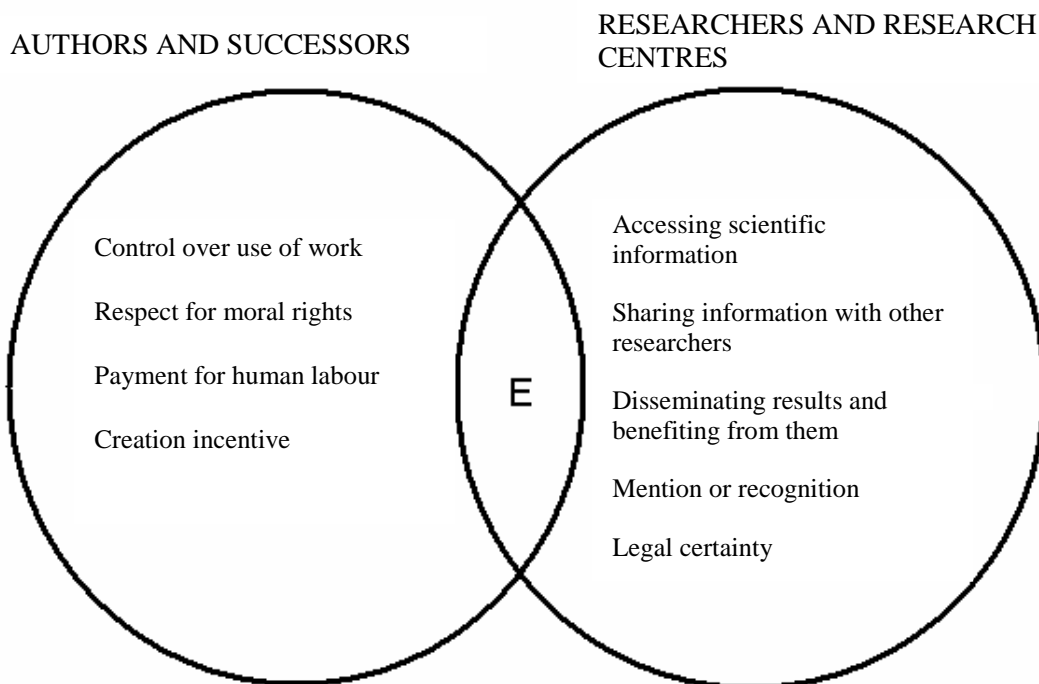
In terms of the clashes of rights and interests identified in this section, the options currently available can be represented as follows:

	Voluntary license	Compulsory license	Payment in compensation	Alternative license scheme	Exception
Reprographic reproduction in academia (see 3.4)	X			X	X
Shows performed within teaching institutions (see 3.7)					X
Technological measures restricting use for teaching purposes (see 3.13)					O
The price of cultural goods as an obstacle to accessing quality education (see 3.14)	Not applicable: this issue can be regulated by other types of rule				

X = Currently exists in at least one of the region's countries.

O = Could be introduced to contribute to the balance.

For the purposes of this summary, the clash of rights and interests around copyright and the right to access knowledge is represented in the following diagram:



According to the system we are using to facilitate the presentation of problems and solutions, their interactions can be represented as follows:

Clash of rights and interests between authors/successors on the one hand and researchers/research centers on the other (Intersection E)	
ISSUES	SOLUTIONS
Difficulties in obtaining copies and the translation of scientific journals (see 3.14)	Electronic publication of scientific journals covered by alternative licensing models (see 4.14)
The issue of access to the results of research carried out with public resources (see 3.15)	Facilitating access to the results of research carried out with public funding (see 4.15)
Difficulties in accessing scientific information contained in patent applications (see 3.16)	Promoting access to scientific and technical journals for patent offices (see 4.16)
Difficulties in disseminating university theses or monographs presented by students (see 3.17)	Electronic publication of university theses or monographs by teaching institutions (see 4.17)
Difficulties in accessing scientific databases (see 3.18)	Facilitating access to scientific databases (see 4.18)

In terms of the clashes of rights and interests identified in this section, the options currently available can be represented as follows:

	Voluntary license	Compulsory license	Payment in compensation	Alternative license scheme	Exception (use free & without payment)
Electronic publication of scientific reviews covered by alternative licensing models (see 4.14)	Not applicable. This issue can be promoted through public policy.				
Facilitating access to the results of research carried out with public funding (see 4.15)	Not applicable. This issue can be promoted through public policy and other areas of legislation.				
Promoting access to scientific and technical journals for patent offices (see 4.16)	Not applicable. This issue should be regulated within patent legislation				
Electronic publication of university theses or monographs by teaching institutions (see 4.17)	Not applicable. This issue can be promoted through public policy.				
Facilitating access to scientific databases el (see 4.18)	Not applicable. This issue can be promoted through public policy.				

INTRODUCTION

The user of works and subject matter as a subject of rights

Meaningful phrases such as “private property has a social function that implies obligations”; “the holder of this right may dispose freely of his/her property, as long as this does not violate the law or the rights of others”; “the rights of one individual end where the rights of his/her fellow citizens begin”; and “the general interest takes precedence over the individual interest” remind us that there are no absolute rights in any sphere, as the peaceful coexistence of different rights is essential for life in society.

The concept of property having or fulfilling a social function emerged in the context of socialist and solidarity tendencies in the late 19th century. This heralded the appearance of what were known as “second-generation rights”, which were deeply social in nature and, as they are based on the search for material equality, made it possible to recognize limits to a right previously considered unconditional and absolute in legislation: the right of private property. Following the Second World War and the adoption of the Universal Declaration of Human Rights in 1948, other “third-generation” rights appeared, and were associated with human collectivities and seen as inherent to humankind as a universal subject of rights. These prerogatives included the right to sanitation and, along with this, another limitation to the right of ownership: the ecological function of property.

The Universal Declaration of Human Rights elevated copyright to the category of a human right, with the former coming up against some of the main limitations in favor of access to culture, information and the right to education. Indeed, although Article 27 of the Universal Declaration recognizes that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author, the same article also acknowledges that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. It is precisely intellectual productions that make up and promote cultural life, the arts and scientific development in society. The Universal Declaration of Human Rights has therefore enshrined copyright as a non-absolute right, because hand in hand with copyright go society’s prerogatives to freely enjoy intellectual creations - and these cannot be ignored.¹

John Rawls explained this relativism of rights by saying that “each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all”.² The exercise of the rights of others defines the limits of the exercise of individual rights and freedoms.

To ensure the peaceful coexistence of both sets of rights, or in other words the balance of rights and interests, restrictions to individual rights must be established in accordance with certain parameters, such as the principle of proportionality, which controls the scope of limitations or restrictions, which are employed according to the following criteria:³

¹ Rodríguez Moreno, S. *La era digital y las excepciones y limitaciones al derecho de autor*. Ediciones Universidad Externado de Colombia. Bogotá. 2004, p. 48.

² John Rawls. *A Theory of Justice*, cited by Carlos Gaviria Díaz, Constitutional Court of Colombia. Sentence C-221 of 5 May 1994.

³ Constitutional Court of Colombia. Sentence T-067 of 5 March 1998, M.P.: Eduardo Cifuentes Muñoz.

(i) *Necessity*, whereby social demands may legitimately restrict rights if the restriction is necessary and there are no alternative means equally suited to achieving that purpose.

(ii) *Suitability*, whereby the limitation must be a useful means of protecting another constitutionally guaranteed good or right; and lastly

(iii) *Weighting*, which demands that the restriction be in proportion to the purported aim or the interest being protected.

Intellectual property is a form of private ownership of intangible goods that are the product of human talent and ingenuity. In what was a major historical vindication of the rights of artistic and literary creators, they had the right over their creations recognized, not in the form of royalties, but as a citizen's right that was a special form of ownership, perhaps the most sacred of all - literary and artistic property now known as copyright.

As a system of checks and balances, copyright laws established certain exclusive rights that enable creators to exercise control over the various acts of exploitation to which their works may be subjected, and in this way protect the highly personal link between creator and work and receive fair economic remuneration, thereby encouraging artistic and literary creation for the benefit of society as a whole. At the same time, copyright laws also developed the principle that no rights are absolute, as they could not constitute an exception to the need for relativity based on the coexistence with other rights. In an attempt to be reasonable and to balance rights and interests, copyright laws established a list of limitations or exceptions that enable works to be used in certain ways, and possibly without payment, without the need for prior and explicit authorization from the relevant right holder. To protect the general interest, some legislations even considered it valid to establish the commandeering of copyright for reasons of educational or cultural interest, and to establish various grounds on which works become part of the public domain.

Although copyright emerged as a recognition of the rights of artistic and literary creators, it does involve various rights and interests, as well as a series of legal relations that call for legal regulation. According to Jose Maria Desantes (cited by Sofia Rodriguez), the horizons of copyright are thus broadening, as it is no longer conceived as a power in the hands of a holder, not even a power that can be negotiated with him/her or contracted with another person or entity involved in the communication process (business owners or publishers), but rather we must consider the third side of a triangle: the recipient of the copyright subject, namely the public.⁴

It is not only the author and cultural business owner interested in commercializing the work (publishers or phonogram/audio-visual producers) that are the legal subjects in the legal relations surrounding artistic or literary creation. The audiences for these cultural goods who access works to satisfy their educational, information or entertainment needs are just as important. Every person in the intended audience for protected works and services is the subject of significant rights in the context of copyright and related rights. Not only do they have rights as consumers of market goods and services, but also the Universal Declaration of

⁴ Jose Maria Desantes. *La información como derecho*, Madrid, Editora Nacional, 1974, p. 111.

Human Rights enshrines the right of audiences to enjoy the arts, participate in cultural life and enjoy scientific progress and its benefits (as well as establishing copyright as a human right).

It is the legal relations among the three subjects (authors, cultural industry and the audience for works and services) that copyright law must regulate, in the interests of striking a balance between rights and interests. Nevertheless, it appears that the balance between exclusive rights for the author and free access without payment to works needs to be readdressed. Currently, copyright can be seen to be undergoing development and change as a result of factors such as the dematerialization of supports for the purposes of digital technology and access to such works through interactive digital networks, as well as the far-reaching transformation under way in cultural industries to replace their business model based on the commercialization of tangible support media. In the face of such continuous large-scale and diverse change, it is difficult for observers to look beyond this and analyze the process underlying these phenomena that come along in rapid succession, let alone predict possible consequences.

Use of works and subject matter in the framework of education

According to the dictionary of the Royal Spanish Academy, “teaching” is defined as the communication of knowledge, skills, ideas and experiences. It is also associated with a system or method used to teach and learn, or the set of knowledge, means, people and activities that make education possible.

Teaching is not necessarily an equivalent term for education. Teaching necessarily refers to the work of a teacher who determines the learning process of the student. Education is a multidirectional process that occurs in various settings, not only academia, where knowledge, values, customs and forms of behavior are passed on to the individual. There are many ways of studying and learning without the intervention of teaching, in other words without the presence of a teacher, and not in the setting of academia.

Illustration for teaching⁵ refers to the use of materials, resources or tools conducive to learning. According to the dictionary of the Royal Spanish Academy, “to illustrate” is defined as clarifying a point or topic using words, images or other means. These support tools are usually termed “teaching resources” and mainly correspond to works protected by copyright and related rights: texts, drawings, paintings, photographs, maps, phonograms, audio-visual works, computer programs, and so forth.

Teaching resources are any materials that have been made with the intention of facilitating the work of teacher and pupil, as used in an educational context.

For what educational purpose are works and services protected by copyright and related rights used in the context of illustration for teaching? Protected works and services, as teaching resources, fulfill the following functions:⁶

⁵ WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights defines the word “illustration” as follows: “(b) More specifically, means the use also of a literary work to a larger extent than mere quotations, or in whole if it is a smaller work, within the framework of another work to demonstrate or make more intelligible the statements of the latter work. The Berne Convention allows the national legislations to permit the use of works by way of illustration for teaching with fair practice” WIPO, Geneva, 1980, p. 130, part 127.

⁶ <http://www.pedagogia.es/recursos-didacticos/>.

1. They provide information to the pupil.
2. They are a learning guide, as they help teachers to organize the information they wish to convey to provide the pupil with new knowledge.
3. They help to exercise and also develop skills.
4. They trigger and drive motivation and create an interest in the content of the teaching resource.
5. They facilitate assessment. Teaching resources make it possible to assess pupils' knowledge as they usually contain a series of questions for the pupil to think about.
6. They provide a setting in which pupils can express themselves.

The works and subject matter used as teaching resources may have been created or produced with the express purpose of being used for teaching and learning (text books, educational videos, educational multimedia, maps and so on), or they may be works and subject matter created without this in mind but suitable for use for educational purposes (works of literature cinema, plastic works of art, etc.).

Education benefits from the constant creation of works and subject matter that can be used as teaching resources. It is therefore beneficial for education if there is a system of incentives for artistic and literary creation such as the one provided by the laws of copyright and related rights. Without this incentive, the creation and production of works can be expected to fall in terms of quantity and quality, thereby depriving teaching of its resources and tools.

However, in order to increase the coverage and quality of education, in certain specific cases it is also appropriate for works to be used as teaching resources without the authorization of the right holder or the payment of a license or fee. With this in mind, international agreements and laws on copyright recognize limitations or exceptions for teaching purposes.

The recitals of European Directive 2001/29/CE (on the harmonization of certain aspects of copyright and related rights in the information society) recognize that education benefits not only from the establishment of limitation and exceptions but above all from the protection of works and services by copyright and related rights. The Directive reads as follows:

“(14) This Directive should seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching”.

Although illustration for teaching is carried out by the teacher, the uses of works included in this limitation or exception refer not only to the actions of teachers (such as the reproduction of literary excerpts for examinations), but also to the action of students (such as the non-profit public performances of dramaturgical works in front of the academic community) and of educational institutions themselves (for instance the production of anthologies or compilations of works to be distributed to students as reading material).

The United Nations Educational, Scientific and Cultural Organization (UNESCO) decided to undertake various activities and studies to analyze and discuss universal access to cyberspace, so as to recommend to States, as part of policies aimed at enabling the entire population to better enjoy the benefits of digital technology, that they update legislation and adapt it to cyberspace (particularly in terms of the need to strike a balance between the rights of the public and those of authors). The recommendations of the group of experts were welcomed by

the 32nd session of the General Conference of UNESCO, held from 29 September to 29 October 2003, where participants stated the aim of maintaining and in many cases extending the list of exceptions and limitations (based on the three-step test).

This is the context for the basic question that gave rise to this study: should the system of limitations and exceptions to copyright in Latin American and Caribbean countries be changed to restore the balance between copyright and the rights to education and access to knowledge?

Any answer to this question is based on the fact that copyright and the right to education and the access to knowledge are human rights in accordance with the International Bill of Human Rights. For all individuals, access to education and knowledge is a decisive factor in their possibilities for accessing better employment or professional opportunities, improving their living conditions and social integration. Access to knowledge is also a crucial factor in scientific and technological progress, to the extent that the dissemination of knowledge obtained is conducive to enabling more people in more countries to become involved in research and development activities in the various spheres of knowledge and skills.

How can the appropriate balance of rights be achieved in terms of limitations and exceptions in the digital environment? The importance of striking a balance between rights and interests is particularly vital in countries such as those in Latin America and the Caribbean where, as well as contributing to access to information and improving people's living conditions, Internet may also widen the gap between rich and poor.

Distance education through digital means

Although copyright laws have traditionally included exceptions in favor of illustration for teaching, the development of digital distance education is generating new requirements to be dealt with in terms of the availability of educational resources that can be used by teachers and students in this environment. The Green Paper on Copyright in the Knowledge Economy published by the Commission of the European Communities states the issue as follows: "Both teachers and students increasingly rely on digital technology to access or disseminate teaching materials. The use of network-based learning accounts at present for a significant part of regular curricular activities. While dissemination of study materials through online networks can have a beneficial effect on the quality of European education and research, it may also carry a risk of copyright infringement where the digitization and/or making available of copies of research and study materials are covered by copyright".⁷

Sam Ricketson produced a "Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment", which stressed the need for copyright to deal with this issue by asking "Is "teaching" confined to actual classroom instruction, or does it also extend to correspondence or online courses where students receive no face-to-face instruction from a teacher. The latter are of importance in many countries, and it is suggested that there is no

⁷ Commission of the European Communities. Green Paper on Copyright in the Knowledge Economy. Brussels, 2008.

reason to exclude them from the scope of “teaching” for the purposes of Article 10(2) [of the Berne Convention]”.⁸

The rise in distance education through digital networks is not only due to the opportunity to learn across geographical barriers and without the need to adhere to a timetable as in face-to-face education, but the results also show that students who receive some or all of their education online perform on average better than those who attend only traditional face-to-face classes. These are the findings of experts from the United States Department of Education, which analyzed 99 studies carried out in the country between 1996 and 2008. The studies analyzed included primary and secondary pupils but concentrated on students of university and continuing education.

The overall result of this review, which was carried out with the support of the research institute SRI International, was that six in ten young people that receive online teaching passed official performance tests with good marks, compared with five out of ten students taught using the traditional model. Although people who received only online education slightly outperformed those in traditional classes, the advantage was more striking when Internet education was combined with face-to-face classes.

The success of distance education basically depends on the interaction with a tutor, the adoption of appropriate teaching strategies and the availability of educational resources that are specific to the technological environment. According to Barbara Means from SRI (the main author of the report), it can clearly be said that online education is better than conventional education. She goes on to say that young people find it more attractive to use tools such as video, instant messaging and online collaboration to learn something, as this is their natural environment.

Developing countries have begun to make use of the possibilities offered by distance education through digital networks to meet their considerable needs in terms of access to education. In Colombia, the National Learning Service is the official body for technical and employment training and offers 2.5 million virtual education places on 435 courses. The virtual course with the highest number of participants is English, with 700,000 pupils throughout the country and a waiting list of over 500,000. What is special about this course is that the tutors live on San Andrés, which is a Colombian island in the Caribbean Sea whose inhabitants are English speaking (unlike the rest of the Colombian population). The benefits of this type of education lie not only in the ability to bring quality education to all corners of the country, but also in the fact that this course has provided new sources of work to the residents of the island (where unemployment rates were high). At present, 44 Colombian universities are providing courses over the Internet in various spheres of knowledge, especially those relating to health, agronomy, law, education, administration, architecture, natural sciences and mathematics.

Colombia’s National Learning Service also has the Strategic Project for Educational Innovation, which has trained over 3,000 university tutors in the use of technological teaching tools, and has also established 13 information banks containing over 3,500 multimedia resources (software, videos, animations, tutorials, etc.) as part of the Learn Colombia gateway

⁸ Ricketson, Sam. “Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment”, Standing Committee on Copyright and Related Rights, WIPO, ninth session, 23 to 27 June 2003, p. 15.

(www.colombiaprende.edu.co). In total, 168 virtual programs for higher and technical education are up and running today in Colombia.

Louise Moran⁹ puts forward the following three reasons why distance education providers have had to pay more attention than any other educational professionals to copyright-related issues:

- (i) Virtual or distance educators select and reproduce the material of others for the benefit of their pupils, instead of letting each pupil make his/her own copies under the system of limitations and exceptions.
- (ii) The original teaching materials created by these teachers to be used in distance education are themselves copyright-protected works. This raises the question of whether they should be the property of the institution or the teacher who created them. Institutions are interested in protecting their intellectual property and in making a profit from it by selling courses in various ways. There is necessarily a conflict between the idea of ownership and the wish to make profits on the one hand, and the desire to minimize the expenditure of students so as to increase levels of access and equality on the other.
- (iii) Unlike what usually happens in a classroom, distance learning materials consist of documents of a public nature, which means that any copyright infringement becomes more obvious. Given that Internet accentuates this situation, distance educators must remain alert to copyright. However, this does not make us experts. Any simplification of the often impenetrable complexities of national (not to mention international) copyright is therefore most welcome.

Scientific research and the quest for knowledge

Although copyright laws establish exceptions in favor of research, it is vital to establish what is meant by this, so that it is clear how the rules should be understood and applied.

According to the dictionary of the Spanish Royal Academy, the word “research” or “investigate” can mean the following:

1. To take steps to discover something.
2. To carry out intellectual and experimental activities in a systematic way for the purpose of increasing knowledge of a specific subject.
3. To explain the behavior of certain people suspected of acting illegally.

Given that limitations and exceptions are fundamentally established to satisfy the general interest, and that legal investigations may benefit by another type of exception in terms of legal actions or government proceedings, it is only reasonable to presume that exceptions in favor of research relate to the quest for knowledge, either through personal study or scientific research.

⁹ Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13.

Scientific research is understood as an activity that leads to scientific knowledge; in other words knowledge intended to be objective, systematic, clear, organized and general, in relation to certain elements of reality. The subject of research is usually called the researcher, and is responsible for carrying out the tasks involved in discovering new knowledge.¹⁰ Research work is the concrete approach of the subject towards the object to be known, or the confrontation of the theory formulated with the practice (to create a new theory).

Statement of the issue

In the order given below, the present study attempts to respond to the following questions, using international standards and the national laws of Latin American and Caribbean countries as a framework of reference:

1. Should the scientific and research community participate in license concession regimes with publishers in order to improve access to works for educational or research purposes? Are there satisfactory examples of license granting regimes that allow for online use of works for educational or research purposes?
2. Should the limitation or exception relating to educational and research purposes be clarified to adapt it to modern forms of distance learning?
3. Should it be specified that this applies not only to material used in classrooms or educational centers, but also to works used at home for studying?
4. Should there be compulsory minimum rules on the length of extracts of works that can be reproduced or made available for educational and research purposes?
5. Should there be a minimum compulsory requirement stating that the limitation or exception will apply in both education and research?
6. Should a minimum standard of limitations or exceptions to copyright be established?
7. Is the business model through which works are commercialized in the digital environment in keeping with the current needs of education and research?
8. Are current limitations and exceptions being used in a way that satisfies the needs of education and research?
9. What role can the Appendix to the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works play in ensuring access to texts necessary for education?
10. Is the legal protection of technological protection measures compatible with the current needs of education and research?

¹⁰ <http://www.educar-argentina.com.ar/OCT2000/educ27.htm>

11. Is there sufficient availability of works in the public domain for the benefit of education and research in the digital environment?
12. What tasks are pending in the region's countries to ensure an appropriate balance of rights and interests?
13. What role can be fulfilled by WIPO in balancing the rights and interests of copyright and the right to education and access to knowledge?

In that order, and in the light of the parameters laid down by WIPO for this study, chapter 1 presents the regulatory framework for the limitations and exceptions to copyright for the purposes of education and research contained in international agreements including the Appendix to the Berne Convention for the Protection of Literary and Artistic Works, as well as references to comparative law in this regard. Chapter 1 also outlines the regulatory framework and comparative law references relating to management of the interface between existing exceptions and the legal regime of technological protection measures.

Chapter 2 summarizes the limitations and exceptions to copyright for the purposes of teaching and research in the legislation of Latin American and Caribbean countries, including their scope, the rights involved and the beneficiaries, as well as the way in which the region's countries have managed the interface with technological protection measures.

Chapter 3 describes the "issues" or situations where satisfying copyright appears incompatible with the rights to education and access to knowledge, and that involve finding the means to resolve the conflict and restore the appropriate balance and the coexistence of both sets of rights (particularly in terms of distance education). Several case studies are therefore presented to illustrate various aspects of the issue, mainly in the countries of the region.

Following on from this, chapter 4 introduces the options for resolving each of the issues identified in the previous chapter, with a view to analyzing the different measures that WIPO Member States could adopt to strike the correct balance between rights and interests, not only in terms of the possible adoption of new limitations or exceptions to copyright and related rights, but also through other legislative measures or the adoption of specific public policies in this regard. Several case studies are used in this chapter to illustrate solutions.

An analysis of the issues and solutions from previous chapters is featured in chapter 5, to consider whether it is now possible to restore the balance between rights and interests or whether, on the contrary, copyright can be considered an obstacle or barrier to the access to education and the quest for knowledge in countries such as those in Latin America and the Caribbean.

The conclusions of the study are included in chapter 6, which provides a response to the questions formulated in the introduction. Chapter 7 is an executive summary of the document in diagrammatic form for ease of understanding.

Annexed to this document are the text of legal provisions regarding limitations or exceptions to copyright and related rights for the benefit of education and research that exist in the region's countries (it was not possible to obtain texts from Guyana, St. Kitts & Nevis or Suriname).

Semantic clarification

A semantic clarification must be made about the way this document uses the terms “exception” and “limitation” to copyright. In his study “Exceptions and Limits to Copyright and Neighboring Rights”,¹¹ Pierre Sirinelli referred to the semantic vagueness and uncertainty around the use of these terms, as not all legal systems use the term “exception”, while other countries use the word “limits” (such as Germany and Spain), or “limitations” (for example, Sweden, Greece and the United States), or “restrictions” (Switzerland), “authorized acts” (United Kingdom), or “free use” (Portugal”), and yet others simply refer to acts that the author may not forbid (France).

For Sam Ricketson, limitations and exceptions can be grouped under the following headings:

- (i) Provisions that exclude, or allow for the exclusion of, protection for particular categories of works or material. For the purposes of analysis, these might be described as “limitations” on protection.
- (ii) Provisions that allow for the giving of immunity from infringement proceedings for particular kinds of use. These can be termed “permitted uses,” or exceptions to protection.
- (iii) Provisions that allow a particular use of copyright material, subject to the payment of compensation to the copyright owner. These are usually described as “compulsory” or “obligatory licenses”.

According to Ricketson, all restrictions relating to concrete acts are exceptions, irrespective of whether payment is provided for by law (including what are known as legal licenses). In this regard, and to complete the terminology overview, it should be pointed out that these legal licenses are a subtype of what are known as non-voluntary licenses, in which the use of a work is unrestricted but not without payment. There is then a distinction between legal licenses (where remuneration is fixed by law or the relevant authority) and compulsory licenses (where remuneration can be negotiated by the holder individually or through a management company, without prejudice to having recourse to legal or administrative authorities if no agreement is reached). This is echoed by Delia Lipszyc.¹²

According to Ramon Casas Valles,¹³ although there is a certain lack of precision in the terms used, fortunately it is clear what needs to be distinguished. It would be ideal if efforts were made to agree on common terminology. He suggests it would be helpful to dispense with exclusions (or what Ricketson terms limitations) and instead refer only to exceptions, without prejudice to the distinction between remunerated and unremunerated exceptions. This is often the case in spoken language. Furthermore, it is significant that the European Directive on the

¹¹ Pierre Sirinelli, “Exceptions and Limits to Copyright and Neighboring Rights”. Presented at the Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Geneva, 6 and 7 December 1999. Document available [online] at http://www.wipo.int/meetings/es/details.jsp?meeting_id=3944.

¹² Delia Lipszyc. Copyright and Neighbouring Rights, UNESCO, Regional Centre for Book Promotion in Latin America and the Caribbean (CERLALC), Zavalía. Buenos Aires. 1993, p. 220.

¹³ Ramon Casas Valles. Los Límites al Derecho de Autor. Revista Iberoamericana de Derecho de Autor. No. 1. CERLALC. Bogotá, p. 49.

Information Society avoided these terminological and conceptual problems by systematically opting to use the phrase “exceptions and/or limitations”.

Pierre Sirinelli states that the doctrine has explained the conceptual difference between “limitation” and “exception”, and nonetheless proposes a Solomonic solution:

“If more precise terminology was used, it would probably be more accurate to speak of “limitation” when considering a right to remuneration and “exception” when copyright or related rights no longer exist.

But the force of habit is so strong and the diversity of laws so wide that the two words are often used without distinction to designate restrictions to the exclusive right, which is customarily the rule in copyright”.

Indeed, a large proportion of copyright laws use the terms “limitations” and “exceptions” interchangeably. The cases where the use of works is unrestricted but subject to remuneration correspond to what are known as “non-voluntary licenses”.

In the light of the foregoing, for the purposes of this document it is worth stating that any reference to “limitations or exceptions” to copyright and/or related rights herein should be understood to mean the use of protected works that does not require authorization from the holder because it falls within particular assumptions that justify free use without payment, by virtue of the balance that must be struck between the individual right of authors and certain rights of others.

CHAPTER 1 BASIS FOR LIMITATIONS OR EXCEPTIONS FOR TEACHING AND RESEARCH PURPOSES, IN INTERNATIONAL TREATIES AND COMPARATIVE LAW

1.1 LIMITATIONS OR EXCEPTIONS TO COPYRIGHT

There are substantive provisions on limitations or exceptions to copyright in both the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), as well as the WIPO Copyright Treaty (WCT).

1.1.1 Berne Convention

The Berne Convention establishes a series of limitations and exceptions that the doctrine has seen fit to classify as “specific”, “general or broad” or “implied”. The Convention also establishes some non-voluntary licenses and other minor exceptions.

Since the relevant provisions have already been analyzed in previous WIPO-commissioned studies, we shall simply summarize them as follows:

(a) “Specific” limitations or exceptions:

- Free use of legislative texts of a legislative, administrative or legal nature (Article 2(4));
- Free use of speeches, lectures and addresses (Article *2bis*);
- Free use of quotations (Article 10(1));
- Free uses for teaching purposes (Article 10(2));
- Free use of certain articles and broadcast works (Article *10bis*(1)).

(b) “General or broad” limitations or exceptions:

- General provisions on limitations or exceptions to the right of reproduction (Article 9(2)).

(c) “Implied” limitations or exceptions:¹⁴

What are known as minor exceptions for religious ceremonies, military bands and the educational needs of children and adults applicable to Articles *11bis*, *11ter*, 13 and 14 of the Convention (the basis is the Agreed Statements at the Brussels revision conference in 1948 and the Stockholm revision conference in 1967);

Discussions at the 1967 Stockholm Conference included whether there is an implied limitation or exception to the right of translation referred to in Articles *11bis* and 13 of the Convention).

¹⁴ Ficsor, Mihaly. “Limitaciones y excepciones al derecho de autor en el entorno digital”. CERLALC, Dirección Nacional de Derecho de Autor, Bogotá, 2007, p. 39

(d) Cases in which the Berne Convention allow member countries to establish a limitation or exception, or a non-voluntary license:

- Free use or non-voluntary license of works for the purposes of information on current events (Article 10*bis*(2));
- Free use or non-voluntary license of ephemeral recordings of broadcast works (Article 11*bis*(3)).

(e) Non-voluntary licenses established in the text of this Convention:

- Non-voluntary licenses for broadcast and certain related acts (Article 11*bis*(2));
- Non-voluntary licenses for the recording of musical works (Article 13(1)).

(f) Non-voluntary licenses allowed to developing countries:

- Non-voluntary licenses for the translation of works published in printed or analogous forms of reproduction (Article II(1) of the Appendix);
- Non-voluntary reproduction licenses in response to the needs of school and university education (Article III of the Appendix)

1.1.2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

By virtue of Article 9.1 of the TRIPS Agreement, the limitations or exceptions to copyright contained in Articles 1 to 21 of the Berne Convention are applicable.

1.1.3 WIPO Copyright Treaty (WCT)

The preamble of the WIPO Copyright Treaty (WCT) reiterates the Berne Convention in underlining the need to maintain a balance between copyright and public interests, particularly education, research and access to information. The WCT also lays down two provisions aimed at recognizing and ensuring that balance in the context of new technologies.

The first one is the Agreed Statement relative to Article 1.4), which emphasizes that the copyright exceptions allowed under Article 9 of the Berne Convention are fully applicable to the digital environment. Second, Article 10 allows States Parties to establish general limitations in their legislations on the rights granted to authors of literary and artistic works in the WCT (provided that they do so in accordance with the three-step test). The same applies to limitations that Parties introduce to rights provided for in the Berne Convention.

The Agreed Statement relative to that Article states that the limitations and exceptions, as they have been applied to date and in accordance with the Berne Convention, can be extended to the digital environment. Furthermore, Contracting Parties may establish new exceptions as befits this new environment.

1.2 LIMITATIONS OR EXCEPTIONS TO RELATED RIGHTS

There are substantive provisions on limitations or exceptions to related rights in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

Organizations (the Rome Convention), the TRIPS Agreement and the WIPO Performance and Phonogram Treaty (WPPT).

1.2.1 Rome Convention

Article 15 of the Rome Convention allows Member States the following limitations and exceptions to the protection of artistic interpretations or performances, phonograms and broadcast programs:

- Private use;
- Use of short excerpts;
- Ephemeral fixation by a broadcasting organization;
- Use solely for the purposes of teaching or scientific research.

Without detriment to the above, Article 15(2) of the Convention allows Member States to establish in each national legislation other limitations and exceptions of the same kind as those protecting copyright.

It is worth mentioning how the above-mentioned article allows the private use of artistic interpretations or performances, phonograms and broadcast programs for private use, with no additional condition. One of the forms of use can be reproduction for private use, which in terms of the Rome Convention can be carried out with no additional condition or requirement. According to many commentators, this can be considered to be out of step, as it does not match the impact from technologies that have arisen to facilitate mass reproduction of artistic interpretations or performances, phonograms and broadcast programs in a time after the entry into force of the Rome Convention. There is therefore not an appropriate balance, as it is one not tipped in favor of holders of related rights.

1.2.2 TRIPS Agreement

Article 18.6 of this Agreement applies the same limitations or exceptions to related rights provided for in the Rome Convention.

Article 13 of the TRIPS Agreement, which establishes the three-step test, appears to be applicable only to limitations or exceptions to copyright, and not those relating to related rights. Indeed, Article 13 is preceded by provisions that refer to copyright, and it is only from Article 14 onwards that the protection of performers, producers of phonograms and broadcasting organizations is developed. Second, there is a specific provision relating to limitations or exceptions to related rights in the above-mentioned Article 18.6 of the Agreement, while Article 13 refers to the normal exploitation of “the work”, but does not mention artistic performances, phonograms or broadcast programs in this regard. As a result, under the TRIPS Agreement the three-step test would not be required in terms of limitations or exceptions to related rights.

1.2.3 WIPO Performance and Phonogram Treaty (WPPT)

Paragraph 4 of the preamble to the WIPO Performance and Phonogram Treaty (WPPT) reads as follows:

“Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,”

Unlike paragraph 5 of the preamble to the WIPO Copyright Treaty, which states the aim of maintaining the balance established by the Berne Convention, the above-mentioned paragraph 4 from the WPPT preamble does not make a similar statement in relation to the Rome Convention, perhaps because it is considered out of date in terms of said balance, thereby suggesting that the WPPT strikes a new balance between the interests of the public with regard to education, research and access to education on the one hand, and the protection of the rights of performers and phonogram producers on the other.

As in the WCT, the preamble to the WIPO Performance and Phonogram Treaty (WPPT) does not refer to education, research and access to information as “rights” or “collective rights” but rather as the “larger public interest”.

The WPPT strikes a new balance between those rights and interests in Article 16:

This Article allows Contracting Parties to establish other limitations and exceptions of the same kind as those established to protect copyright in each legislation (Article 16(1)), similarly to what is provided for in Article 15(2) of the Rome Convention and Article 18.6 of the TRIPS Agreement;

It establishes the three-step test in relation to the limitations or exceptions to the right provided for in the WPPT (Article 6(2)), which clearly differs from the provisions of the Rome Convention and the TRIPS Agreement, as these refer to applicability for related rights;

Unlike Article 15(1) of the Rome Convention, which is echoed by Article 18.6 of the TRIPS Agreement, the WPPT does not explicitly mention the possibility of establishing limitations or exceptions in favor of private use, the use of brief excerpts, ephemeral fixing by a broadcasting organization or use for solely teaching or scientific research purposes. This means that the possibility of having such limitations and exceptions within the WPPT framework depends on whether these are established in national legislation covering copyright, and secondly whether they satisfy the three-step test.

The WPPT therefore strikes a new balance between rights and interests, by reformulating what had been established by other relevant treaties to date.

The provisions of the WPPT relating to applicability of limitations or exceptions to the digital environment will be referred to in a later section.

1.3 THREE-STEP TEST

The three-step test is the most important principle of exceptions and limitations to copyright, not only because it defines their scope and content, but also because it guides the task of

legislators when it comes to regulation, as well as providing guidance to judges deciding on the applicability of a limitation or exception.

The principle was first established solely in relation to the right of reproduction in the 1967 Stockholm Act to amend the Berne Convention. At that time, Main Committee I of the Stockholm Diplomatic Conference (1967) explained the way in which the new paragraph in Article 9 (on the right of reproduction) should be interpreted: “If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment”.¹⁵

According to this principle, the legislator may establish exceptions to the right of reproduction, provided that they fulfill the following criteria:

- a. Certain special cases;
- b. No conflict with normal exploitation of the work; and
- c. Cannot unreasonably prejudice the author’s interests.

The first criterion originates in the previously mentioned principle of restrictive application; the second confirms the fact that limitations apply once the work has been disclosed; the third states that, although limitations do prejudice authors’ interests (as the latter will not be able to achieve the normal exploitation of their work in certain cases), the prejudice is justified to defend freedom of expression and the right to culture, information, education and so forth.

The three-step test has been the basis for forcing certain countries to adapt their legislation to the test. Indeed, in case No. WT/DS160 (which was heard by the Dispute Settlement Body of the World Trade Organization (WTO)), the United States was asked to adapt subparagraph b. of Article 110 (5) of the United States Copyright Act, amended by the 1998 Fairness in Music Licensing Act (FIMLA), to the three existing criteria for establishing limitations and exceptions. The decision was adopted by the Dispute Settlement Body of WTO on 27 July 2000.

The dispute arose after the European Union requested the establishment of a panel to examine possible non-compliance by the United States with the provisions of Article 9.1 of the TRIPS Agreement. The matter was submitted to the Dispute Settlement Body (DSB).

Article 110 (5) of the United States Act contains limitations or exceptions to copyright that allow the public communication of protected works or communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, which constitutes the limitation or exception relating to home or private use (subparagraph a).

¹⁵ This interpretation was based on a proposal presented by the United Kingdom to Main Committee I of the Stockholm Conference. For a detailed analysis of the process that gave rise to the rule, see Mihaly Ficsor. “How Much of What? The “Three-step Test” and its application in two recent WTO dispute settlement cases”, *Révue Internationale du Droit d’Auteur*, RIDA, 192, April 2002, pp. 119.

Subparagraph b of the same Article establishes a limitation or exception relating to communication by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public, originated by a radio or television broadcast station, or, if an audio-visual transmission, by a cable system or satellite carrier, provided that the area covered does not exceed that provided for in the subparagraph. The panel termed this limitation or exception a "business" exemption.

The Panel report¹⁶ examined the various components of the three-step test, and this is included here as it is relevant to the purpose of this chapter:

1, *Certain special cases*: "In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. (...) public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition".¹⁷

The Panel applied a statistical approach and concluded that, since the business limitation or exception applied to a large proportion of commercial establishments (73% of restaurants, 70% of drinks establishments and 45% of retail establishments), it could not be considered a "special case". On the other hand, the private use exception could constitute a special case as it only applied to a small number of places.

2. *No conflict with normal exploitation of the work*: "We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains".

3. *Cannot unreasonably prejudice the author's interests*: "In our view, one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders (...) In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner".

The Panel concluded that the business exemption of subparagraph b of Article 110 (5) did not comply with these requirements, and therefore recommended that the DSB ask the United States to amend that regulation and bring it into line with the TRIPS Agreement. This recommendation was adopted by DSB on 27 July 2008.

¹⁶ The Panel report on this case was submitted on 15 June 2000, and is available online at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.

¹⁷ According to Ficsor, the Panel's position references the stance of S. Ricketson (The Berne Convention: 1886-1986), who states that the term "special" means "that it is justified by some clear reason of public policy or some other exceptional circumstance" (Ficsor. Op. Cit., p. 223).

1.3.1 Berne Convention

Article 9.2 of the Berne Convention establishes the possibility of setting limitations on the right of reproduction, reserving the authority of national legislations to allow the reproduction of literary and artistic works in certain special cases, provided that this reproduction does not infringe upon the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author.

1.3.2 TRIPS Agreement

Article 13 of the Agreement establishes the three-step test, stating that “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”.

The three-step test established by the TRIPS Agreement generally refers to the exclusive rights of the copyright holder enshrined therein, whereas the three-step test established by Article 9(2) of the Berne Convention applies exclusively to the right of reproduction.

By virtue of Article 13 of the TRIPS Agreement and the application of Articles 1 to 21 of the Berne Convention referred to in Article 9.1 of the TRIPS Agreement, the three-step test is applicable to all limitations and exceptions contained in Articles 1 to 21 of the Berne Convention, and not only to those that come under the right of reproduction. Having said that, this application by referral is not considered to change the applicability of the provisions of the Berne Convention, but rather it guarantees their appropriate interpretation, excluding any conflict with the normal exploitation of works and unreasonable prejudice to the legitimate interests of the author.¹⁸

The above-mentioned Article 13 appears to be applicable only to the limitations or exceptions to copyright, but not to those connected with related rights. Indeed, Article 13 is preceded by the provisions referring to copyright, while the protection of performers, phonogram producers and broadcasting organizations only begins to be developed from Article 14 onwards. Secondly, there is a specific provision on limitations or exceptions to related rights in Article 18.6 of the Agreement, and Article 13 also refers to the normal exploitation of “the work” but does not mention artistic performances, phonograms or broadcast programs in this regard. As a result, the three-step test seems not to be required in terms of limitations or exceptions to related rights.

1.3.3 WIPO Copyright Treaty (WCT)

Article 10(1) of the WIPO Copyright Treaty (WCT) on limitations and exceptions establishes the three-step test as a criterion for Contracting Parties to provide for limitations of or exceptions to the rights granted to authors works under the Treaty. Article 10(2) then applies the three-step test to limitations or exceptions granted under the Berne Convention. In this

¹⁸ WIPO, “Implications of the TRIPS Agreement on Treaties Administered by WIPO”.

sense, this Article fulfils the same purpose in the WCT as Article 13 in the TRIPS Agreement, by extending the three-step test to all patrimonial rights recognized in both treaties either directly or by means of referred application.

The Agreed Statement relating to Article 10 of the WCT established a criterion for interpretation whereby the application of the three-step test to the limitations or exceptions imposed on the right provided for in the Berne Convention (under Article 10(2) of the WCT) does not reduce or extend its sphere of applicability. This is in accordance with paragraph 5 of the preamble to the Treaty, which recognizes the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.

1.3.4 WIPO Performance and Phonogram Treaty (WPPT)

Under Article 16 of the WIPO Performance and Phonogram Treaty (WPPT), Contracting States may apply in their national legislation the same kind of limitations as they provide for in connection with the protection of copyright (Article 16(1)), similarly to what is provided for in Article 15(2) of the Rome Convention and Article 18.6 of the TRIPS Agreement.

Having said that, the WPPT establishes the three-step test for limitations or exceptions to the rights provided for in the Treaty (Article 16(2)), and makes a clear distinction with the relevant provisions of the Rome Convention and TRIPS Agreement, which do not address applicability to limitations or exceptions to related rights.

1.4 LIMITATIONS OR EXCEPTIONS IN COUNTRIES WITH AN ANGLO-SAXON LEGAL TRADITION: FAIR USE AND FAIR DEALING

There are differences in how limitations and exceptions to copyright and related rights are treated in countries with a Latin or continental European legal tradition and countries with an Anglo-Saxon legal tradition. The main difference is that, in the Anglo-Saxon system, limitations or exceptions are not subject to a *numerus clausus* structure, as they are in countries with a Latin legal tradition, where limitations or exceptions are the subject of a specified list, with no room for analogical or extensive application of grounds.

In United States legislation, the free use without payment of protected works is known as fair use, while in the United Kingdom and Canada it is known as fair dealing.

Fair use is established in Article 106 of the United States Copyright Act, and provides for free use without payment of works for the purposes of criticism, comment, news reporting and teaching (including multiple copies for classroom use). Although there is no specific definition or concept of fair use, case law has resulted in the following four criteria for classifying a use as fair:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;

- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

Fair dealing, which is used in countries including Australia, Canada and New Zealand, refers to acts carried out for purposes such as research, education, abstracts or summaries, criticism and news reporting. There are also general criteria used to determine if the use of a work constitutes fair dealing.

In the United Kingdom, fair dealing was established in the Copyright Act of 1911, for the purposes of education, information and criticism.

1.5 APPLICABILITY OF LIMITATIONS OR EXCEPTIONS TO THE DIGITAL ENVIRONMENT

1.5.1 WIPO Copyright Treaty (WCT)

The Diplomatic Conference adopted an Agreed Statement on Article 10 of the WCT, relating to the limitations and exceptions applicable in the digital environment. The Statement establishes an interpretation of the Treaty under which Contracting Parties may choose the following two non-mutually exclusive options:

- (i) To carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention; and/or
- (ii) To devise new exceptions and limitations that are appropriate in the digital network environment.

Both of these options are subject to compliance with the three-step test in terms of the provisions of Article 10, which is a relevant consideration not only in relation to the creation of new limitations or exceptions but also given that a limitation or exception that is applicable to the analogue environment may comply with the three-step test, but that does not mean that it also satisfies the three-step test when applied to the digital environment. Indeed, digital technology can substantially change the way in which works are exploited and multiply the impact of that use, such that extending a limitation or exception to the digital environment may affect the normal exploitation of the work or cause unreasonable prejudice to the legitimate interests of the right holder.

1.5.2 WIPO Performance and Phonogram Treaty (WPPT)

The Diplomatic Conference adopted an Agreed Statement on Articles 7, 11 and 16, which established a criterion for interpreting Article 16, whereby the exceptions permitted therein apply fully to the digital environment, particularly to the use of performances and phonograms in digital format.

The Diplomatic Conference adopted another Agreed Statement on Article 16, so that the Agreed Statement relating to Article 10 of the WIPO Copyright Treaty would apply, *mutatis mutandis*, to Article 16 of the WPPT.

As a result, in terms of limitations and exceptions to rights over performances and phonograms applicable to the digital environment, Contracting Parties to the WPPT can opt for the following two non-mutually exclusive options:

- (i) To carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Rome Convention (if they are parties to it); and/or
- (ii) To devise new exceptions and limitations that are appropriate in the digital network environment (of the same kind as those established to protect copyright in the digital environment).

Both options are subject to compliance with the three-step test.

The following are examples of legislations that have regulated the matter by developing either the first or second option described in the Agreed Statement relating to Article 10 of the WCT or Article 16 of the WPPT, in other words applying the limitations or exceptions of the analogue environment and/or establishing new limitations and exceptions appropriate to the digital environment.

In this regard, there are differences between countries with an Anglo-Saxon legal tradition that apply the concepts of fair use and fair dealing, and countries with a Latin legal tradition where limitations and exceptions are subject to a closed list.

1.5.3 United States Digital Millennium Copyright Act (DMCA) (1998)

As well as referring to the general principles of fair use and fair dealing, countries with an Anglo-Saxon legal tradition that have regulated the application of limitations or exceptions in the digital environment also establish grounds for specifically identified limitations or exceptions.

In the United States, the Digital Millennium Copyright Act (DMCA) states that the fair use regime is fully applicable to the digital world. Indeed, according to subparagraph c) of Section 1201 “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use”.

In terms of exceptions in favor of libraries and archives, the DMCA (Section 304) allows the digitization (reproduction by obtaining the digital copy) for the purposes of preserving works that have suffered damage or deterioration, have been stolen or whose storage format has become obsolete.

In relation to the exceptions applicable to computer programs, the DMCA (Section 302) allows the production of a copy of a computer program for the purposes of maintaining or repairing a machine in which that program has been legally installed.

As far as distance education is concerned, the DMCA (Section 403) ordered the United States Copyright Office to prepare a report of recommendations on how to promote distance education through digital technology, while striking the right balance between the rights of copyright holders and the needs of the users of works. On the basis of this report, the

Copyright Office approved the Technology, Education, and Copyright Harmonization Act (or TEACH Act) of 2002, which is discussed in a later section.

1.5.4 European Directive 2001/29/CE on the harmonization of certain aspects of copyright and related rights in the information society

This Directive shall hereafter be referred to as the European Directive.

Article 5 of the European Directive establishes 21 limitations or exceptions to copyright and related rights, distinguishing between those that must be adopted by Member States and those whose adoption is optional (with the latter forming the majority). As a general rule, States must respect the three-step test when incorporating these into their national legislation.

The European Directive creates a new limitation or exception to be applied specifically to the digital environment, in relation to acts of temporary reproduction.

The Directive also includes a list of limitations and exceptions which Member States can choose to adopt, which may or may not have a likely application in the digital environment, and in relation to which it is up to Member States to develop ways of making them applicable to the digital environment, while respecting the three-step test (as mentioned in recital 44) and taking account of the different economic impact that a limitation or exception might have in the analogue and digital environment. Recital 44 reads as follows:

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject matter.

Below is a list of the limitations or exceptions established therein:

(1) Compulsory limitation or exception in relation to acts of temporary reproduction (Article 5(1))

Member States are obliged to establish this limitation or exception for any temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject matter to be made, and which have no independent economic significance.

In accordance with recital 33 of the European Directive, this limitation or exception covers acts that permit browsing or caching. Browsing is an example of reproduction that is part of a technological process whose sole purpose is to facilitate access to the work. In contrast, the temporary storage carried out in proxy servers is not considered to be covered by the

limitation or exception, provided that for those servers the temporary copies have independent economic significance.¹⁹

The other exceptions in the list are optional, rather than compulsory.

(2) Limitation or exception in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation (2(a));

(3) Limitation or exception in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned (2(b));

(4) Limitation or exception in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage (2(c));

(5) Limitation or exception in respect of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted (2(d));

(6) Limitation or exception in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right holders receive fair compensation (2(e)).

(7) Limitation or exception in respect of reproduction and public communication when the use is for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved (3(a));

(8) Limitation or exception in respect of reproduction and public communication in the case of uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability (3(b));

(9) Limitation or exception in respect of reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible (3(c));

¹⁹ Rodriguez Moreno, Sofía. "La era digital y las excepciones y limitaciones al derecho de autor". Universidad Externado de Colombia, Bogotá. First edition, p. 222.

(10) Limitation or exception in respect of reproduction and public communication in respect of quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose (3(d));

(11) Limitation or exception in respect of reproduction and public communication in respect of the use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (3(e));

(12) Limitation or exception in respect of reproduction and public communication for the use of political speeches as well as extracts of public lectures or similar works or subject matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible (3(f));

(13) Limitation or exception in respect of reproduction and public communication for use during religious celebrations or official celebrations organized by a public authority (3(g));

(14) Limitation or exception in respect of reproduction and public communication for the use of works, such as works of architecture or sculpture, made to be located permanently in public places (3(h));

(15) Limitation or exception in respect of reproduction and public communication for the incidental inclusion of a work or other subject matter in other material (3(i));

(16) Limitation or exception in respect of reproduction and public communication for use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use (3(j));

(17) Limitation or exception in respect of reproduction and public communication for use for the purpose of caricature, parody or pastiche (3(k));

(18) Limitation or exception in respect of reproduction and public communication for use in connection with the demonstration or repair of equipment (3(l));

(19) Limitation or exception in respect of reproduction and public communication for use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building (3(m));

(20) Limitation or exception in respect of reproduction and public communication for use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject matter not subject to purchase or licensing terms which are contained in their collections (3(n));

(21) Limitation or exception in respect of reproduction and public communication for use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article (3(o)).

Where the Member States may provide for an exception or limitation to the right of reproduction, or right of reproduction and public communication, they may provide similarly for an exception or limitation to the right of distribution, to the extent justified by the purpose of the authorized act of reproduction.

1.6 INTERFACE BETWEEN EXISTING LIMITATIONS OR EXCEPTIONS AND PROVISIONS ON TECHNOLOGICAL PROTECTION MEASURES

Article 11 of the WIPO Copyright Treaty establishes the obligation of Contracting Parties to grant legal protection against unauthorized circumvention of technological measures that restrict acts (or uses of works) which are not authorized or permitted by law. The technological measures referred to in this obligation must be effective and used in connection with the exercise of any of the rights under the WIPO Copyright Treaty and the Berne Convention.

Article 18 of the WIPO Performance and Phonogram Treaty (WPPT) establishes a similar provision in relation to the rights of performers and phonogram producers.

Commentators on the provisions of the 1996 WIPO Treaties explain that this legal protection of technological measures that restrict acts (or uses of works) which are not authorized implies for Contracting Parties the obligation to provide protection and remedy against:

- (i) Preparatory activities for circumvention (manufacture, import and distribution of tools intended for circumvention) and the supply of circumvention services;
- (ii) Circumvention of technological measures against unauthorized access or uses, where these require the authorization of the right holder (for instance, devices to prevent reproduction or copying);
- (iii) Devices for the circumvention of technological measures, either those designed and produced for the sole purpose of carrying out said circumvention, or those whose various purposes and uses include that of circumventing technological measures, or ones that are obviously marketed or advertised for that purpose;
- (iv) Individual components of devices to circumvent technological measures that meet the criteria mentioned in (iii).

The various European Community and national rules developed by the WIPO Treaties of 1996 correspond to the above-mentioned principles.

Technological protection measures intended to restrict unauthorized access or uses have an impact on the application of limitations or exceptions to copyright and related rights. This impact or influence lies in the need to resolve the possible contradiction between the use of such technological measures by authors and right holders, and the exercise of limitations or exceptions. Such a contradiction may arise in the following cases, for instance:

- (i) A technological measure that prevents access to a protected work or phonogram necessarily restricts the possibility of producing reproductions, public communications or any other use covered by limitations or exceptions; or
- (ii) A technological measure that restricts certain acts or uses of the protected work or phonogram may prevent the exercise of limitations or exceptions where the law provides that the said act or use should be free and without payment

The solution aimed at making the use of technological protection measures compatible with the exercise of limitations or exceptions has not consisted in subordinating or restricting their use in favor of all applicable limitations or exceptions. On the contrary, the solution has been to determine certain cases in which it is possible to lift or withdraw the technological protection measure. Although an attempt is made to benefit the general interest or collective rights in some aspects, this does not necessarily tally with the grounds for limitations or exceptions to copyright and related rights.

The result is a regime of exceptions to the legal protection of technological measures: grounds that make it possible to lift or withdraw the technological restriction on the access to or use of works and phonograms. The aim is to strike a balance between protecting copyright and related rights, and the collective interests and rights represented, for instance, in the access to works by libraries, technological development, child protection, data protection and privacy and national security.

Below are examples of how this interface is handled in comparative law:

1.6.1 United States Digital Millennium Copyright Act (DMCA)

The legal protection of technological measures is established in Section 1201 of the United States Copyright Act, which was amended by the Digital Millennium Copyright Act of 1998 (DMCA).

According to the DMCA to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner (Section 1201 (a)(3)(a)).

For Jane Ginsburg²⁰, the DMCA establishes a new right to control access to the work of a copyright holder. There is a clear difference between access to a work protected by a technological measure and the access to the copy of a work. The latter is incorporated in the right of distribution, while the former cannot come under the traditional categories of patrimonial rights and would therefore become a new right. In other words, whenever a user wishes to access a work online, he must be subjected to the conditions established by the owner, in terms of the technological means of access (such as paying for a password, unless this is covered by a limitation or exception – see below). What is more, if there is a measure that prevents a copy from being made, users who wish to use the work again will have to re-

²⁰ Ginsburg, Jane. “Copyright Legislation for the “Digital Millennium””, Columbia VLA Journal of Law and the Arts, 23 Colum.-VLA J.L. & Arts 137, spring, 1999.

access it online, which is unlike what used to happen in the analogue world, where the future use of the work purchased was not subject to such requirements. The DMCA clearly goes beyond what is required by the WIPO Copyright Treaty, which at no point specified the establishment of a new right. This re-access right of copyright holders is considered as a *de facto* right that was not provided for in the Berne Convention.

The DMCA protects measures that control access to works against acts that seek to circumvent them, but it does not prohibit behavior that aims to circumvent measures that control *use*. Michael S. Keplinger explains that this distinction is reasonable because, for instance, an act aimed at avoiding a technological measure that protects a work from illegal copying would be included in the unauthorized exercise of the right of reproduction. The DMCA therefore does not prohibit the act of circumventing a technological measure to control copies, because due respect for the exclusive right of reproduction would be sufficient to provide “adequate and effective” protection.²¹

In these matters, what is forbidden is therefore the trade in devices that facilitate the neutralization of such measures, because this is where rules to prevent the manufacture and distribution of such objects are truly required.

The DMCA refers to *effective* technological measures, which is also mentioned in the 1996 WIPO Treaties. However, the DMCA is slightly more specific: “a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work”. The Act goes on to state that “a technological measure 'effectively protects a right of a copyright owner under this title' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title”. No examples are given of technological measures protected by the Act, as technological development constantly involves new discoveries. As a result, any effective measure is covered by the regulation.

What is known as an “interface” has developed with the protection of limitations or exceptions, and the legal protection of these measures is subject to exceptions that allow certain uses of protected works, which can be summarized as follows:²²

- (a) Limitation or exception to technological measures to control access and protect information for rights management, law enforcement, intelligence, and other government activities (Section 1201(e));
- (b) Limitation or exception to technological measures to control access, in favor of a nonprofit library, archives, or educational institution which gains access to a work solely in order to make a good faith determination of whether to acquire a copy of that work (Section 1201(d));

²¹ Keplinger, Michael S. “Intellectual Property Protection for the Digital Economy: The United States Millennium Copyright Act”, at the National WIPO Seminar on Copyright and Related Rights, their limitations or exceptions in the digital environment, Bogotá, 26 to 28 April 2000, p. 3.

²² Ficsor, Mihály. “Limitaciones y excepciones al derecho de autor en el entorno digital”. CERLALC, Dirección Nacional de Derecho de Autor, Bogotá, 2007, p. 94.

- (c) Limitation or exception to technological measures to control access, in favor of a person who has lawfully obtained the right to use a copy of a computer program, in order to carry out reverse engineering, so as to achieve interoperability with other programs (Section 1201(f));
- (d) Limitation or exception to technological measures to control access, for the purposes of encryption research, in order to identify and analyze flaws and vulnerabilities of encryption technologies and to develop encryption products (Section 1201(g));
- (e) Limitation or exception to technological measures to control access, for the protection of minors (Section 1201(h));
- (f) Limitation or exception to technological measures to control access, for the protection of personally identifying information the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person (Section 1201(i));
- (g) Limitation or exception to technological measures to control access, to circumvent technological measures and develop circumvention technology, for the purpose of testing computer or computer systems or networks (Section 1201(j));
- (h) Other limitations or exceptions to technological measures that are established in the future in accordance with an administrative procedure following assessment of the impact of protection of the technological measure (Section 1201 a.1.b-e). The role of recommending new limitations or exceptions falls to the Register of Copyrights, who must consult the Assistant Secretary for Communications and Information of the Department of Commerce, while the role of rulemaking falls to the Librarian of Congress.

The following criteria must be considered when establishing such limitations or exceptions:

- (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Register of Copyrights or Librarian considers appropriate.

The following limitations or exceptions were adopted using this mechanism in 2000, with effect until 27 October 2003:

- (a) Limitation or exception to technological measures to control access, for compilations consisting of lists of websites blocked by filtering software applications; and
- (b) Limitation or exception to technological measures to control access, for literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.

The following limitations or exceptions were adopted using this mechanism in October 2003, with effect until 27 October 2006:

(a) Limitation or exception to technological measures to control access, for compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites.

This exception does not apply to (i) lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or (ii) lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail;

(b) Limitation or exception to technological measures to control access, for computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete;

(c) Limitation or exception to technological measures to control access, for computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace;

(d) Limitation or exception to technological measures to control access, for literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

The following limitations or exceptions were adopted using this mechanism in 2006, with effect until 27 October 2009:

(a) Limitation or exception to technological measures to control access, for audio-visual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom.

(b) Limitation or exception to technological measures to control access, for computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace;

(c) Limitation or exception to technological measures to control access, for computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace;

(d) Limitation or exception to technological measures to control access, for literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the

enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

(e) Limitation or exception to technological measures to control access, for computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

(f) Limitation or exception to technological measures to control access, for sound recordings, and audio-visual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

1.6.2 European Directive

In order to make the European Directive on exceptions to technological measures easier to understand, its contents can be summarized as follows:

(a) Limitations or exceptions to technological protection measures of a voluntary nature, in other words those established through agreements between right holders and other interested parties, for the purpose of achieving the aims of specific limitations or exceptions (recital 51 and Article 6(4));

(b) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(2)(a));

(c) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow reproductions made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(2)(c));

(d) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts; or the preservation of these recordings in official archives on the grounds of their exceptional documentary character, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(2)(c));

(e) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right holders receive fair compensation, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(2)(c));

(f) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(3)(a));

(g) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(3)(b));

(h) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings, *where that beneficiary has legal access to the protected work or subject matter concerned* (recital 51, Article 6(4) and Article 5(3)(e));

(i) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation, without preventing right holders from adopting appropriate measures in relation to the number of reproductions (Article 6(4) and Article 5(2)(b)).

It should be pointed out that the above-mentioned limitations or exceptions are not applicable to works or subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. In other words, this regime of exceptions of technological measures is only applicable to an "off-line" digital environment. To state this even more clearly, they are not applicable to works made available to the public on interactive digital networks such as Internet.

1.7 LIMITATIONS OR EXCEPTIONS FOR TEACHING AND RESEARCH PURPOSES (IN INTERNATIONAL TREATIES)

1.7.1 The right to education in declarations of principles or recitals of international treaties and Community rules

The need to strike a balance between the protection of copyright and the public interest of a satisfied right to education was recognized at the first Berne Conference in 1884 by the Chair Numa Droz, who stated in his speech:

Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses (...).”²³

Paragraph 5 of the preamble of the WIPO Copyright Treaty states the following:

“Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.

The above acknowledges the balance between the rights of authors and the public interest as reflected in the Berne Convention, and posits the need for that (existing) balance to be maintained in the WIPO Copyright Treaty (WCT). This aim of not changing the balance between rights and interests established by the Berne Convention is developed in the Agreed Statement in relation to Article 10(2) of the Treaty.

It is worth noting that the preamble to the WCT does not refer to education, research and access to information as “rights” or “collective rights” but as “the larger public interest”.

In terms of comparative law, the European Directive is relevant as its recitals include the following references to education:

(14) This Directive should seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(...)

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings..

(...)

²³ Proceedings of the Diplomatic Conference of 1884: International Conference for the Protection of Authors' Rights held in Berne, from September 8 to 19, 1884, p. 68.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

1.7.2 Berne Convention (Article 10(2))

Article 10(2) of the Berne Convention allows member countries to establish limitations or exceptions in relation to the possibility of lawfully utilizing literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching. This must be to the extent justified by the purpose, and provided that such utilization is compatible with fair practice.

According to Mihály Ficsor,²⁴ the concept of “utilizing by way of illustration for teaching” includes parts of works as well as complete works, provided that it does not go beyond the concept of “illustration” for teaching. Complete works are, in turn, understood to be short works (for instance, individual photographic or graphic works), as the free use of longer works may not correspond to the concept of simple illustration.

Similarly, Delia Lipszyc²⁵ considers Article 10(2) of the Berne Convention to be based on the needs of teaching, on the understanding that “illustration” for educational purposes involves a use of literary works that is greater than that allowed for quotations or in their entirety, in the case of smaller works.

One of the conditions of applicability of this limitation and exception is that the utilization must be “to the extent justified by the purpose”. This means that it is not simply a matter of the utilization occurring in an educational institution, as the utilization must also be specifically intended for teaching, thereby ruling out merely entertainment activities that may be take place in such institutions.

The requirement that such utilization be compatible with fair practice refers to the application of the three-step test, established in Article 9(2) of the Convention.

In addition, mention should be made of the source, and of the name of the author if it appears (Article 10(3)). The limitation or exception relating to illustration for teaching is thus subject to the same conditions as quotations (Article 10(1)).

²⁴ Ficsor, Mihály. “Limitaciones y excepciones al derecho de autor en el entorno digital”. CERLALC, Dirección Nacional de Derecho de Autor, Bogotá, 2007, p. 27

²⁵ Delia Lipszyc. Copyright and Neighbouring Rights, UNESCO, Regional Centre for Book Promotion in Latin America and the Caribbean (CERLALC), Zavalía. Buenos Aires. 1993, p. 695.

1.7.3 Berne Convention (Appendix)

The Appendix to the Berne Convention establishes a series of special provisions relating to developing countries. States considered as developing countries by the United Nations General Assembly may benefit from this preferential regime.

In its latest triennial review of the list of Least Developed Countries in 2003, the Economic and Social Council of the United Nations used the following three criteria for determining the new list, as proposed by the Committee for Development Policy:²⁶

Criterion of low income, based on an estimated measure of gross national income per capita over a three-year period (less than 750 dollars to be on the list and more than 900 dollars to graduate from the list).

Criterion of insufficient human assets, consisting of a human assets index (HAI) of the quality of life in terms of: (a) nutrition; (b) health; (c) education; and (d) adult literacy; and

Criterion of economic vulnerability, using an economic vulnerability index (EVI) based on the following indicators: (a) instability of agricultural production; (b) instability of exports of merchandise and services; (c) economic importance of non-traditional activities (percentage of GDP); (d) merchandise export concentration; (e) disadvantage of having a small economy (measured using population logarithm); and (f) homelessness owing to natural disasters.

The Appendix to the Berne Convention that creates a preferential regime for developing countries includes six articles, in which educational purposes are extremely important. Article II(5) on non-voluntary translation licenses states that these licenses should be granted only for the purpose of teaching, scholarship or research. Article III establishes non-voluntary reproduction licenses, which are conditional upon, inter alia, copies of such editions not having been distributed in that country to the general public or in connection with systematic instructional activities.

The following countries have benefited from this preferential regime to date:

Cuba, Bangladesh, Jordan, Mongolia, Philippines, Sri Lanka, Sudan, Syria, United Arab Emirates, Uzbekistan and Yemen have adopted the provisions of Articles II and III of the Appendix. Samoa and Thailand have adopted the provisions of Article II of the Appendix only. This regime remains in force until 10 October 2014.

Below are details of the substantive provisions of the Appendix to the Berne Convention that are relevant to the subject of this study.

²⁶ Sumarriva Gonzalez, Víctor. “La problemática actual del derecho de autor y conexos en los países en desarrollo”, in “Copyright and the challenges of a changing world - homage to Professor Delia Lipszyc”. Palestra Editores. Lima, 2006, p. 189

1.7.4 Non-voluntary translation licenses for developing countries, in the Appendix to the Berne Convention

Article II(1) of the Appendix to the Berne Convention establishes non-voluntary translation licenses for any developing country which has declared that it will avail itself of the faculty provided for in this Article, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses, granted by the competent authority, so far as works published in printed or analogous forms of reproduction are concerned.

For such compulsory licenses to be granted, a period of at least three years must have passed from the date of the first publication of the work, without a translation of such work being published by the owner of the right of translation, or with his authorization, in a language in general use in the country that has adopted the Appendix. A license may also be granted if all the editions of the translation published in the language concerned are out of print.

Any national of a country covered by the Appendix may obtain a license to produce a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction. Any such license shall be granted only for the purpose of teaching, scholarship or research.

The wording of this provision excludes its applicability to works published in digital format, as it refers to those published in printed or analogous forms of reproduction (which necessarily correspond to hard copies of works).

1.7.5 Non-voluntary reproduction licenses for developing countries

Article III of the Appendix to the Berne Convention deals with limitations to the right of reproduction provided for in Article 9, in favor of developing countries, by means of non-exclusive and non-transferable licenses granted by the competent authority.

For such compulsory licenses to be granted, a period of at least five years must have passed from the date of the publication of a work printed or reproduced in analogous forms, without copies of such edition being distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works.

For works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years. For works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

In addition to works published in printed or analogous forms of reproduction, reproduction licenses can also be granted for the reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a language in general use in the country in which the license is applied for, provided that the audio-visual fixations in question were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

According to Mihály Ficsor,²⁷ although the scope of this article appears fairly wide, in relation to the possibility of applying the article to works published in digital format, Article III(7) clearly states that it cannot be applied to works published through digital systems or reproductions carried out through digital transmissions: “(a) Subject to subparagraph (b), the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction”.

However, Ficsor points to another provision with possible applicability for the digital environment: Article III(7)(b) of the Appendix (as previously mentioned) allows the audio-visual reproduction of audio-visual fixations that incorporate protected works, and the translation of the accompanying text in a language in general use in the country where the license application is made. Its applicability in the digital environment corresponds to the fact that it does not restrict the form in which the audio-visual reproduction is carried out, thereby allowing it to be carried out in digital form.

1.7.6 Limitations or exceptions for teaching purposes in the digital environment, according to the European Directive

As stated previously, in terms of limitations or exceptions applicable in the digital environment, the European Directives chose to create a new limitation/exception specifically applicable to that digital environment, in relation to acts of temporary reproduction. The Directive goes on to provide a list of limitations or exceptions whose adoption by Member States is optional, which may or may not be likely to be applied in the digital environment, and for which it is up to Member States to develop ways of making them applicable to the digital environment, while respecting the three-step test and (as stated in recital 44 of the Directive) taking account of the different economic impact that a limitation or exception may have in the analogue environment and the digital environment.

This group of optional exceptions includes the following ones that refer to teaching purposes:

Article 5

Exceptions and limitations

(...)

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(...)

c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(...)

²⁷ Ficsor, Mihály. “Limitaciones y excepciones al derecho de autor en el entorno digital”. CERLALC, Dirección Nacional de Derecho de Autor, Bogotá, 2007, p. 27

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(...)

n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject matter not subject to purchase or licensing terms which are contained in their collections;

The exceptions established in the European Directive for educational purposes do not cover distance learning through digital networks. Although recital 42 of the Directive establishes that Article 5(3)(a) is also applicable to distance education, the above-mentioned rule does not make any reference to this possibility or define the concepts of “education”, “scientific research”, “illustration” or any other clarification that might imply how the rule would apply to distance education.²⁸

In member countries, the implementation of the European Directive in terms of the use of works for teaching and scientific research purposes can be summarized as follows:

- A first group of countries do not have a limitation or exception in this regard, with this use remaining subject to the conclusion of extended collective agreements between collective management companies and teaching centers (Denmark, Finland, Sweden and France, as of January 2009);
- A second group of countries have this limitation or exception and extend it to communication rights²⁹ and communication to the public (Belgium, Luxembourg, Malta and France, as of January 2009);

²⁸ Commission of the European Communities. Green Paper on Copyright in the Knowledge Economy. Brussels, 2008.

²⁹ In Spain, this includes rights of reproduction, distribution and communication to the public. Article 32 of Royal Legislative Decree 1/1996 was amended by Law 23 of 7 July 2006, single article(7), as follows: “2. (...) not subject to authorisation when undertaken by teachers in “regular education” regarding small fragments of works or isolated works of visual arts and figurative photography, excluding text books and University manuals, provided that such acts take place only for educational activities in the classroom, to the extent justified by the non commercial purpose, that the works concerned have already been disclosed and that, unless proven impossible, the source and the name of the author of the work is mentioned. However this limitation does not cover compilations or collections of fragments of works or isolated works in visual arts and figurative photography”.

- In other countries the right of reproduction is limited (Greece, Slovenia);
- In the United Kingdom, the limitation or exception only allows communication to the public provided that the copy does not leave the premises of the teaching centre;
- In Germany, a distinction is made between teaching and research activities. For teaching, the use of protected works is allowed only for teaching purposes in the classroom and through an intranet, with this limited to a group of students attending a specific course. For research, the making available of works for research purposes is allowed for a restricted number of participants.

In terms of the form of copying authorized under this limitation or exception for teaching or research purposes, implementation in member countries can be summarized as follows:

- Most Member States allow analogue and digital copies to be made under this limitation or exception;
- In Hungary, the limitation or exception applies only to analogue reproductions;
- In Denmark, teaching establishments and collective management companies have not reached an agreement on digital copying. Teaching establishments have therefore been granted a license that is only applicable to paper copies of extracts of works. The only extended collective license that includes digital copies (incorporating activities such as scanning, printing, e-mail, downloading and digital storage) has been granted by collective management companies for the use of works on the Internet in teacher training schools.

With regard to the length of extracts of work that may be reproduced or made available for educational or research purposes, the implementation in member countries can be summarized as follows:

- The limitation or exception is applicable to newspaper articles and brief extracts of works (for instance in Belgium, Germany and France);
- In Malta, the limitation or exception is applicable to the entire work;
- In Luxembourg, the limitation or exception is applicable to brief extracts of works, with no distinction as to the type or length of work.

In terms of the institutions that can use the limitation or exception for research and teaching purposes, the various options adopted by Member States can be summarized as follows:

- In Germany, reference is made to schools, universities, post-secondary education institutions and non-commercial professional training institutions;
- The United Kingdom tends to refer to teaching centers, without specifying them individually;

- In France, there is no mention of the institutions to which the limitation or exception is applicable, and the law simply uses the same terms as Article 5(3)(a): illustration for the purposes of education or scientific research;
- In Spain and Greece, the limitation or exception only applies to teaching, and research activities are therefore excluded.

Differences in the treatment of digital copying (covered by a limitation/exception or licensed by the right holder) and the making available in digital networks for teaching or research purposes (licensed or covered by exceptions with different requirements and scope in each country) generate difficulties and legal uncertainty around the use of works in the context of digital distance education, especially when this takes place among people located in different countries.

Analyses of the implementation of the European Directive have included calls for the scope of the limitation or exception in Article 5(3)(a) to be extended to allow parts of works to be made available to students by e-mail or virtual learning environments.³⁰ One suggestion concerns the introduction of a compulsory limitation or exception for educational and scientific research purposes, with a sphere of application clearly defined in the Directive. For instance, Gowers Review of Intellectual Property 2006 recommends the following:

- That the educational limitation or exception be defined on the basis of the category of use and activity, rather than according to the supports or location;
- That the limitation or exception to public communication for teaching or research does not allow works to be made available to the general public, but only to students and researchers;

Nevertheless, the Green Paper on Copyright in the Knowledge Economy suggests that making the limitation or exception compulsory and clarifying its scope in terms of distance education does not imply extending it, as there is a need to also consider the growing economic impact of the use of works in digital networks (recital 44 of the European Directive) and the need for a balance between the protection of exclusive rights and competitiveness in European education and research.

Lastly, mention should be made of the way in which the provisions of Article 5(3)(n) of the European Directive³¹ were transformed into the German context by means of a law that was approved on 10 September 2003 and entered into force in July 2006.

Article 52(b) of this law refers to the reproduction of works on electronic reader terminals in public libraries, archives and museums. The novelty lies in the fact that the digital

³⁰ Gowers Review of Intellectual Property 2006, 4.17 and 4.19, cited in Commission of the European Communities. Green Paper on Copyright in the Knowledge Economy. Brussels, 2008.

³¹ Article 5. Exceptions and limitations. 3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (...) n) se by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject matter not subject to purchase or licensing terms which are contained in their collections.

reproduction of such works is allowed solely for scientific research and/or study, while successors must also receive appropriate remuneration. Compensatory remuneration is thus established in the form of an indirect non-voluntary licenses, which taxes the equipment and inputs needed for the reproduction, while the remuneration is collected and distributed to right holders by collective management companies.³²

Nonetheless, the same rule prohibits the circulation of such digital copies outside the establishments provided for, and libraries are obliged to make a sworn statement undertaking to limit the provision of digital copies to the existing analogue resources of the library.³³ Furthermore, the above is not applicable to works that have already been made available to the public by the successors through a special contract or agreement. For such works, which are excluded from collective remuneration, the terms of use established in the relevant contract shall apply.³⁴

Article 53 on private copying was supplemented by 53a, which recognizes the lawfulness of libraries' document dispatch services (provided that they involve articles from periodicals or small parts of a work that are not accessible by the public at a chosen time and place). In addition, this service is limited to the post and fax. However, electronic dispatches are allowed when the technical characteristics of the digital copy that is the subject of the service are the equivalent to the aforementioned unique remittance of a physical archive. This amendment does not affect the prohibition on public dissemination (Article 19a of the law) or the circumvention of technological protection measures (Articles 95 and 108). This document dispatch service is subject to fair remuneration for successors in the above-mentioned way. Articles 52a and 53a therefore make it possible to make use of the opportunities of the digital environment for the development of society in general, without prejudicing the rights of authors and publishers.

In Germany, the 2003 reform was the subject of intense debate,³⁵ which led to a more recent amendment of the law. In January 2008, a new reform of the copyright law entered into force, with the aim of reformulating or re-establishing the balance between the various interests of authors, authorized users, equipment manufacturers and final consumers.

The bill for this second reform had originally provided for schools, universities and non-commercial research institutions to be authorized to digitize for their own purposes, without special authorization, copyright-protected works in order to upload them to the Intranet or Internet and reproduce them from there as many times as they wished. However, following intense debate, and in the light of the impact it would have on publishers, it was eventually decided that although the reform would allow museums, libraries and archives to digitize their resources and make the available on electronic reading terminals, they can only make as many versions available at the same time as there are (for instance) physical copies in the library's

³² See Articles 45, 49, 52a, and Articles 54, 54a, 54f, 54g and 54h of the German Copyright Law (Urheberrecht).

³³ This does not, however, include the obligation to provide only as many digital copies as there are existing analogue editions.

³⁴ Etorena, Joaquín. "Compartir y Excluir: El derecho de autor en el contexto de la Sociedad de la Información". Final submission. Intensive postgraduate course on copyright and related rights in theory and practice. Faculty of law, Universidad Nacional de Buenos Aires. December 2006.

³⁵ The German Publishers and Booksellers Association (*Boersenverein*) states its critical position on its website: <http://www.boersenverein.de>.

physical inventory. In the future, libraries are also authorized to send copies of review articles and book extracts to users, provided that the publisher in question does not offer that service itself.³⁶

1.7.7 The United States Technology, Education, and Copyright Harmonization Act of 2002, or TEACH Act

In November 2002, the United States Congress amended Article 110(2) of the United States Copyright Act, which establishes another copyright limitation or exception in addition to fair use for the public performance of literary or musical works in educational institutions. The amendment is known as the TEACH Act, which stands for Technology, Education and Copyright Harmonization.

The main changes it introduces include the elimination of the requirement for a “classroom”, so that the limitation or exception covers distance learners. The reform clarifies the terms and conditions under which non-profit educational institutions in the United States can use protected works in their distance education programs, including on websites, without having to request authorization from the author or provide any remuneration.³⁷

The limitations or exceptions applicable to distance education had been the subject of wide discussion and debate. In 1998, United States Congress instructed the Copyright Office to prepare a report of recommendations on which reforms should be enacted to facilitate the use of digital technology in distance education.

The Copyright Office report recommended significant changes. A bill to implement the recommendations was presented to Congress in March 2001 and was approved in late 2002.

The TEACH Act broadened the scope of limitations and exceptions by making them applicable to the transmission of works through digital networks, and the digitization of works with a view to said transmission for educational purposes. However, the Act also established more specific and stricter conditions than those applicable to face-to-face education.

These limitations or exceptions applicable to digital distance education can be summarized as follows:

(a) Digital transmission digital for educational purposes

This limitation or exception allows the transmission through digital networks of recordings of poetry readings and readings of short stories, and the transmission through digital networks of parts of any other performance.

³⁶ Loick, Atonia “La nueva Ley de derecho de autor”. Bulletin of the Goethe-Institut in Peru. Available at <http://www.goethe.de/Ins/pe/lim/wis/es2550214.htm>.

³⁷ See Lucie Guibault, “The nature and scope of limitations and exceptions to copyright and neighbouring rights with regard to general interest missions for the transmission of knowledge: prospects for their adaptation to the digital environment”, study prepared for UNESCO, Amsterdam, Institute for Information Law, 2003, p. 31.

The applicability of this limitation or exception is subject to the following conditions or requirements:

- That the works were not originally created to be used in instructional activities transmitted through digital networks
- That it does not go beyond the amount comparable to that which is typically displayed in the course of a live classroom session
- That it involves accredited non-profit educational institutions
- That the educator does not know or have reason to believe that the works were not lawfully made and acquired
- That it does not refer to textbooks, course packs, or other material which are typically purchased or acquired by the students for their independent use
- That it involves mediated educational activities. This concept outlines the types of materials that an educator can incorporate for reading in class. In other words, it covers works that an educator can present, perform or read during class (such as a film or music videos, images of works of art or poetry), but does not include materials that an educator may ask the student to read, study, listen to or watch outside class (at a time of the latter's choosing)
- The performance or presentation must be a normal part of the mediated educational activity; carried out by an educator or under his/her control or supervision; directly related and of material assistance to the teaching content; and aimed at – and technologically limited to – students enrolled for the class. The condition that the performance or presentation must be “technologically limited” to students, means that the technological protection measures must exclude from access those who are outside that circle
- The educational institution must institute policies regarding copyright and provide notice to students that materials used may be subject to copyright protection; must apply technological measures that reasonably prevent retention of the work outside class and its further distribution; and must not interfere with technological measures used by copyright owners to prevent such retention or dissemination.

(b) Obtaining digital copies to be used for transmission for educational purposes

This limitation or exception allows the obtaining of digital copies and the digitization of analogue works needed for the transmission of authorized presentations or performances in the digital sphere.

The applicability of this limitation or exception is subject to the following conditions or requirements:

- That the copies be kept only by the institution and used solely for authorized digital transmissions;

- For the digitization of analogue works, there must be no available digital version of the work, and it must be free from technological protections that may prevent authorized digital transmissions.

1.8 TEACHING PURPOSES AS A LIMITATION OR EXCEPTION TO THE PROTECTION OF TECHNOLOGICAL MEASURES

1.8.1 United States Digital Millennium Copyright Act (DMCA)

As stated previously, the legal protection of technological measures is established in Section 1201 of the United States Copyright Act. This protection is subject to exceptions that allow for certain uses of protected works, including the following in relation to education and research:

- (a) Limitation or exception to technological measures to control access, in favor of a non-profit library, archives, or educational institution which gains access to a work solely in order to make a good faith determination of whether to acquire a copy of that work (Section 1201(d));
- (b) Limitation or exception to technological measures to control access, for the purposes of encryption research, in order to identify and analyze flaws and vulnerabilities of encryption technologies and to develop encryption products (Section 1201(g));

As part of the administrative procedure established by the DMCA for the creation of new limitations or exceptions to technological measures (Section 1201 a.1.b-e), the criteria to be considered to lay down such exceptions are to include the availability of works to be used in education, as well as the impact of prohibiting the circumvention of technological protection measures on teaching, science or research;

The limitations or exceptions adopted in 2006, which will remain in force until 27 October 2009, include the following:

- (c) Limitation or exception to technological measures to control access, for audio-visual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom.

1.8.2 European Directive

As part of the list of limitations or exceptions to technological measures, Article 6 of the European Directive establishes the following cases for teaching and research purposes:

- (a) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow reproductions made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(2)(c));

(b) Limitation or exception to technological protection measures, in the absence of an agreement whereby right holders voluntarily allow the exercise of this limitation or exception, in order to allow illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, *where that beneficiary has legal access to the protected work or subject matter concerned* (Article 6(4) and Article 5(3)(a));

As stated previously, the above-mentioned limitations or exceptions to technological measures mentioned in the Directive are not applicable to works or subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

CHAPTER 2 ANALYSIS OF THE LIMITATIONS OR EXCEPTIONS FOR TEACHING AND RESEARCH PURPOSES, AS PROVIDED FOR IN NATIONAL LAWS

Both the right to education and the right to culture are fundamental for the development of a society. As copyright is personal, it should therefore be secondary to the right to culture and education, as they are rights of the wider interest that are essential for the development of any society.

The use of works for teaching purposes is a limitation or exception to copyright for an altruistic reason: the right to education and the right to access culture. Article 26 of the Universal Declaration of Human Rights states that education is a human right directed to full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Education seeks to enable access to knowledge, science, skills and other cultural goods and values.

Article 27 of the Declaration recognizes the right of everyone to freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

These rights are prioritized by the limitation or exception in question. Although authors do not receive compensation for the use of their work, their contribution to the dissemination of knowledge is considered sufficient reward, provided that the work is used in accordance with certain parameters.

For the purposes of this document, exceptions for teaching and research purposes can be classified as follows:

1. Limitations or exceptions related to illustration for teaching:

- Use of works
- Reproduction of works
- Public communication of works
- Compilation of works
- Right of quotation for teaching purposes
- Examinations

2. Limitations or exceptions relating to note taking in class or lectures

3. Limitations or exceptions relating to research:

- Reproduction (private copying) of works
- Right of quotation for research purposes
- Public communication for scientific purposes
- Use of subject matter protected by related right for research purposes

4. Right of quotation

5. Limitation or exception for personal or private copying

6. Limitations or exceptions applicable to the digital environment relating to teaching or research:

- Reproductions inherent in the technological process of digital transmission
- Digitization of works or subject matter to be used in distance education
- Digital transmission of works or subject matter in the framework of distance education
- Limitation or exception of communication to individual members of the public, by dedicated terminals on the premises of teaching centers for the purpose of research or private study, of works and other subject matter not subject to purchase or licensing terms which are contained in their collections.

7. Limitations or exceptions to the protection of technological measures:

- Access to a work or subject matter to determine whether to acquire it
- Research in information encryption
- Research into computer system security

The present chapter contains an analysis of each of the above limitations or exceptions, in that order.

2.1 LIMITATIONS OR EXCEPTIONS RELATING TO ILLUSTRATION FOR TEACHING PURPOSES

Below is a description of each of the limitations or exceptions established for illustration for teaching purposes.

2.1.1 Limitation or exception of “use” for illustration for teaching purposes

In completely broad terms, when considering which acts are allowed by the limitation or exception, legislation in some of the region’s countries allows the “use” of certain works for teaching. The word “to use” has no special meaning in copyright, and could therefore be interpreted to apply to a wide variety of acts and uses of works within academic activities. There are so many of these that this study alone identified over 40 different ways of using works in activities within school education.

Under this limitation or exception, one group of countries allows the publication, broadcast or sound or visual recording of works:

COLOMBIA. Law 23 of 1982. Article 32 - The utilization by way of illustration of literary or artistic works or part thereof for teaching is allowed, by means of publications, broadcasts or sound or visual recording to the extent justified by the purpose, as is the communication for teaching purposes of the work broadcast for use in schools, education, universities and nonprofit professional training, provided that the name of the author and the title of the works thus used are mentioned.

COSTA RICA. Law 6.683 of 1982. Article 73 - (amended by Law 8686 of 2008)- (...) The use and reproduction, to the extent justified by the purpose, of works by means of illustration for teaching by means of publications such as anthologies, radio broadcasts or sound or visual recordings is lawful, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned, if this name appears in the source.

CUBA. Law 14 of 1977. Article 38 - The following is lawful without the consent of the author and any remuneration to him/her, but with the obligation to reference his/her name and source, provided that the work is publicly known, and respecting its specific values:

(...)

b) to use a work, including in its entirety, if this is justified by its short length and nature, by way of illustration for teaching, in publications, radio or television broadcasts, films or sound or visual recordings; (...)

HAITI. Copyright Decree 2005 - Notwithstanding the provisions of Article 7, the following is allowed without the authorization of the author and without payment of a remuneration, but provided that the source and name of the author is mentioned if this name appears in the source:

1) to use a lawfully published work for teaching purposes by way of illustration, in writings or sound or visual recordings; and (...)

The following countries establish this exception in connection with related rights:

COLOMBIA. Law 23 of 1982. Article 178 - The previous articles of the present law are not applicable when the acts to which they refer concern:

(...)

c) Use solely for the purposes of teaching or scientific research;(...)

COSTA RICA. Law 6.683 of 1982. Article 73bis - (supplemented by Law 8686 of 2008).- 1.- The following exceptions to the protection provided for in this law are allowed, for the exclusive rights of performers, phonogram producers and broadcast organizations, provided that these do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder:

(...)

d) In cases of use solely for the purposes of teaching or scientific research.

MEXICO. Federal Copyright Law. Article 151 - The use of performances, phonograms, videograms or broadcasts does not constitute violations of the rights of performers, phonogram or videogram producers or broadcast organizations when:

(...)

III. It is for teaching or scientific research purposes, or (...)

a. Sphere of application

Although this is not explicitly mentioned in the laws, it is understood that teaching institutions and the teachers associated with them are to benefit from this limitation or exception.

In order to clarify the concept of “teaching institution”, it should be pointed out that there are three types of education: formal, non-formal and informal. Formal education refers to schools, institutions, universities and modules; non-formal education covers courses, academies and so forth; and informal education includes both, as it means lifelong education.

Exceptions for illustration for teaching purposes established in the region’s countries are intended to be used in the academic environment, in the setting of educational or teaching institutions. This means that the application of this type of exception comes under formal and non-formal education, where there is an institution and an academic community organized around the purpose of teaching and learning.

The exceptions established by the region’s countries do not explicitly mention whether the educational institution entitled to use them must be officially recognized as such, approved or

operate under the supervision of a public authority such as a ministry or department of education or public instruction. This field is not discussed in copyright law, so it depends on how each country uses the terms “educational institution” and “teaching institution”, as to exactly which institutions can be counted as such and under what conditions.

b. Works or subject matter to which the limitation or exception applies

- Literary and artistic works (Colombia);
- Works in general (Costa Rica, Cuba, Haiti);
- Explicitly mention the possibility of using the entire work (Colombia, Cuba);
- Artistic performances, phonograms and broadcasts (Colombia, Costa Rica);
- Artistic performances, phonograms, videograms and broadcasts (Mexico).

c. Applicability conditions or requirements

- Use to the extent justified by the purpose (Colombia, Costa Rica);
- Compliance with fair use (Costa Rica);
- Non-profit use (Colombia);
- Work must be lawfully published (Haiti);
- Obligation to mention the name of the author and the title of the work (Colombia, Cuba);
- Obligation to mention the name of the author and the title of the work, if the name appears in the source (Costa Rica);
- Respect for the specific values of the work (Cuba);
- Solely for the purposes of teaching (Colombia, Costa Rica).

2.1.2 Limitation or exception of reproduction for the illustration of teaching

In specific terms, most of the region’s countries have a limitation or exception for the illustration of teaching that allows works to be reproduced freely and without payment.

One group of countries allows the work to be reproduced in its entirety under this limitation or exception:

CUBA. Law 14 of 1977. Article 38 - The following is lawful without the consent of the author and any remuneration to him/her, but with the obligation to reference his/her name and source, provided that the work is publicly known, and respecting its specific values:

(...)

e) to reproduce a work using a photographic or similar procedure, when the reproduction is carried out by a library, documentation centre, scientific institution or a teaching establishment, provided that this is done in a non-profit way and that the number of copies is strictly limited to the requirements of a specific activity; (...)

COSTA RICA. Law 6.683 of 1982. Article 73 - (amended by Law 8686 of 2008)

Article 73.- (...)

The use and reproduction, to the extent justified by the purpose, of works for the purposes of illustration for teaching by means of publications such as anthologies, radio broadcasts or sound or visual recordings is lawful, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned, if this name appears in the source.

In the legislation of Costa Rica, this provision is supplemented by another:

COSTA RICA. Law 8039 on Procedures for Enforcement of Intellectual Property Rights, Article 54.- Unauthorized reproduction of literary or artistic works or phonograms (...) The nonprofit reproduction of literary or artistic works or phonograms, to the extent required for illustration for

teaching purposes, shall not be punished, provided that this reproduction complies with fair use and mentions the source and the name of the author, if this name figures in the source.

GRENADA. Copyright Act 1989. 34 (...) (2) The following acts do not constitute an infringement of copyright or neighboring rights-

(...)

(h) the reproduction of a protected work or protected production by a teacher or pupil in the course of instruction Provided that the reproduction is not made by means of an appliance capable of producing multiple copies;

(ii) as part of the questions to be answered in an examination: or

(iii) in answer to such questions; (...)

MEXICO. Federal Copyright Law. Article 148 - The literary and artistic works already disclosed may be used, provided that the normal exploitation of the work is not affected, without the authorization of the owner of the economic right and without remuneration, the source invariably being cited and the work being unaltered, only in the following cases:

(...)

IV. Reproduction on a single occasion, and in one copy, of a literary or artistic work, for personal and private use of the person making the reproduction and for non-profit making purposes. Legal persons may not avail themselves of the provisions of this section, except in the case of an educational or research institution, or where this is not devoted to commercial activities; (...)

URUGUAY. Law. 9.739. Article 45 – The following does not constitute unlawful reproduction: the publication or radio or press broadcast of works intended for teaching, extracts, sections of poetry and loose articles, provided that the name of the author is mentioned, except for the provisions of Article 22. (...)

In the following countries, this limitation or exception covers the reproduction using reprographic means of articles lawfully published in newspapers or magazines, but does not allow the reproduction of the entire work, only brief extracts thereof:

ANDEAN COMMUNITY (Bolivia, Colombia, Ecuador, Peru). Andean Community Decision 351 of 1993. Article 22 - Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby; (...)

EL SALVADOR. Decree 604 of 1993 – Law on the Promotion and Development of Intellectual Property. Article 45 – In relation to works that have already been lawfully disclosed, the following is allowed without the authorization of or payment to the author:

(...)

c) reproduction by reprographic means for teaching or for the holding of examinations in educational establishments, provided that no profit-making purposes are pursued and to the extent justified by the purpose, of lawfully published articles, brief extracts or short works, on condition that such use is made in accordance with fair practice; (...)

GUATEMALA. Law on Copyright and Related Rights. Law 33 – 98. Article 64 - With regard to works already disclosed, the following is likewise permitted without the authorization of the author, in addition to what is provided for in Article 32:

a) the reproduction by reprographic means of articles or short excerpts from lawfully published works for teaching or the holding of examinations at educational institutions, provided that there is no profit-making purpose and the use does not interfere with the normal exploitation of the work or prejudice the legitimate interests of the author; (...)

HAITI. Copyright Decree 2005 - Notwithstanding the provisions of Article 7, the following is allowed without the authorization of the author and without payment of a remuneration, but provided that the source and name of the author is mentioned if this name appears in the source:

(...)

2) the reprographic reproduction for teaching or examinations in educational institutions the activities of which do not serve direct or indirect commercial gain, to the extent justified by the purpose, of isolated articles lawfully published in a newspaper or periodical, short extracts of a lawfully published work or a short lawfully published work.

HONDURAS. Law on Copyright and Related Rights. Decree 4 99 E. Article 50 - Reprographic reproduction for teaching or examinations in educational institutions is allowed, provided that no profit-making purposes are pursued and to the extent justified by the purpose, of lawfully published articles, lectures, lessons, brief extracts and brief works, on condition that such use is made in accordance with fair practice.

NICARAGUA. Law on Copyright and Related Rights. Law 312 of 1999. Article 33 – The following is allowed without the authorization of the author: the reprographic reproduction for teaching purposes of isolated articles published in the press of short extracts of a work, provided that they have been published on the condition that the reproduction is carried out in teaching institutions and that no profit-making purposes are indirectly or directly pursued, and that it is to the extent justified by the purpose, on condition that such use is made in accordance with fair practice and quotes the source and name of the author, if that figures in the source.

PANAMA. Law on Copyright and Related Rights. Law 15 of 1994. Article 48.- In relation to works that have already been lawfully disclosed, the following is allowed without the authorization of or payment to the author:

(...)

3. The reprographic reproduction of lawfully published articles and extracts of brief works for teaching or examinations, provided that there are no profit-making purposes, that it is to the extent justified by the purpose and on condition that such use is made in accordance with fair practice.(...)

PARAGUAY. Law on Copyright and Related Rights. Law 1.328 of 1998. Article 39 – In relation to previously disclosed works, the following is allowed without authorization of or payment to the author:
1. the reprographic reproduction for teaching or examinations in educational institutions, provided that there are no profit-making purposes and that it is to the extent justified by the purpose, of lawfully produced articles or brief extracts of works, on condition that such use is made in accordance with fair practice; (...)

PERU. Copyright Law. Legislative Decree 822 of 1996. Article 43.- In relation to works that have already been lawfully disclosed, the following is allowed without the authorization of the author:
a. The reprographic reproduction for teaching or examinations in educational institutions, provided there are no profit-making purposes and to the extent justified by the purpose, of lawfully published articles or brief extracts of works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby. (...)

DOMINICAN REPUBLIC. Copyright Law. Law 65-00. Article 32 - The following may be reproduced by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose: articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby.

VENEZUELA (BOLIVARIAN REPUBLIC OF). Copyright Law. Article 44 – The following reproductions are lawful:

(...)

3. the reprographic reproduction for teaching or examinations in educational institutions, provided that there are no profit-making purposes and that it is to the extent justified by the purpose, of lawfully produced articles, brief extracts of work or short works, on condition that such use is made in accordance with fair practice. (...)

Other countries in the region apply this limitation or exception to literary, musical, artistic and choreographic works, phonograms, cinematographic and audiovisual works, and broadcast or cable programs. The countries in question are as follows:

ANTIGUA AND BARBUDA. The Copyright Act, 2002. Use of Work for Educational Purpose.

56. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(...)

58. (1) A recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

59. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorized by this section if, or to the extent that, licenses are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) Where a license is granted to an educational establishment authorizing the reprographic copying of passages from any published literary, dramatic or musical work, for use by the establishment, then, any term of that license which purports to restrict the proportion of work which may be copied (whether on payment or free of charge) to less than that permitted under this section shall be of no effect.

60. (1) Where a copy of a work would be an infringing copy if the making thereof were not authorized under section 56, 58 or 59 and such copy is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing and, if that dealing infringes copyright, for all subsequent purposes. (2) In subsection (1) "dealt with" means sold, or let for hire or offered or exposed for sale or hire.

THE BAHAMAS. Statute Law. Chapter 323.

62. (1) Copyright in a literary, dramatic, musical, choreographic or artistic work is not infringed by its being reproduced in the course of instruction or of preparation for instruction, provided the reproduction is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in sound recordings, motion pictures, and audiovisual works, is not infringed by its being reproduced in a single copy or phonorecord in the course of instruction or of preparation for instruction, in the making of motion pictures or motion picture soundtracks, provided the reproduction is done by a person giving the instruction and such copy reproduced is retained by the department of educational establishment in which the instruction is being given.

(3) For the purposes of subsection (2), the educational establishment must be one with an accredited degree program in motion pictures.

(...)

64. The transmission of a performance or display may be reproduced in a single copy or phonorecord by an educational establishment for the educational purposes of that establishment without thereby

infringing the copyright in the work if such performance or display is directly related to the course content.

65. (1) *Subject to the provisions of this section, the reproduction of copies from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work.*

(2) *Not more than five per cent of any work may be reproduced by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.*

66. (1) *Where a reproduction of a work would be an infringing copy or phonorecord if the making thereof were not authorized under section 62, 64 or 65 and such copy or phonorecord is subsequently dealt with, it shall be treated as an infringing copy or phonorecord for the purposes of that dealing as if that dealing infringes copyright for all subsequent purposes.*

(2) *In subsection (1), "dealt with" means sold, or let for hire or offered or exposed for sale or hire.*

BARBADOS. Copyright Act, 1998. Use of Work for Educational Purposes.

55. (1) *Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, if the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.*

(2) *Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound track in the course of instruction, or of preparation for instruction, in the making of films or film sound tracks, if the copying is done by a person giving or receiving instruction.*

(...)

57. (1) *Subject to subsection (2), a recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational institution for the educational purposes of that institution without thereby infringing the copyright in the broadcast or cable program or in any work included in it.*

(2) *Subsection (1) shall not apply if or to the extent that there is a licensing scheme certified pursuant to section 100 for the purposes of this section.*

58. (1) *Subject to this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational institution for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.*

(2) *Not more than five per cent of any work may be copied by or on behalf of an educational institution by virtue of this section in any one period of three months.*

(3) *Copying is not authorized by this section if, or to the extent that, licenses are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.*

(4) *Where a license is granted to an educational institution authorizing the reprographic copying of passages from any published literary, dramatic or musical work, for use by the institution, then, any term of that license which purports to restrict the proportion of work which may be copied, whether on payment or free of charge, to less than that permitted under this section is of no effect.*

BELIZE. COPYRIGHT ACT. Chapter 252. Revised edition 2000. Showing the Law as at 31st December, 2000. Use of Work for Educational Purposes.

60. (1) *Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.*

(2) *Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film soundtrack in the course of instruction or of preparation for instruction in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.*

(...)

63. (1) *Subject to subsection (2), a recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable program or in any work included in it.*

(2) *Subsection (1) shall not apply if or to the extent that, there is a licensing scheme under which licenses are available authorizing the making of such recordings or copies, and the person making the recordings knows or ought to have been aware of that fact.*

64. (1) *Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for*

the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorized by this section if, or to the extent that, there is a licensing scheme under which licenses are available authorizing the copying in question and the person making the copies knows or ought to have been aware of that fact.

(4) Where a license is granted to an educational institution authorizing the reprographic copying of passages from any published literary, dramatic or musical work, for use by the institution, then, any term of that license which purports to restrict the proportion of work which may be copied (whether on payment or free of charge) to less than that permitted under this section shall be of no effect.

65. (1) Where a copy of a work would be an infringing copy if the making thereof were not authorized under sections 60, 63 and 64 and such copy is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright, for all subsequent purposes.

(2) In subsection (1), "dealt with" means sold, or let for hire or offered or exposed for sale or hire.

JAMAICA. The Copyright Act. Use of Work for Educational Purposes.

56. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instructions and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(...)

58. (1) Subject to subsection (2), a recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

(2) Subsection (1) shall not apply if or to the extent that there is a licensing scheme certified pursuant to section 102 for the purposes of this section.

59. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorized by this section if, or to the extent that, licenses are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) Where a license is granted to an educational establishment authorizing the reprographic copying of passage from any published literary, dramatic or musical work, for use by the establishment, then, any term of that license which purports to restrict the proportion of work which may be copied (whether on payment or free of charge) to less than that permitted under this section shall be of no effect.

SAINT LUCIA. Copyright Act No. 10 of 1995. Use of Work for Educational Purposes.

62. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

SAINT VINCENT AND THE GRENADINES. Copyright Act, 2003.

56. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(...)

59. (1) Subject to subsection (2), a recording of a broadcast or cable broadcast program or a copy of such a recording may be made by or on behalf of an educational institution for the educational purposes of that institution without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

(2) Subsection (1) shall not apply if or to the extent that, there is a licensing scheme under which licenses are available authorizing the making of the recordings or copies, and the person making the recordings knows or ought to have been aware of that fact.

60. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical work may be made by or on behalf of an educational institution for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than one percent of any work may be copied by or on behalf of an educational institution by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September, 1st October to 31st December.

(3) Copyright is not authorized by this section if, or to the extent that, there is a licensing scheme under which licenses are available authorizing the copying in question and the person making the copies knows or ought to have been aware of that fact.

(4) Where a license is granted to an educational institution authorizing the reprographic copying of passages from any published literary, dramatic or, musical work, for use by the institution, then, any term of that license which purports to restrict the proportion of work which may be copied whether on payment or free of charge, to less than that permitted under this section shall be of no effect.

61. (1) Where a copy of a work would be an infringing copy if the making thereof were not authorized under section 56, 59 or copy if the making thereof were not authorized under section 56, 59 or 660 and such copy is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing and, if that dealing infringes copyright, for all subsequent purposes.

(2) For the purposes of this section "dealt with" means sold, or let for hire or offered or exposed for sale or hire.

The following countries permit the reproduction of a short excerpt from published works in writing or sound or visual recordings, or from published articles:

DOMINICA. Copyright Act 2003.

67. (1) Notwithstanding the provisions of section 1 O(1)(a), Reproduction for the following acts shall be permitted without the authorization of teaching the author or other owner of copyright

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose;

(b) the reprographic reproduction, for face-to-face teaching in educational institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of work, to the extent justified by the purpose, provided that

(i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions; and

(ii) there is no collective license available (that is, offered by a collective administration organization of which the educational institution is or should be aware) under which such reproduction can be made.

(2) The source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under subsection (1).

(3) Where a reproduction permissible under subsection (1) or (2) is subsequently reproduced such reproduced copy shall be treated as an infringing copy.

TRINIDAD AND TOBAGO. The Copyright Act, 1997. (No. 8 of 1997, as amended by Act No. 18 of 2000)

Reproduction for teaching

11. (1) Notwithstanding the provisions of section 8(1)(a), the following acts shall be permitted without authorization of the owner of copyright:

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that such reproduction is compatible with fair dealing and does not exceed the extent justified by the purpose;
(b) the reprographic reproduction, for face-to-face teaching in educational institutions the activities of which do not serve direct or indirect commercial gain, of published articles, short works or short extracts from works, to the extent justified by the purpose, provided that—
(i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions; and
(ii) there is no collective license available (that is, offered by a collective administration organization of which the educational institution is or should be aware) under which such reproduction can be made.
(2) The source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under subsection (1).

(a) Scope of application

Some countries state explicitly that reproduction in accordance with this limitation or exception may be carried out by the person giving the instruction (teacher or the educational establishment) and the person receiving it (the student) (Antigua and Barbuda, The Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines).

Other countries explicitly state that reproduction can be made by the educational institution or establishment (Cuba, Mexico).

The other countries make no explicit reference to the people entitled to apply this limitation or exception. It is understood that education is the responsibility of educational establishments and the teachers associated with them, and these people are therefore the only ones that can make use of this limitation or exception (such is the case of Costa Rica, Andean Community of Nations, Dominica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, Venezuela).

(b) Works to which the limitation or exception applies

Works in general, allowing the entire work to be reproduced (Cuba, Costa Rica, Grenada, Mexico, Uruguay)

Articles lawfully published in newspapers and works in general, but only allowing the reproduction of short excerpts (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela)

Other countries in the region apply this limitation or exception to literary, artistic and choreographic works, phonograms, cinematographic and audiovisual works, broadcast or cable programs, and excerpts from literary, dramatic or musical works (Antigua and Barbuda, the Bahamas, Barbados, Belize, Jamaica, Saint Lucia, Saint Vincent and the Grenadines).

Finally, other countries allow the reproduction of a short excerpt from published works in writing or sound or visual recordings, or from published articles (Dominica, Trinidad and Tobago).

(c) Terms and conditions of applicability

With regard to compulsory reference:

- Obligation to state the author and title of the work reproduced (Cuba, Uruguay, Dominica, Trinidad and Tobago)
- Obligation to state the author and title of the work reproduced, if this name appears in the source (Costa Rica, Nicaragua)

In connection with the means of reproduction:

- Reproduction of the work by a photographic or other similar process (Cuba)
- Reproduction by means of a reprographic process (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Panama, Paraguay, Peru, Venezuela)
- Reproduction may not be made by processes able to produce multiple copies (reprographic processes) (Grenada, Antigua and Barbuda)

With regard to the purpose of the reproduction:

- Reproduction for non-profit purposes (Andean Community of Nations, Cuba, Dominica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela)
- Reproduction to the extent justified by the aim pursued (Andean Community of Nations, Costa Rica, Dominica, Dominican Republic, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela)

In connection with the number of copies and the reproducible part of the work:

- Number of copies limited to those needed for the specific activity (Cuba)
- Reproduction once and in a single copy (Mexico)
- Reproduction must be an isolated, non-recurrent act; if repeated, the acts of reproduction must be separate and unrelated (Dominica)
- Reprographic reproduction may not exceed five per cent of the work (Antigua and Barbuda, The Bahamas, Barbados, Belize, Jamaica, Saint Lucia, St. Vincent and the Grenadines)

With regard to *fair use* or *fair dealing*:

- Compliance with fair use (Andean Community of Nations, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, Venezuela)
- Compliance or compatibility with *fair practice* (Dominica, Trinidad and Tobago)

Other requirements:

- Reproduction must be made at educational establishments (Nicaragua)
- Use must comply with lawful practice (Panama)
- There must be no opportunity to obtain a license authorizing copying and the person obtaining the copy must be aware of this (Antigua and Barbuda, the Bahamas, Barbados, Belize, Jamaica, Saint Lucia, Saint Vincent and the Grenadines)
- There must be no collective license authorizing the reproduction to be made (Dominica, Trinidad and Tobago)

2.1.3 Limitation or exception of public communication to illustrate teaching

The limitation or exception regarding illustration for educational purposes allows free public communication of a work or production without payment of remuneration. The laws of the countries in the region include and develop this limitation or exception as follows:

With regard to this limitation or exception, one group of countries refers to communication in general:

EL SALVADOR. Legislative Decree No. 604 of 1993 on the Promotion and Protection of Intellectual Property Rights.

Article 44. The following communications shall be lawful without the authorization of the author or payment of remuneration:

(...)

(c) (Amended by Decree No. 912 of 2005 Article 19) those shown to be for exclusively educational purposes, in personalized teaching activities at accredited institutions and without gainful intent, in a classroom or similar place devoted to teaching; (...)

GUATEMALA. Law on Copyright and Related Rights. Decree No. 33-98.

Article 63. The works protected under this Act may be lawfully communicated, without the necessity of authorization by the author or payment of any remuneration, where the communication:

(...)

(b) is carried out for exclusively educational purposes, being performed in the course of the activities of an educational institution by the staff and students of that institution, provided that the communication pursues no direct or indirect profit-making purpose and the audience is composed solely of the staff and students of the educational centre or parents or teachers of students and other persons directly associated with the institution's activities. (...)

PANAMA. Law No. 15 of 1994 on Copyright and Neighboring Rights.

Article 47. The following shall be lawful communications without authorization from the author or payment of remuneration:

(...)

3. those shown to be for exclusively educational purposes in teaching establishments, provided that they are communications without gainful intent. (...)

PARAGUAY. Law No. 1328 on Copyright and Related Rights, 1998.

Article 38. The intellectual works protected by this Law may be lawfully communicated in the following cases without need for the permission of the author or payment of any remuneration:

(...)

3. in the case of single, personal copies that are used solely for teaching purposes by teaching staff at educational establishments; (...)

PERU. Copyright Law. Legislative Decree No. 822 of 1996.

Article 41. The intellectual works protected by this Law may be lawfully communicated, without the necessity of authorization by the author or payment of any remuneration, in the following cases:

(...)

(c) where the acts are shown to have an exclusively educational purpose, being performed in the course of the activities of a teaching institution by the staff and students of that institution, provided that the communication pursues no direct or indirect profit-making purpose and the audience is composed solely of the staff and students of the institution or parents or teachers of students and other persons directly associated with the institution's activities. (...)

DOMINICAN REPUBLIC. Law No. 65-00 on Copyright.

Article 44. The following shall be considered the sole exceptions to the right of public communication under this Law:

(1) communications that are made for strictly educational purposes, and are not reproduced, within the grounds or buildings of educational institutions, provided that no charge whatever is made for admission; (...)

VENEZUELA. Law on Copyright, 1993.

Article 43. The following shall be considered lawful communications:

(...)

3. those made for strictly scientific and teaching purposes in educational establishments, provided that there is no gainful intent.

Another group of countries refer to this limitation or exception to the performance of a work:

ANDEAN COMMUNITY OF NATIONS (Bolivia, Colombia, Ecuador, Peru). Decision No. 351 of 1993.

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

(j) effect the performance or execution of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution; (...)

CUBA. Law No. 14 of 1977.

Article 38. The following shall be lawful, without the author's consent and without paying him any remuneration, but subject to the obligation to name the author and the source, provided that the work is accessible to the public, and respecting its specific values:

(...)

(d) to represent or perform a work, provided that the presentation or performance pursues no profit-making purpose; (...)

URUGUAY. Law on Copyright No. 9.739.

Article 44. The following are, among others, special cases of unlawful reproduction: (...)

(B) Dramatic, musical, poetic or cinematographic works: the representation, performance or reproduction of works in any form or by any means in theatres or in public places without the authorization of the author or his beneficiaries. For the purposes of this Law, representation, performance or reproduction in a public place is understood to be any outside the home. However, performances given at strictly family gatherings outside the home shall not be deemed unlawful when they meet the following requirements:

(I) that the gathering has no profit-making purpose;

II) that discotheque, audio or similar services are not used and that live artists do not take part;

(III) that only home (non-professional) musical equipment is used. Within the framework of the competences recognized under this Law, the collective management bodies may verify compliance with the aforementioned requirements. Nor shall performances at private or public academic institutions and at places intended for religious worship be deemed unlawful, provided that they have no profit-making objective. [Text of subsection (A), paragraph 1, of Article 44 given by Article 13, and text of subsection (B), paragraph 1, of Article 44 given by Article 14, both from Law No. 17.616 of 10 January 2003]

The following laws apply the limitation or exception to dramatic interpretation or performance and musical performance:

BRAZIL. Law No. 9.610 of 1998.

Article 46. The following shall not constitute violation of copyright:

(...)

VI. stage and musical performance, where carried out in the family circle or for exclusively teaching purposes in educational establishments, and where devoid of any profit-making purpose; (...)

COSTA RICA. Law No. 6683 of 1982. (Amended by Law No. 8686 of 2008).

Article 73. Theatrical and musical performances that have been made available to the public in a legal form shall be free when they take place in the home for the sole benefit of the family circle. Such performances shall also be free when they are used solely by way of illustration for educational activities, to the extent justified by the educational purpose, provided that the normal exploitation of the work is not affected and the legitimate interests of the holder of the rights are not unreasonably prejudiced thereby. Furthermore, the source and the name of the author must be stated, if that name is featured in the source. (...)

HONDURAS. Law on Copyright and Related Rights. Decree Law No. 4-99-E.

Article 56. Stage and musical performance, when carried out in the home for the exclusive benefit of the family circle or the family's guests at parties or gatherings, shall be free. It shall also be free when it takes place in teaching establishments for educational purposes, civic celebrations or social, cultural and sporting activities, provided that no profit-making purpose is pursued and that no financial compensation of any kind is paid.

Other countries refer to the performance or interpretation and recitation of literary and artistic works, but they also refer to the playing or showing of a sound recording, film, broadcast or cable program:

BELIZE. Copyright Act. Chapter 252. Revised edition 2000, showing the Law as at 31st December, 2000. Use of Work for Educational Purposes.

62. (1) The performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment—

(a) by a teacher or pupil in the course of the activities of the establishment, or

(b) at the establishment by any person for the purposes of instruction,

is not a public performance for the purposes of infringement of copyright.

(2) The playing or showing of a sound recording, film, broadcast or cable program before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright.

(3) A person is not for this purpose directly connected with the activities of the educational establishment simply because he is the parent of the pupil at the establishment.

SAINT VINCENT AND THE GRENADINES. Copyright Act, 2003.

58. (1) The performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational institution and other persons directly connected with the activities of the institution,

(a) by a teacher or pupil in the course of the activities of the institution; or

(b) at the institution by any person for the purposes of the instruction;

is not a public program for the purposes of infringement of copyright.

(2) The playing or showing of a sound recording, film, broadcast or cable program before such an audience at an educational institution for the purposes of instruction is not a playing or showing of the work in public for the purposes of the infringement of copyright.

(3) A person is not for this purpose directly connected with the activities of the educational institution simply because he is the parent of the pupil at the institution.

Argentinean law makes explicit reference to the performance or interpretation and recitation of literary and artistic works, as well as to artistic interpretations or performances:

ARGENTINA. Law No. 11.723 of 1933. Legal Intellectual Property Regime.

Article 36. The authors of literary, dramatic, dramatico-musical and musical works shall enjoy the exclusive right to authorize:

(...)

(b) the public broadcasting by any means of the recital and performance of their works.

However, the performance and recital of literary or artistic works already published, in public acts organized by educational institutions, or linked with the fulfillment of their educational purposes, study

plans and programs, shall be lawful and shall be exempt from the payment of copyrights and performers' rights as established in Article 56, provided that the event in question is not broadcast outside the place where it occurs and the performers gather and perform free of charge.(...) (Text according to Laws No. 17.753, 18.453 and 20.098.)

Colombian law refers to the communication of broadcast works, although another article refers to public performance in general:

COLOMBIA. Law No. 23 of 1982.

Article 32. It shall be permissible to make use, to the extent justified by the purpose, of literary or artistic works, or parts thereof, by way of illustration in works intended for teaching, by means of publications, broadcasts or sound or visual recordings, or to communicate, without gainful intent and for teaching purposes, works broadcast for use in schools, education, universities and professional training, subject to the obligation to mention the name of the author and the title of the work thus used.

This provision is complemented by another which refers to the public performance of works and phonograms:

COLOMBIA. Law No. 23 of 1982.

Article 164. For the purposes of this Law, it shall not be considered public performance when a performance is made for strictly educational purposes within the grounds or buildings of the educational establishments concerned, provided that no admission charge whatever is made.

Chilean law applies the limitation or exception to the public communication and performance of works and phonograms:

CHILE. Law No. 17.336.

Article 47. For the purposes of this Law, use of the work, including phonograms, within the family circle, in non-profit educational establishments and other similar institutions shall not be deemed public communication or performance, provided that this use pursues no profit-making purpose. In such cases, it is not necessary to remunerate the author or to obtain his authorization. (...)

Finally, the Law of Grenada refers to the interpretation or performance of a literary, musical or audiovisual work, radio broadcast or phonogram, or the use of a protected interpretation or performance:

GRENADA. Copyright Act, 1989.

34. (...) (2) The following acts do not constitute an infringement of copyright or neighboring rights— (...)

(I) the performance, in the course of the activities of a school or other educational institution designated by Order of the Minister, of a literary or musical work or of an audio-visual production or broadcast, or the use of a record of a protected performance, by the staff and students of the school or institution if the audience is composed entirely of any or all of the following—

- (i) staff and students of the school or institution;*
- (ii) parents or guardians of the students;*
- (iii) other persons directly connected with the activities of the school or institution;*

(a) Scope of application

In connection with the persons entitled to carry out the acts covered by the limitation or exception:

- Communication must be made by the staff or students of an educational institution (Grenada, Guatemala, Peru).
- Communication must be made by the teacher or student in the course of the activities of the establishment, or by any other person but within the establishment and for teaching purposes (Belize, Saint Vincent and the Grenadines).

In connection with the place in which the acts covered by the limitation or exception may be carried out:

- Communication must be made within accredited institutions, in a classroom or a place set aside for teaching (El Salvador).
- Communication carried out at public or private teaching institutions (Uruguay).
- Communication carried out at educational establishments (Panama, Venezuela).
- Communication within the grounds or buildings of educational institutions (Dominican Republic).
- Communication carried out in the course of the activities of a school or another educational institution designated by government order (Grenada).
- Communication carried out in public acts organized by educational establishments (Argentina).

(b) Works and/or productions to which the limitation or exception applies

- One group of countries refers to public communication in general. This must be understood to cover both works and performances protected by related rights (Dominican Republic, El Salvador, Guatemala, Panama, Peru).
- Works protected by copyright (Andean Community of Nations, Cuba, Paraguay, Uruguay).
- Interpretations or performances of dramatic and musical works (Brazil, Costa Rica, Honduras).
- Literary and artistic works, sound recordings, films, broadcast or cable programs (Belize, Saint Vincent and the Grenadines).
- Argentinean law refers explicitly to literary and artistic works, as well as to artistic interpretations or performances.
- Colombian law refers to broadcast works but, in another article, refers in general to works and performances.
- Chilean law refers to works and phonograms.
- The law of Grenada refers to literary, musical and audiovisual works, broadcasts, phonograms, or protected interpretation or performance.

(c) Terms and conditions of applicability

With regard to the aims or purposes of the communication:

- Exclusively educational purposes (Argentina, Brazil, Dominican Republic, El Salvador, Guatemala, Panama, Peru)
- Communication carried out in personalized teaching activities (El Salvador)
- Communication carried out in the course of the activities of an educational institution (Andean Community of Nations, Grenada, Guatemala, Peru)

In connection with the non-profit nature of the communication:

- Communication carried out without direct or indirect gainful intent (Andean Community of Nations, Brazil, Chile, Cuba, El Salvador, Guatemala, Panama, Peru).
- There must be no gainful intent or any kind of financial compensation (Colombia, Honduras).
- No charge may be made for admission (Andean Community of Nations, Dominican Republic).

With regard to the target audience:

- Audience consisting solely of the staff and students of the educational centre or parents or teachers of students and others directly connected with the activities of the establishment (Andean Community of Nations, Grenada, Guatemala, Peru);
- Audience consisting solely of the staff and students of the educational centre or parents or teachers of students and others directly associated with the activities of the establishment, although a person is not directly associated with the establishment simply because he is the parent of a student (Belize, Saint Vincent and the Grenadines);

With regard to compulsory references:

- The source and the author's name must be stated if that name is given in the source (Colombia, Costa Rica)

Other requirements:

- The show may not be broadcast outside the place where it is given (Argentina);
- The performers must take part and perform free of charge (Argentina);
- Interpretations or performances of dramatic or musical works must have been made available to the public in a legal form (Costa Rica);
- Communication carried out to the extent justified by the educational purpose (Costa Rica);
- Compliance with fair practice (Costa Rica);
- Single, personal copies used for exclusively educational purposes by teachers in teaching establishments (Paraguay);
- Communication without reproduction (Dominican Republic).

2.1.4 Limitation or exception on collections for teaching illustration

These kinds of exception allow a short passage of a literary or artistic work to be included in anthologies intended for use in educational establishments. Inclusion in collections may be considered an act of reproduction of the work, which, despite this limitation or exception, entails the explicit prior authorization of the owner of the rights.

A first group of countries permits, in identical terms, the inclusion of a short excerpt from a literary or dramatic work in a collection intended for use in educational establishments, as follows:

ANTIGUA AND BARBUDA. The Copyright Act, 2002. Use of Work for Educational Purpose.

57. (1) *The inclusion in a collection intended for use in educational establishments of a short passage from a published literary or dramatic work does not infringe copyright in the work if–*
- (a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;*
 - (b) the work was not itself published for the use of educational establishments;*
 - (c) the collection consists mainly of material in which no copyright subsists; and*
 - (d) the inclusion is accompanied by a sufficient acknowledgement.*
- (2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.*
- (3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author –*
- (a) shall be taken to include excerpts from works by him in collaboration with another; and*
 - (b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.*

BARBADOS. Copyright Act, 1998. Use of Work for Educational Purposes.

56. (1) *The inclusion in a collection intended for use in educational establishments of a short passage from a published literary or dramatic work does not infringe copyright in the work if–*
- (a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;*
 - (b) the work was not itself published for the use of educational establishments;*
 - (c) the collection consists mainly of material in which no copyright subsists; and*
 - (d) the inclusion is accompanied by a sufficient acknowledgement.*
- (2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.*
- (3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author–*
- (a) shall be taken to include excerpts from works by him in collaboration with another; and*
 - (b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.*

BELIZE. Copyright Act. Chapter 252. Revised edition 2000 showing the Law as at 31st December, 2000. Use of Work for Educational Purposes.

61. (1) *The inclusion, in a collection intended for use in educational institutions, of a short passage from a published literary or dramatic work does not infringe copyright in the work if–*
- (a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;*
 - (b) the work was not itself published for the use of educational institutions;*
 - (c) the collection consists mainly of material in which no copyright subsists;*
 - (d) not more than one other such passage or part from works by the same author is published by the same publisher within the period of five years immediately preceding the publication of that collection; and*
 - (e) the inclusion is accompanied by a sufficient acknowledgement.*
- (2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.*
- (3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author–*
- (a) shall be taken to include excerpts from works by him in collaboration with another; and*
 - (b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.*

JAMAICA. The Copyright Act. Use of Work for Educational Purposes.

57. (1) *The inclusion in a collection intended for use in educational establishments of a short passage from a published literary or dramatic work does not infringe copyright in the work if–*
- (a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;*
 - (b) the work was not itself published for the use of educational establishments;*
 - (c) the collection consists mainly of material in which no copyright subsists; and*
 - (d) the inclusion is accompanied by a sufficient acknowledgement.*

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author—

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

SAINT VINCENT AND THE GRENADINES. Copyright Act, 2003.

57. (1) The inclusion, in a collection intended for use in educational institutions of a short passage from a published literary or dramatic work does not infringe copyright in the work if

(a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for the use of educational institutions;

(c) the collection consists mainly of material in which no copyright subsists;

(d) the inclusion is accompanied by a sufficient acknowledgement; and

(e) not more than one other such passage or parts from works by the same author is published by the same publisher within the period of five years immediately preceding the publication of that collection.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

THE BAHAMAS. Statute Law. Chapter 323.

63. (1) The inclusion in a collective work created specifically for use in educational establishments of a short passage from literary, musical or dramatic works published in copies does not infringe copyright in the work if—

(a) the collective work is described in the title and in any advertisements thereof distributed by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for use of educational establishments;

(c) the collective work consists mainly of public domain works; and

(d) the inclusion is accompanied by a sufficient acknowledgement.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collective works published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author—

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

In addition to permitting the inclusion of short excerpts from literary works, the law of Grenada provides for the possibility of including musical works or short excerpts from artistic works.

GRENADA. Copyright Act, 1989

34. (...)

(2) The following acts do not constitute an infringement of copyright or neighboring rights— (...)

(g) publishing in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, short passages from published literary or musical works, or small parts of artistic works, not themselves published for the use of educational institutions, in which copyright subsists, but only if—

(i) not more than two such passages, or parts, from works by the same author are published by the same publisher during any period of five years; and

(ii) the publication is accompanied by a sufficient acknowledgement;

(...)

(a) Scope of application

All the countries providing for this limitation or exception state explicitly that educational institutions may carry out the acts that it covers (Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Vincent and the Grenadines).

(b) Works to which the limitation or exception applies

- Using identical terms, one group of countries permits the inclusion in a collection intended for use in educational establishments of a brief excerpt from a literary or dramatic work (Antigua and Barbuda, the Bahamas, Barbados, Belize, Jamaica, Saint Vincent and the Grenadines).
- In addition to permitting the inclusion of short excerpts from literary works, the law of Grenada provides for the possibility of including musical works or short excerpts from artistic works.

(c) Terms and conditions of applicability

- The title and any advertisement must state that this is a collection (Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Vincent and the Grenadines);
- The work may not have been specifically published for use in educational institutions (Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Vincent and the Grenadines);
- The collection must consist mainly of public domain material (Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Vincent and the Grenadines);
- The author and the source must be sufficiently acknowledged (Antigua and Barbuda, the Bahamas, Barbados, Belize, Jamaica, Saint Vincent and the Grenadines);
- The same publisher may not publish more than two collective works with excerpts from works by the same author within a period of five years. Such excerpts must be accompanied by quotations or excerpts from other authors (Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Vincent and the Grenadines).

2.1.5 Limitation or exception on quotation for teaching purposes

Various laws from the region include a limitation or exception on quotation which makes it possible to include short excerpts from works by others in one's own work. Nonetheless, there are laws that make the limitation or exception on quotation conditional on its being used for educational purposes, under the terms reproduced below:

The law of Cuba permits quotations to be included in written, audio or audiovisual form for educational purposes:

CUBA. Law No. 14 of 1977.

Article 38. The following shall be lawful, without the author's consent and without paying him any remuneration, but subject to the obligation to name the author and the source, provided that the work is accessible to the public, and respecting its specific values:

(a) to reproduce quotations or fragments in written, audio or visual form for the purposes of teaching, information, criticism, illustration or explication, to the extent justified by the purpose being pursued;
 (...)

The following laws permit quotations to be given for educational purposes in written, audio or visual form, as well as quotations of three-dimensional, photographic or similar works:

ECUADOR. Law No. 83 of 1998.

Article 83. The following acts, which shall not require authorization by the owner of the rights or be subject to any remuneration, shall exclusively be lawful subject to respect for proper practice and provided that the normal exploitation of the work is not adversely affected or the owner of the rights prejudiced thereby:

(a) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, and also that of isolated works of three-dimensional, photographic, figurative or other character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, comment or critical assessment; such use may only take place for teaching or research purposes to the extent justified by the purpose of the incorporation, and the source and the name of the author of the work used shall be stated; (...)

GUATEMALA. Law on Copyright and Related Rights. Decree No. 33-98.

Article 66. The following shall be lawful, without the authorization of the holder of the rights and without payment of remuneration, with the obligation to acknowledge the source and the name of the author of the work used, if indicated:

(...)

(d) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, and also that of isolated works of three-dimensional, photographic, figurative or similar character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, for teaching or research purposes.

(a) Scope of application

None of the laws quoted identify the person or entity entitled to carry out the acts covered by the limitation or exception. However, requiring the quotation to be made for teaching or educational purposes implies that the acts in question can only be carried out by teachers and educational institutions.

(b) Works to which the limitation or exception applies

The law of Cuba permits quotations in written, audio or visual form. This means that such quotations are made by extracting insubstantial parts from literary, musical, artistic, or audiovisual works that are suitable for such forms of reproduction.

The laws of Ecuador and Guatemala also refer to quotation in written, audio or visual form, implying the use of literary, musical, artistic or audiovisual works. They then explicitly refer to the possibility of quoting from three-dimensional, photographic and other similar works.

(c) Terms and conditions of applicability

- Indicate the source and name of the author of the work used (Ecuador)
- Reproduction of quotations to the extent justified by the goal being pursued (Cuba, Ecuador)
- Works that have already been disclosed (Ecuador, Guatemala)
- That the quotation is made for analysis, comment or critical assessment (Ecuador)
- That the quotation is made for analysis (Guatemala)

2.1.6 Limitation or exception for the purpose of examinations

Evaluation is part of the teaching-learning process. Holding examinations is part of the teaching task carried out by teachers and educational institutions. Copyright-protected works or productions protected by related rights may be used in various forms in connection with such examinations, and it may rightly be said that this use is for the purpose of “teaching illustration”. The form in which exceptions are provided for is analyzed below.

In almost identical terms, the following laws permit in general terms the use of works for the purpose of examinations by way of setting, communicating or answering the questions:

ANTIGUA AND BARBUDA. The Copyright Act, 2002. Use of Work for Educational Purpose.

56. (...) (3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

THE BAHAMAS. Statute Law. Chapter 323

62. (...) (4) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.
(...)

JAMAICA. The Copyright Act. Use of Work for Educational Purposes.

56. (...) (3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.
(...)

SAINT LUCIA. Copyright Act No. 10 of 1995. Use of Work for Educational Purposes.

62. (...) (3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

SAINT VINCENT AND THE GRENADINES. Copyright Act, 2003.

56. (...) (3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

Another group of countries refers to the reproduction of works by reprographic processes for examinations at educational institutions:

ANDEAN COMMUNITY OF NATIONS (Bolivia, Colombia, Ecuador, Peru). Andean Decision No. 351 of 1993.

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

(b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby; (...)

EL SALVADOR. Legislative Decree No. 604 of 1993 on the Promotion and Protection of Intellectual Property.

Article 45. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration:

(...)

(c) the reproduction by reprographic means, to the extent justified by the purpose, of articles, brief extracts or lawfully published short works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use is made in accordance with proper practice; (...)

GUATEMALA. Law on Copyright and Related Rights. Decree No. 33-98.

Article 64. With regard to works that have already been disclosed, the following shall also be permitted without the authorization of the author, in addition to the provisions of Article 32:

(a) the reproduction by reprographic means of articles, brief extracts from lawfully published works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use has no adverse effect on the normal exploitation of the work and that the legitimate interests of the author are not unreasonably prejudiced thereby; (...)

HAITI. Decree on Copyright, 2005.

Article 9. Notwithstanding the provisions of Article 7, the following shall be allowed, without the author's consent and without payment of remuneration, provided that the source and the author's name are stated, if that name is stated in the source:

(...)

(2) the reproduction by reprographic means for teaching or the holding of examinations at educational establishments, provided that activity has no direct or indirect profit-making purpose and to the extent justified by the purpose, of isolated articles that have been lawfully published in a newspaper or magazine, of short extracts from lawfully published works or lawfully published short works.

HONDURAS. Law on Copyright and Related Rights. Decree No. 4-99-E.

Article 50. Reproduction by reprographic means, for the purpose of teaching or the holding of examinations in educational institutions, provided that there are no profit-making purposes and to the extent justified by the purpose, of articles, lectures, lessons, brief extracts from works or lawfully published short works is permitted, on condition that the use is in keeping with proper practice.

PANAMA. Law on Copyright and Neighboring Rights. Law No. 15 of 1994.

Article 48. With regard to works that have already been lawfully disclosed, the following shall be allowed without authorization from the author or remuneration:

(...)

3. the reproduction by reprographic means of articles or extracts from lawfully published short works for teaching or the holding of examinations at educational establishments, provided that there is no gainful intent and to the extent justified by the aim pursued, and on condition that the use is made in accordance with proper practice; (...)

PARAGUAY. Law No. 1328/98 on Copyright and Related Rights, 1998.

Article 39. The following is permitted without authorization by the author or payment of remuneration in relation to works already disclosed:

1. reproduction by reprographic means, for the purposes of teaching or the holding of examinations at educational establishments, provided that there is no gainful intent and only to the extent justified by the objective pursued, of articles or short extracts from lawfully published works, on condition that the use is in keeping with proper practice; (...)

PERU. Copyright Law. Legislative Decree No. 822 of 1996.

Article 43. With regard to works that have already been lawfully disclosed, the following shall be permitted without the author's consent:

(a) reproduction by reprographic means, for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and to the extent justified by the aim pursued, of articles or brief extracts from lawfully published works, on condition that the use made of them is consistent with proper practice, involves no sale or other transactions for consideration and has no direct or indirect profit-making purpose. (...)

DOMINICAN REPUBLIC. Law on Copyright. Law No. 65-00.

Article 32. For teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works may be reproduced by reprographic means, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby.

VENEZUELA. *Law on Copyright.*

Article 44. *The following shall be considered lawful reproductions:*

(...)

3. *reproduction by reprographic means, for the purpose of teaching or the holding of examinations in educational institutions, provided that there are no profit-making purposes and to the extent justified by the purpose, of articles, brief extracts from works or lawfully published short works, on condition that the use is in keeping with proper practice. (...)*

The law of Grenada refers both to works and to productions protected by related rights, permitting their reproduction as part of the questions to be answered in an examination or as part of the answers to those questions.

GRENADA. *Copyright Act, 1989.*

34. (...) (2) *The following acts do not constitute an infringement of copyright or neighboring rights—*

(...)

(h) *the reproduction of a protected work or protected production by a teacher or pupil in the course of instruction.*

Provided that the reproduction is not made by means of an appliance capable of producing multiple copies;

(ii) *as part of the questions to be answered in an examination: or*

(iii) *in answer to such questions; (...)*

(a) Scope of application

No mention is made of the person entitled to carry out the acts covered by the limitation or exception, but educational institutions and teachers are clearly implied (Antigua and Barbuda, the Bahamas, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines).

Another group of countries state that the reproduction of works for the purpose of examinations must be carried out at educational institutions (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Panama, Paraguay, Peru, Venezuela).

(b) Works to which the limitation or exception applies

A first group of countries permit, in general terms, the use of works for the purpose of carrying out examinations (Antigua and Barbuda, the Bahamas, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines).

Another group of countries refers specifically to lawfully published articles in newspapers or periodicals, or to short extracts from lawfully published works (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Honduras, Panama, Paraguay, Peru, Venezuela).

The law of Haiti permits the reproduction of articles lawfully published in newspapers or journals, short extracts from lawfully published works, or lawfully published short works.

(c) Terms and conditions of applicability

- There are no specific conditions or requirements in this regard (Antigua and Barbuda, The Bahamas, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines)
- Reproduction by reprographic means (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Panama, Paraguay, Peru, Venezuela)
- Compliance with proper practice (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Honduras, Paraguay, Venezuela)
- Compliance with lawful use (Panama)
- No gainful intent (Andean Community of Nations, Dominican Republic, Guatemala, Panama, Paraguay, Peru, Venezuela)
- Reproduction to the extent justified by the aim pursued (Dominican Republic, Haiti, Honduras, Panama, Paraguay, Peru, Venezuela)

2.2 EXCEPTION FOR NOTE-TAKING IN CLASS

A lesson, class or lecture is an example of a copyright-protected oral work. Taking notes constitutes a reproduction of this work insofar as it is a transcription of it. Such lessons, classes or lectures may also be reproduced by means of sound or audiovisual recording, in which case these oral works are said to have been “collected”.

The following exceptions have been provided for in the laws of the region in connection with note-taking:

A first group of countries states that lessons can be noted down (reproduced in writing) or collected (reproduced by means of sound or audiovisual recording):

COLOMBIA Law No. 23 of 1982.

Article 40. Lectures or talks given at establishments of higher, secondary or primary education may be freely noted and collected by the students to whom they are addressed, but their full or partial publication or reproduction shall be prohibited without the written authorization of the person who gave them.

ECUADOR. Law No. 83 of 1998.

Article 83. The following acts, which shall not require authorization by the owner of the rights or be subject to any remuneration, shall exclusively be lawful subject to respect for proper practice and provided that the normal exploitation of the work is not adversely affected or the owner of the rights prejudiced thereby:

(...)

(k) lessons and lectures given in universities, colleges, schools and teaching and training centers in general, which may be annotated and collected by those to whom they are addressed for their personal use.

GUATEMALA. Law No. 33-98.

Article 67. Lectures or lessons given at educational establishments may be freely noted and collected but their full or partial publication or reproduction shall be prohibited without the written authorization of the person who gave them.

NICARAGUA. Law No. 312 of 1999.

Article 36. Lectures or lessons given at educational establishments may be freely noted down and collected but their full or partial publication or reproduction shall be prohibited without the authorization of their author.

DOMINICAN REPUBLIC. Law No. 65-00.

Article 40. Lectures or talks given at establishments of higher, secondary or primary education may be freely noted down and collected by the students to whom they are addressed, but their full or partial reproduction, distribution or communication shall be prohibited without the written authorization of the person who gave them.

Other countries also state that, in accordance with this limitation or exception, lessons may be noted down or collected “in any form”:

CHILE. Law No. 17.336.

Article 41. Lessons given in universities, colleges and schools may be annotated and collected in any form by those to whom they are addressed, but they may not be published fully or partially without the author’s consent.

PERU. Legislative Decree No. 822 of 1996.

Article 42. Lectures given either in public or in private by the lecturers of universities, higher institutes of learning and colleges may be annotated and collected in any form by those to whom they are addressed, provided that no person may disclose them or reproduce them in either a complete or partial collection without the prior written consent of the authors.

The law of Brazil provides for the possibility of lessons being noted down, but does not state that they can be “collected”:

BRAZIL. Law No. 9610 of 1998.

Article 46. “The following shall not constitute violation of copyright:” (...)

(...)

IV. notes taken in the course of lessons given in teaching establishments by the persons for whom they are intended, provided that their complete or partial publication is prohibited without the express prior authorization of the person who gave the lessons.

(a) Scope of application

- Higher, secondary or primary educational establishments (Colombia, Dominican Republic)
- Universities, colleges, schools and teaching and training centers in general (Ecuador)
- Colleges, universities and schools (Chile)
- Universities, higher institutes of learning and colleges (Peru)
- Teaching establishments (Brazil, Nicaragua)

(b) Works to which the limitation or exception applies

- Lectures or lessons (Colombia, Dominican Republic, Ecuador, Guatemala, Nicaragua)
- Lessons (Brazil, Chile)
- Lectures given either in public or in private (Peru)

(c) Terms and conditions of applicability

- Full or partial reproduction is prohibited without the written authorization of the person who gave them (Colombia, Dominican Republic, Guatemala, Nicaragua)
- No one may disclose them or reproduce them in either a complete or partial collection without the prior written consent of the authors (Peru)

- They may not be published fully or partially without the author's consent (Chile)
- Their complete or partial publication is prohibited without the express prior authorization of the person who gave them (Brazil)
- Reproduction for personal use (Ecuador)

2.3 LIMITATIONS OR EXCEPTIONS CONNECTED WITH RESEARCH

Let us now proceed to examine the exceptions for research purposes included in the copyright laws in the region.

2.3.1 Limitation or exception on the reproduction (private copies) of works for research purposes

In accordance with Mexican law, literary and artistic works may be reproduced as private copies for research institutions.

Other countries in the region which provide for private copying may possibly support, among other things, scientific research or private study. Nonetheless, the extent to which the work reproduced by private copying can be used for research purposes is limited, as the limitation or exception on private copies stipulates personal use by the person making it, thus excluding use of the copies by a plurality of persons, which is precisely what often occurs in scientific research, where a group of researchers are required to work together and to share their work.

This limitation or exception is set forth in the following terms:

MEXICO. Federal Law on Copyright.

Article 148. Literary and artistic works that have already been disclosed may only be used in the following cases without the consent of the owner of the economic rights and without remuneration, provided that the normal exploitation of the work is not adversely affected thereby and provided also that the source is invariably mentioned and that no alteration is made to the work:

(...)

IV. reproduction of a literary or artistic work once, and in a single copy, for the personal and private use of the person doing it, and without gainful intent;

A legal entity may not avail itself of the provisions of this subparagraph except where it is an educational or research institution, or is not devoted to trading activities;

(...)

(a) Scope of application

Research institutions may carry out the acts covered by this limitation or exception.

(b) Works to which the limitation or exception applies

Literary and artistic works

(c) Terms and conditions of applicability

Reproduction once and in a single copy

2.3.2 Limitation or exception on quotation for research purposes

As already stated, the right of quotation is of particular relevance with regard to scientific articles and publications. To the extent that the article should reflect the state of the art or refer to the level of knowledge acquired in a given subject area, reference must inevitably be made to other articles and publications and transcriptions must be made for the purposes of analysis or criticism.

Exceptions on quotation for research purposes cover such matters. The following countries provide for this limitation or exception:

ECUADOR. Law No. 83 of 1998.

Article 83.

The following acts, which shall not require authorization by the owner of the rights or be subject to any remuneration, shall exclusively be lawful subject to respect for proper practice and provided that the normal exploitation of the work is not adversely affected or the owner of the rights prejudiced thereby:

(a) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, and also that of isolated works of three-dimensional, photographic, figurative or other character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, comment or critical assessment; such use may only take place for teaching or research purposes to the extent justified by the purpose of the incorporation, and the source and the name of the author of the work used shall be stated

GUATEMALA. Law No. 33-98.

Article 66. The following shall be lawful, without the authorization of the holder of the rights and without payment of remuneration but with the obligation to acknowledge the source and the name of the author of the work used, if indicated:

(...)

(d) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, as well as works of three-dimensional, photographic, figurative or similar character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, for teaching or research purposes.

(a) Scope of application

Although this is not stated explicitly, it is to be understood that anyone conducting research exercises the right of quotation for those purposes.

(b) Works to which the limitation or exception applies

- Fragments of other, different works in written, audio or audiovisual form, and isolated works of three-dimensional, photographic, figurative or other character (Ecuador)
- Fragments of other, different works in written, audio or audiovisual form, as well as works of three-dimensional, photographic, figurative or similar character (Guatemala)

(c) Terms and conditions of applicability

- Quotation to the extent justified by the purpose of this incorporation (Ecuador)
- Indicate the source and the name of the author of the work used (Ecuador)

- The works must have already been disclosed (Guatemala)

2.3.3 Limitation or exception on public communication for scientific purposes

Research projects produce their results by disclosing their findings through publications in scientific journals or electronic publishing or by participating in forums or conferences.

Certain forms of access to such publications or presentations are acts or practices that may benefit from legal provision for a limitation or exception on public communication for scientific purposes, as enshrined in Venezuelan law as follows:

VENEZUELA. Law on Copyright.

Article 43. The following shall be considered lawful communications: (...)

3. those made for strictly scientific and teaching purposes in educational establishments, provided that there is no gainful intent.

(a) Scope of application

Educational establishments may carry out the acts covered by this limitation or exception.

(b) Works to which the limitation or exception applies

Although this is not stated explicitly, it is to be understood that this applies to protected works and performances.

(c) Terms and conditions of applicability

There must be no gainful intent.

2.3.4 Exceptions concerning related rights for research purposes

In accordance with the provisions of Article 15(1)(d) of the Rome Convention, the limitation or exception for research purposes may also cover productions protected by related rights. In reference to the rights of performers, phonogram producers and broadcasters, the following countries make the following provisions:

COLOMBIA. Law No. 23 of 1982.

Article 178. The preceding articles of this Law shall not apply where the acts referred to in those articles are concerned with:

The preceding articles of this Law shall not apply where the acts referred to in those articles are concerned with:

(c) use solely for the purposes of teaching or scientific research. (...)

COSTA RICA. Law No. 6683 of 1982.

Article 73a (added by Law No. 8686 of 2008). (1) The following exceptions to the protection provided for under this Law for the exclusive rights of performing artists, phonogram producers and broadcasting organizations shall be permitted, provided that the normal exploitation of the performance, phonogram or broadcast and the legitimate interests of the holder of the rights are not unreasonably prejudiced thereby:

(...)

(d) where the use is exclusively for teaching purposes or scientific research.

MEXICO. Federal Law on Copyright.

Article 151. The use of performances, phonograms, videograms or broadcasts shall not constitute a violation of the rights of the performers, producers of phonograms or videograms or broadcasting organizations where:

(...)

(III) the use is made for educational or scientific research purposes.

(...)

(a) Scope of application

Colombia and Costa Rica provide for this limitation or exception for research purposes with regard to related rights, but fail to do so in respect of copyright. By contrast, the law of Mexico ensures coherence or consistency by making reproduction by means of private copying by research institutions applicable to both copyright and related rights.

It should be noted that providing for a limitation or exception on related rights but not for the corresponding limitation or exception in the area of copyright, which addresses the same assumed fact and has an equivalent objective, makes the practical scope of such exceptions on related rights very restricted or limited, for reasons such as the following:

- (i) The possibilities of using an artistic performance free of charge and freely are very limited if the work being interpreted or performed cannot be used in the same manner;
- (ii) There are very few ways of using a phonogram free of charge and freely if the musical works reproduced therein may not be used in the same manner. The application of the limitation or exception is restricted to phonograms which contain other different sounds from those of a performance of the musical work;
- (iii) Unless there is an equivalent limitation or exception for audiovisual, musical and other copyright-protected works which are part of the programs broadcast by television or radio, the possibilities of using a broadcast freely and free of charge in accordance with a limitation or exception are also limited.

(b) Productions to which the limitation or exception applies

- Artistic interpretations or performances, phonograms and broadcast programs (Colombia, Costa Rica)
- Artistic interpretations or performances, phonograms, videograms and broadcast programs (Mexico)

(c) Terms and conditions of applicability

Purposes exclusively connected with scientific research (Colombia, Costa Rica)

2.4 RIGHT OF QUOTATION

In the above section we referred to the right of quotation when specifically provided for in connection with research purposes. Here, we refer in general to the limitation or exception known as the right of quotation.

The right of quotation consists of “the quotation of a relatively short excerpt from another written, audio or audiovisual work and from isolated artistic works to support or make more intelligible the writer’s opinions or to refer to the opinions of the other author in a credible manner”.³⁸ The right of quotation is a limitation or exception to the right of reproduction. In the case of quotation, only very brief excerpts from the same are taken for purposes of illustration or by way of example in a specific educational, scientific, informative or literary work or for purposes of criticism.

Quotation is one of the most common restrictions to copyright. This limitation enables authors to include in their works short passages from other works in order to make their own work more comprehensible or to refer to the other author’s opinion. Quoting means mentioning, and hence refers to mentioning another intellectual creation and its author.

This limitation or exception requires the quotation to be accurate, i.e. to transcribe the work and to refer to the author in such a way that it can be consulted, and therefore requires the work in question to have already been disclosed. It is therefore lawful to take parts of protected works of others to make notes, criticism or comments.

As a limitation on copyright, the right of quotation guarantees the right to culture and to education; without this limitation, society would not be able to access works without the author’s express permission. This would lead to his authorization being required even for partial use of a work. Both the right to education and the right to culture are fundamental rights for the development of a society, hence copyright must be in keeping with the exercise of the right to culture and the right to education, these being rights of general interest that are, in turn, essential for the development of any society.

This limitation and exception is set forth in the law of Argentina, Bolivia, Brazil, Cuba, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago and Venezuela and in Andean Decision No. 351 of 1993 of the Andean Community of Nations. The following is the text of the relevant provisions:

ARGENTINA. Law No. 11.723 of 1933.

Article 10. Any person may publish, for didactic or scientific purposes, comments, criticisms or notes referring to intellectual works, including up to 1,000 words for literary or scientific works, or eight bars in musical works and, in all cases, only the parts of the text essential for this purpose.

This provision shall cover educational and teaching works, collections, anthologies and other similar works.

Where inclusions from works by other people are the main part of the new work, the courts may fix, on an equitable basis and in summary judgment, the proportional amount to which holders of the rights of the works included are entitled.

³⁸ Delia Lipszyc, op. cit., p. 231

BOLIVIA. Law No. 1322 of 1992.

Article 24. An author may be quoted, whereby quotation shall be understood to mean the inclusion within one's own work of short excerpts from works by others, provided that the works have already been disclosed, that the source and the name of the author of the work used are stated, that the inclusion is by way of quotation for analysis, comment or critical assessment, for educational or research purposes, in accordance with proper practice and to the extent justified by the purpose being pursued and that no infringement of the law occurs.

BRAZIL. Act 9610 of 1998.

Article 46. The following shall not constitute violation of copyright: (...)

III – the quotation in books, newspapers, magazines or any other medium of communication of passages from a work for the purposes of study, criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given; (...)

CHILE. Law No. 17.336 of 1970.

Article 38. It shall be lawful, without remuneration and without obtaining the authorization of the author, to reproduce in cultural, scientific or educational works, fragments of protected works by other people, provided that their source, title and author are stated.

COLOMBIA. Law No. 23 of 1982.

Article 31. It shall be permissible to quote an author by transcribing the necessary passages in so far as they are not of such length and continuity that they might reasonably be considered a simulated, substantial reproduction constituting a prejudice for the author of the work from which they were taken. Every quotation shall mention the name of the author of the work quoted and the title of that work. Where the inclusion of the works of others constitutes the main part of the new work, the courts shall, at the request of any interested party, make an equitable assessment in an oral proceeding, awarding a proportional amount to each of the owners of the works included.

ANDEAN COMMUNITY OF NATIONS (Bolivia, Colombia, Ecuador, Peru). Decision No. 351 of 1993.

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(a) quote published works in another work, provided that the source and the name of the author are given, and on condition that the quotations are made in accordance with fair practice and to the extent justified by the purpose; (...)

COSTA RICA. Law No. 6683 of 1982.

Article 70. It shall be permissible to quote an author, transcribing the relevant passages, provided that the passages are not consecutive and such that they might be considered a simulated, substantial reproduction that redounds to the prejudice of the author of the original work.

CUBA. Law No. 14 of 1977.

Article 38. The following shall be lawful, without the author's consent and without paying him any remuneration, but subject to the obligation to name the author and the source, provided that the work is accessible to the public, and respecting its specific values:

(a) to reproduce quotations or fragments in written, audio or visual form for the purposes of teaching, information, criticism, illustration or explication, to the extent justified by the purpose being pursued; (...)

ECUADOR. Law No. 83 of 1998.

Article 83. The following acts, which shall not require authorization by the owner of the rights or be subject to any remuneration, shall exclusively be lawful subject to respect for proper practice and provided that the normal exploitation of the work is not adversely affected or the owner of the rights prejudiced thereby:

(a) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, and also that of isolated works of three-dimensional, photographic, figurative or other character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, comment or critical assessment; such use may only take place for teaching or research purposes to the extent justified by the purpose of the incorporation, and the source and the name of the author of the work used shall be stated; (...)

EL SALVADOR. Decree No. 604 of 1993.

Article 46. It shall be permissible, without the consent of the author or payment of remuneration, to make brief quotations from lawfully published works, subject to the obligation to name the author and source, and on condition that such quotations are made in accordance with proper practice and to the extent justified by the purpose.

GUATEMALA. Decree No. 33 of 1998.

Article 66. The following shall be lawful, without the authorization of the holder of the rights and without payment of remuneration, with the obligation to acknowledge the source and the name of the author of the work used, if indicated: (...) (d) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, as well as works of three-dimensional, photographic, figurative or similar character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, for teaching or research purposes.

MEXICO. Federal Law on Copyright of 1996.

Article 148. Literary and artistic works that have already been disclosed may only be used in the following cases without the consent of the owner of the economic rights and without remuneration, provided that the normal exploitation of the work is not adversely affected thereby and provided also that the source is invariably mentioned and that no alteration is made to the work:

(I) quotation of texts, provided that the amount quoted may not be considered a substantial, simulated reproduction of the contents of the work; (...)

(III) reproduction of parts of the work for the purposes of scientific, literary or artistic criticism and research;

NICARAGUA. Law No. 312 of 1999.

Article 32. It shall be lawful to reproduce, without the authorization of the author, an excerpt from other, different works and isolated works of three-dimensional, photographic character, provided that the works have already been disclosed and that their reproduction is by way of quotation or for their analysis, comment or critical assessment, to the extent justified by the purpose being pursued, in accordance with proper practice and stating the source and the name of the author of the work used.

PANAMA. Law No. 15 of 1994.

Article 49. It shall be permissible, without authorization from the author or payment of remuneration, to make quotations from lawfully published works, subject to the obligation to name the author and the source and on condition that the quotations are made in conformity with proper practice and to the extent justified by the aim pursued.

PARAGUAY. Law No. 1328 of 1998.

Article 40. It shall be permissible, without the authorization of the author or payment of remuneration, to make quotations from lawfully disclosed works, subject to the obligation to mention the name of the author and the source, and on condition that the quotations are made in accordance with proper practice and to the extent justified by the aim pursued.

PERU. Legislative Decree No. 822 of 1996.

Article 44. It shall be permissible to make quotations from lawfully disclosed works without the author's consent or payment of remuneration, subject to the obligation to state the name of the author and the source, and to the condition that such quotations are made in accordance with proper practice and only to the extent justified by the aim pursued.

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 31. It shall be permissible to quote an author by transcribing the necessary passages in so far as they are not of such length and continuity that they might reasonably be considered a simulated, substantial reproduction of the contents of that work, constituting a prejudice for its author. Every quotation shall mention the name of the author, the title and other data identifying the work quoted. Paragraph. Where the inclusion of the works of others constitutes the main part of the new work, the courts shall, at the request of any interested party, make an equitable assessment, awarding a proportional amount to each of the owners of the works included.

SAINT VINCENT AND THE GRENADINES. Copyright Act, 1989. Permitted use of work.

6. (1) *Notwithstanding the provisions of section 5, protection shall not be afforded to any author or other person for the time being entitled thereto and the consent of such author or other person shall not be required in the following instances: (...) (e) where quotations are taken from one work or article and produced as part of another work, provided that the work from which the quotations were taken has been lawfully made public and mention is made of this source and the author thereof;*” (...)

TRINIDAD AND TOBAGO. The Copyright Act, 1997. (Quotation).

10. (1) *Notwithstanding the provisions of section 8(1)(a), the reproduction of a short part of a published work, in the form of a quotation, shall be permitted without authorization of the owner of copyright, provided that the reproduction is compatible with fair dealing and does not exceed the extent justified by the purpose.*

(2) *The quotation shall be accompanied by an indication of its source and the name of the author, if his name appears in the work from which the quotation is taken.*

VENEZUELA. Law on Copyright.

Article 46. *Provided that the name of the author and the source are clearly stated, the following shall also be lawful: (...)*

2. *the quotation of certain parts of an already disclosed work in an original work in which the author has made use of language as a means of expression.*

(a) Scope of application

The beneficiary of the limitation or exception on the right of quotation is not defined in the laws being analyzed, and may therefore be any natural or legal person. A natural person may benefit from this limitation or exception; an author may take part of another work and include it in his own work.

(b) Works to which the limitation or exception applies

The works to which the right of quotation might apply are written works, oral works such as lectures and sermons, and compilations or anthologies. On the other hand, referring to the right of quotation for works of fine art would seem a contradiction in terms, since it is difficult to imagine how an excerpt from a work of fine art can be quoted. Some consider that to be able to refer to quoting from this kind of creation, it is necessary for the work to have been reproduced in a written format, such as in a history of art or art education work, in which it is used as an illustration, having no value as an independent reproduction.³⁹

In any case, it is clear that if the legitimate interests of the author or the normal exploitation of the work are not prejudiced when a work of art is used for the purposes of criticism or study, for example, it is perfectly possible to speak of “quotation”, provided that the source and name and the name of the author are indicated.

(c) Terms and conditions of applicability

The quotation must be limited to the inclusion of an excerpt from the work, or of passages of that work, on condition that they are not of such length and continuity that they might be considered a simulated, substantial reproduction.

³⁹ Isidro Satanoswky, *Derecho Intelectual*, Buenos Aires, Tipográfica Editora Argentina, 1954, p. 356

There are, in addition, other conditions relative to the applicability of the limitation or exception on the right of quotation. For example, some States require the excerpt to be correct and to be included by way of quotation or for its analysis, comment or analytical assessment, to clarify the content of the work (Venezuela) and it can only be used for teaching or research purposes (Argentina, Bolivia, Brazil, Cuba, Ecuador, El Salvador, Guatemala), for information purposes (Peru) and to the extent justified by the purpose of the inclusion.

The source of the quotation, the title and the author of the work quoted must always be given in order to respect the author's moral right and so that the opinion of the person giving the quotation cannot be confused with the opinion of the author quoted. It is also necessary for proper practice to be respected.

With regard to the length of the quotation so that it complies with the limits established by the exception, it is agreed that the excerpts quoted must be short, but there is no consistent indication of what exactly that means.

There are laws that establish the maximum volume of a work that can be quoted: up to 1,000 words of literary or scientific works and eight bars in musical works (Argentina). Others do not stipulate a permitted volume and refer only to short excerpts, necessary passages or brief excerpts (Bolivia, Brazil, Colombia, Dominican Republic, El Salvador, Guatemala, Mexico, Nicaragua, Trinidad and Tobago, Venezuela).

Finally, in some countries, when the inclusion of works by other people constitute the main part of the new work, the courts are empowered to fix, on an equitable basis and in summary proceedings, the proportional amount to which holders of the rights in the works included are entitled (Argentina, Colombia, Dominican Republic).

2.5 LIMITATION OR EXCEPTION ON PERSONAL OR PRIVATE COPYING

Copying by reprographic means constitutes an act of reproduction which, in principle, does not circumvent the obligation to obtain the express prior authorization of the copyright holder. However, this limitation or exception applies when the copying is carried out in the personal or private domain, subject to certain terms or conditions. The concept of "personal" has to do with the individual, corresponding to a human being's intimate sphere (excluding requirements relating to a legal person). By contrast, the notion of "private" as opposed to "public" may be applied to a specific group of people (for example, students in a class, employees of a company). Such is the diverse range of the laws that provide for a limitation or exception on copying for personal or private use under the right of reproduction.

The limitation or exception of personal or private copying does not seem to comply with the acknowledgement or safeguarding of an individual or collective right. On the contrary, its existence is evidently associated with the undeniable reality of the significance for copyright of the profusion of technologies that enable the public to mass reproduce works.

It is argued that the limitation or exception on private copying does not respect the need to give precedence to a human right or to the general interest of society, but yields to the inability of rightholders to control mass reproduction of their works by the public in the face of the use and dissemination of technological devices that enable reprographic reproduction.

On the other hand, it is argued that private copying is a means of accessing information, education, culture and entertainment, and a legitimate use of technology should not be prohibited because that would imply ignoring an undeniable reality, a social fact, whereas it would be better to channel efforts towards achieving a balance between rights and interests.

Educational institutions that provide photocopying facilities for their students must obtain a permit or license for the reprographic reproduction of works. In the next chapter we will give examples of licenses provided by the collective reprographic rights management organizations that exist in the region, particularly for educational institutions.

As mentioned, the countries in the region that provide for this limitation or exception are Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago and Venezuela. The text of the relevant provisions is as follows:

BRAZIL. Law No. 9610 of 1998.

Article 46. The following shall not constitute violation of copyright: (...) II. the reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful intent;" (...)

COLOMBIA. Law No. 23 of 1982.

Article 37. "It shall be lawful to reproduce, by any means, a literary or scientific work, such reproduction having been arranged or effected by the party concerned in one copy for his private use and without gainful intent."

COSTA RICA. Law No. 6683 of 1982.

Article 74 (Amended by Law No. 7397 of May 3, 1994). The reproduction of an educational or scientific work, done personally and exclusively by the person concerned for his own use and without any direct or indirect gainful intent, shall also be free. Such reproduction shall be done in a single handwritten or typewritten copy. This provision shall not apply to computer programs.

EL SALVADOR. Decree No. 604 of 1993.

Article 45. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration:
(a) production of one copy of the work for the personal and exclusive benefit of the user, who shall have made it himself with his own facilities, provided that the normal exploitation of the work is not affected and the legitimate interests of the author are not unjustifiably prejudiced thereby;
(b) photomechanical reproduction for exclusive personal use, such as by photocopying and microfilming, provided it is confined to small parts of a protected work or to works that are out of print. Any use of the parts reproduced for other than personal purposes, made by any means or process and in competition with the author's exclusive right to exploit his work, shall be treated as unlawful reproduction; (...)

HONDURAS. Decree Law No. 4-99-E.

Article 47. (Amended by Law No. 16-2006, Article 54) With regard to copies of works lawfully acquired by a person, it shall be permissible, without the authorization of the author or remuneration, to reproduce one copy of the work for the exclusive, personal use of that person, who shall have made it himself with his own facilities, provided that these are special cases that have no adverse effect on the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 48. Photomechanical reproduction for exclusive personal use, such as by photocopying and microfilming, shall also be lawful, provided that it is confined to small parts of a protected work or to works that are out of print.

MEXICO. Federal Law on Copyright of 1996.

Article 148. Literary and artistic works that have already been disclosed may only be used in the following cases without the consent of the owner of the economic rights and without remuneration, provided that the normal exploitation of the work is not adversely affected thereby and provided also that the source is invariably mentioned and that no alteration is made to the work: (...)

IV. reproduction of a literary or artistic work once, and in a single copy, for the personal and private use of the person doing it, and without gainful intent.

A legal entity may not avail itself of the provisions of this subparagraph except where it is an educational or research institution, or is not devoted to trading activities.

NICARAGUA. Law No. 312 of 1999.

Article 31. Reproduction in one copy of a disclosed work exclusively for personal use shall be permissible without the authorization of the author. The foregoing provision shall not apply to:

(1) the reproduction of works of architecture that review the form of buildings or other similar constructions;

(2) the reprographic reproduction of an entire book or of a musical work in graphic form (musical scores);

(3) The reproduction of all or major parts of databases in numeric form;

(4) The reproduction of computer programs, except in those cases provided for in Article 39 of this Law;

(5) Or to any other reproduction of a work that might affect the normal exploitation of the work or that might unreasonably prejudice the legitimate interests of the author.

PANAMA. Law No. 15 of 1994.

Article 48. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration:

1. the reproduction in one copy of the work by the prospective user with his own facilities and for his personal and exclusive use;

2. photomechanical reproduction, such as by photocopies and microfilming, for exclusively personal use, provided that they are confined to small portions of a protected work or to works that are out of print; any use of pieces reproduced by any means or process for other than personal purposes that is made in competition with the author's exclusive right to exploit his work shall be treated as unlawful reproduction.

PARAGUAY. Law No. 1328 of 1998.

Article 44. The exclusively personal copying of works published in graphic form or in the form of sound or audiovisual recordings shall be lawful where the compensatory remuneration referred to in Chapter IV of Title IV of this Law has been paid. The reproductions allowed under this Article shall not however extend to the following:

1. reproduction of a work of architecture in the form of a building or other construction;

2. reproduction of the whole of a book or musical work in graphic form, or of the original or a copy of a work of fine art executed and signed by the author;

3. a database or compilation of data.

PERU. Legislative Decree No. 822 of 1996.

Article 43. With regard to works that have already been lawfully disclosed, the following shall be permitted without the author's consent: (...) (b) reproduction by reprography of short fragments or of works published in graphic form or that are out of print, for exclusively personal use. (...)

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 37. It shall be lawful to reproduce once and in a single copy a literary or scientific work for personal use and without gainful intent, without prejudice to the right of the copyright holder to obtain equitable remuneration for the reprographic reproduction or for the private copy of an audio or audiovisual recording, in the form established by the ruling. Computer programs are specifically governed by the ruling established in the special provisions for such works in this Law.

TRINIDAD AND TOBAGO. The Copyright Act, 1997. (Private reproduction for personal purposes)

9. (1) Notwithstanding the provisions of section 8(1)(a) and subject to the provisions of subsection (2) the private reproduction of a published work in a single copy shall be permitted without the authorization of the owner of copyright, where the reproduction is made by a natural person exclusively for his own personal purposes.

(2) The permission under subsection (1) shall not extend to reproduction—

- (a) of a work of architecture in the form of a building or other construction;*
- (b) in the form of reprography of the whole or a substantial part of a book or of a musical work in the form of notation;*
- (c) of the whole or a substantial part of a data base;*
- (d) of a computer program, except as provided in section 14; and*
- (e) of any work in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the owner of copyright.*

VENEZUELA. Law on Copyright.

Article 44. The following shall be considered lawful reproductions: 1. the reproduction in one copy of a printed, sound or audiovisual work, except in the case of a computer program, which shall be governed by subparagraph 5 of this Article, provided that the copy is made for the exclusive personal use of the user, and is made by the person concerned with his own facilities;

2. photomechanical reproduction for exclusive personal use, as by photocopying and microfilm, provided that it is confined to small parts of a protected work or works that are out of print, and without prejudice to the equitable remuneration that the companies, institutions and other organizations offering the service to the public have to pay to the owners of the right of reproduction; any use of the reproduced material for other than personal purposes that is made in competition with the author's exclusive right to exploit his work shall be deemed equivalent to unlawful reproduction.

(a) Scope of application

With regard to the persons entitled to be covered by this limitation or exception, the range of meanings of the expressions “personal” and “private”, as mentioned, needs to be considered. The expression “personal use” or “personal purposes” is used in the laws of El Salvador, Dominican Republic, Honduras, Nicaragua, Panama, Peru, Trinidad and Tobago and Venezuela. The expression “private use” is used in the laws of Brazil and Colombia. Meanwhile, the law of Costa Rica refers to the “own use” of the person concerned.

Mexican law provides for both personal and private use, establishing limitations or exceptions not only for natural persons but also for moral or legal persons such as educational or research institutions or those that are not devoted to trading activities.

(b) Works or productions to which the limitation or exception applies

The works covered by this limitation or exception, generally within the laws of the countries cited, are both literary and artistic works. However, the application of that limitation or exception may be restricted to literary or scientific works, excluding artistic works (Colombia, Dominican Republic), or is limited to so-called “educational or scientific works” (Costa Rica, Honduras).

Likewise, this limitation or exception does not apply to works of architecture, musical scores, digital databases and computer programs (Nicaragua), its application is restricted to works published in graphic form, or audio or audiovisual recordings (Paraguay and Peru), or works of architecture are excluded, as are books in their entirety, musical scores or three-dimensional works executed and signed by the author and databases (Peru). Furthermore, in some laws, the limitation or exception does not cover works of architecture, the whole or a substantial part of a book, musical scores, the whole or a substantial part of a database or a substantial part of a computer program (Trinidad and Tobago) or its application is restricted to copies of published audio or audiovisual works (Venezuela).

(c) Terms and conditions of applicability

Most of the laws of Latin America and the Caribbean which include the limitation or exception on personal or private copying require reproduction carried out under those laws to be made in a single copy.

Other conditions regarding the applicability of the limitation or exception include the requirement that reproduction be made without gainful intent (Brazil, Colombia, Costa Rica, Dominican Republic, Honduras, Mexico); that it be carried out or obtained directly for the person's own purposes (in all the laws of the region providing for the limitation or exception, apart from the Dominican Republic, Nicaragua, Paraguay and Peru); that the works be out of print (Peru); or that the reproduction be typewritten or handwritten (Costa Rica).

The applicability of this limitation or exception is made explicitly conditional in the relevant text in the laws of the Dominican Republic, Paraguay and Venezuela upon compensatory or equitable remuneration being paid.

2.5.1 Compensatory remuneration or equitable compensation for private copying in the countries in the region

Ecuador

ECUADOR. Law No. 83 of 1998.

Article 105. The private copying of works fixed on phonograms or videograms, and also the reprographic reproduction of printed literary works, shall be subject to compensatory remuneration in accordance with the provisions of this Part. That remuneration shall become payable by virtue of the distribution of physical media capable of embodying a sound or audiovisual fixation or of apparatus for the reproduction of phonograms or videograms, or of equipment for reprographic reproduction.

The remuneration shall accrue in equal parts to the authors, performers and phonogram producers in the case of phonograms and videograms, and shall likewise accrue in equal shares to the authors and publishers in the case of literary works.

Compensatory remuneration for the private copying of phonograms and videograms shall be collected by a single collecting agency common to authors, performers and phonogram and videogram producers, the sole corporate purpose of which shall be the collection on their behalf of the compensatory remuneration for private copying. In the same way, the collection of the compensatory fees for reprographic reproduction shall be carried out by a single collecting agency common to authors and publishers.

These management bodies shall be authorized by the IEPI and shall abide by the provisions of this Law.

ECUADOR. Law No. 83 of 1998.

Article 106. The compensatory remuneration provided for in the foregoing Article shall be paid by the manufacturer or importer at the time of placing the following on the market:

- (a) tapes or other material capable of embodying a sound or audiovisual fixation;*
- (b) reproduction equipment.*

The percentage rate of compensatory remuneration for private copying shall be calculated according to the price of the recording material or reproduction apparatus, and shall be determined and laid down by the Board of Directors of the IEPI.

ECUADOR. Law No. 83 of 1998.

Article 107. The person, whether natural person or legal entity, who offers material capable of embodying a sound or audiovisual fixation or reproduction apparatus to the public without having paid compensatory remuneration may not distribute the said material and apparatus and shall be jointly answerable with the manufacturer or importer for the payment of the remuneration, without prejudice

to the right of the IEPI or of the competent courts, as the case may be, to withdraw the merchandise in question from the market until the said remuneration has been settled.

Non-payment of the compensatory remuneration shall be punished with a fine corresponding to 300 per cent of what should have been paid.

Producers of phonograms or the owners of rights in the works to which this paragraph relates, or their licensees, shall not be liable for this remuneration in respect of material that they import.

ECUADOR. Law No. 83 of 1998.

Article 108. Private copying shall be understood to mean the domestic copying of phonograms or videograms, or reprographic reproduction in a single copy carried out by the original acquirer of a lawfully circulating phonogram or videogram or literary work, for the exclusive purpose of non-profit-making use by the natural person who does it. Such copies may not on any account be used in a manner contrary to proper practice.

Private copying done on material or with reproduction apparatus for which compensatory remuneration has not been paid constitutes a violation of the relevant copyright and related rights.

Paraguay

PARAGUAY. Law No. 1328/98.

Article 34. The owners of the rights in works published in graphic form or in the form of videograms or phonograms or any kind of sound or audiovisual recording shall have the right to a share in the compensatory remuneration for reproductions of those works or products that are made exclusively for personal use by means of non-typographical technical apparatus.

The remuneration shall be determined according to the equipment, apparatus and materials used for making the reproduction.

Payment shall be proved by an identifying mark on the recording or reproduction apparatus and on the physical materials used for the duplication, as appropriate.

Copyright owners may incorporate anti-copying technology and oversee the reproduction of their work.

PARAGUAY. Law No. 1328/98.

Article 35. The foregoing remuneration shall not be payable for equipment and materials that are used by the producers of audiovisual works and phonograms and publishers or their licensees, neither shall it be payable by studios concerned with sound recordings or the post-synchronization of sound and images, or companies that work under contract to any of them, with respect to the legitimate production or reproduction of their works and products, provided that the equipment or media in question are intended solely for such activities.

PARAGUAY. Law No. 1328/98.

Article 36. The collection and distribution of the remuneration referred to in this Chapter shall take place through the appropriate collective management bodies, which shall centralize collection either by delegating it to one of their number or by setting up a collecting agency with its own legal personality.

PARAGUAY. Law No. 1328/98.

Article 37. Within the six months following the entry into force of this Law the Executive, on a proposal by the National Directorate of Copyright, shall specify the owners entitled to remuneration and shall regulate the procedure for determining the equipment and material for which it is payable, its amount and the methods of collection and distribution.

The National Directorate of Copyright shall decide what exemptions are appropriate and may also broaden the liability for payment of remuneration referred to in Article 34 to include those who distribute the material mentioned therein to the public.

Dominican Republic

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 37. It shall be lawful to reproduce once and in a single copy a literary or scientific work for personal use and without gainful intent, without prejudice to the right of the copyright holder to obtain equitable remuneration for the reprographic reproduction or for the private copy of an audio or

audiovisual recording, in the form established by the ruling. Computer programs are specifically governed by the ruling established in the special provisions for such works in this Law.

DOMINICAN REPUBLIC. Decree No. 362-01.

Article 53. The right to equitable remuneration which is due to the holders of rights in respect of works published in graphic form, videograms or phonograms, or any other form of audio or audiovisual recording, in order to compensate such holders for the remuneration not received by reason of these reproductions, in accordance with Article 37 of the Act, shall be subject to special regulation.

DOMINICAN REPUBLIC: Decree No. 548-04.

Article 1. Reproduction that is carried out exclusively for personal use and without gainful intent, in accordance with the use authorized in Article 37 of Law No. 65-00 on Copyright of 21 August 2000, by means of non-typographical apparatus or technical equipment, of works disclosed in the form of books or other publications, and phonograms, videograms or other sound, visual or audiovisual media, will give rise to a single equitable remuneration for each of those modes of reproduction, this being intended to compensate for the rights that are not received by reason of the said reproduction. The said remuneration shall accrue to the authors, performers, phonogram producers, the producers of audiovisual works in the form of videograms and the publishers, as the case may be.

DOMINICAN REPUBLIC. Decree No. 548-04.

Article 2. The remuneration referred to in the preceding Article shall be determined according to the material media, equipment, apparatus and materials used for making the reproduction and shall accrue by virtue of its being made in the Dominican Republic or of its being imported to the territory of the Dominican Republic of:

- 1. tapes, compact discs or other material media capable of embodying a sound, visual or audiovisual fixation;*
- 2. material or digital media capable of embodying literary or graphic works.*
- 3. non-typographical reproduction and storage equipment used for works disclosed in the form of books or other publications, as well as phonograms, videograms or other audio, visual or audiovisual media, as indicated in the preceding Article.*
- 4. units for the copying of sound and audiovisual media included in a personal computer or manufactured or imported for use in a peripheral manner, excluding the hard drives that are part of the equipment.*

Article 3. The remuneration shall be distributed as follows: 50% for authors and composers; 25% for performers and 25% for the respective producers in the case of phonograms and audiovisual works included in videograms; and in equal shares for authors and publishers in the case of the reproduction of works in graphic form.

The collection and distribution of that remuneration shall be carried out by the manufacturers and importers in case of the initial sale of the equipment or, in their absence, by the distributors, whose liability for payment will be equal to that of the aforementioned, solely through collective management bodies established in accordance with the category of works, performances and productions in question, pursuant to the provisions of Part XII of Law No. 65-00 of 21 August 2000 on Copyright.

DOMINICAN REPUBLIC. Decree No. 548-04.

Article 4. The remuneration referred to in the preceding Article shall be determined by common accord between the manufacturers and importers and the respective copyright holders concerned, or the collective management organizations that they have mandated to represent them and that are established in accordance with the category of works, performances or productions concerned for each mode of reproduction, depending on the equipment, apparatus and materials suitable for making said reproduction.

The percentage to be paid by way of remuneration, to which reference is made in the preceding article, shall be determined within the six months following approval by the National Copyright Bureau; the tariffs of the corresponding collective management organization, established in accordance with the category of works, performances or productions in question shall be determined by means of a direct agreement between the parties in the form of a legal document, which, to be valid, must be registered with the National Copyright Bureau and published in a national daily newspaper.

If the deadline for direct settlement has passed, unless an agreement has been reached, the National Copyright Bureau will instruct the parties to file the briefs containing their arguments within the two months following the date of the previous lapsed deadline. Within the 20 days following the date of the filing of the briefs by the parties concerned, the National Copyright Bureau will submit a draft

agreement to the parties, upon which they must decide in an open hearing at the same time as notification of the draft agreement is given by the National Office of Copyright.
If the parties fail to reach an agreement or if either of them fails to present their brief within the set deadline, the National Copyright Office will determine the percentage by order in accordance with the principles of equity and based on information that the party which appeared in the proceedings submitted by the above deadlines.
These percentages will be revised periodically once every five years, or as requested jointly by the parties, following the same procedure defined in this paragraph.

DOMINICAN REPUBLIC. Decree No. 548-04.

Article 5. The reproduction of works using equipment or materials acquired or introduced into the market without the remuneration established in Articles 2 and 3 having been paid, as well as non-payment of the said remuneration, shall be deemed an infringement of copyright and related rights and will incur the corresponding civil and criminal liability in respect of the owner of the media, materials, equipment, apparatus and materials required to make the said reproduction, as well as jointly in respect of the distributor, manufacturer and importer of the same, in accordance with the provisions of Law No. 65-00 of 21 August 2000 on Copyright.

In any case, non-payment of the compensatory remuneration shall be subject to administrative sanctions in accordance with Article 187 of Law No. 65-00 of 21 August 2000 on Copyright and 107, 115, 116 and 117 of Regulation No. 362-01 of 14 March 2001, without prejudice to appropriate legal action and precautionary measures to remove the goods and equipment concerned by the same, pending settlement of the respective remuneration.

DOMINICAN REPUBLIC. Decree No. 548-04.

Article 6. Producers of phonograms or audiovisual works in the form of videograms as well as broadcasting organizations are exempted from paying the above-mentioned remuneration in respect of equipment, apparatus or materials intended for use in their activity, provided that they have the appropriate authorization granted by the rightholders to carry out the said reproduction of works, phonograms or audiovisual works in the form of videograms, as appropriate.

DOMINICAN REPUBLIC. Decree No. 548-04.

Article 7. The preceding provision shall not apply to computer programs, whose only permitted reproductions are expressly governed by the ruling established in the special provisions for such works in Law No. 65-00 of 21 August 2000 on Copyright.

Peru

PERU. Law No. 28131.

Article 20. Compensation for private copying 20.1 Reproduction that is carried out exclusively for private use of works or artistic performances in the form of videograms or phonograms, on media or materials capable of embodying them, shall lead to payment of compensation for private copying, which is to be shared between the artist, the author and the producer of the videogram and/or phonogram, in the form and percentages established by the Regulation.

20.2 Compensation for private copying does not constitute a tax. The income derived under that concept is governed by the applicable tax regulations.

20.3 This compensation must be paid by the domestic manufacturer and the importer of suitable materials or devices that permit the reproduction referred to in the preceding paragraph.

20.4 Duly authorized producers of videograms or phonograms as well as broadcasting companies are exempt from payment in respect of phonogram or videogram materials or media for the reproduction of phonograms and videograms intended for their activities.

20.5 The compensation shall be determined according to the appropriate media created or established, for making that reproduction, in accordance with the provisions of the Regulation.

20.6 The form of collection and other aspects not provided for in this Law shall be established in the Regulation.

PERU. Regulation of the Law of the Artist.

Article 7. The collection of revenue. In the absence of an agreement between the relevant collective management organizations, remuneration for private copying will be collected and distributed by a

rights collection agency, which will be established under the auspices of the Copyright Office of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI).

PERU. Regulation of the Law of the Artist.

Article 8. Collection of royalties. The royalties collection agencies to which the preceding Article refers shall be established by each of the collective management organizations of authors, performers, producers of phonograms and videograms that are authorized or to be authorized. Like collective management organizations, the collection agencies shall be subject to the authorization, inspection and supervision of the INDECOPI Copyright Office, as set forth in Andean Decision No. 351 and Legislative Decree No. 822. The rules set forth in Andean Decision NO. 351 and Legislative Decree No. 822 in respect of collective management organizations shall also apply to collecting agencies.

PERU. Regulation of the Law of the Artist.

Article 9. Tariffs for the public communication of videograms and private copying. By mutual agreement, the collective management organizations shall also determine the tariffs for the public communication of videograms and the remuneration for private copying referred to in Article 20 of the Law, within thirty (30) days of the promulgation of this Regulation. If they cannot reach an agreement, the management organizations may appeal to the Copyright Office, which shall place the dispute settlement mechanisms, such as conciliation, mediation and arbitration, at their disposal.

If, for lack of an agreement on the setting of tariffs, the collective management organizations appeal to the Copyright Office, the latter may set temporary tariffs, which will be valid for one (1) year. In order to set those tariffs, the Copyright Office will base its decision on technical and economic criteria, market studies and so on.

PERU. Regulation of the Law of the Artist.

Article 10. Extension of the temporary tariff. At the end of the year referred to in the preceding Article, if the collective management organizations cannot reach an agreement on the tariffs to be charged, the temporary tariffs may be extended at their request for a period of the same length.

PERU. Regulation of the Law of the Artist.

Article 11. Compensation for private copying. With regard to compensation for private copying, referred to in Article 20 of the Law, the following definitions shall apply:

1. Debtors:

(a) Manufacturers in Peru and purchasers outside Peruvian territory for commercial distribution or use therein of media or materials capable of embodying protected works and performances.

(b) Distributors, wholesalers and retailers, subsequent purchasers of the above media or materials capable of containing protected works or productions, shall be liable to pay compensation jointly with the debtors who have supplied the said media or materials, unless they provide evidence of actually having paid it.

2. Creditors: Performing artists, authors, publishers, producers of phonogram and, producers of videograms, whose performances, works and performances have been fixed in phonograms and videograms.

3. Where various management organizations are involved in managing a single mode of remuneration, they may take action against debtors in all matters relating to any claim for the collection of the royalties before the judicial and administrative authorities within and outside the established procedures, jointly and by a single representation, in accordance with the relations between such organizations established in the provisions of the Civil Code on joint ownership. Likewise, in this case, conflict resolution bodies, such as conciliation, mediation and arbitration.

4. The following shall be exempt from paying the remuneration:

(a) Producers of phonograms or videograms and broadcasting organizations, in respect of media or materials intended for use in their activities, provided that they have the appropriate authorization to effect the said reproduction of works, artistic productions, phonograms and videograms, as appropriate in the course of that activity; what is due to the manufacturers and importers and, where appropriate, to those jointly responsible, by virtue of certification of the organization or relevant management organization, assuming that the media or materials have been purchased within Peruvian territory.

(b) Natural persons who purchase the aforementioned media outside Peruvian territory and import them into the country as personal effects and in such quantities that it may be reasonably presumed that they are intended for private use in the said territory

(a) Works whose reproduction leads to compensatory remuneration

In Ecuador, this applies in respect of works fixed in phonograms and videograms that are the subject of reprographic reproduction. In Paraguay, these are works published in graphic form, by means of videograms or phonograms or any type of audio or audiovisual recording. In the Dominican Republic, this applies in respect of works disclosed in the form of books or other publications, as well as phonograms, videograms or other audio, visual or audiovisual media. In Peru, these are works or artistic performances in the form of videograms or phonograms on media or materials capable of embodying them.

(b) Owners benefiting from the limitation or exception

In Ecuador, the beneficiaries are authors, artists, performers and producers and, in the case of literary works, authors and publishers. In Paraguay, they are the holders of rights in the works. The executive branch of the government, at the proposal of the National Directorate of Copyright, shall determine the holders entitled to the said remuneration. In the Dominican Republic, the beneficiaries are authors, performers, phonogram producers, the producers of audiovisual works in the form of videograms and publishers. In Peru, they are performing artists, authors, publishers, producers of phonograms and producers of videograms, whose performances, works and performances have been fixed in phonograms and videograms.

(c) Those required to pay compensatory remuneration

In Ecuador, the debtor is the manufacturer or importer at the time of placing the item on the market. The person, whether natural person or legal entity, who offers media capable of embodying a sound or audiovisual fixation or reproduction apparatus to the public without having paid compensatory remuneration shall be jointly liable with the manufacturer or importer for the payment of the said remuneration.

In the Dominican Republic it is the manufacturer or importer into the territory of the Dominican Republic in case of the initial sale of the equipment or, in his absence, by the distributors, whose liability for payment will be equal to that of the manufacturer or importer.

In Peru, the remuneration must be paid by the domestic manufacturer and the importer of suitable materials or media that permit reproduction; those purchasing media or materials capable of embodying protected works and performances outside Peruvian territory, for commercial distribution or use within that territory; distributors, wholesalers and retailers, subsequent purchasers of the above media or materials capable of embodying protected works or productions, shall be jointly liable to pay the remuneration with the debtors who have supplied those items, unless they can provide evidence of actually having paid the remuneration.

(d) Equipment and media which lead to payment

In Ecuador, these are the media capable of embodying an audio or audiovisual fixation (tapes or other material media capable of embodying a sound or audiovisual fixation) or equipment for reproducing phonograms and videograms, equipment for reprographic reproduction. N.B.

Resolution No. CD-IEPI-03-133 sets the compensatory remuneration for (i) recording systems and similar phonographic recording media (audio cassettes), (ii) recording systems and similar audiovisual recording media (video tapes), (iii) recording systems and dedicated digital phonographic media (phonographic recording equipment, recording media), (iv) recording systems and dedicated digital audiovisual media (videographic recording equipment and recording media), and (v) multiplatform recording systems and media, which has to be applied in the Ecuadorian market on all units sold in the market if media are based on data CD and data DVD technology. This Resolution is not applied in practice.

In Paraguay, these are equipment, non-typographical technical apparatus and materials suitable for reproduction. The executive branch of the government, at the proposal of the National Directorate of Copyright, shall regulate the procedure for determining the equipment and media subject to compensatory remuneration.

In the Dominican Republic these are the tapes, compact discs and material media capable of embodying an audio, visual or audiovisual fixation, the material or digital media capable of embodying literary or graphic works, equipment permitting the reproduction or (non-typographical) storage of works disclosed in the form of books or other publications, as well as phonograms, videograms or other audio, visual or audiovisual media, units for the copying of sound and audiovisual media included in a personal computer or manufactured or imported for use in a peripheral manner.

Peruvian law does not clearly establish the equipment and media which lead to payment. It is stated that payment must be made by the domestic manufacturer and the importer of suitable materials or media for reproduction. It is also stated that the compensation is determined in accordance with the appropriate media, created or to be created, for making that reproduction.

(e) Tariffs

In Ecuador a percentage rate is calculated on the basis of the price of the reproduction media or apparatus and is determined and laid down by the Board of Directors of the IEPI. In Paraguay, the executive branch of the government, at the proposal of the National Directorate of Copyright, shall regulate the procedure for determining the amounts. The Dominican Republic provides for a percentage rate determined by mutual agreement between the manufacturers and importers and the relevant rightholders, or the collective management organizations mandated to represent them. If no agreement is reached, the provisions of Article 4(3) of the Regulation on Remuneration for Private Copying, Decree No. 548-04, shall apply. In Peru, the law provides for a percentage amount determined by mutual agreement between the collective management organizations; if no agreement is reached, the Copyright Office may set rates which shall remain in force for one year. If no agreement is reached, 30 days after issuing this ruling, the management organizations may appeal to the Copyright Office, which shall place the dispute settlement mechanisms at their disposal. If there is no agreement, the Copyright Office may set temporary tariffs which will remain valid for one (1) year. In order to set those tariffs, the Copyright Office will base its decision on technical and economic criteria, market studies and so on. At the end of the year, if the collective management organizations cannot reach agreement on the tariffs to charge, the temporary tariffs may be extended at their request for a period of the same length.

2.6 EXCEPTIONS APPLICABLE TO THE DIGITAL ENVIRONMENT RELATING TO EDUCATION OR RESEARCH

The countries of Latin America and the Caribbean have not developed a specific set of rules concerning limitations or exceptions to the copyright applicable to the digital environment.

The WCT authorizes the Member States to provide for certain limitations or exceptions in their laws; as the exclusive rights of authors remain valid when their works are used in the digital environment, it is indisputable that exceptions must also continue to be included to ensure that the balance of rights is maintained. The WPPT makes similar provision.

This means that the countries in the region, in particular those that are members of the WCT and WPPT, are called upon to apply the limitations and exceptions that exist in the analogue environment to the use of works in the digital environment insofar as this is compatible with the three-step test.

Taking account of the type of exceptions applicable to the digital environment that have been enshrined in other laws, exceptions such as the following have not been developed in the region:

- Limitation or exception on reproduction as part of the technological process of digital transmission
- Limitation or exception on the digitization of works or productions for their use in distance education
- Limitation or exception on the digital transmission of works or productions in the context of distance education
- Limitation or exception on communication to specific individuals from the general public or making available, for the purpose of research or private study, through dedicated terminals installed in educational centers, works and performances contained in their collections and not subject to acquisition or licensing conditions.

2.7 EXCEPTIONS TO TECHNICAL PROTECTION MEASURES FOR EDUCATIONAL OR RESEARCH PURPOSES

Exceptions to technological protection measures have been provided for by the countries that have signed and implemented the Free Trade Agreement between Central America, Dominican Republic and the United States (FTA USA – CAFTA-DR). By virtue of the implementation of this Agreement, provisions on the protection of technological measures and exceptions to this prohibition were established in the laws of the Dominican Republic, El Salvador, Guatemala and Honduras.

The provisions governing this matter in the relevant laws are as follows:

- El Salvador: Decree No. 912 of 2005, Article 37, Amendment of the Law on the Promotion and Protection of Intellectual Property, Decree No. 604 of 1993, Articles 85(d) to 85(e)

- Guatemala: Decree No 11-2006, amending the Law on Copyright and Related Rights, Decree No. 33 of 1998, Articles 133 *quinquies*, 133 *sexties* and 133 *septies*
- Honduras: Decree Law No. 16 of 2006, Implementation of the Free Trade Agreement between the Dominican Republic, Central America and the United States, Articles 33, 35 and 38
- Dominican Republic: Law No. 424-06, Article 62, amending the Law on Copyright and Related Rights, Law No. 65-00, Articles 186-189

How the subject has been dealt with in these laws is outlined below, after which restrictions or exceptions on technological measures for educational institutions are discussed.

These countries adopted a regulation, which clearly resembles the provisions of the DMCA in the United States, prohibiting the circumvention of technological protection measures as well as the manufacture and marketing of devices or services which are primarily designed to circumvent technological measures, which have no commercial use apart from circumvention or which are advertised as having this specific purpose.

Violation of these prohibitions results in civil action, regardless of actions in respect of the infringement of copyright or related rights. Nonetheless, any natural or legal person who is not in charge of libraries, archives, an educational institution or a non-commercial, non-profit-making public broadcasting authority and who has been involved intentionally and in order to achieve a commercial advantage or for private financial and commercial gain in any activities that are prohibited pursuant to the second paragraph of this Article shall be subject to the procedures and sanctions stipulated in the Penal Code.

The above-mentioned article states that “No order shall be issued for payment of damages by a non-profit-making library, archives, educational institutions or public broadcasting entity which provides evidence to show that it was unaware and had no reason to know that its acts constituted a prohibited activity” (emphasized outside the text). While a universally accepted principle of law is that ignorance of the law is no excuse and that no one can be absolved of liability by invoking in their favor their own fault, negligence, imprudence or lack of experience, in this case an educational institution can be exempted from civil liability by demonstrating that it did not know and had no reason to know of the prohibitions relating to technological protection measures.

By way of exceptions to technological measures, the laws developing the FTA USA – CAFTA-DR establish the following provisions:

First, the exceptions to the prohibition of producing or marketing circumvention devices are:

- (i) reverse engineering for computer programs, with the aim of achieving interoperability with other programs;
- (ii) research to identify and analyze flaws and vulnerabilities of technologies for encoding and decoding information;
- (iii) preventing the access of minors to inappropriate online content;
- (iv) activities aimed at testing, investigating or correcting the security of that computer, computer system or network.

Second, the exceptions to the prohibition on circumventing or overcoming the technological measures are as follows:

- (i) the above-mentioned exceptions relating to circumvention devices, i.e. reverse engineering for interoperability of computer programs, encryption research, preventing the access of minors to inappropriate online content and protection of computer systems.
- (ii) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram to which there is no other form of access, with the sole aim of taking decisions about its acquisition;
- (iii) activities to protect the privacy of personal data;
- (iv) government activities aimed at implementing the law, intelligence activities, national defense, essential security and similar purposes;
- (v) Other exceptions established by an administrative procedure and in force for four years.

With regard to the measures to protect the information needed for rights management, the laws to which reference is made establish as exceptions lawfully authorized activities carried out by employees, agents or government contractors to implement the law, intelligence activities, national defense, essential security and other similar government purposes.

Lastly, it is worth noting that the countries in question have adopted provisions in their laws that are similar to those passed in 1998 by the United States Congress for the DMCA. Nonetheless, the same thing did not occur with the administrative provisions adopted by the Library of Congress of the United States, within which there are some provisions that are as important to education as that adopted in 2006 and valid until 27 October 2009, such as the limitation or exception to the technological measures for controlling access, in the case of audiovisual works in the libraries of colleges or universities with courses in audiovisual or cinematographic media, provided that the technological constraint is lifted or circumvented in order to allow compilations of such works to be made for educational use in the classroom.

Nonetheless, the countries referred to here have scope to develop similar or different provisions, also administratively as provided for in the above-mentioned Acts.

The other countries in Latin America and the Caribbean which, as members of the WCT and WPPT, have developed legal protection for technological protection measures but have not stipulated exceptions to that protection, are omitting to give the general public which uses the works the opportunity to circumvent or overcome these technological constraints by legitimate means, thereby maintaining an imbalance to the detriment of rights such as education or teaching purposes.

Failure to regulate the interface between the protection of technological measures and the exercise of limitations or exceptions results in all such limitations or exceptions being sacrificed in return for the legal protection of technological measures, a situation contrary to the necessary balance of rights and interests.

We therefore now move on to reviewing the existing exceptions in the laws relating to education and research in the countries in the region:

2.7.1 Limitation or exception on accessing a work or production for the purposes of deciding whether to purchase it

In this regard, exceptions to the protection of technological measures are provided for in the following laws:

EL SALVADOR. Decree No. 604 of 1993 – Law on the Promotion and Protection of Intellectual Property.

Article 85(d) (added by Decree No. 912 of 2005, Article 37). Likewise, the activities listed in the preceding paragraph and the following activities, provided that these do not impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures, shall constitute exceptions to any measure implementing the prohibition referred to in subparagraph (a) of the second paragraph of this Article:

(a) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram to which there is no other form of access, with the sole aim of taking decisions about its acquisition;

GUATEMALA. Law on Copyright and Related Rights. Law No. 33-98.

Article 133 sexties (added by virtue of Article 10(7) of Decree No. 11-2006). 2. With regard to Article 133 quinquies (a), in addition to the activities described in section 1 (a), (b), (c) and (d), the following activities shall be lawful, provided that do not undermine the lawful protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:

(a) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram which is not available in another form, with the sole aim of taking a decision about acquisition;

HONDURAS. Implementation of the Free Trade Agreement between the Dominican Republic, Central America and the United States, Decree Law No. 16, 2006.

Article 35. Likewise, the activities described in Article 34 and the following activities shall constitute exceptions to the prohibition stipulated in Article 32(1), provided that they do not affect the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:

(a) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram to which there is no other form of access, with the sole aim of taking decisions about acquisition;

DOMINICAN REPUBLIC. Law No. 65-00 on Copyright.

Article 187. Para. (1). The exceptions to the activities prohibited under this Article are limited to the following activities, provided that they do not impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:

(...)

(e) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram to which there is no other form of access, with the sole aim of taking decisions about acquisition; (...)

(a) Scope of application

Educational institutions (Dominican Republic, El Salvador, Guatemala, Honduras)

(b) Protection measures to which the limitation or exception applies

Technological protection measures which restrict unauthorized access to works, or which protect copyright and related rights (Dominican Republic, El Salvador, Guatemala, Honduras)

(c) Terms and conditions of applicability

- Access without gainful intent (Dominican Republic, El Salvador, Guatemala, Honduras)
- There is no other way of accessing the work, performance or phonogram (Dominican Republic, El Salvador, Guatemala, Honduras)
- Sole or exclusive purpose of taking decisions about acquiring the work, performance or phonogram (Dominican Republic, El Salvador, Guatemala, Honduras)

2.7.2 Limitation or exception on research into information encoding and decoding

Exceptions to the protection of technological measures are provided for in the following laws:

EL SALVADOR Decree No. 604 of 1993 – Law on the Promotion and Protection of Intellectual Property.

Article 85(d) (added by Decree No. 912 of 2005, Article 37). (...) Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to any measure implementing the prohibition stipulated in section 2(b) of this Article, regarding technology, products, services or devices to evade effective technological measures controlling access to, and in the case of subsection (a) of this section, protect any copyright or related rights in a protected work, interpretation or performance, or phonogram referred to in the second paragraph of subsection (b) of this Article:
(...)

(b) Non-infringing bone fide activities carried out by an appropriately qualified researcher who has lawfully obtained a copy, performance or sample of a work, an unfixed performance, or a phonogram and who has made an effort to obtain authorization to carry out the activities involved in his own research to the required extent and for the sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for encoding and decoding information; (...)

GUATEMALA. Law on Copyright and Related Rights. Law No. 33-98.

Article 133 sexties. (Added by virtue of Article 10(7) of Decree No. 11-2006). The following shall be considered unlawful activities:

1. With regard to Article 133 quinquies (b) on the effective technological measures that control access to a work, performance or phonogram, the activities described in subsections (a), (b), (c) and (d) of this section shall be lawful, provided that they do not prejudice the lawful protection or the validity of legal remedies against the circumvention of effective technological measures,
(...)

(b) non-infringing bone fide activities carried out by an appropriately qualified researcher who has lawfully obtained a copy, a performance or a phonogram and who has made an effort to obtain authorization to carry out those activities to the required extent and for the sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for encoding and decoding information. (...)

HONDURAS. Implementation of the Free Trade Agreement between the Dominican Republic, Central America and the United States, Decree Law No. 16, 2006.

Article 34. Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to the prohibitions set forth in paragraph (2) of Article 32 above, regarding technology, products, services or devices to evade effective technological measures which control access to, and in the case of subsection (a) below, which protect any copyright or exclusive related rights in a protected work, performance or phonogram referred to in paragraph (2) of Article 32 above:
(...)

(b) bone fide activities carried out by an appropriately qualified researcher who has lawfully obtained a copy, performance or sample of a work, an unfixed performance, or a phonogram and who has made an effort in good faith to obtain authorization to carry out the said activities involved to the required extent and for the sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for encoding and decoding information; (...)

DOMINICAN REPUBLIC. Law No. 65-00 on Copyright.

Article 187. Para. (1). The exceptions to the activities prohibited under this Article are limited to the following activities, provided that they do not impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:
(...)

(b) Non-infringing bone fide activities carried out by an appropriately qualified researcher who has lawfully obtained a copy, performance or sample of a work, an unfixed performance, or a phonogram and who has made an effort in good faith to obtain authorization to carry out the said activities to the required extent and for the sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for encoding and decoding information; (...)

(a) Scope of application

Duly qualified researchers (Dominican Republic, El Salvador, Guatemala, Honduras)

(b) Protection measures to which the limitation or exception applies

Technological protection measures which restrict unauthorized access to works or which protect copyright and related rights (Dominican Republic, El Salvador, Guatemala, Honduras)

(c) Terms and conditions of applicability

- The activity must be bona fide (Dominican Republic, El Salvador, Guatemala, Honduras)
- A non-fixed copy, performance or sample of the work, performance or phonogram must have been obtained legally (Dominican Republic, El Salvador, Guatemala, Honduras)
- An effort must have been made to obtain authorization to carry out his own research activities (Dominican Republic, El Salvador, Guatemala, Honduras)
- Activity to the extent needed for the purpose pursued (Dominican Republic, El Salvador, Guatemala, Honduras)
- The sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for encoding and decoding information (Dominican Republic, El Salvador, Guatemala, Honduras)

2.7.3 Limitation or exception on research into the security of computer systems

The countries in the region provide for this limitation or exception to technological measures as follows:

EL SALVADOR Decree No. 604 of 1993 – Law on the Promotion and Protection of Intellectual Property.

Article 85(d) (added by Decree No. 912 of 2005, Article 37). (...) Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to any measure implementing the prohibition stipulated in section 2(b) of this Article, regarding technology, products, services or devices to evade effective technological measures controlling access to, and in the case of subsection (a) of this section, protect any copyright or related rights in a protected work, interpretation or performance, or phonogram referred to in the second paragraph of subsection (b) of this Article:

(...) (d) non-infringing bona fide activities authorized by the owner of a computer, computer system or network and carried out for the sole purpose of testing, investigating or correcting the security of that computer, computer system or network. (...)

GUATEMALA. Law on Copyright and Related Rights. Law No. 33-98.

Article 133 sexties (added by virtue of Article 107 of Decree No. 11-2006).

The following shall be considered unlawful activities:

1. With regard to Article 133 quinquies (b) on the effective technological measures that control access to a work, performance or phonogram, the activities described in subsections (a), (b), (c) and (d) of this section shall be lawful, provided that they do not prejudice the lawful protection or the validity of legal remedies against the circumvention of effective technological measures,

(...)

(d) non-infringing bona fide activities authorized by the owner of a computer, computer system or network for the sole purpose of testing, investigating or correcting the security of that computer, computer system or network.

HONDURAS. Implementation of the Free Trade Agreement between the Dominican Republic, Central America and the United States, Decree Law No. 16, 2006.

Article 34. Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to the prohibitions set forth in paragraph (2) of Article 32 above, regarding technology, products, services or devices to evade effective technological measures which control access to, and in the case of subsection (a) below, which protect any copyright or exclusive related rights in a protected work, performance or phonogram referred to in paragraph (2) of Article 32 above: (...)

(d) non-infringing bona fide activities authorized by the owner of a computer, computer system or network for the sole purpose of testing, investigating or correcting the security of that computer, computer system or network.

DOMINICAN REPUBLIC. Law No. 65-00 on Copyright.

Article 187. Para. (1). The exceptions to the activities prohibited under this Article are limited to the following activities, provided that they do not impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures: (...)

(d) non-infringing bona fide activities authorized by the owner of a computer, computer system or network and carried out for the sole purpose of testing, investigating or correcting the security of that computer, computer system or network; (...)

(a) Scope of application

The activities covered by this limitation or exception may be carried out by the persons authorized to do so by the owner of the computer, computer system or network (Dominican Republic, El Salvador, Guatemala, Honduras)

(b) Protection measures to which the limitation or exception applies

Technological protection measures which restrict unauthorized access to works, or which protect copyright and related rights (Dominican Republic, El Salvador, Guatemala, Honduras)

(c) Terms and conditions of applicability

- Non-infringing bona fide activity (Dominican Republic, El Salvador, Guatemala, Honduras)
- Authorization of the owner of a computer, computer system or network (Dominican Republic, El Salvador, Guatemala, Honduras)
- Sole purpose of testing, investigating or correcting the security (Dominican Republic, El Salvador, Guatemala, Honduras)

2.7.4 Limitation or exception on reverse engineering for the purpose of achieving the interoperability of computer systems

In this regard, exceptions to the protection of technological measures are provided for in the following laws:

EL SALVADOR. Decree No. 604 of 1993 – Law on the Promotion and Protection of Intellectual Property.

Article 85(d) (added by Decree No. 912 of 2005, Article 37). (...) Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to any measure implementing the prohibition stipulated in section 2 (b) of this Article, regarding technology, products, services or devices to evade effective technological measures controlling access to, and in the case of subsection (a) of this section, protect any copyright or related rights in a protected work, interpretation or performance, or phonogram referred to in the second paragraph of subsection (b) of this Article:
(a) Non-infringing reverse engineering activities in respect of the lawfully obtained copy of a computer program, carried out in good faith, with regard to the particular elements of the said computer program that were not available to the person involved in the activities, for the sole purpose of achieving the interoperability of an independently created computer program with other programs; (...)

GUATEMALA. Law on Copyright and Related Rights. Law No. 33-98.

Article 133 sexties (added by virtue of Article 107 of Decree No. 11-2006).

The following shall be considered unlawful activities:

1. With regard to Article 133 quinquies (b) on the effective technological measures that control access to a work, performance or phonogram, the activities described in subsections (a), (b), (c) and (d) of this section shall be lawful, provided that they do not prejudice the lawful protection or the validity of legal remedies against the circumvention of effective technological measures,

With regard to Article 133 quinquies (b) on the effective technological measures that protect any copyright or related rights in a work, performance or phonogram, the activity described in subsection (a) of this section shall be lawful, provided that it does not prejudice the lawful protection or the validity of legal remedies against the circumvention of effective technological measures:

(a) Non-infringing reverse engineering activities in respect of a lawfully obtained copy of a computer program, carried out in good faith on particular elements of the said computer program that were not available to the person involved in the reverse engineering, for the sole purpose of achieving the interoperability of an independently created computer program with other programs; (...)

HONDURAS. Implementation of the Free Trade Agreement between the Dominican Republic, Central America and the United States, Decree Law No. 16, 2006.

Article 34. Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to the prohibitions set forth in paragraph (2) of Article 32 above, regarding technology, products, services or devices to evade effective technological measures which control access to, and in the case of subsection (a) below, which protect any copyright or exclusive related rights in a protected work, performance or phonogram referred to in paragraph (2) of Article 32 above:
(a) Non-infringing reverse engineering activities in respect of the lawfully obtained copy of a computer program, carried out in good faith, in respect of the particular elements of the said computer program that were not available to the person involved in the activities, for the sole purpose of achieving the interoperability of an independently created computer program with other programs; (...)

DOMINICAN REPUBLIC. Law No. 65-00 on Copyright.

Article 187. Para. (1). The exceptions to the activities prohibited under this Article are limited to the following activities, provided that they do not impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:

(a) Non-infringing reverse engineering activities in respect of the lawfully obtained copy of a computer program, carried out in good faith, with regard to the particular elements of the said computer program that were not available to the person involved in the said activity, for the sole purpose of achieving the interoperability of an independently created computer program with other programs; (...)

(a) Scope of application

The person who may carry out the activity covered by this limitation or exception, i.e. reverse engineering, is not specified or defined in any way (Dominican Republic, El Salvador, Guatemala, Honduras)

(b) Protection measures to which the limitation or exception applies

Technological protection measures which restrict unauthorized access to a computer program or which protect copyright on it (Dominican Republic, El Salvador, Guatemala, Honduras)

(c) Terms and conditions of applicability

- Non-infringing activities (Dominican Republic, El Salvador, Guatemala, Honduras)
- The activity must be carried out in respect of a lawfully obtained copy of a computer program (Dominican Republic, El Salvador, Guatemala, Honduras)
- Reverse engineering must be carried out in respect of the particular elements of the computer program that were not available to the person carrying out the engineering (Dominican Republic, El Salvador, Guatemala, Honduras)
- Sole purpose of achieving the interoperability of an independently created computer program with other programs (Dominican Republic, El Salvador, Guatemala, Honduras)

2.7.5 Limitation or exception to technological measures controlling access, in the case of audiovisual works in the libraries of colleges or universities with courses in audiovisual or cinematographic media when the technological constraint is lifted or circumvented in order to make compilations of such works for educational use in the classroom

No country in the region has a law providing for a limitation or exception in that respect, as has been established in the United States under the administrative powers granted by the DMCA.

2.8. COMPULSORY LICENSES FOR TEACHING OR RESEARCH PURPOSES PROVIDED FOR IN THE NATIONAL LAWS

Compulsory licenses do not preclude economic rights but, on the contrary, limit them and are also introduced to allow the public to access protected works. These restrictions allow the works to be used freely in return for payment of remuneration to the author and are also known as non-voluntary licenses.

Non-voluntary licenses can be divided into legal licenses and compulsory licenses. In legal licenses, the remuneration which is paid to the author is determined by a legal ruling or is established by the competent authority. In compulsory licenses, the author may negotiate the amount of the remuneration. Examples of non-voluntary licenses are those provided for in international conventions with regard to the translation of works for use in education for the benefit of developing countries by virtue of Article II of the Appendix to the Berne Convention.

The provisions regarding compulsory licenses in the laws of the countries in the region are given below:

2.8.1 Compulsory licenses for the use of national works

CUBA. Law No. 14 of 1977.

Article 36. The competent authority may grant an official institution, body, company or social or mass organization of a country that is not in a position to acquire the particular rights to use a scientific, technical, artistic, literary or educational work, a free license for non-profit use of the said work in any of the forms authorized by this Law, provided that it has been drawn up for a Cuban citizen; that it is distributed or used exclusively within the territory of the State whose official institution, body, company or social or mass organization has obtained the license; that the name of the author is stated; and that the integrity of the work is respected. This license is not transferable.

Licenses for the use of works of major social interest that are required for education, science, technology and professional advancement.

2.8.2 Compulsory licenses for the use of foreign works – provided for in the national laws

CUBA. Law No. 14 of 1977.

Article 37. For reasons of social interest, the competent authority may grant a license to reproduce and publish in printed or other similar form a published work of that type, in order to translate and publish it or to broadcast it on the radio, television or other audio or visual media, in its original language or in translation, or to reproduce in audiovisual form any fixation of the same character, without the authorization or remuneration provided for in paragraphs (c), (d) and (e) of Article 4 of this Law, provided that the following conditions are met:

(a) that the work is needed for the development of science, technology, education or professional advancement;

(b) that its distribution or broadcasting is free or, in the case of the sale of printed materials, that this is done on a non-profit basis;

(c) that it is distributed or broadcast solely within the territory of the Cuban State.

2.8.3 Compulsory licenses for the translation of foreign works – provided for in the national laws

COLOMBIA. Law No. 23 of 1982.

Article 45. The translation of a work into Spanish and the publication of that translation on the territory of Colombia, or by virtue of a license granted by the competent authority, shall be lawful even without the authorization of the author, in accordance with the provisions contained in the following Articles.

COLOMBIA. Law No. 23 of 1982.

Article 46. Any natural person or legal entity of the country, on expiration of seven years from the date of first publication of a work, may apply to the competent authority for a license to make a translation of the work into Spanish and to publish the translation in printed or analogous forms of reproduction, in so far as its translation into Spanish has not been published by the owner of the right of translation or with his authorization during that period.

COLOMBIA. Law No. 23 of 1982.

Article 47. Before granting a license under the preceding Article, the competent authority shall determine that:

(a) no translation of the work into Spanish has been published in printed or analogous forms of reproduction, by or with the authorization of the owner of the right of translation, or that all previous editions in that language are out of print;

(b) the applicant for the license has established that he either has requested, and has been denied, authorization from the owner of the right of translation or, after due diligence on his part, he was unable to find such owner;

(c) at the same time as addressing the request referred to in (b) above to the owner, the applicant for the license has informed any national or international information center designated for this purpose by the government of the country in which the publisher of the work to be translated is believed to have his domicile;

(d) if he could not find the owner of the right of translation, the applicant has sent, by registered airmail, a copy of his application to the publisher whose name appears on the work and another such copy to any national or international information center, or, in the absence of such a center, to the UNESCO International Copyright Information Centre.

COLOMBIA. Law No. 23 of 1982.

Article 48. No license shall be granted unless the owner of the right of translation, where known or located, has been given an opportunity to be heard.

COLOMBIA. Law No. 23 of 1982.

Article 49. No license shall be granted until the expiration of a further period of six months following the date on which the seven-year period referred to in Article 46 ended. Such further period shall be computed from the date on which the applicant complies with the requirements mentioned in Article 47 in (b) and (c) or, where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant also complies with the requirement mentioned in (d) of the same Article.

COLOMBIA. Law No. 23 of 1982.

Article 50. For works composed mainly of illustrations, a license shall be granted only if the conditions of Articles 58 et seq. are fulfilled.

COLOMBIA. Law No. 23 of 1982.

Article 51. No license shall be granted when the author has withdrawn all copies of the work from circulation.

COLOMBIA. Law No. 23 of 1982.

Article 52. Any license under the foregoing Articles:

(a) shall be only for the purpose of teaching, scholarship or research of the work to which the license relates;

(b) shall only allow publication in a printed or analogous form of reproduction and only on the national territory;

(c) shall not extend to the export of copies published under the license;

(d) shall be non-exclusive;

(e) shall not be transferable.

COLOMBIA. Law No. 23 of 1982.

Article 53. The license referred to in the foregoing Articles shall provide for just compensation in favor of the owner of the rights of translation that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the country and owners of translation rights in the latter's countries.

COLOMBIA. Law No. 23 of 1982.

Article 54. The competent authority shall order the cancellation of the license if the translation is not correct and if the following particulars are not included in all copies published:

(a) the original title and name of the author of the work;

(b) a notice in Spanish stating that the copy is available for sale or distribution only within the national territory;

(c) if the original work was published with a copyright notice, a reprint of that notice.

COLOMBIA. Law No. 23 of 1982.

Article 55. The license shall terminate if a translation of the work in Spanish, with the same content as the translation published under the license, is published in printed or analogous forms of reproduction by the owner of the right of translation, or by another entity or person with his authorization, and where copies of that translation are offered within the country at a price reasonably related to that charged for comparable works. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

COLOMBIA. Law No. 23 of 1982.

Article 56. A license under the foregoing Articles may also be granted to a domestic broadcasting organization, provided that all the following conditions are met:

- (a) the translation is made from a copy made and acquired legally;*
- (b) the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;*
- (c) the translation is used exclusively for the purposes specified in (d) above, through broadcasts that are lawfully made and that are intended for recipients in the country, including broadcasts made through the medium of sound or visual recordings that have been made lawfully and for the sole purpose of such broadcasts;*
- (d) sound or visual recordings of the translations may not be used by broadcasting organizations other than those having their headquarters in the country;*
- (e) all uses made of the translation are without any commercial purpose.*

COLOMBIA. Law No. 23 of 1982.

Article 57. A license may also be granted to a domestic broadcasting organization, under all of the conditions provided in the foregoing Article, to translate any text incorporated in an audiovisual fixation that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

2.8.4 Compulsory licenses for the reproduction of foreign works – provided for in the national laws

COLOMBIA. Law No. 23 of 1982.

Article 58. Any natural person or legal entity may, after the expiration of the periods specified in this Article, apply to the competent authority for a license to reproduce and publish a particular edition of the work in printed or analogous forms of reproduction.

No license shall be granted until the expiration of one of the following periods, commencing on the date of first publication of the work for which the license is requested:

- (a) three years for works of technology and of the natural and physical sciences, including mathematics;*
- (b) seven years for works of fiction, poetry, drama and music, and for arts books;*
- (c) five years for all other works.*

COLOMBIA. Law No. 23 of 1982.

Article 59. Before granting a license, the competent authority shall determine that:

- (a) no distribution, by or with the authorization of the owner of the right of reproduction, of copies in printed or analogous forms of reproduction of that particular edition has taken place in the country, to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the country for comparable works, or that, under the same conditions, such copies have not been on sale in the country for a continuous period of at least six months;*
- (b) the applicant for the license has established that he either has requested, and has been denied, authorization from the owner of the right of reproduction, or that, after due diligence on his part, he was unable to find such owner;*
- (c) at the same time as addressing the request referred to in (d) above to the owner, the applicant for the license has informed any national or international information center designated for the purpose by the government of the country in which the publisher of the work to be reproduced is believed to have his domicile;*
- (d) if he could not find the owner of the right of reproduction, the applicant has sent, by registered airmail, a copy of his application to the publisher whose name appears on the work and another such copy to any information center referred to in (c) of this Article, or, in the absence of such a center, to the UNESCO International Copyright Information Centre.*

COLOMBIA. Law No. 23 of 1982.

Article 60. No license shall be granted unless the owner of the right of reproduction, where known or located, has been given an opportunity to be heard.

COLOMBIA. Law No. 23 of 1982.

Article 61. Where the three-year period referred to in (a) of the second paragraph of Article 58 applies, no license shall be granted until the expiration of six months computed from the date on which the applicant complies with the requirements mentioned in (a), (b) and (c) of Article 59 or, where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant also complies with the requirement mentioned in (d) of Article 59.

COLOMBIA. Law No. 23 of 1982.

Article 62. Where the seven-year or five-year periods referred to in (b) and (c) of Article 58 apply and where the identity or the address of the owner of the right of reproduction is unknown, no license shall be granted until the expiration of three months computed from the date on which the copies referred to in (d) of Article 59 have been mailed.

COLOMBIA. Law No. 23 of 1982.

Article 63. If, during the period of six or three months referred to in Articles 61 and 62, a distribution or placing on sale as described in (a) of Article 59 has taken place, no license shall be granted.

COLOMBIA. Law No. 23 of 1982.

Article 64. No license shall be granted when the author has withdrawn from circulation all copies of the edition which is the subject of the application.

COLOMBIA. Law No. 23 of 1982.

Article 65. Where the edition which is the subject of an application for license under the foregoing Articles is a translation, the license shall only be granted if the translation is in Spanish and was published by or with the authorization of the owner of the right of translation.

COLOMBIA. Law No. 23 of 1982. Article 66. Any license under Articles 58 et seq.:

- (a) shall be only for use in connection with systematic instructional activities;*
- (b) shall, subject to the provisions of Article 70, only allow publication in a printed or analogous form of reproduction at a price reasonably related to that normally charged in the country for a comparable work;*
- (c) shall only allow publication on the territory of the country and shall not extend to the export of copies made under the license;*
- (d) shall be non-exclusive;*
- (e) shall not be transferable*

COLOMBIA. Law No. 23 of 1982.

Article 67. The license shall provide for just compensation in favor of the owner of the right of reproduction that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the country and owners of reproduction rights in the country of the owner of the right of reproduction.

COLOMBIA. Law No. 23 of 1982.

Article 68. As a condition of maintaining the validity of the license, the reproduction of that particular edition must be accurate and all published copies must include the following:

- (a) the title and name of the author of the work;*
- (b) a notice in Spanish stating that the copy is available for distribution only in the country;*
- (c) if the edition which is reproduced bears a copyright notice, a reprint of that notice.*

COLOMBIA. Law No. 23 of 1982.

Article 69. The license shall terminate if copies of an edition of the work in printed or analogous forms of reproduction are placed on sale in the country, by or with the authorization of the owner of the right of reproduction, to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the country for comparable works, if such edition is in the same language and is substantially the same in content as the edition which was published under the license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

COLOMBIA. Law No. 23 of 1982.

Article 70. Under the conditions provided in Articles 58 et seq., a license may also be granted:

- (a) to reproduce in audiovisual form a lawfully made audiovisual fixation, including any protected works incorporated in it, provided that the said fixation was prepared and published for the sole purpose of being used in connection with systematic instructional activities;
- (b) to translate any text incorporated in the said fixation into Spanish.

COLOMBIA. Law No. 23 of 1982.

Article 71. The Articles of this Chapter shall apply to works whose country of origin is any one of the countries bound by the Universal Copyright Convention as revised in 1971.

2.8.5 Compulsory licenses for the reproduction and translation of foreign works

EL SALVADOR. Decree No. 604 of 1993.

Article 77. The compulsory translation and reproduction licenses provided for in the international conventions ratified by El Salvador shall be granted by the competent court subject to compliance with the requirements laid down in the said conventions.

HONDURAS. Decree No. 4-99-E.

Article 122. Through the Administrative Office, the State may grant non-exclusive licenses for the reproduction or translation of foreign works in accordance with the provisions of Articles 2 and 3 of the Appendix to the Berne Convention, signed by the Republic of Honduras.

PANAMA. Law No. 15 of 1994.

Article 84. The competent authority or any other entity designated in the regulations may grant non-exclusive licenses for the translation and production of foreign works intended for the purposes specified in, and subject to compliance with the requirements for such licenses imposed by, Law No. 8 of October 24, 1971, approving the Universal Copyright Convention as revised at Paris on July 24, 1971, and also other international conventions ratified by Panama.

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 45. Through the body designated in the regulations, the State may grant non-exclusive and non-transferable compulsory licenses for the translation and reproduction of foreign works, for the purposes of and subject to compliance with the requirements for such licenses, in accordance with the international conventions to which the Republic is party or will adhere in the future.

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 46. With regard to the licenses referred to the preceding article, the necessary steps shall be taken to ensure that provision is made for the holder of the right of translation or reproduction, as appropriate, to be paid equitable remuneration adjusted to the level that would normally be paid in the case of freely negotiated licenses and for a correct translation of the work or an exact reproduction of the edition, as appropriate, to be ensured.

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 47. The provisions of this Chapter shall enter into force as soon as a regulation for their implementation has been promulgated.

2.8.6 Limitation on copyright for public utility, arising from the scientific or educational value of the work

DOMINICAN REPUBLIC. Law No. 65 of 2000.

Article 48. Before the term of protection of a work has expired, the State may prescribe the use for public necessity of the economic rights in a work that is considered of high cultural, scientific and educational value for the country, or of social or public interest, on payment of fair compensation to the holder of that right.

To decree such use, the follow is required:

- (1) that the work has already been published;*
- (2) that the copies of the last edition are out of print;*

- (3) that at least three years have lapsed since it was last published;*
- (4) that the holder of the copyright is unlikely to publish a new edition;*
- (5) that the cost of the copy is considered unaffordable for most of the students in the country which is to use it as a textual work.*

Para.

The provisions of this Chapter shall enter into force as soon as a regulation for their implementation has been promulgated.

CHAPTER 3 CASE STUDIES ON ISSUES CONNECTED WITH COPYRIGHT

As has been stated, the purpose of this study is to analyze the conflict of rights and interests between copyright, the right to education and access to knowledge, as well as to consider possible alternative ways of achieving a balance of rights and interests.

With regard to education and research, each of the aforementioned rights is expressed through a combination of the authors' own interests, those of holders of related rights and their rightholders, those of educational institutions and teachers, and those of the students themselves. The rights and interests of each party can be compatible and are fulfilled by virtue of the legal treatment that is given to the use of works and performances within the sphere of education or research or, in addition, such rights and interests may possibly be in conflict or the subject of controversy, making it necessary to find means of resolving the conflict and of restoring the appropriate balance and a peaceful coexistence.

With regard to the use of works and performances within the context of education and research, the interests of authors and holders of related rights or the beneficiaries of such rights focus on:

- (i) control over the use of the works or productions, in order to prevent violations and allowing the right to be applied in such a way that it assists them in authorizing, prohibiting or receiving compensation for each of their uses or acts of exploitation;
- (ii) respect for moral rights, which, in the academic and research field, mainly involves the obligation to state the author's name every time that all or part of his work is used, and which may be infringed through plagiarism or academic fraud; and
- (iii) obtaining financial compensation for the use of the work or service by virtue of the sale of the cultural property or the licensing of rights, in exercise of copyright and related rights and in application of the purposes of obtaining compensation for work and an incentive to be creative.

With regard to the use of works and performances in the context of education, educational institutions or establishments and teachers, in calling for the right to education to be guaranteed, voice interests which are concerned primarily with:

- (i) offering their students quality education by making use of the works and performances as teaching resources;
- (ii) using technology for the benefit of education, with particular interest in the use of digital network technology for purposes of distance education; and
- (iii) having legal certainty, given the use that their students may make of the works and performances that the institutions and teachers make available to them, and the liability that may arise from infringements of copyright and/or related rights.

In turn, students need to have use of works and performances as part of the learning process and invoke their right to education through interests such as the following:

- (i) having access to quality education, being able to use works and performances as educational resources for that purpose;

- (ii) obtaining free access to information, a decisive situation in the learning process as it is the starting point for the transmission of knowledge and skills development;
- (iii) having access to cultural property at a low price, otherwise one of the many costs of education will increase, which in turn may block or impede public access to the education system; and
- (iv) taking advantage of technology and all the new opportunities available for education through access to information and interaction or communication between those involved in the teaching/learning process.

Lastly, in referring to the right of access to knowledge, researchers and research centers express, in relation to the use of works and performances in the context of research, interests such as the following:

- (i) having access to scientific information that is contained primarily in journals or specialized publications and databases;
- (ii) sharing information with other researchers, to the extent that the research can be presented as a collective effort in the quest for knowledge;
- (iii) disseminating the results of their research by publishing them in scientific journals, for example, and enjoying the economic benefits that may arise therefrom;
- (iv) obtaining acknowledgement and recognition for their names, earning a reputation within the scientific community; and
- (v) having legal certainty, as an infringement of the intellectual property rights of third parties will jeopardize the results of the research.

The aforementioned interests of the various parties may thus clash in particular cases or specific scenarios, to which, for the purposes of this document, we will refer as “issues” and which correspond to situations in which complying with copyright may seem to be incompatible with the rights to education and access to knowledge and vice versa, making it necessary to seek the means to remedy the conflict and to restore a proper balance and a peaceful coexistence.

Several cases are cited below in which the above-mentioned situation occurs and to which, for the purposes of this document, we shall refer “issues”:

3.1 Impact of mass reprographic reproduction in academic circles

Case study

Photocopying has become the main means of accessing information in academic circles (Brazil)

Monica Torres, Deputy Director of Copyright, Regional Center for Book Development in Latin America and the Caribbean (CERLALC), recounts how in Brazil, according to a 2002 survey, 99% of students make photocopies; at the universities in Sao Paulo, 226 million copies a year⁴⁰ were recorded, in Colombia 337 million copies a year,⁴¹ in Argentina 1,320 million a year at the universities of Buenos Aires and Rosario,⁴² and in Chile students spend around 40 million dollars a year on photocopies.⁴³

In Brazil, during a public hearing on the status of copyright in Brazil held on 11 November and promoted by the Committee on Education and Culture of the House of Representatives of Brazil, the General Coordinator of Copyright at the Ministry of Culture, Marcos de Souza, advocated the creation of new legislation on the topic to include the legalization of photocopies. According to the lawyer, Guillermo Carboni, restricting photocopying directly affects education. In that sense, he asked for the laws governing the subject to be adapted to the advances in computer technology since he claimed that the new technologies introduce social and economic transformations that generate the need for a change in copyright law, particularly in critical areas in a developing country, such as education.

Representing the Book Sector Forum, which comprises 18 bodies of authors, publishers and booksellers, Dr Dalton Morato spoke on the challenge of overcoming the unauthorized reproduction of literary works by copying centers at the universities. He also referred to the need to ensure access to the content of literary works through libraries, the collective management of copyright and, thus, by altering the Law on Copyright to enable such management to be carried out by the book sector.

The Chairman of the Committee on Education and Culture received a letter signed by all the constituent entities in the Forum expressing their solidarity and their willingness to participate in discussions for the purpose of updating the Law in question

On the other hand, a group of artists and representatives of the Central Office for the Collection and Distribution of Royalties (ECAD) defended the current legislation, and Silvio Cezar, President of the Brazilian Society for the Management and Protection of Intellectual

⁴⁰ *The university student and photocopies of texts and study materials*. Study carried out by ABDR in 2002. The study was carried out at the universities of Sao Paulo. Making a conservative forecast for other cities in Brazil, according to this study, this would result in a total 1,935,000,000 pages of photocopies in that country. The study refers to surveys conducted among students on the photocopying of books

⁴¹ According to estimates by the Colombian Centre for Reprographic Rights (CDR), which found that 54% of university students spend, on average, between \$3,000 and \$4,000 a week on photocopying. The survey, conducted in Cali, Bucaramanga, Medellín and Bogotá, revealed that a student spends an average of \$130,640 a year. Of that sum, 62% of photocopied material is copyright-protected material. In Colombia, 1,200,000 people are enrolled in higher education; it is estimated that the university spends \$97,195,200 a year on photocopies of protected material. The study also found that 53% of students photocopy entire books, although they know that this activity infringes copyright and is classified as a crime.

⁴² Economic impact of photocopies: in the CADRA report. The study gives a figure of 1,320,600,000 photocopies made by 465,000 students a year in the cities of Buenos Aires and Rosario, estimated on the basis of what a student spends on photocopies each year. These figures do not distinguish between the photocopying of copyright-protected material and unprotected material.

⁴³ Study *“Quantification of the photocopying of books at higher education centers in Chile”*, carried out by SADEL in 2005.

Property Rights, said that free access to culture should be handled fairly and raised the following questions: How are we to solve this issue? How do we promote access to culture without harming the creator, who depends on his work to survive?

Current legislation on copyright in Brazil, Law No 9610 of 1998, has been criticized by specialists for not establishing a satisfactory balance between the right of public access to information and copyright protection.

Case study

Debate on the legality of photocopying (Costa Rica)

A debate similar to that in Brazil took place in Costa Rica in early 2009, when the Interinstitutional Commission on Intellectual Property announced that photocopies may be made, provided that they are for educational purposes and not for the user to make a profit and that photocopying is used to the extent necessary to achieve educational goals; the source and author's name must be stated for the use or reproduction to be in keeping with proper practice. This last condition is satisfied insofar as the use or reproduction of the work does not affect the normal exploitation of the work in question or unreasonably prejudice the legitimate interests of the author.

The Commission launched a series of hearings with representatives of the public and private sectors concerned by the topic of photocopying and its use in the educational environment; the participants included representatives of photocopying companies, educational authorities and institutions, representatives of the authors of literary and editorial works, and consumers. The main objective of this initiative was to provide the various players involved and the general public with sound information on the current copyright legislation in the country and the limitations and exceptions thereto in order to clarify its content and scope

The Interinstitutional Commission on Intellectual Property hopes that this clarification will help to resolve the concerns and doubts expressed by different sectors with regard to the scope of the legislation on copyright and the possibility of making reproductions of works for educational purposes. The Commission will continue the initiative to promote reconciliation and to establish a communication channel with the various players involved in this matter, trying to provide clear information to help guide the task of owners and users of copyright.

Those violating the Law on Procedures for the Enforcement of Intellectual Property Rights shall be liable to a period of imprisonment lasting from six months to two years and fines of CRC 500 thousand for the reproduction of books or texts.

The student organizations (grouped together in "Popular Student Power") stated that restrictions on photocopying place students at a serious disadvantage with regard to the political, economic and cultural rights of the new millennium, because access to new knowledge becomes crucial when thinking of a development project. Moreover, it is noticeable that the superpowers such as the USA and others, and in particular their publishing houses, are resistant to the idea of universalizing and popularizing knowledge and, therefore, copyright protection measures are the mechanisms by which the prevention of access by the majority to academic production is ensured and, in parallel, relations of domination over

third-world countries and their youth are strengthened. Photocopying is necessary whenever the average student is unable to afford to purchase books, whose price can in some cases exceed CRC 50,000, this being considered an excessive expense in times of crisis.

Case study

The debate on the agreement signed by CADRA and the University of Buenos Aires (Argentina)

On April 29, 2008, CADRA (Centro de Administración de Derechos Reprográficos) and the University of Buenos Aires (UBA) signed an agreement by which UBA is granted a license to reproduce part (maximum 20%) of literary and scientific works “managed by CADRA and protected by copyright”. In exchange for the license, UBA undertakes to pay CADRA \$12.72 a year for each of its 300,000 registered students, giving a figure of \$3,816,000 per annum. This agreement settles the matter of the indiscriminate issuing of photocopies at all academic sites belonging to UBA, which has historically amounted to disregard of copyright.

Various sectors immediately began to see that the license fees would account for 2.5% of UBA’s total 2009 budget, equivalent to the annual income of 60 lecturers/researchers, if the calculation is based on the post of Associate Professor, or, if preferred, 4% of the total UBA health budget (running the hospitals Clinics, Roffo, Lanari, Vacarezza and Odontology).

Other sectors complained about a public university signing an agreement to transfer funds from the public to the private sector, targeting a practice such as photocopying, which is increasingly being less used in support of the learning of university students because of the proliferation of excellent, top-quality, free digital libraries.

Other critics considered this agreement inappropriate because very few writers live from their royalties. Virtually no researcher receives a substantial sum from the sale of his books. These researchers meet their needs by teaching and from university subsidies granted for research. Strictly speaking, the only authors to earn a significant income from their publications are those who produce best-sellers (self-help books, thrillers), i.e. commercial literature. Thus, the photocopying done at universities is mostly detrimental to publishers. On the other hand, there are student centers with their own photocopiers and the proceeds are reinvested to improve the students’ situation.

The agreement between CADRA and UBA sparked off discussions on the importance of analysis and debate at other universities in Argentina. One university official acknowledged the need to have such agreements and to legalize photocopying, stating that “the message is mainly for the professors who encourage students to photocopy a book when they themselves may be authors of works in the future and suffer the same consequences”.

Reprographic reproduction is defined as “*making tangible, visually perceptible facsimile*”

*copies from an original or a copy of a work in any size and form, by any system or method”.*⁴⁴ The WIPO Glossary defines reprographic reproduction as *any system or technique by which facsimile reproductions of documents and other graphic works are made in any size or form.*⁴⁵

In other words, reprography is a form of reproduction or duplication of works, so that reprographic reproduction is a process which produces a copy of the work on a graphic surface, this concept including technologies such as photocopying and printing. Nonetheless, the concept of reprography varies from one country to another, and in some countries this concept includes various forms of electronic reproduction, i.e. digital copies, that are equivalent to photocopying. Likewise, in some countries, printing copies of internet content is included within the scope of the licenses granted for photocopies.

In some countries, the law has broadened the definition of copying and/or reprography to include certain electronic practices. That is the case of New Zealand, where, in the Copyright Act, the term “copying” includes storing the work in any medium by any form, in accordance with the applicable international standards. Likewise, the Jamaican Copyright Act defines “copying” in such a way as to include “storing the work in any medium by electronic means”.

Photocopying is a form of reprographic reproduction that, like any act of reproduction, requires in principle the authorization of the rightholder, unless a limitation or exception to copyright provides for such reproduction, under certain conditions, as an act that can be carried out freely and free of charge without the authorization of the holder of the rights.

Like reproduction by printing or similar procedures, reprographic reproduction is the main or at least one of the main forms of economic exploitation of works; in other words, it is the usual form of exploitation, while the marketing of such copies is their main business model, by which rightholders derive their financial remuneration for their creative work and investment and which encourages literary and artistic creation.

Unlike printed reproduction, which requires specific authorization to be given to the publisher by the author by means of a publishing contract, in which authorization is also given to distribute or sell the copies reproduced for the publisher’s own account, reprographic reproduction constitutes mass use carried out in an ongoing manner by the general public with regard to a large number of works, so that to obtain authorization for such reproduction, recourse needs to be made to collective management organizations which can grant global, general or repertory licenses authorizing the reprographic reproduction of all works whose rights management has been entrusted to them.

With regard to limitations or exceptions for purposes of illustration for teaching, reprographic reproduction, among other acts, of articles published in the press or of short extracts from published works is permitted. Such reproduction is free and free of charge and takes place without the authorization or license granted by the rightholder or the collective management organization representing him.

⁴⁴ LIPSZYC, Delia, *Derechos de Reproducción Reprográfica en las Convenciones Internacionales y en las Legislaciones Nacionales de América Latina*. Bogotá: Seminar on Reprographics in Latin America and the Caribbean, April 26-28, 1995, p. 2.

⁴⁵ WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights, published by the World Intellectual Property Organization, Geneva, 1980, p. 229.

Victoriano Colodrón⁴⁶ refers to the following hypothetical cases, in which photocopying is commonly carried out within the framework of activities of educational institutions:

- (i) In class, a teacher hands a photocopied excerpt from a textbook out to his students because he thinks that on this particular topic the said book explains the subject matter better or gives more interesting examples or exercises than those in the book used as basic course material.
- (ii) A university gives its postgraduate students a compilation of photocopies, usually bound or ring-bound, of excerpts from books or articles relating to each of the subjects being studied; these excerpts are to be read and analyzed in class over the following weeks.
- (iii) A university student goes to his faculty's reprographic centre to buy a copy of the compilation of texts (course pack) prepared by his professor of Civil Law; it consists of 100 pages and includes a text written by the professor, three chapters from three different books, a paper presented at a conference, two laws and three decrees, a legal commentary taken from the website of an expert in the subject, and six articles published in four different journals.
- (iv) Reproductions or compilations of works prepared by educational establishments (course packs)

Likewise, educational institutions prepare study or work guides for their students; they consist of documents that usually reproduce excerpts from literary works, maps, plans or other three-dimensional works of art.

In the above-mentioned cases, works are reproduced and possibly included in a compilation. These acts may be covered by the limitation or exception regarding use or reproduction for the purposes of illustration for teaching. Nonetheless, the preceding chapter referred to the main constraint on this limitation or exception as being the permitted extent of the reproduction, which is established by the laws of the region as follows:

- (i) the entire work may be reproduced (Cuba, Costa Rica, Grenada, Mexico, Uruguay)
- (ii) articles that have been lawfully published in newspapers and short excerpts from works in general may be reproduced (Andean Community of Nations, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela)
- (iii) other countries in the region apply this limitation or exception to literary, musical, artistic and choreographic works, phonograms, cinematographic and audiovisual works, broadcast or cable programs, and excerpts from literary, dramatic and musical works (Antigua and Barbuda, the Bahamas, Barbados, Belize, Jamaica, Saint Lucia, Saint Vincent and the Grenadines).

⁴⁶ Victoriano Colodrón, "Facilitating the flow of educational materials in developing countries", paper presented at the Information Meeting on Educational Content and Copyright in the Digital Age. WIPO, Geneva, November 21, 2005.

(iv) Lastly, other countries allow the reproduction of a short excerpt from works published in written form, sound or visual recordings, or published articles (Dominica, Trinidad and Tobago).

Any reproduction that exceeds the conditions of the limitation or exception for the purposes of illustration of teaching requires the educational institution to obtain a license for the reprographic reproduction of printed works, which is granted by the authors and publishers who own the rights through reproduction rights organizations (RROs).

The CDR, Center of Reprographic Rights (the Colombian RRO), believes that the limitation or exception on reprographic reproduction for educational purposes or for the conduct of examinations at educational institutions, as set forth in Article 22(b) of Andean Decision No. 351 of 1993,⁴⁷ does not apply to the photocopies obtained by universities to distribute to their students as reading or study material, since what occurs in most cases is that the reading material distributed by the educational centers to be photocopied is repeated each semester or each academic period, thus not complying with fair practice in that such repeated reproduction of the same works adversely affects the normal exploitation of the work and causes unreasonable prejudice to the author. The organization argues that the aforementioned limitation concerns reprographic reproduction when it is something sporadic that has an educational value and that is carried out within an educational centre; it is therefore very important for educational centers not to take such a limitation lightly, although they are entitled to propose institutional policies and guidelines on the subject, the objective being to avoid violating the author's economic rights. In support of this view, CDR refers to the preliminary interpretation made by the Court of Justice of the Andean Community on March 17, 2004 in case No. 139-IP-2003, in which the expression "to the extent justified by the aim pursued" used in the limitation or exception on quotation and that on reproduction for teaching purposes is interpreted to mean that the reproduction can only cover "the minimum required to perform the permitted act".⁴⁸

This gives rise to questions such as the following:

Is there a balance of rights and interests with regard to reprographic reproduction in academic circles?

What happens in those countries where there are no reprographic rights organizations? Can there be said to be an imbalance to the detriment of copyright holders?

What is the limit or borderline between the limitation or exception on reproduction for the purposes of education and the scope of exclusive rights within the framework of the rights granted by reprographic rights organizations under license?

⁴⁷ Andean Decision No. 351 of 1993. Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following: (b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby.

⁴⁸ Center of Reprographic Rights, CDR. Bogotá. View of Legal Counsel Juan Carlos Serna Rojas.

Is compensatory remuneration for private copying a component that is needed to achieve a balance of rights and interests, making good the detriment to copyright holders caused by the mass reproduction of their works?

What happens if a technological measure prevents reproduction in the case raised? Should a limitation or exception be established to permit its circumvention?

3.2 Difficulties in accessing audiovisual works in order to use them for educational purposes

Case study.

Educational television in Argentina, Brazil, Colombia, Mexico and Panama.

ATEI is the acronym for the Ibero-American Educational Television Association, whose objectives are to launch educational television projects as part of its international cooperation program of social interest. The following are examples of national experiments in the countries in the region⁴⁹:

In Argentina, SIPTAR (Regional System of Tele-education and Development) is an institution that, since 1948, has been implementing distance education systems in the province of Misiones, which is characterized by great cultural diversity. Its cultural mosaic comprises aboriginal, Creole, cross-border influences, etc. Although it is a project based on television programming, its methodology relies on the production and delivery of videos.

In Brazil, “TV Escola” is an exclusively educational television channel. It is transmitted to all public schools with a satellite dish. We would like to draw attention here to the series “Vejo Vozes” (17 20-minute programs) for children with hearing difficulties, which makes use of sign language.

In Colombia, INRAVISION (National Institute of Radio and Television) is developing two projects of great interest from the perspective of attention to diversity. One of them is entitled “Canal Maestro” (educational television project); in its pilot project, aerials were installed, covering, in 1995, 138 municipalities in 12 departments (a total of 1,135 aerials). Among the criteria for the installation of these aerials are illiteracy rates, drop-out rates, municipalities with high levels of violence, and border areas. They have been installed not only at educational institutions but also at other institutions such as prisons or cultural centers. The second educational television project is literacy; “Basic Adult Education” provides a service for 7 million people without primary education and without access to the formal education system.

In Mexico, we find, in addition to educational programs broadcasting on two satellites, the “Telesecundaria” experiment: tele-classrooms for teaching in remote areas where access is difficult or the number of pupils is too small for consideration to be given to the construction of a school and the maintenance of teaching staff. The programs are predetermined and

⁴⁹ María Paz Prendes Espinosa. “Televisión Educativa y Cultura de la Diversidad”, published in EDUTECA, Revista Electrónica de Tecnología Educativa. No. 5, March 1997. Available at <http://www.uib.es/depart/gte/revelec5.html>.

controlled, the medium of television being considered an educational resource of considerable value in serving these somewhat marginalized groups of people.

In Panama, the Foundation for Television Education (1990) broadcasts non-commercial programs on a non-profit basis, thus allowing it to be defined as an educational channel. Its objectives include facilitating access to culture and comprehensive individual education. This experiment serves as an example of television as a mass medium for informal education and as an example of educational television itself, since, in addition to educational programs (Your world of knowledge, tele-courses, etc.), it broadcasts programs of entertainment or general information (debates, comedies, films, cartoons, etc.).

Thanks to these public channels, or even their own channels, educational institutions send out or broadcast television signals (cable or broadcast) that are captured by television sets in the classroom.

In Chapter 2 of this document, reference was made to the provisions for the limitation or exception regarding the public communication of works for teaching purposes. A reading of the relevant provisions shows that these limitations or exceptions seem to deal more with the holding of shows or artistic performances within educational institutions than with the use of audiovisual works and media as educational works used in the classroom.

With regard to the object of these limitations or exceptions in the laws of the region, it was stated that:

- one group of countries refers to public communication in general. This must be understood to cover both works and performances protected by copyright (Dominican Republic, El Salvador, Guatemala, Panama, Peru)
- copyright-protected works (Andean Community of Nations, Cuba, Paraguay, Uruguay)
- performances of dramatic and musical works (Brazil, Costa Rica, Honduras)
- literary and artistic works, sound recordings, films, broadcast or cable programs (Belize, Saint Vincent and the Grenadines)
- Argentinean law refers explicitly to literary and artistic works as well as to the artistic performances.
- Colombian law refers to broadcast works, but in another article refers generally to works and performances.
- Chilean law refers to works and phonograms.
- The law of Granada refers to literary, musical and audiovisual, works, broadcast programs, phonograms or protected performances.

It was also said that there are countries in the region which provide for a limitation or exception to related rights, permitting, among other things, the use of broadcast programs for the purposes of education (Colombia, Costa Rica, Mexico).

The classrooms are equipped with television set and video players, with which audiovisual educational material can be shown. This type of audiovisual material is also now shown in theatres or halls within educational institutions.

This material may consist of videos or cinematographic films that are produced exclusively for educational purposes and purchased by the education institution, or they may also be obtained by recording educational and cultural programs broadcast on television channels

(incidental or encrypted signals) of educational interest, such as DISCOVERY CHANNEL, NATIONAL GEOGRAPHIC CHANNEL, THE HISTORY CHANNEL, etc.

Audiovisual material is also available to teachers and students as reference or study material, or to be shown in class. When recordings are made, they constitute reproductions of audiovisual works and broadcasts protected by related rights. In the case of broadcasts, the signal protected by related rights is retransmitted. In most countries, this protection is not given on equal terms to the signal transmitted by cable.

As for the audiovisual content of the television signal, what occurs is an act of public performance, which is, in turn, a form of public communication subject to the exclusive right of the owner, who is usually the audiovisual producer concerned.

Another case of the use of audiovisual material at educational institutions is the showing of commercial films at educational institutions for teaching purposes.

In that case, film clubs are organized inside the educational institution, where students and teachers watch commercial films or artistic films and discuss or debate issues relating to them, either as a leisure activity or as extra-curricular activity. These are not works produced for educational purposes but are commercial films, i.e. they are films shown in public places. This may be described as public communication of the audiovisual work. In accordance with the limitation or exception on the public use or communication of works for educational purposes, this should be done for the purposes of education, ruling out the leisure/entertainment purposes, and it must be done without gainful intent.

This may give rise to questions such as the following:

In cases where the signal is emitted by a government agency and not by an educational establishment, can that public communication of works be subject to the limitation or exception on the public communication of works for the purposes of illustration of teaching?

While in the Member States of the Rome Convention the use of broadcast programs is permitted for the purposes of teaching, what happens with the signals sent by cable television?

In the case of an encrypted signal or of subscription television, where a technological measure prevents or restricts unauthorized access, how can the limitation or exception be applied if the laws of the region do not regulate the interface between technological measures and the limitations or exceptions to copyright and related rights?

What protection is offered to television signals that are not emitted by broadcasting but by cable?

In the case of broadcasts protected by related rights that transmit copyright-protected programs, what sense is there in providing for a limitation or exception to the related right if a limitation or exception to copyright is not also established for the same scenario or actual situation?

If the audiovisual producer sells those programs on video media (e.g. DVD) and the same programs are available in the country, would the application of this limitation or exception be contrary to proper practice?

Given that no country in the region regulates the interface between the protection of technological measures and limitations or exceptions to copyright and related rights, what would happen if, in the present case, the television signal is protected by technological measures (i.e. the signal is encrypted)? Should educational institutions be allowed a limitation or exception on technological measures in order to decode television signals with educational content?

In the case of DVD media, these signals are programmed by area so that they can be seen only in the region of the world determined by the producer, restricting their use in other areas. This technological protection measure could probably prevent an educational institution from using that medium for the showing referred to above, in accordance with a limitation or exception to copyright. In that case, should there be a limitation or exception on the technical measure to allow the public performance of such works for the purposes of illustration of teaching?

Case study

Educational radio and distance education (Mexico)

Radio stations that broadcast this kind of educational program are generally government-owned and have no profit-making purpose. The programs include radiophonic works and possibly music.

In Mexico, the programs focused on education were created on the basis of the dropout rate or of lack of support for the formal school system because the schools were located at distances that made them inaccessible for some groups of people. As an affordable medium for use in the home, the radio was the alternative educational site. The *Radio Schools of the Sierra Tarahumara in Chihuahua* were established in 1955 and operated until the mid-1970s; they were closely connected with the Jesuit mission to spread the benefits of primary education.

In 1970, the Cultural and Educational Promotion A.C. (FCE) proposed a new type of education aimed at disadvantaged groups, the educational concern being not merely the transmission of knowledge but “learning by doing”, with the objective of helping these groups to break out of their present way of life. Two of the projects used the radio as an instrument for the promotion of social well-being. The two projects were carried out in the state of Veracruz: *Huayacocotla Radio School* in 1973 through XEJN on the shortwave and the *Teocelo Rural Cultural Radio School*, which was broadcast through SEIT-AM from 1980 to 1989. Both projects set out to teach literacy in the most unexpected places by broadcasting recorded programs in mathematics, Spanish and development in the communities, all coordinated by a speaker who gave progress reports.⁵⁰

The radiophonic work is recognized as having been created especially for radio-broadcasting. The aforementioned case involves the public performance of radiophonic works and musical works, as well as artistic performances or phonograms.

⁵⁰ <http://www.razonypalabra.org.mx/anteriores/n36/carteaga.html>

The limitation or exception on public communication for educational purposes is not applicable because, in this case, the public communication goes beyond the academic community and is not carried out by an educational establishment.

In the countries which provide for limitations to related rights for the purposes of education (Colombia, Costa Rica, Mexico), this limitation or exception can include the retransmission or reproduction of those broadcasts.

This gives rise to questions such as the following:

Should a limitation or exception be established with regard to radio-broadcast or musical works used in this type of distance education so that they can be reproduced or communicated publicly?

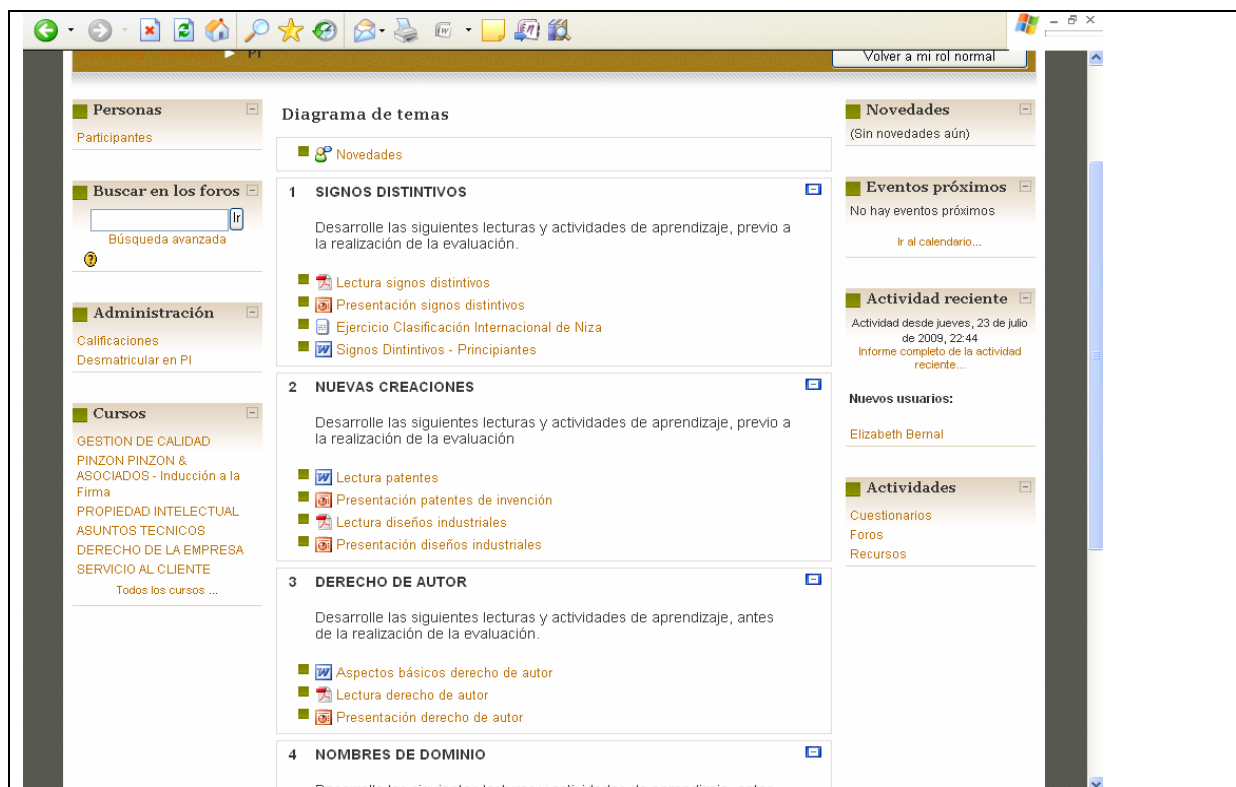
3.3 Difficulties relating to the digitization of works and performances for their use in digital distance education

Case study

How are digitized works used in digital distance education?

For the purposes of online digital distance education, various documents need to be included as study material and made available to the students on the website or virtual education platform.

For example, the following virtual course on intellectual property, which uses a free 2008 Moodle distribution platform in accordance with the GPL, offers students readings in digital documents in .pdf and .doc format, slide shows in .ppt format, and an online test:



If such documents or reading material are available as hard copies (books or paper documents), they have to be digitized, either by using a scanner and possibly a text recognition software or even by transcribing them.

In that case, each course module comprises a study guide, a series of compulsory reading documents, and other reference or supplementary documents for optional reading. A resource is also used for interaction between the students and the tutor (e.g. forum or chat) and an evaluation, after which the tutor publishes the grades and gives feedback or sums up the ideas, developing and justifying the answers in the evaluation, and gives his conclusions on the discussions that took place during the module.

Case study

To what extent does the development of distance education projects involve the digitization of protected works and performances? (Mexico)

DR Néstor Fernández of the National Autonomous University of Mexico (UNAM) estimates that most (about 80%) of the elements used in virtual and non-virtual distance education are images (photographs, paintings, drawings and all sorts of fixed images). In second place (at 10%) are moving pictures (video in different formats), and the remaining 10% concerns the use and misuse of originally printed documents (books, chapters and articles in journals).

He reports that he has found courses in which material is used without stating the authorship or without authorization. While it is true that those using these materials do not give notification of (or express their thanks for) using foreign documents, he considers that it is also fair to say that they do not rule out stating the authorship.

He also considers that the percentages of digitized works used in distance education projects in which he took part may be broken down as follows:

- (i) public domain works whose period of protection has already expired: 10%
- (ii) works covered by creative commons licenses whose reproduction and publication for academic purposes is free and free of charge: 80%
- (iii) copyright-protected works whose digitization and publication requires a license or authorization and payment of a price or royalties for that authorization: 10%

With regard to the possible difficulties presented by copyright for the development of a digital distance education project, the expert referred to the case of printed documents (books) which include the specific statement “This document may not be reproduced by any reprographic ... without the express permission of the authors (or publishers)”. These are intellectual products that are not publicly accessible to users. Specifically, they are educational documents typically produced by some international publishing houses that specialize in technical books.

The way round this drawback could be to use the relative excerpt and to place statements on the copied document, such as: “This document is part of the work of (author and publisher). We recommend obtaining that document in order to place it in the original context. This document is copyright-protected. It may be reproduced for non-commercial educational purposes.”

Asked about cases in which authorization to digitize materials needed for virtual education and/or to publish them on digital networks is easily obtained, Dr Nestor Fernandez S. replied that in coordinating the development of training materials for distance teachers, it has proved necessary to notify and seek permission from museums that have very interesting pictures on their websites. A positive answer has always (in three cases) been given and they have offered to assist by making their image banks available, provided that intellectual authorship is safeguarded.

Case study

Not only libraries and universities want to digitize cultural goods: the case of the Manuel Felguérez Museum of Abstract Art (Mexico)

The Manuel Felguérez Museum of Abstract Art is a proposed collective venture submitted to officials of the planning department at the Zacatecas Institute of Culture by university teachers seeking “virtualization” of the museum. The idea is to collect works of specific importance from different artistic periods, not focusing exclusively on abstract art and almost exclusively covering works by Manuel Felguérez.

María José Sánchez Uzón, a lecturer in the Masters course in Philosophy and the History of Ideas, pointed out that “the artist Felguérez knows the work”, that several proposals were presented and that account has been taken of his tastes, his willingness and his initiative; Sanchez Uzón, who is also a member of the team, adding that special care needs be taken to protect copyright.

For their part, the teachers at the Zacatecas Institute of Culture commented that this is a task with high expectations for the dissemination of culture in the State and at the national level, and complimented the project developer and the associates for the excellent work being done, although they recommended waiting until the conclusion of the project before placing it online.

The possibility of digitizing a protected work or production is conditional upon express prior authorization being obtained from the relevant rightholder.

With regard to obtaining that authorization, the party concerned must contact the rightholder directly and, following negotiations, must agree to the conditions upon which authorization to digitize and to use the work or production is granted.

In the region, there is no possibility of obtaining that kind of authorization through collective management organizations, except in the case of the reproduction rights organizations (RROs) whose licenses permit digital copying as a means of reprographic reproduction, albeit with the restriction that digital copying may not be used online, which is an inherent necessity for the purposes of distance education.

The difficulties encountered by those concerned with regard to digitizing the works may consist of difficulty in contacting the rightholder or his representatives in order to reach an agreement on the conditions of a contract and its signing, in conducting separate negotiations for each of the works to be digitized and not being able to conduct negotiations for all of them together, as well as the costs that may be involved in obtaining such licenses.

Educational institutions and teachers may ask the following question: if, in accordance with a limitation or exception on copyright, excerpts from works can be freely reproduced using an analogue medium when they are intended for the illustration of teaching, should it not also be possible to digitize and use the same excerpts of works online in the context of digital distance education?

As already stated, the countries of Latin America and the Caribbean have not developed a specific set of rules concerning limitations or exceptions to the copyright applicable to the digital environment. As is natural for a set of rules that was not conceived for the technological digital environment but for different circumstances, the alternative of applying the limitations and exceptions provided for in the laws presents difficulties such as the following:

(i) The same limitation or exception may have different effects on the analogue and digital environments, where its consequences may have a greater negative impact on holders of copyright and related rights to the point of adversely affecting the normal exploitation of the work or unreasonably prejudicing the legitimate interests of the rightholder, leading to situations that are contrary to the three-step test;

In its recitals, the European Directive acknowledges this situation as follows:

“(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations

to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.”

(...)

“(44) (...) The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.”

(ii) The balance of rights and interests needs to be considered in clear terms as the use of protected works and performances in the digital environment presents a specific problem for copyright and related rights, consisting primarily of:

- the ease with which copies of works are made in the digital environment, and the ability to reproduce those copies an infinite number of times in succession;
- the fact that digital copies can be virtually identical to the original;
- the difficulty for rightholders to control the use of the work by the public;
- the ease with which the works are modified in the digital medium and the fact that the modified works can be disseminated to the public;
- the fact that the public can access works without using physical copies, thus distorting the market or traditional business model based on selling the works embodied in tangible media.

(iii) Legal certainty is affected because the definition of whether or not a limitation or exception is applicable in the digital environment is not provided by the legislator, as it is a matter for the interpreter of the ruling or, in the last resort and for each case in particular, of the judge.

Rightholders and users of works do not therefore have clear rules that determine what may and may not be done freely with works in the digital environment.

(iv) The matter falls into a regulatory vacuum with regard to acts of temporary reproduction of works that are bound up with the technological process of digital transmission and without any economic significance of their own.

In its recitals, the European Directive raised, in this respect, the need to establish such limitations or exceptions as follows:

“(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take

place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorized by the rightholder or not restricted by law.”

In the digital environment, it is understood that reproduction occurs when the work is the subject of a recording or of temporary or permanent storage in the memory of a computer system. However, the unrestricted application of the exclusive right of reproduction tends to mean that any storage of the digitized work in a memory requires the express prior authorization of the relevant rightholder, which can certainly be impractical in some cases.

For example, digital transmission in computer networks involves repeatedly saving items in the memory, which takes place in fractions of a second. Each time the item is saved, it is for the sole purpose of enabling the technological process; it has no relevance as an act of exploitation and has no economic significance for the user or the rightholder, but it is still reproduction.

Without a limitation or exception which provides for such reproductions to be exempt from the owner’s authorization, we find ourselves in a situation in which the natural and legitimate use of the technology results in widespread violation of the rules.

In a similar situation, with regard to reproductions that are an inherent part of simply displaying webpages or of web navigation by internet users (browsing), where all the information that can be seen on the screen has been previously stored or recorded in the temporary storage memory (RAM), generating multiple reproductions of works, it so happens that, without a limitation or exception as mentioned, this constitutes – in theory – multiple infringements of copyright, although it cannot be said that these reproductions have caused prejudice to the rightholders or placed them at an economic disadvantage.

In Latin America and the Caribbean, this regulatory vacuum needs to be resolved, and laws have therefore been made to adopt a system of limitations and exceptions applicable specifically to the digital environment, as is the case of the European Directive, which adopts in its Article 5.1 a limitation or exception regarding the right of reproduction in the following terms:

“Article 5. 1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

“(a) a transmission in a network between third parties by an intermediary, or

“(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.”

(v) The opportunity is being missed to establish specific provisions for activities which are specific to the digital environment and which involve problems that are distinct and separate from similar or equivalent activities in the physical environment.

Digital distance education is different from face-to-face education, where the teacher and the pupil are in the same physical place at the same time. Likewise, there is a difference between the online consultation of works available in a digital library and consulting books in a

library. Digital distance education and the service provided by libraries in the digital environment raise their own problems and are examples of areas of human and social activity which require specific legal solutions and which are not resolved by analogy with other rules that were based on other circumstances and never intended for the new situations arising as a result of technological change in the digital age.

It is worth mentioning by way of example that the subject of digital distance education led in the United States to the adoption of the *TEACH Act* of 2002, which provides for the possibility of applying limitations and exceptions to copyright in connection with the digitization and digital transmission of works for the purpose of illustration of teaching.

For the purposes of this study, it is appropriate to ask what applicability limitations or exceptions existing under the laws of the countries in the region may have with regard to the use of works for teaching purposes in the digital environment. In other words, what situation does the interpreter of the standard or the operator or administrator of justice in the region find himself in, when faced with the need to determine whether a limitation or exception applicable to the analogue environment is applicable to the particular use of a work in the digital environment.

We believe that an answer should take account of situations such as the following:

- (i) Whether the existing limitations or exceptions, and the acts protecting each one of them, can be applied to the uses of works in the digital environment. We have shown that most limitations or exceptions for educational purposes currently existing in the laws of the region refer to certain reproductions or to the public communication of works and, to a lesser extent, other laws refer to the use or compilation of works. The question is whether, in the task that befalls him, the interpreter of the rule can match the verbs “reproduce”, “communicate”, “use” or “compile” to acts pertaining to the use of works in the digital environment. It seems that their equivalents should be sought in acts typical of the digital environment, which use the verbs “digitize”, “transmit”, “store”, “make available”, “download”, etc. and, to be more speculative, mention should be made of “accessing” or “sharing”.
- (ii) Whether the subject of the limitation or exception in the analogue environment, i.e., the work to which it applies, has an equivalent in the digital environment. With regard to the type of works to which the limitations and exceptions for educational purposes apply, there seems to be no problem with works such as literary works, which can be in paper form or expressed in bits and remain the same. A similar situation arises with audiovisual and artistic works and even with (face-to-face) lectures or lessons or newspaper articles (on paper), which easily find their alter ego in that parallel universe that is the digital environment, in video-conferencing transmitted over digital networks and digital newspapers;
- (iii) Whether other conditions or requirements for the application of the limitation or exception from the analogue environment can be extrapolated to the digital environment. Here, various negative answers may be given. For example, if the limitation or exception from the analogue environment requires reproduction to be carried out by reprographic means, reference is being made to technology from the physical world, such as, for example, photocopying. This requirement cannot be met in the digital medium because it is not applicable to the technology itself; and

(iii) Whether extrapolating the behavior covered by the limitation or exception in the analogue environment to its equivalent in the digital environment yields a result that does not violate the three-step rule.

The aim of this chapter is not to determine which limitations or exceptions in which countries could, in theory, be transferred to the digital environment, a task that seems to be fairly speculative and can easily cause two people to reach opposite conclusions if account is not taken of the particular features of each specific case and not only of the rule in question but also of each set of circumstances to which it can be said to be applied.

Our task is to reflect the current state of regulations in the region regarding limitations and exceptions applicable to the digital environment in order to show that there is no precise ruling in a subject area where certainty and legal security should clearly prevail, as is the case for the limitations or exceptions regarding exclusive rights in cases where works are used in digital technology.

This absence of legal certainty or security is not only detrimental to anyone who aspires to make use of the limitations or exceptions for free use of the works or productions or even to the rightholders, who have no definition of the area of activity in which they must exercise their exclusive rights for the purpose of developing business models or licensing, thus obtaining new sources of revenue in the digital environment.

Without laws governing a specific situation, a source of justice may be case law, the repetition of decisions by courts or the high courts in one sense or another. However, while court decisions are being reached that establish whether each of the uses of works in the digital environment may or may not be covered by a limitation or exception from the analogue environment, too much time may go by, and the needs of the different sectors concerned and the speed with which technology is advancing and transforming social relations certainly provide no hope.

Digitizing a text in paper form, which involves obtaining a digital representation of its content, constitutes an act of reproduction in which digital data is stored temporarily or permanently. This reproduction must, in principle, have the express prior authorization of the relevant rightholder.

In conclusion, there is no provision for limitations or exceptions specifically for the digital environment and there is consequently no limitation or exception that explicitly provides for the possibility of digitizing works for their use in digital distance education. In this regard it is appropriate to ask:

Could the limitations or exceptions that currently provide for reproduction for the purposes of education be applied to the digitization of works intended to be used for digital distance education?

By becoming applicable to the digital environment, would such limitations or exceptions be consistent with the three-step test?

3.4 Difficulties relating to the digital transmission of works and performances for the purposes of digital distance education

Case study

This is how the case of Professor Horacio Potel⁵¹ (Argentina) is presented on the website www.tratojustoparatodos.cl. It is reproduced here to demonstrate the passionate debate generated by this information.

“Horacio Potel is an Argentinean philosophy professor. He has committed a crime. In view of the high prices of the editions of Derrida’s books in Argentina, the poor translations, books that are out of print in Argentina as well as the shortage of texts in Spanish by the indispensable French thinker, he published much of the author’s work on the website www.jacquesderrida.com.ar so that anyone can access it and thus use the material in class, to develop an essay, to study for an examination, and simply to read.

“However, the publisher Les Éditions de Minuit – which has published only two books by Derrida and in French – found out and took legal action against Potel for the terrible crime of facilitating access to culture and knowledge. Through the Cámara Argentina del Libro, this publishing house then took Potel to court and he had to remove the website, *Copysouth* reports.

Finally, it is asked whether police officers raided the university to investigate the case: “A professor guilty of wanting to educate. When the intellectual property systems become as absurd as this, they need to be changed.”

From the perspective of copyright, the publication of a work on the website of a virtual course constitutes an act of reproduction by means of storing the work in digital form on an electronic medium (in this case, the medium is the server of the network on which the data of the virtual course is recorded), which is equivalent to making a work available so that the network users (in this case, the students on the virtual course) can access the work whenever and wherever each of them decides.

The combination or summation of the above acts (uploading the work to the virtual course website and downloading it for consultation by the student) constitutes digital transmission for educational purposes.

We mentioned in an earlier section that the TEACH Act in the United States provides for a limitation or exception to copyright in order to permit, under strict conditions, free digital transmission of protected works for educational purposes. To give a brief summary, we may recall that, in accordance with this limitation or exception, transmission of recordings of poetry readings and short story readings is permitted over digital networks, as is transmission of parts of any other performance over digital networks, subject to conditions such as the following: (i) that the works were not originally created to be used in educational activities transmitted by digital networks; (ii) that a volume similar to that used in classroom presentations is not exceeded; (iii) that the institution must be an accredited, non-profit educational institution; (iv) that the works should not be ones about which the educator knows or has reason to believe that they were not legally acquired and made; (v) that the use must not include textbooks, course packs and other materials typically purchased by students individually; (vi) that the use must be part of mediated instructional activities; (viii) the

⁵¹ Available at <http://www.tratojustoparatodos.cl/2009/05/18/derrida-sacudete-en-tu-tumba/>

performance must be a normal part of mediated instructional activities, carried out by an educator or under his direction or supervision; it must be directly related and of material assistance to the teaching content of the transmission and intended – and technologically limited – to students enrolled in the class; and (viii) the educational institution must have copyright protection policies and apply technological measures to prevent the recipients from maintaining the works outside the teaching sessions and subsequently distributing them.

In the region there are no provisions similar to those of the *TEACH Act* which specifically refer to digital transmission in the context of digital distance education, i.e. virtual education.

To attempt to transfer the limitations or exceptions currently existing in the region to digital use and, in particular, the digital transmission of works presents various difficulties, starting with the fact that those limitations or exceptions do not jointly refer to the two acts which together constitute digital transmission, i.e. reproduction and public communication, but refer to them separately and for different situations or only refer to one or the other.

The same cannot be said of the limitations or exceptions currently existing in the region which refer in general to the “use of works” for educational purposes, without limiting it to one or other form of specific use, in which case it would be necessary to go beyond the three-step rule to transfer the aforementioned limitation or exception to the digital environment. Nonetheless, the three-step rule imposes the particularly demanding criterion of the digital transmission being an act that is part of the normal exploitation of the works and performances in that environment, evidence of which are the demanding conditions which were imposed with regard to the limitation or exception of digital transmission in the aforementioned *TEACH Act* in the United States.

It is therefore appropriate to raise concerns such as the following:

If, in the countries in the region, the current limitations or exceptions are transferred in order to allow the digital transmission of works for educational purposes, is the balance of rights and interests guaranteed, given that there are no other provisions or conditions duly covering the exercise of this limitation or exception?

Should the countries in the region provide for a limitation or exception regarding digital transmissions for teaching purposes in the same terms as in other countries, or should they distinctly reflect their concern to provide access to education and the dissemination of knowledge, which is particularly important in developing countries?

With regard to digital transmission, it is relevant to mention what happens when users of digital networks decide to share the data that those networks make available to them. Hypothetical examples may be as follows:

(i) A university releases its virtual campus, with a web space where lecturers, or also the students, can place previously scanned texts of interest that they have read in connection with the materials and the courses that are taught there, and thus share them with the other teachers and students.⁵²

⁵² Example submitted by Victoriano Colodrón, “Facilitating the flow of educational materials in developing countries”, Information Meeting on Educational Content and Copyright in the Digital Age. WIPO, Geneva, November 21, 2005.

(ii) On the internet, a teacher finds a document which is of interest to his students as reading material or for analysis and discussion in class. He would like to share it with his students for that purpose and e-mails a copy of it to each of them. The students, in turn, wish to share among themselves the works that they find on the internet and consider interesting, such as summaries of the subject matter, questions or resolved cases, reading material, etc. They all want to use interactive digital networks to share, in various ways, information that is of interest for the teaching and learning processes.

In that respect, it should be said that interactive digital networks permit multidirectional communication, not only between a content provider and network users, but also at the level of networked users who share information with each other.

The act of sharing information over the network, when the information consists of copyright-protected works and performances protected by related rights, involves a digital transmission which, in accordance with the WIPO Agreements of 1996, is classed as an act of reproduction consisting of the storage of works in digital form,⁵³ in some cases accompanied by an act of making available, enabling members of the public to access the work whenever and whenever they choose.

One of the ways of exchanging digital information which has led to major discussions about its impact on copyright is peer-to-peer (P2P) exchange. Among the various arguments put forward, it has been considered that while sharing unlawfully obtained copies of protected works is an infringement of copyright, it makes no sense to prohibit or restrict the use of a technology that develops one of the uses and services inherent in digital networks such as the sharing of information among network users.

Therefore, when information is shared over digital networks for non-profit-making academic purposes, questions arise such as the following:

Is it affecting the market and the business model used by rightholders to achieve the normal exploitation of the work?

Is it unreasonably prejudicing the legitimate interest of the rightholder?

Similar to the provisions of the *TEACH Act*, should there be a limitation or exception for this kind of digital transmission for educational purposes in the client-server mode or in the peer-to-peer (P2P) transmission mode?

[Continuación de la nota de la página anterior]

⁵³ “Thanks to the Internet Treaties, it has been determined that a digital transmission of content implies making a copy, at least at the receiving point. In fact, when a protected work is accessed over a server and a user receives a copy, reference can be made to the right of reproduction and not to the right of distribution (ultimately, that is the view which was adopted at the first of the Agreed Statements annexed to the WIPO Copyright Treaty (WCT).” “Copyright in the digital environment. Internet Treaties.” Carlos Fernandez Ballesteros. Paper given at the Third Seminar on Copyright in the Publishing World, Buenos Aires, April 21-22, 2005.

Should there be a limitation or exception to the protection of technological measures for the purposes of the illustration of teaching, or even with regard to the measures used to restrict access to, or unauthorized copying of, electronic books?

If limitations or exceptions such as the aforementioned exist, could the use of information-sharing technologies be geared to the balance of rights and interests, providing remuneration for rightholders and at the same time allowing this exchange to benefit the assumptions of access to education and the pursuit of knowledge?

3.5 The shortage of works and contents available for use in digital distance education

Case study

Virtual learning objects

Virtual learning objects⁵⁴ are computer resources used in education, comprising, for example, simulators, virtual courses, multimedia applications, tutorials, animations, videos, interactive documents, audio clips, maps, collections of still images, schematic learning tools (concept maps, mentefacts, semantic networks, mental networks), etc. These resources are used by teachers to reinforce their face-to-face or virtual lessons.

In the context of information and communication technologies (ICT) in education, virtual learning objects are designed and developed in order to be used by other people or other institutions. For that purpose, there are repositories of virtual learning objects on the internet, where teachers can find objects relating to different fields of knowledge for use in their face-to-face or virtual classes.

The following are examples of repositories of virtual learning objects:

Universia (<http://biblioteca.universia.net/>)

Merlot (<http://www.merlot.org/merlot/index.htm>)

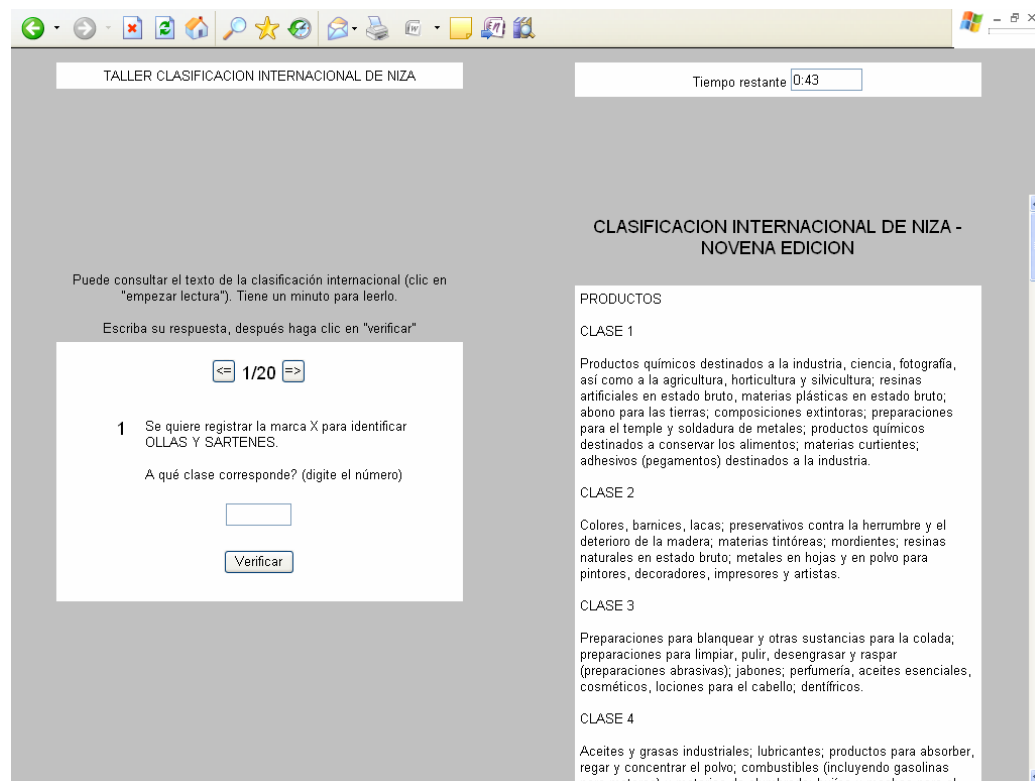
The Ariadne Foundation (<http://www.ariadne-eu.org/>)

The creators of these virtual learning objects can authorize others in different ways and under certain conditions to reuse or modify the objects for educational purposes. One of the possible forms of authorization is provided through alternative licensing models (e.g. creative commons licenses).

As an example of a virtual learning object, the following is an online test used in a virtual

⁵⁴ A virtual object is an educational mediator that has been intentionally designed for a learning purpose and is of benefit to the users of various educational methods. In that sense, the object must be designed on the basis of criteria such as the following: (i) Timelessness: to avoid losing its relevance over time and with regard to the contexts used; (ii) Teaching: the object implicitly responds to what, why, how and who is learning; (iii) Usability: facilitating intuitive use by the user concerned; (iv) Interaction: motivating the user to express concerns and return answers or substantive learning experiences; and (v) Availability: guaranteed for users in accordance with their interests. (<http://www.colombiaaprende.edu.co>)

course on intellectual property, which allows the Nice International Classification to be read and asks the student in which class of products it would be appropriate to register a trademark to identify pots and pans:



The program will mark the student's answer right or wrong and give him feedback on the rationale behind the correct answer and the score accumulated so far:

Just as in this case the text of the Nice International Classification was transcribed, the reading material could have been, for example, an excerpt from a copyright-protected literary work on which students are asked questions.

A virtual learning object can be developed from a reproduction, compilation or transformation of existing works, such as literary, audiovisual, musical or artistic works, maps, etc.

Likewise, the virtual learning object is, of itself, a copyright-protected work, which means that the possibility for third parties to use it depends on the terms under which the rightholder considers it appropriate to authorize its use.

Adapting a virtual learning object to the content or specific learning needs of a face-to-face or online course or class may involve its modification. As a general rule, any transformation of a work requires the express prior authorization of holder of the relevant rights.

That may give rise to concerns such as the following:

Could the limitations or exceptions that exist at present be applied to the reproduction or compilation of works for educational purposes so that virtual learning objects can be developed on the basis of those works?

At present, the use of creative commons licenses is being promoted to facilitate reuse and transformation of the virtual learning objects; should that be taken further and a limitation or exception be established that explicitly allows such objects or resources to be reused for educational and non-profit-making purposes?

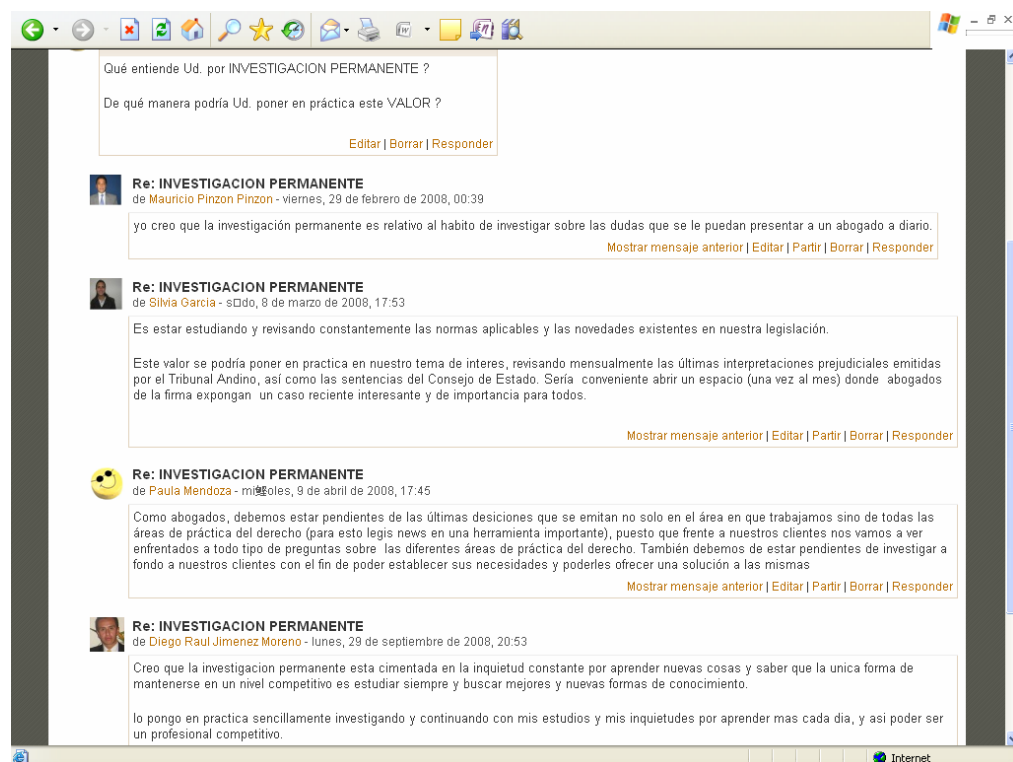
Would a limitation or exception such as those mentioned above comply with the three-step rule? Would it allow normal exploitation of the work by the rightholders and the creators of the computer resources? Would it allow the development of the computer-based educational resources industry?

Case study

Lectures or lessons given by teachers as part of virtual courses

Virtual courses make use of communication resources such as forums or chat, in which the teacher or tutor answers the students' questions or, vice versa, their students answer the teacher's questions or analyze cases or examples.

The following is an example of a forum used as part of a virtual course, which started with a question asked by the teacher or tutor:



Another way in which teachers in virtual courses give their lessons or lectures is through so-called “conceptual closures”, these being documents that are published after the evaluation of each module or thematic unit of the course and, when the marks are published, in which the teacher answers the questions that were evaluated and gives his conclusion on the discussions and views expressed by the students.

In the context of face-to-face education, the lectures or lessons given by teachers at educational institutions can be considered copyright-protected works. In the same way, the text made up of the various contributions, explanations or presentations by the tutor and the participants in a forum or chat that is part of a virtual course may constitute protected works.

It may appropriately be asked, since a limitation or exception exists to allow reproduction by taking notes during teachers' lectures or lessons, whether there should be a similar limitation or exception to allow students on an online course to reproduce the lecture written by the tutor or teacher and other participants by means of digital storage in an electronic medium?

Since the lessons and lectures in face-to-face education cannot be compiled and published without the express prior authorization of the teacher or lecturer concerned, should a similar prohibition exist for the written contributions to a forum or chat session in the context of virtual education?

3.6 The need for digital transformation or adaptation of works for students carrying out academic work

Case study

Producing and editing educational videos, now available to all students

Thanks to programs such as MOVIE MAKER that are available on the web, it is becoming increasingly easy for amateurs to edit videos. This program is used to cut out video shots that you do not want to use or to cut a picture from a video, and is easy to use even for beginners. For more professional video-editing, there are applications such as ADOBE PREMIER PRO and then effects can be added by using the program AFTER EFFECTS. These applications even enable a video to be made from still photographs, animating the sequence of pictures in such a way that it looks like a video.

Through this technology, the production of audiovisual material has been made available to students – not necessarily media students – who, as an academic activity or project, produce videos, in which audiovisual works, or excerpts from them, are frequently reproduced and musical components are synchronized. These musical or audiovisual works may also be modified.

These students also often want to show their audiovisual productions to others or on the internet and publish them on YouTube (for example) as a means of getting known in audiovisual production circles.

In addition to modifying videos, it is also common for students of fine art or other crafts to carry out academic work involving the copying of protected works as part of a study. Similarly, those students may make their own versions of the artistic works by modifying them or even by deforming or mutilating them in such a way as to affect their artistic integrity. Nonetheless, their validity as an educational resource cannot be denied.

Among the limitations or exceptions to copyright which are clearly established for educational purposes in the countries in the region, there is none that refers specifically to academic work carried out by students as part of their learning activities.

The only limitation or exception to copyright for the reproduction of works for purposes of art study is found in Venezuelan law (Article 44(8) of the Law on Copyright of 1993).

This does not mean that the aforementioned situation cannot be covered by the limitations and exceptions that exist at present. We have mentioned that the laws generally refer to the “use” of works for educational purposes or have referred to other laws which state explicitly that the said limitation or exception covers acts carried out by people providing education and by those receiving it. Nonetheless, there are many laws that do not contain that explicit reference.

The situation in question involves a use that does not transcend the personal or private sphere. In this regard, some laws, such as that of Colombia, stipulate that economic rights apply as soon as the work or production is disclosed or transferred to the public (Article 72 of Law No. 23 of 1982) so that similar behavior that does not transcend the strictly private sphere is irrelevant as an infringement of the author’s economic rights. However, nothing is said about moral rights.

Everything said about the use of works within user-generated contents is applicable to the use, processing or generation of derivative works in the context of academic work carried out by students as part of their learning activities.

Therefore, among other matters, it is appropriate to analyze the following questions:

Is it necessary to provide for new limitations or exceptions that refer explicitly to the possibility of students reproducing or transforming works and performances for the purpose of carrying out academic work which forms part of their learning activities?

What economic significance can reproduction for the purpose of art study have as an act of exploitation of the work? Is it reasonable for copyright to cover this type of act under exclusive rights?

Is it appropriate for limitations and exceptions for teaching purposes to state explicitly that the acts which they cover may not only be carried out by those providing the education, but also by those receiving it?

Some cases of works being modified by students deserve special consideration:

(i) In the case of the manipulation of digitized videos, this is an infringement not only of the right of transformation applicable to audiovisual works but of the works embodied in the videos. If manipulation consists of adding a musical background, other rights are also infringed because the synchronization of musical works in an audiovisual production is an act of reproduction that requires the express prior authorization of the holders of the rights in the musical works and possibly also in the phonograms.

Likewise, the inclusion in an audiovisual production of pictures or pictures and sound taken from other audiovisual productions requires the aforementioned authorization unless a limitation or exception to copyright is applicable.

Whether or not a limitation or exception can be applied in that case depends on the extent to which the use or reproduction of works is permitted for educational purposes, in that, in accordance with that limitation or exception, it covers the use of the work not only by the persons giving the education but also by those receiving it.

The following may be mentioned as subjects for analysis in that regard:

Is it appropriate to create new limitations and exceptions concerning the use of works by students doing academic work to include permission to reproduce and alter existing audiovisual works?

Should it be permissible for these public audiovisual productions to be communicated freely even outside the academic environment as a means of promoting the work of those students or new producers?

(ii) A similar situation arises with regard to translations of literary works, or excerpts from them, made by language students as a class exercise or academic work.

It is proposed that when the translation is done in the purely private sphere and in the context of learning activities, a student should not be required to supply any type of authorization from the copyright holders. However, this is a cause for concern because the law contains no limitation or exception providing expressly for this to be an act that may be carried out freely and without charge.

The translation of a literary work is an act of transformation that requires the express prior authorization of the rightholder.

If, within the framework of teaching activities, the translated text does not transcend the personal or private sphere of the person doing the translation, this is deemed an act inherent in language learning with no economic significance as a form of exploitation of the work, especially when such translations are not intended for public dissemination.

It can be argued that the limitations or exceptions that generally include the use of works for teaching purposes can be applied to the case of translations. However, there is understandable concern about there being no limitation or exception relating to translations or any other transformation of a work, which states explicitly that such translations done in the academic environment and in the personal or private sphere can be done freely and without charge.

In this regard, it is appropriate to ask:

If there are limitations or exceptions relating to other acts from the personal or private sphere that are an inherent part of the learning process, such as taking notes or the reproduction of works for the purpose of art study, why are there no limitations and exemptions relating to translations or other transformations of works that students do or make as part of their academic work?

How could the laws be made clearer with regard to the fact that the scope of exclusive rights does not extend to the different hypothetical uses of works in the context of teaching and learning which have no economic significance as acts of exploitation and do not affect the normal exploitation of the works thus used?

3.7 The issue of private copying and access to education

Case study

The debate about the limitation or exception on private copying in Chile

The following is taken from a statement that various sectors of the Chilean civil society⁵⁵ issued during the debate about changing the system of limitations and exceptions in their country and within WIPO.

“Position of the Chilean civil society on exceptions and limitations to copyright in WIPO’s session

“The organizations of the Chilean society civil who subscribe below, have wanted to show publicly their position with respect to the proposal of the government of Chile to include in the agenda of 13th Meeting of the Standing Committee on Copyright and Related Rights of the WIPO, the discussion about exceptions and limitations to the copyright.

“1. Current situation in Chile

“Chile has a legal applicable copyright regime from earlier 70’s, which has been actualized – for example in relation with the incorporation of data bases and software as protected works, and the extension of the protection period as well–, but it is not yet adecuated to the challenges of the digitization of works and the masification of the new technologies.

“In the subject of limitations and exceptions of copyright, the Chilean legal regime is too precarious in relation with the experiences of the comparative law. So, for example, in our legislation, among other complicated situations, we have to notice that:

- There are not exceptions related to disability of certain users,
- There are not private-copy right,
- There are not specific exceptions for libraries,
- Exceptions for educational development are excessively restrictives,
- Was derogated the right of illustration, and
- Through a regulation, has been restricted the right of quotation.

“The legislative omissions cause serious inconvenient. Inconvinients for educational and investigation purposes. For that reason, diverse civil society organizations have declared to the government their interest in the inclusion of apropiated exceptions in order to reestablish the balance in the national copyright regulation.

(...)

⁵⁵ Statement signed by the following bodies: ONG Derechos Digitales (Digital Rights NGO), Facultad de Artes, Universidad de Chile (Faculty of Art, University of Chile), Comisión de Directores de Bibliotecas – Consejo de Rectores de las Universidades Chilenas (Chilean Universities Principals Council), Colegio de Bibliotecarios de Chile A.G. (Librarian Association), Editores de Chile (Independent publishers of Chile), Centro del Software Libre (Center of Free Software), Centro de Difusión del Software Libre (Center of Diffusion of Free Software), ONG Alianza Chilena por un Comercio Justo y Responsable (Alliance for a Fair and Responsable Trade NGO), ONG Vivo Positivo, Red Educalibre, Red SoftwareLibre.cl, Red Conexión Social. Available on <http://www.aporrea.org/tecno/a18041.html>.

“In this context, we assess the Chilean Government initiative to admit the need of adopting a system of exceptions and limitations in the international forum, that balances the concurrent interest in the subject.

“With the same emphasis we hope that along with some open dialogue channels the Government respect the need of concret an equilibrate regime of limitations and exceptions for the copyright in our internal legislation, as the accepted international standards and the following requirements.

“2. Requirements of exceptions in the internal legislation

“In order to establish an adequate balance between the copyright protection and the educational fundamental right, in function of the proper requirements of our institutions, we consider necessary the incorporation of the following points:

(...)

“b) Specific exceptions for investigation and educational activities

“Must be dispositions that admit a restricted exercise of the reproduction right (v. gr. Course pack, circumstantial uses and the scientific communication), as well the execution of works (v. gr. Non commercial exhibitions of films or musical pieces) and the record of radial and television broadcasting with academic and educational purposes. In the same direction, must contemplate the right of the institutions and centers to dispose of the conservation of the academicals productivity.

(...)

“d) Private copy exception for the rightful buyer of a protected work.

(...)

“The points below not implies the adoption of another exceptions and limitations to the copyright associated to the exercise of the rest of fundamental rights, as the freedom of speech and the rights of information and health.

“The precarious system of exceptions and limitations for the copyright in the Chilean legislation, and the high access costs –consider the national income of the country- and the tax upon the circulation of works, reduce the access of the people to participate of the benefits resulting of the development of science and technologies, arts and literature, of the culture in general.

“Santiago, 21 November 2005.”

Copying by reprographic means constitutes an act of reproduction which, in principle, does not avoid the obligation to obtain the express prior authorization of the copyright holder. Nonetheless, this limitation or exception applies when the copying is carried out in the personal or private domain, subject to certain terms or conditions. The concept of “personal” has to do with the individual, corresponding to a human being’s intimate sphere (excluding requirements relating to a legal person). By contrast, the notion of “private” as opposed to “public” may be applied to a specific group of people (for example, students in a class, employees of a company). Such is the diverse range of the laws that provide for a limitation or exception on copying for personal or private use under the right of reproduction.

The limitation or exception on private copying has been linked to the emergence of new technologies, which have progressively been facilitating domestic reproduction of public

works and improving their quality. The limitation or exception on personal or private copying does not seem to comply with the acknowledgement or safeguarding of an individual or collective right. On the contrary, its existence is evidently associated with the undeniable reality of the significance for copyright of the profusion of technologies that enable the public to mass reproduce works.

As mentioned, the countries in the region that provide for this limitation or exception are Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago and Venezuela.

In accordance with this limitation or exception, private copying must be carried out by the party concerned with his own facilities and is not applicable when the reproduction is made through a third party who provides the service of reproducing the work or the facilities enabling the interested party to obtain a copy. In this case, this is an act of reproduction requiring the express prior authorization of the rightholder. Likewise, to apply this limitation or exception, some laws expressly require copies to be made on the basis of lawfully reproduced publications which are not unlawful copies of the work.

It is argued that the limitation or exception on private copying does not tally with the need to give precedence to a human right or with the general interest of society, but yields to the inability of rightholders to control mass reproduction of their works by the public in the face of the use and dissemination of technological devices permitting reprographic reproduction.

On the other hand, it is argued that private copying is a means of accessing information, education, culture and entertainment, and a legitimate use of technology should not be prohibited because that would imply ignoring an undeniable reality, a social fact, whereas it would be better to channel efforts towards achieving a balance of rights and interests.

Educational institutions that provide photocopying facilities for their students must obtain a permit or license for the reprographic reproduction of works. In the next chapter we will give examples of licenses provided by the collective reprographic rights organizations that exist in the region, particularly for educational institutions.

In Chapter 2 we stated that in the region, only the laws of the Dominican Republic, Paraguay, Peru and Ecuador provide for compensatory remuneration or fair compensation for private copies, although this fee has not been collected in any of those countries.

Compensatory remuneration or fair compensation for private copying consists of collecting a fee or levy based on the price of the equipment and media for reproduction, such as photocopiers and video recorders. This fee is to be paid by the manufacturers or importers of such equipment and media, and must be paid to the reprographic rights organization, which distributes the proceeds to the rightholders.

This fee is an attempt to compensate authors, publishers and rightholders, who are adversely affected financially by mass private copying of their works. Ensuring remuneration for private copying through this tax system ensures that payment is made to offset economic losses incurred by rightholders.

This system of compensatory remuneration for private copying comprises two elements:

- A physical tax (hardware) levied on photocopiers, facsimile machines, printers, scanners, multifunctional devices and CD and DVD recorders.
- A user fee or operator charge to be paid by institutions such as educational institutions, libraries, and government and research institutions that do a large amount of photocopying.

In most of the countries which have adopted this type of license, there is a combination of a fee charged on the equipment and a fee to be paid by the operator. In a few countries, only the fee charge on the equipment is levied (Czech Republic, Greece, Romania). In other countries, the law allows a fee to be collected on the underlying material such as photocopying paper (Greece, Nigeria and Poland).

Among the many topics for analysis relating to private copying and its possible benefit for education and access to knowledge, reference may be made to the following:

In what way is the limitation or exception on private copying compatible with exercising the right of reproduction and the granting of reprographic reproduction licenses by rightholders and collective management organizations?

If there is no compensatory remuneration for private copying in the countries in the region, can a balance of rights and interests be said to exist in this area?

For countries that have no legal ruling in that respect, should the limitation or exception on private copying be applied to the online or offline digital environment?

For countries that have no legal ruling in that respect, should an exception on the protection of technical measures be established to allow private copying within the framework of this exception?

3.8 The issue of private copying in the digital environment

Case study

The company RealNetworks is sued for creating a computer program to obtain digital copies of DVD content (United States)

A judge in San Francisco convicted the company RealNetworks of having violated the copyright laws with the RealDVD program, software enabling the user to create a copy of his DVDs on his computer. What attracted attention was that in San Francisco it is completely legal for users to make copies of their DVDs; however, the view of the judge, Marilyn Mal Patel, was that it is illegal to devise a program that enables that to be done.

After more than a year of litigation, RealNetworks was left with a ruling that bans it from continuing to sell the program.

Those commenting on that verdict are asking the following question: if it is legal to copy a DVD but not to devise a program to do it, what is the point of the copying permit? If the judge had banned the sale of the software, we could find ourselves dealing with its free

distribution, but what is considered illegal is making that software, which poses a quite complex dichotomy.

Other details of the case influenced the ultimate verdict. In 2008, RealNetworks apparently paid for a license from the DVD Copy Control Association, but the license only allowed the creation of a DVD player and in no way gave approval for the creation of software enabling DVDs to be copied. Thus, violation of the license agreement by the company would have had a bearing on the verdict, since the owners of RealDVD would have been taking advantage of the situation to derive an economic benefit from a license that allowed them to do what they ultimately did.

Private copying poses other problems when works are reproduced in the digital environment, or when works and performances are used online or offline.

MÓNICA TORRES says that the reasons that once justified providing for a limitation or exception on private copying, which basically derive from the inability of owners to control the mass reproduction of their works, evaporate in the digital world, where the technology itself provides the ability to exercise that control⁵⁶: the appropriateness of providing for a limitation or exception on private copying that is applicable to the digital environment has to be given thorough consideration, given the impact of accepting a limitation or exception on private copying in the digital environment.

On the other hand, information digitization has considerable benefits for both users and creators. Indeed, wider distribution of copyright-protected information is of benefit both to the authors and for the general interest in the culture and the information. Private copying is thus an opportunity to take advantage of the wealth of information provided by the digital environment and free access to information. Technology allows access to information that was previously denied, and it should not be banned but must be allowed to be enjoyed within a scenario of a balance of rights and interests. Users of works are entitled to make use of private copying.

Following the discussions, various countries recognized in their laws that private copying was applicable to the digital environment – at least in the offline digital environment – provided that equitable compensation for rightholders is admitted. That is the case of Article 5(2)(b) of the European Directive, which makes the following provisions:

“2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(...)

“(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;”

⁵⁶ “El libro y los derechos de autor en la Sociedad de la Información” (Books and Copyright in the Information Society). Paper presented at the first meeting of Ibero-American Ministers of the Information Society. Madrid, Spain, September 27 and 28, 2001.

Subsequently, Article 6(3) provides for a limitation or exception on technological protection measures, in order to permit private copying offline without undermining the possibility for the rightholder to restrict the number of copies that may be made.

In Spain, in implementation of the provision of the European Directive, Article 31(2) of the Law on Intellectual Property was amended to read as follows:

“Works already disclosed may be reproduced in any medium without authorization from the author provided that the reproduction is carried out by a natural person for private use and is of works that were accessed legally and that the copy obtained is not intended for collective use or profit, without prejudice to the fair compensation provided for in Article 25, which should take account of whether the measures referred to in Article 161 apply to such works.

“Electronic databases and, pursuant to Article 99(a), computer programs are excluded from the provisions of this section.”

With regard to the countries in the region and for the purpose of examining whether the limitation or exception on private copying may be of benefit to the right to education and access to information, questions such as the following may appropriately be asked:

Is it reasonable to transfer private copying in the analogue environment to the digital environment and do the problems of the analogue environment still exist in the digital environment?

To what extent must the right of reproduction be adapted to the new information technologies?

What is the goal of private copying? What has justified the existence of private copying?

To what extent is private copying applicable to the digital environment, and should it be extended without distinction to the online digital environment and the offline environment?

Is compensatory remuneration or fair compensation necessary for private digital copying?

Given our completely different stages of development, and given the national and multinational interests of service providers, are the legislative solutions adopted by Article 5(2)(b) of the European Directive appropriate for the region?

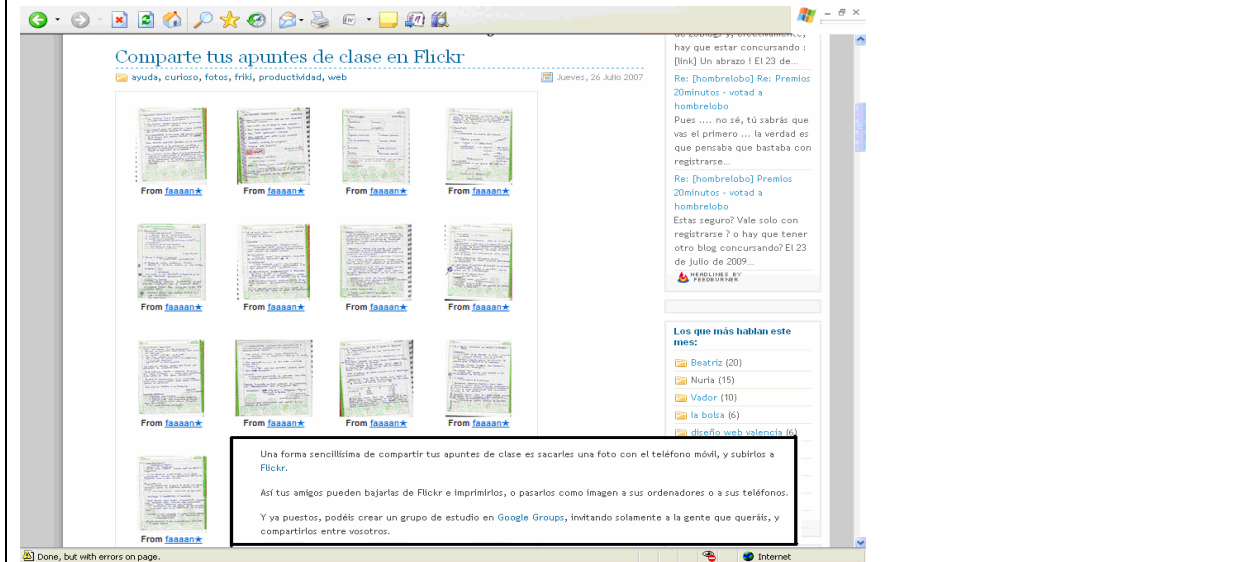
3.9 Just as notes can be taken in accordance with a limitation or exception, should it also be possible to record or film classes or lessons freely?

Case study

Unauthorized publication of notes on the internet

The internet facilitates the unauthorized publication of any document, including notes taken in

class. For example, the following website tells its visitors how to publish them, as follows: “An extremely simple way to share your class notes is to take of photo of them with your mobile phone and submit them to *Flickr*. Your friends can then download them from Flickr and print them or transfer them as images to their computers or telephones. For that matter, you can create a study group in *Google Groups*, inviting only the people you want, and share the notes among yourselves.”



Taking notes of teachers' classes or lessons by the students to whom they are addressed is a private act without economic significance as an act of exploitation. Some wonder if perhaps other limitations or exemptions therefore need to be established with regard to many other uses of works that do not go beyond the private sphere and do not constitute acts of economic exploitation.

There are students who, instead of transcribing the teacher's works, note the main ideas, make a summary table or draw a concept map.

Taking notes involves an act of reproduction through the written or manuscript form of an oral work (transcription).

It has already been said that, in the region, this limitation or exception is provided for in the laws of Brazil, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Nicaragua and Peru, enabling classes to be noted down and/or collected freely and free of charge by the studies to whom they are addressed, with some laws adding that this may be done “in any form”. The basic requirement of this limitation or exception is that the notes may not be published fully or in part without the authorization of the author, i.e. the person giving the classes or lessons. This limitation or exception draws attention to behavior that is so natural, obvious and inherent in academic activities that note-taking during classes or lessons by students to whom they are addressed could hardly be prohibited or subject to conditions.

Nonetheless, a lesson given by a teacher or a lecture given by a lecturer are examples of oral works, which, as such, cannot be reproduced, compiled, distributed or communicated publicly without express prior authorization. This limitation or exception is justified insofar as note-taking can be considered a reproduction of a work.

The following may be appropriate points for analysis:

What happens in countries in which there is no provision for this limitation or exception? In those countries, do all students taking notes in class become copyright-infringers?

What economic significance can note-taking have as an act of exploitation of the work? Is it reasonable for copyright to cover this type of act under exclusive rights?

Does a genuine reproduction of the work take place when notes are taken? As these notes can hardly be verbatim transcripts of the class or lesson and usually outline the main ideas of the talk given by the speaker, is this not merely a use of ideas, which, by definition, are not subject to copyright protection?

Case study

Audio or audiovisual recordings of classes or lessons. A case at the University of Buenos Aires (Argentina) which reached the communication media.

Various communication media in Argentina reported the case that took place in July 2008, involving a student with impaired hearing who filed a complaint with the university management because a tutor who was asked to authorize a recording to be made of the class instead of note-taking during his postgraduate course in the Faculty of Law, replied, “No, you cannot make a recording. No way. If you want, buy my book; everything is in there.”

The student told the media that he had a motor disability that hardly allowed him to walk, besides having a spastic hand and reduced hearing. It was therefore difficult for him to take notes and he needed to record the classes with the authorization of the lecturers concerned, who had all complied, with the exception of the one against whom he had lodged a complaint.

The next day, the situation was repeated with another teacher, prompting the student to not attend the next class and, instead, to go to see the Ombudsman and complain. The Ombudsman requested a report from the faculty management, in which the Dean replied as follows:

“... it has long been standard practice here not to permit the recording of classes, precisely in order to protect the intellectual property rights on which the claimant sought information through the course in question.”

The Supreme Council of the University stated, however, that *“... there are no regulations forbidding students in the Faculties and Colleges that are part of this University to record classes”*.

Finally, the Ombudsman recommended that the University of Buenos Aires make public the right of its students to record classes given by their teachers.

In the preamble to his recommendation to the UBA, the Ombudsman said that *“it is understood that from the moment that the teacher is committed to offering his knowledge to students through oral or written lectures, he is willing to relinquish ownership of such*

knowledge so that the students can acquire it and development can take place". He also considered that "... the principle according to which ideas are and should be freely accessible is essential and without it there can be no creative activity. The ideas underlying intellectual works are only components of the work. They are subjective and intangible expressions, and as soon as they spread, everyone is in a position to enjoy them without anyone being able to claim any right, just as it is impossible to appropriate air or light for one's own exclusive use".

When contacted by the press, the Ombudsman stated that no teacher can begin by assuming that the aim of a student who wants to record one of his classes is to then sell his recording. *"Because there is no rule in this area, the university should establish a comprehensive standard so that it is not left to each faculty or individual teacher."*

The student told the journalists that he felt discriminated against by not being allowed to record the class: *"Despite my disability, I qualified as a national public auctioneer in 1982, as a solicitor in 1989 and as a lawyer in 1990; I was awarded a doctorate in 1995. And I never experienced anything like this."*

Digital sound recording devices, which are becoming increasingly smaller and have greater storage capacity, as well as the audiovisual recording facilities built in to mobile telephones and other devices are making it increasingly easy for students to reproduce the content of classes or lessons given at educational establishments.

When the recording is digital, there are multiple ways of forwarding the contents of classes or lessons to others or to the general public, including via the internet (e.g. podcasts⁵⁷). Analogue media provide no such facility for public dissemination of the contents of the recordings. The audio or video recording of classes or lessons given at educational establishments involves the reproduction of an oral work by means of its audio or audiovisual fixation.

It has been seen that the laws of Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Nicaragua and Peru provide not only for a limitation or exception to copyright for note-taking, but also for "collecting" classes or lessons given by teachers at educational institutions. It is precisely a kind of "collecting" that is involved in making an audio or audiovisual recording.

As is true of the limitation or exception for the purposes of note-taking, the prohibition on reproducing the entire content of a class or lesson or on communicating it to the public without the authorization of the rightholder also applies to this type of reproduction.

That may give rise to concerns such as the following:

⁵⁷ Podcasting consists in setting up sound archives (usually in mp3 or AAC format, and in some cases in the free ogg format) or video archives (known as videocasts or vodcasts) and of distributing them by means of a syndication system that enables people to subscribe and to use a program that is downloaded from the internet so that the user can listen when he want, usually on a portable player. (Source: <http://es.wikipedia.org/wiki/Podcasting>).

In addition to regular classes, a speaker may occasionally give a presentation at an educational establishment without being a teacher or professor. Should any lecturer, under any circumstances, because he gives a presentation at an educational establishment, have to tolerate those attending his talk obtaining the sound or audiovisual recordings that they make without his consent? What clarifications need to be made to the limitations and exceptions in order to avoid this extreme?

In this case, has the balance of rights and interests been affected to the detriment of copyright holders as a result of digital technology? Should the limitations or exceptions be clearer on the possibility of compiling or disseminating lessons or lessons “collected” by digital recording mechanisms?

A similar situation arises in the case of teachers or lecturers preparing digital slide presentations (using PowerPoint or similar programs) that include copyright-protected works in order to illustrate their classes or lectures. It often happens that at the end of the slide show, students or assistants (with digital storage devices – USB memory drives or pen drives – in hand) gather around the speaker with great eagerness, asking if they can have digital copies of the slide show.

It is thus appropriate to recall that slide shows, whether they are digital or not, may reproduce works by third parties or, themselves, be copyright-protected works.

The reproduction of works within the slide show that is presented to students is linked to public communication. However, insofar as this takes place by way of illustration for teaching purposes, such communication may be covered by a limitation or exception to copyright.

Concerns such as the following may appropriately be raised:

Is the professor or lecturer obliged to allow those reproductions or digital recordings of his slide show?

There are laws which, in accordance with a limitation or exception, allow classes or lessons given at educational institutions to be “collected in any form”. Should it be understood that in those countries, the law requires teachers or lecturers to permit digital recordings of their slide shows to be made in this way?

If the limitation or exception allowing the content of classes or lessons given at educational institutions to be collected in any form is applicable to this case, should further clarification be made with regard to digital slide shows, given the ease with which they are published on the internet?

3.10 Public liability for infringement of copyright by students using the institution’s resources

Case study

In 2005, a controversy arose in Spain, as a result of which the University of Valencia sent a circular to all its professors and staff at the institution, in which it clearly stated that the use of

P2P programs was not authorized and included the warning that it was an “offence” to use any program to copy copyright-protected contents.

The following is the text of that note:

"SECURITY MEASURES IN THE UNIVERSITY NETWORK

"Because of the adoption of security measures related to network usage by users of computers located at the University, notification is hereby given that:

"The University does not authorize the use of "peer to peer" programs or, generally, of any programs that may involve uncontrolled downloading of files that might pose security risks. The use of such programs in teaching may only cover the exchange of files whose rights are held by the institution.

"The use of any kind of program or procedure to copy contents that are the subject of intellectual property shall be considered an offence pursuant to Article 270 of the Organic Law 10/1995 of 23 November, Criminal Code.

If the University becomes aware by any means of the existence of levels of traffic from a computer that may be suggestive of the existence of a risk to security (viruses, spyware, etc.), it shall be entitled, for reasons of security, to suspend the network connection service temporarily. In that case, competent technical staff will check the existence of problems before reactivating it.

"The University has no actual knowledge of the contents of users' communications and is therefore not liable for the administrative or criminal offences that they might commit."

As a result of the controversy, it became known that various Spanish universities received communications from United States companies or associations such as the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA).

In those letters, a user of the computers at the university was usually identified by his nickname, and the academic institution was requested “to do the following immediately: (i) to deny access to the person who carried out these acts, and (ii) to take the necessary measures against the account holder in accordance with its policy of abuse”.

It is in the legitimate interest of the educational institutions and teachers for them to be able to take advantage of information and communication technology to give their students quality education. This objective implies that the universities make various computer resources that they own, such as access to computer systems and the use of equipment located on its premises, available to the students.

Students may possibly use the institution's equipment and resources for purposes that are not purely academic, even committing violations of copyright that have leaked to the media, as was the case of students who were charged with the mass downloading or exchange of music by means of such resources.

Educational institutions must bear in mind that they have a custodial or supervisory duty with regard to the conduct of their students and their use of the resources made available to them. Nonetheless, it is reasonable for the institutions to want to have clear rules that establish to what extent that responsibility covers what others do.

With regard to digital distance education, various resources such as access to a computer platform or system are made available to students, within which they are given access to works and performances protected by copyright and related rights. This presents a risk because students may possibly misuse these resources, so that the institutions need to clearly

identify the preventive measures that, with reasonable diligence, they need to adopt to minimize this legal risk without affecting the development of the educational process. In other words, educational institutions are calling for legal certainty.

It is appropriate to recall that the TEACH Act in the United States contains some criteria for the application of the limitation or exception on digital transmission for educational purposes, which have to do precisely with the degree of responsibility that can be assumed by an educational institution in the context of digital distance education. Indeed, as mentioned in Chapter 1, the aforementioned limitation or exception is subject to conditions or requirements such as the following:

- that the educator is aware that these are works that were not legally acquired and produced;
- that educational institutions have policies and provide information regarding the fact that the materials used may be protected by copyright, that they must apply technological measures that reasonably prevent recipients from retaining the works outside classes and from subsequently distributing them, and that they should not interfere with the technological measures taken by copyright holders to prevent the retention of the works and their distribution.

Conditions such as the foregoing take account of the degree of responsibility that can be assumed by the educational institution in this connection, as in failing to fulfill these conditions, using the work concerned would be an infringement of the rights.

3.11 Availability of works in the public domain and their impact on education and research – the question of “orphan works”

Case study

The question of using “orphan works” for educational purposes

The Green Paper on Copyright in the Knowledge Economy prepared by the Commission of the European Communities (Brussels, 2008) refers to the issue of “orphan works” as follows:

“An issue which came to the fore in large scale digitisation projects is the so-called orphan works phenomenon. Orphan works are works which are still in copyright but whose owners cannot be identified or located. There is a significant demand for the dissemination of works or sound recordings of an educational, historical or cultural value at a relatively low cost to a wide audience online. It is often claimed that such projects are held up due to the lack of a satisfactory solution to the orphan works issue. Protected works can become orphaned if data on the author and/or other relevant rightholder(s) (such as publishers or film producers) is missing or outdated. This is often the case with works which are no longer exploited commercially.

“Apart from books, thousands of orphan works such as photographs and audiovisual works are currently held in libraries, museums or archives. The lack of data on their ownership can constitute an obstacle to making such works available online to the public and can impede digital restoration efforts. This is particularly the case with orphan films.

“The issue of orphan works is mainly a rights clearance issue i.e. how to ensure that users who make orphan works available are not liable for copyright infringement when the rightholder reappears and asserts his rights over the work. Apart from liability concerns, the cost and time needed to locate or identify the rightholders, especially in the case of works of multiple authorship, can prove to be too great to justify the effort. This appears to be especially true for rights in sound recordings and audiovisual works that are currently kept in broadcasters archives. Copyright clearance of orphan works can constitute an obstacle to the dissemination of valuable content and can be seen as hampering follow-on creativity. However, the extent to which orphan works actually impede uses of works is not clear. There is a scarcity of the necessary economic data which would allow the problem to be quantified on the pan-European level.

“The orphan works issue is currently being considered both at the national [23] and at the EU level. The US[24] and Canada[25] have also taken initiatives regarding orphan works. While approaches to this issue differ, the proposed solutions are mostly based on a common principle; a user has to perform a reasonable search in order to try to identify or locate the rightholder(s).

“The Commission adopted a recommendation[26] in 2006 encouraging the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works. A High Level Expert Group on Digital Libraries was established bringing together stakeholders concerned by orphan works. The Group adopted a ‘Final Report on Digital Preservation, Orphan Works and Out-of-Print Works’ and a ‘Memorandum of Understanding on orphan works’ was signed by representatives of libraries, archives and rightholders[27]. The memorandum contains a set of guidelines on diligent search for rightholders and general principles concerning databases of orphan works and rights clearance mechanisms. Detailed solutions are to be developed at the national level.

“The majority of the Member States have not yet developed a regulatory approach with respect to the orphan works issue. The potential cross-border nature of this issue seems to require a harmonised approach.”

Orphan works are works which are still in copyright but whose owners cannot be identified or located. The use and enjoyment of them is not only of interest to libraries or archives, but also to educational institutions, as facilitating their use would promote the availability of works for use as resources or content in education in its various forms, and is of particular interest with regard to the exploitation of the opportunities currently permitted by digital distance education, by using digitized works as input or support resources.

Nonetheless, educational institutions may not act in any way without first having clear legal conditions for the proper management or use of this type of works. Unless this is the case, situations may occur which involve infringement of copyright or related rights in which their liability may be compromised. Once again, educational institutions need to identify clearly the preventive measures that they have to adopt diligently and reasonably in respect of this type of works in order to be in a position to use this type of works without incurring legal liability. In other words, this is an area in which educational institutions are also calling for legal certainty.

3.12 Technological measures that restrict use for educational purposes

Case study

Conflicts between technological measures and consumer rights (European Union)

The Association Consommation Logement Cadre de Vie, better known as CLCV, instituted a lawsuit against EMI Music France because the anti-copying device on the CD by the French singer LIANE FOLY made the CD unreadable in certain equipment such as that used in motor vehicles. In accordance with the Tribunal de Grande Instance de Nanterre, although EMI had informed the public about the existence of anti-piracy system, it should also have indicated that such a device could prevent the CD from being played in the sound equipment fitted in cars.

The judge in the case, in a verdict given on June 24, 2003, found that the presence of the anti-piracy system constituted a restriction of the right of use by consumers and that there was also deceptive advertising on the CD label, where the presence of the mechanism was stated in part, leading to confusion among consumers about the product's features and methods of use. For this reason, ordered EMI to include on the CD a statement informing consumers about any limitations to its use.

In the case UFC Que Choisir v. EMI Music France, where a technological measure that prevented the copying of a CD was also studied, the same court found that although the measure was announced on the disc, it restricted its use and was a "hidden defect" in accordance with the provisions of the Article 1641 of the French Civil Code. The defendant was therefore ordered to return the price paid for the product to the plaintiff. However, the judge rejected the plaintiff's request, which aimed at prohibiting EMI France from using technological measures on compact discs.

The Belgian consumer protection association Test-Achats said that it plans to sue four large music companies, Sony, EMI, BMG and Universal Music, as it has received a large number of complaints from different consumers about the restrictions imposed by technological measures on private copying and the reading of certain CDs.

In Spain, the Association of Internet Users (Asociación de Internautas), which deals with the protection of internet surfers, filed a complaint with the National Consumer Institute against Warner Music Benelux and singer ALEJANDRO SANZ as the system included on a CD by the singer prevented private copying. There were serious doubts about the chances of success of the complaint, given that the National Consumer Institute can only comment on products that pose a high risk to consumers. However, this type of conflict can provide users with new arguments in the fight to use the works based on the rules governing consumer rights, which, for the authors, would imply a new challenge to a tool – technical protection measures – that is seen as essential to the protection of their works.

Case study

Technological measures that restrict the dissemination of information of academic or scientific interest /USA)

The following are some cases in which the legal protection of technological measures has meant a restriction on the dissemination of knowledge in subject areas in which the academic and scientific community could have a legitimate interest:

(a) In one version of the Linux kernel, an explicit statement was included in its list of “changes” to the effect that several security problems had been resolved, but no details were provided for fear of violating the DMCA.

(a) A Russian citizen by the name of Dimitri Sklyarov was awaiting trial in the United States as the co-author of a program used to decrypt PDF documents. The program, which had been developed and distributed by a Russian company, was being sold from Russia. Dimitri was accused of violating the DMCA, although he is a foreign citizen and the acts of which he was accused had taken place outside the United States. Dimitri was arrested by the FBI following a security conference in the United States, to which he had travelled from his native country. Sklyarov’s work is perfectly legal in Russia and in most Western countries. Dmitri was subsequently released on bail and was forbidden to leave the United States, although he is a Russian national and lives in Russia.

(c) Professor Edward Felten of Princeton University decided not to publish the security flaws that had been discovered in the SDMI challenge (Secure Digital Music Initiative), which proved that it was possible to eliminate “watermarks” embedded in a song, thus destroying the copy system tested by the SDMI. Although the objective of the challenge was to demonstrate whether the proposed systems were safe, which Felten disproved, to publish his results would have been illegal.

(c) Niels Ferguson, a Dutch cryptographer of recognized international repute, claimed to have discovered a vulnerability in the Intel HDCP protection scheme. HDCP is a cipher system for the DVI bus, which connects televisions, cameras, DVD recorders and the like. According to Ferguson, the master key system can be obtained in less than two weeks. Once this key has been obtained, content can be copied or created without restriction, new devices created, etc. Although Ferguson did not publish the details, the information came to light soon after through Scott A. Crosby of Carnegie Mellon University, who publicly announced the vulnerability of the HDCP system security.

The context for the above cases regarding the United States is the application of the Digital Millennium Copyright Act, which has been taken as a reference for the amendments that some countries in Central America and the Dominican Republic have made to their copyright laws in the light of their free trade agreements.

As mentioned in Chapter 2, although there are limitations or exceptions to the protection of technological measures in the countries in the region, the interface between that protection and the exercise of the limitations or exceptions has not been regulated in any of those countries, as is the case for the exceptions favoring the right to education.

However, the disadvantages of not properly regulating this interface can also be illustrated in specific cases. In the following, we would like to illustrate some of the practical difficulties that may arise from the fact that this matter has not been appropriately regulated:

(i) There are internet information services, which can be accessed by using an access code. This information may be of interest for the purposes of the illustrating of teaching at educational institutions, although the access code is given only to those who agree to and pay for the service, and in any case restricts the possibility of sharing information with third parties.

If a technological measures controls access to the works by means of a code, login or password, by virtue of the limitations or exceptions currently stipulated in the countries whose laws already deal with the issue, the technological measure could only be circumvented or overcome so that the educational institution can make a decision about whether to purchase the item or, as suggested by the example, about whether to agree to and pay for the service. Any country which wishes something else would have to go much further regarding provisions for the limitations or exceptions to technological measures than has so far been established by the laws.

Those who appeal against the legal impossibility of circumventing or overcoming such technological measures in order to satisfy, by this circumvention, their expectations regarding access to education and the dissemination of knowledge, argue that the exclusive rights explicitly recognized by copyright law do not include a right to authorize or prohibit “access” to the work, as if exclusive powers in respect of “reproduction”, “public communication”, “distribution”, “transformation”, etc. of the work were expressly stipulated, and, therefore, such technological measures have no basis in the substantive rule.

On the other hand, those who consider that the use of such technological measures to restrict unauthorized access is a legitimate act, point out that proof of this is that laws and international treaties require legal protection to be provided against the act of avoiding or overcoming them or of manufacturing or selling devices for such purposes. They argue that although the law does not stipulate a [right of access”, this kind of technological protection constitutes a means of observing the moral and economic rights that guarantee its effectiveness in the digital environment, especially in the online digital environment, where access control has a decisive economic importance and significance within the acts of commercial exploitation, to the point where part of the normal exploitation of the work is to conclude a contract and to pay to use, through access, the work.

(ii) A teacher acquires an electronic book and would like to distribute and share it, or at least an excerpt from it, with his students. However, there is a technological measure which prevents that.

In that case, where a technological measure prevents a teacher from sharing a short extract of the electronic book that he has bought with his students, there is a contradiction with what happens when the same professor purchases a book in paper form which he thinks might be interesting for his class, in which case he may make use of a limitation or exception stipulated in the law in order to make a reprographic reproduction of this short excerpt and give it to his students to read, study, analyze or discuss. This situation arises because the interface between the protection of technological measures and limitations and exceptions on copyright has not

been regulated in the countries in the region, such situation being contrary to the balance of rights and interests in the digital environment.

(iii) In virtual courses, documents or texts that are made available to students as reading material may be subject to a printing restriction (e.g. a document configured with the Acrobat Reader program in pdf format). The students prefer to read the printed document, as reading them on screen tends to cause eyestrain. Those in charge of the course say that they cannot provide a printable version because of restrictions under copyright law (e.g. a publisher has the exclusive right to reproduce a work by printing).

None of the limitations or exceptions to technological measures currently provided for in the countries in the region helps students who do not want to read material on a computer screen but on paper and find themselves facing a technological constraint that prevents them from obtaining a printed copy of the document. The possibility of avoiding or overcoming that restriction seems to be reserved for those seeking knowledge in higher bodies, in areas such as research into encryption, encoding or decoding information, for example.

This may give rise in this regard to questions such as the following:

Is there a balance of rights and interest in the countries that have provided for legal protection of technological measures but have not established any limitation or exception in that respect in their laws?

Is there a balance or rights and interests in the countries in the region that already provide for limitations or exceptions regarding technological measures but that have not regulated the interface between them and the limitations or exceptions to copyright?

3.13 The price of cultural goods as an obstacle to access to quality education

Case study.

The cost of educational materials as a factor adversely affecting the quality of education⁵⁸
(Puerto Rico)

In a study on the quality of education in Puerto Rico, it was found that high school students had no mastery of Spanish, English, science and mathematics. According to recent tests, they obtained an average grade of approximately 50%.

Analysts consider that at the root of this problem there is a combination of reasons, one of them being financial. Despite federal benefits granted to individuals, around 50% of the Puerto Rican population lives below the official poverty level. Unemployment has increased considerably for several reasons and employment in Puerto Rico now consists primarily of part-time jobs, employees being forced to do two or three jobs to survive. Given that scenario, the environment in Puerto Rico is not conducive to education.

⁵⁸ ROSARIO BARBOSA, Pedro M. "Los derechos de autor y el sistema educativo" (Copyright and the educational system). Published on <http://pr.indymedia.org/news/2004/10/5117.php>.

The Department of Education in Puerto Rico has a far bigger budget (for state and federal funds) than many countries in the world. However, it has not succeeded in providing enough books and computers for students. In many cases, books cannot be bought because their prices are too high. In accordance with current copyright laws, in order to alleviate this situation, teachers are also entitled to provide copies of the books for the students, who, in the end, would pay far less for them. Under such circumstances, school teachers or university professors need to find some way for students to obtain the material they need. If a parent has to buy six books at an average cost of \$40 to \$50 each, that costs him \$240 to \$300.

The analysts ask how many parents with children at state schools can pay that kind of sum. A tiny minority. Paradoxically, sometimes not even scholarships cover all expenses.

Case study

International comparison of educational book prices⁵⁹ (Peru)

Author and title (soles)	Price in official bookshops (soles) Price of photocopy (soles)	Price of pirate edition
Bryce Echenique: Tarzan's Tonsillitis	75.00	15.00 10.00
Nason: Cellular Biology	79.00 23.00	14.00
Goleman: Artificial Intelligence	35.00	10.00 7.00
Koontz: Administration	75.00 20.00	15.00
Chiavenato: Administration	50.00 15.00	10.00

Case study

International comparison of book prices⁶⁰ (Peru)

Author and title	Price in the USA (in dollars)	Price in Peru (in soles)	% of the current minimum wage in the USA	% of the current minimum wage in PERU
Red Book Atlas of Pediatric Infectious Diseases				
Meter Georges	96.70	319.11	11.7%	77.80%
Infectious Diseases				
Mandell, Douglas & Bennett		172.00	567.60	20.80% 138%
Maingot's Abdominal Operations				
Michael J. Zinder	305.95	1010.00	37.01%	246.34%

⁵⁹ Crisólogo Cáceres "Asuntos que atañen a los consumidores en Perú" (Issues that affect consumers in Peru). Paper given at the Regional Meeting on Access to Knowledge. Santiago de Chile, March 30, 2009. Available at <http://a2knetwork.org/es/am%C3%A9rica-latina-reuni%C3%B3n-regional-sobre-acceso-al-conocimiento>

The price of books and other cultural goods that are likely to be used as educational resources within the context of the activities of educational institutions is one of the main factors hindering access to education and knowledge.

The cost of these educational materials, and the economic impact of their acquisition on the resources of students and their families, is a source of problems which have led to a call in several countries in the region for new definitions of the system of limitations and exceptions to copyright and related rights as well as for an extension of the concept of the public domain, the aim being to achieve free and open access to works that are relevant to access to education and knowledge.

On the other hand, the authors, rightholders and cultural industry that provide this kind of work as educational material may be deprived of their source of income; nor can they ignore their legitimate right to be paid for their creative work. Ultimately, the main sufferer would be education and culture as the artistic and literary production that supports its development and that, as an advantage of diversity, guarantees the survival of a national cultural identity in the face of foreign influence would be halted.

For that reason, although it is not a topic directly connected with the system of limitations and exceptions, we are addressing this issue because of its enormous impact on the balance and contrast of rights and interests relating to copyright, the right to education and the pursuit of knowledge

With regard to this topic, it is appropriate to ask the following questions:

Should the price of books and cultural goods needed for education be determined solely by the market, by supply and demand, or should it somehow be regulated?

What solution can be found for those sections of the population that are not able to afford the purchase price of cultural goods?

What role should the State play in guaranteeing access to the cultural goods needed for education and research?

What role can be played by other sections of the population, including the authors and rightholders themselves, to contribute to the objective of making those cultural goods accessible to disadvantaged sections of the population?

Can this set of problems be said to be attributable entirely to copyright protection or are there other factors that boost the purchase price of cultural goods?

[Continuación de la nota de la página anterior]

⁶⁰ Crisólogo Cáceres “Asuntos que atañen a los consumidores en Perú” (Issues that affect consumers in Peru). Paper given at the Regional Meeting on Access to Knowledge. Santiago de Chile, March 30, 2009. Available at <http://a2knetwork.org/es/am%C3%A9rica-latina-reuni%C3%B3n-regional-sobre-acceso-al-conocimiento>

3.14 Difficulties in obtaining copies and translation of scientific journals

Case study

Why are few scientific publications produced in the countries in the region? The case of Ecuador⁶¹

The difficulty in accessing international scientific publications is related to the low level of intellectual output at the Latin American universities.

In the past four decades, each of the 73 universities or polytechnics in Ecuador produced, on average, only four publications every five years. This is shown in a study published on January 29 on the Ecuadorinmediato.com website and prepared by the Ecuadorian researcher Juan Carlos Idrovo, who works at Vanderbilt University in the United States.

The study shows that from 1965 to 2009, the Ecuadorian educational institutions published 2,912 scientific articles, books or papers at the international level. This number is low compared with Chile, which published 60,570, Venezuela with 28,580 studies, Colombia with 15,574 or Peru with 7,085 studies in the same period.

For statistical evaluation, Idrovo used the *Web of Science* website, a page that is attached to its database of internationally printed books, technical reports on scientific talks and international magazines.

According to this study, the Universidad San Francisco de Quito (USFQ) – the most recently established university in the country – is in the lead with 307 publications. It is followed by the Pontifical Catholic University of Ecuador (PUCE) with 187 articles and the National Polytechnic School (EPN) with 177. The oldest university, the Central University of Ecuador, was in fourth place with 142.

The fields with the largest number of publications included physics, ecology, health, plant science and geoscience.

The study also shows that from 2000 onwards, there was a marked increase in publication. Until then, there were no more than 150 articles a year, but in 2008 there were twice as many.

With regard to his conclusions, Idrovo pointed out to SciDev.Net that although the contribution made by Ecuador is low in quantity, the country has cutting-edge scientific research that stands up to international comparison.

For Marco Calahorrano, Subdean at the EPN, the problem of the low number of publications with innovative content is attributable to three factors: the shortage or total lack of a good research tradition, the terrible shortage of laboratories and libraries, and the poor financial recognition of production.

Likewise, Patrizia Di Patre, a lecturer at PUCE, stated that, given the high demands of elite international scientific journals, Ecuadorian researchers have few opportunities to be published there.

Both Calahorrano and Di Patre agree that the universities should join together to access virtual libraries and to obtain real State funding.

⁶¹ Review report published at <http://www.scidev.net/es/science-communication/science-publishing/news/ecuador-produce-pocas-publicaciones-cient-ficas.html>

The production and scientific productivity of a research project materializes or see its results in the publication of articles in scientific journals, presentations at scientific conferences or, in the case of research and development in various technical fields, in obtaining patents.

“Scientific publication” tends to mean all scientific journals, with the support of editorial boards that, by means of a process called peer review or scientific review, “guarantee” minimum quality standards for what they publish. The field of scientific publishing brings scientific research into contact with copyright law, giving rise to the following issues:

(i) The research project may lead to an article for publication in a scientific journal or a paper to be presented at a scientific congress, both being akin to literary works in that publication, reproduction, translation, etc. by others is subject to authorization or a license issued by the copyright holder;

(ii) With regard to patents, the text describing the invention and the sketches showing it, which are among the documents that the applicant submits to the patent office to register a patent, may be considered copyright-protected works. However, the national laws may expressly exclude this copyright protection and refer to the relevant provisions of patent law,⁶² and its disclosure or access by third parties may become subject to the law of patents or industrial property rather than being a matter for the copyright holder.⁶³

(ii) Within the research group, issues may arise concerning the authorship and ownership of rights to articles, papers and other results obtained through the research project. The author of the article or the written text of the paper, who, from the point of view of copyright, is the original owner of moral and economic rights, may not necessarily be the same person who, from the scientific perspective, must appear as in charge of the research, as its director, who is the person recognized by the scientific community as being entitled to present the article or paper as his own, and to determine or decide on its publication, reproduction, translation, etc.

(iii) The right of quotation is of particular relevance with regard to scientific articles and publications. To the extent that the article should reflect the state of the art or refer to the level of knowledge acquired in a given subject area, reference must inevitably be made to other articles and publications and transcriptions must be made for the purposes of critical analysis. However, transcripts of the same article may thus easily become so many, so frequent or so extensive that they end up being a virtual reproduction of the cited work, and since the reproduction has been made without the copyright holder’s authorization, this constitutes an infringement of copyright.

(iv) Access to the scientific journal or publication is a key factor for accessing knowledge and the possibility of developing research in the area. Copyright may be one of the various

⁶² One example of this is Article 6 of the Colombian Law on Copyright, Law No. 23 of 1982, which provides that “Inventions or scientific discoveries susceptible of practical application and exploitation in industry, and the writings describing them, shall be the subject of temporary rights only, pursuant to Article 120, paragraph 18, of the Constitution”, referring (in the 1886 Constitution in force when the Law on Copyright was issued) to the regulations for patents and intellectual property.

⁶³ For example, Article 40 of Decision No. 486 of the Andean Community of Nations, Common Provisions on Industrial Property, stipulates that when 18 months have elapsed, the content of the patent application, including the written description and the sketches showing the file shall be declared public and may be inspected and freely reproduced by third parties and the information enters the state of the art.

factors that affect the cost of acquisition or subscription, along with the cost of raw materials, layout, printing, warehousing, distribution, etc. for the publisher, all of which are passed on to the buyer or subscriber. Nonetheless, those requiring free access to the content of these publications seem to base their arguments solely on copyright protection, claiming that it is ruled out at least in cases where public funds are used to finance the research.

As mentioned in Chapter 2, the limitations and exceptions that exist in the region, apart from in Mexico, which refers to research institutions by name, do not specify what kind of person may carry out the acts and uses of the works or productions that they cover. This means that anyone conducting research or seeking knowledge may apply the limitation or exception, regardless of whether the party concerned is a researcher or a group of researchers academically recognized as such, or persons carrying out personal study for the purpose of increasing their knowledge of a subject, or institutions devoted wholly or in part to research.

From the academic perspective, a researcher in a scientific field must have a doctorate in that field. A doctorate is obtained by following a series of steps⁶⁴:

1. Obtaining a degree in the relevant field;
2. Then, or initially, obtaining a master's degree in that field of academic knowledge;
3. Taking doctorate courses and acquiring research ability;
4. Preparing a thesis, defending it and being awarded a doctorate in that field of knowledge.

The person is thus well equipped to carry out research in that field of knowledge and to present the results of his own research at conferences and in prestigious journals in the field.

Nonetheless, as already stated, in countries where it is not determined who can use the works under the limitation or exception for research purposes, nothing prevents people from using the works for the purposes of personal study.

Scientific journals and, in particular, each of the articles published in them, are copyright-protected works. Consequently, their reproduction, translation and distribution, among other things, are acts that require the express prior authorization of the relevant rightholders.

With the exception of Mexican law, which authorizes private copying once and in a single copy for the benefit of research institutions, the laws in the region make no other provision for a similar limitation or exception for the benefit of such institutions, as the moral or legal persons that they are.

Moreover, with regard to natural persons, private copies of these articles or scientific journals may be made, provided that, for example, they have made the copies themselves and that only one copy has been made from a legally reproduced work, without gainful intent and without the right to pass the copy on to third parties.

There is no limitation or exception regarding the translation or distribution of these works, so that the rightholder, in the exercise of his exclusive rights, must always authorize or prohibit such acts.

⁶⁴ <http://www.sofiaoriginals.com/tesis2elinvestigador.htm>

3.15 The issue of accessing the results of research conducted with public resources

Case study

Access to the results of research financed with public funds (Bolivia)

Timothy J. Killeen, a member of Conservation International and of the Noel Kempff Mercado Museum of Natural History in Santa Cruz (Bolivia), describes the following situation in his article entitled “Data in the Public Domain”⁶⁵:

“Recently, when looking for an associate for a research project, I approached someone who is affiliated to a Bolivian institution. That institution is home to some of the most experienced scientists in Bolivia and is the product of nearly two decades of investment in the country’s technical capabilities. I wanted to take advantage of their expertise to ensure that the project was properly implemented as well as to have the support of that centre as the project grew and developed, which, in my humble opinion, was an excellent opportunity.

“To my regret, this person declined my offer, which is the prerogative of any scientist who has to establish his priorities for his research program. However, the main reason that was given for declining that opportunity was the need to protect the integrity of the institution’s database and the desire not to share its data with third parties. In fact, the proposed collaboration did not depend on access to a database – although it would have been beneficial – and I am sure that access to the database was used as an excuse not to collaborate with the research group, which was seen as competition. This is a reaction that many of us have experienced at some point in our careers; it is not particularly pleasant, but is part of our reality and is in many cases utterly legitimate.

“However, the argument that they were not prepared to allow access to their information reveals an unhealthy attitude that many scientists have to data, whether they are raw, processed, systematized, analyzed or published data.

“Knowledge is power. Despite this, what do we need to do correctly – as professionals or institutions – to restrict or provide access to information that can benefit science and, through science, society?

“We need to ask ourselves a simple question: are we funding the work that has generated the data or was it financed by the State or the institution that pays our salaries (for professionals) or that subsidizes our studies (in the case of students)?

“Most scientific institutions operate on the basis of funds provided by the State or, more commonly in Bolivia, by international development and cooperation agencies from other countries or multilateral development entities. In other words, the funds are allocated by someone who is paying tax somewhere on the planet; these funds are expressly earmarked for the improvement of common property, usually with the express purpose of preserving the

⁶⁵ The published article may be viewed on

<http://docs.google.com/gview?a=v&q=cache:QE5DLsWzVGAJ:editorenjefe.ecologiabolivia.googlepages.com/Editorial43-1.pdf+investigaciones+financiadas+por+el+estado&hl=es&gl=co>

environment and improving human well-being.

“Or maybe our support comes from a private foundation, although such foundations typically exist as a way to avoid paying taxes (e.g. foundations), so that their support also means some kind of public funding (although clearly neoliberal in its implementation).

“Moreover, the fundamentals of their mission are clearly geared towards advancing the public good. Similar arguments can be proposed for funding from private corporations when the funds are provided as a donation – which can often be deducted from the tax to be paid by the State – so they are probably paid by citizens of the world.

“How can we justify not sharing or hoarding data (because that is what it is) when our funding is seen from this perspective?

The funding of scientific research with public money is a mechanism used by States to implement their public policies on science and technology. Indeed, scientific research is usually carried out within research groups operating at universities or research institutes that are public, private or independent. Generally, these groups may apply as such to the competent state institutions to receive funding, resources or incentives from public money and to participate in its meetings and other programs that promote the development of science and technology in each country.

Public interest is therefore represented in the advancement of knowledge, which is associated with access to works as sources of information. However, it is still to be discussed whether copyright can be seen as an obstacle to the dissemination of knowledge, so that limitations and exceptions as discussed have to be established if rights protection is specifically to promote the creation and dissemination of works that are vehicles of knowledge and information. The discussions on this issue will be dealt with in the following chapter.

It is therefore appropriate to ask how the pursuit of knowledge and inventions in the field of technology can be promoted most effectively – by enabling free and open public access to research results or by using intellectual property rights to enable researchers and research centers to receive financial compensation?

In this regard, UNESCO’s “Declaration on Science and the Use of Scientific Knowledge” referred to the need to protect intellectual property in order to promote scientific research as follows:⁶⁶

“Intellectual property rights need to be appropriately protected on a global basis, and access to data and information is essential for undertaking scientific work and for translating the results of scientific research into tangible benefits for society. Measures should be taken to enhance those relationships between the protection of intellectual property rights and the dissemination of scientific knowledge that are mutually supportive. There is a need to consider the scope, extent and application of intellectual property rights in relation to the equitable production, distribution and use

⁶⁶ UNESCO, Declaration on Science and the Use of Scientific Knowledge. Adopted by the World Conference on Science, July 1, 1999. Available at http://www.unesco.org/science/wcs/eng/declaration_e.htm

of knowledge. There is also a need to further develop appropriate national legal frameworks to accommodate the specific requirements of developing countries and traditional knowledge and its sources and products, to ensure their recognition and adequate protection on the basis of the informed consent of the customary or traditional owners of this knowledge.”

3.16 Difficulties with accessing scientific information in patent applications

Case study

Debate about whether the information accompanying patent applications is sufficient (Venezuela)

Within the framework of a bill reforming the law on patents in Venezuela, the National Assembly and various sections of the civil society in Venezuela are debating whether patents that had been granted by the Autonomous Service of Intellectual Property (SAPI) must be revoked or not, arguing, among other reasons, that the descriptive reports were poorly presented, poorly translated or accompanied by insufficient information, or that the product formulae do not have the status of inventions.

Those calling for the patent system to be reviewed are asking for the law to guarantee that a patent document contains sufficient information to enable a person having ordinary skill in the relevant art to carry out the invention without undue or excessive experimentation. They argue that the patent applicant should be required to disclose the best known method of carrying out the invention and also to provide the basis for assessing whether claims are in keeping with the description and comply with the principles of sufficient disclosure and fair basis.

In accordance with the rules established by the World Intellectual Property Organization (WIPO), applicants are obliged to disclose all information in their possession, but they (primarily transnational companies) frequently fail to disclose the entire invention and that is why the legislation and its implementation by the patent offices are what ultimately determine what information is contained in a patent document and will be made available to the public.

It has also been proposed that the countries comprising the Bolivarian Alliance for the Americas (ALBA) create a portal for the disclosure of patent information compiled by their industrial property offices, whose purpose is to facilitate public access to technological information. It has been suggested that the information on various technology sectors be stored in databases managed jointly and in accordance with ALBA's own classification criteria (ALBA classification), giving easy access to those topics of strategic, political, economic and social development interest to the communities. This proposal should be developed in accordance with the guiding principles of ALBA, which are based on solidarity and complementarity, considering the technological information contained in patents not as a commodity but as social goods.⁶⁷

The expert Ricardo Enrique Antequera said that the bill appears to depart from the patent system adopted by the Government of Cuba, where inventions and knowledge are protected

⁶⁷ Fabian Pena “En el ALBA: La información tecnológica es un bien social”. Available at <http://www.aporrea.org/tecno/a39253.html>.

as much as or more than in any other country characterized by its cutting-edge technology. “One of the measures taken by the Cuban Government to permit the arrival of technology following the collapse of the Soviet Union, the only country that exported it, was to strengthen the patent system. The outcome was that many of the applicants who had never disclosed their information in Cuba submitted their inventions for patenting. Cubans disclosed such inventions, enabling them to be used for research and educational purposes authorized by international law and showing the world technological progress thanks to that information.”⁶⁸

The expert recalls that Fidel Castro himself promoted patent protection “because of his great interest in the latest inventions. His aim is to have access to these discoveries and to have far more information about them so that new Cuban formulae and patents can be established”.

He also explained that “previously, Cubans were given an inventor’s certificate which was nothing more than recognition or a certain academic grade, but now they obtain rights to their patents. However, most inventions are developed by employees, and in Cuba there is only one employer, the State, so that ultimately the government always remains the holder of patent rights. Nonetheless, for foreign companies it is different, because they are given ownership of the invention,” he pointed out.

The texts of patent applications or documents of the state-of-the-art search made by patent offices on the basis of such applications are sought after by researchers and institutions interested in consulting, reproducing, translating and/or distributing them. In that case, the text describing the invention and the sketches showing it, which are among the documents that the applicant submits to the patent office to register a patent, may be considered copyright-protected works. Nonetheless, the national laws may explicitly overrule this copyright protection and refer to the provisions of patent law with regard to those works. One example of this is Article 6 of the Colombian Law on Copyright, Law No. 23 of 1982, which provides that “Inventions or scientific discoveries susceptible of practical application and exploitation in industry, and the writings describing them, shall be the subject of temporary rights only, pursuant to Article 120, paragraph 18, of the Constitution”, referring (in the 1886 Constitution in force when the Law on Copyright was issued) to the regulations for patents and intellectual property.

Disclosure or access by third parties to the texts and diagrams that describe the invention or analyze the state of the art, are material that is governed by patent law or industrial property law, rather than a matter for the copyright holder. For example, Article 40 of Decision No. 486 of the Andean Community of Nations, Common Provisions on Industrial Property, stipulates that when 18 months have elapsed, the content of the patent application, including the written description and the sketches showing the file shall be declared public and may be inspected and freely reproduced by third parties and the information enters the state of the art.

In this regard it is appropriate to ask:

[Continuación de la nota de la página anterior]

⁶⁸ <http://www.producto.com.ve/articulo.php?art=318>

Regardless of whether or not such writings or graphics are protected by copyright, or whether it is the patent law which deals with regulating access to or consultation of them by third parties, is the public interest represented by the dissemination of knowledge and progress of science and technology duly satisfied in this area?

3.17 Difficulties encountered by university students in disseminating degree theses or monographs

Case study

Why do degree theses need to be published electronically? The case of the University of the Andes, Mérida (Venezuela)

The University of the Andes in Mérida (Venezuela) has a large store of degree and promotional work, as well as theses and dissertations, deriving from academic production, research and extension studies. The need to store, disseminate, preserve and share this intellectual legacy has been a fundamental aim in compliance with the university's mission and goals

The production and dissemination of theses and dissertations in electronic form has turned into a global phenomenon that has encouraged the creation of knowledge networks at local, national and international levels; in Venezuela, for example, the lead is taken by the National Association of Directors of Libraries, Networks and Information Services in the Academic, University and Research Sector (ANABISAI).

In 1998 the University of the Andes proposed setting up the Digital Library of Electronic Theses, which would ensure high levels of interaction between internal and external authors, by means of the consultation and publication of their scientific and intellectual production; it is a major project being carried out in the University's library service, SERBIULA. Carrying out this project involves dealing with the following fields of action:

1. Studying existing computer platforms;
2. Creating a national metadata model and a publication model for local, national and international integration;
3. Managing financial resources for human resources training;
4. Advising on and evaluating the implementation and execution of the project at each of the participating institutions;
5. Studying and analyzing the Law on Copyright.

Initiatives such as the aforementioned have enabled the University of the Andes to become the leading university for scientific production and the third largest in Venezuela.

Recently, the University of the Andes, by resolution issued by the University Council, invoked the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, ensuring the free publication of its entire scientific and intellectual production.

Institutions of higher education often have a voluminous and important bibliographic collection of degree theses or monographs, as researchers are interested in accessing any information contained therein and in being able to reproduce at least brief excerpts from documents of interest.

There are cases in which, as stipulated by such educational institutions, these documents may only be consulted but may not be reproduced by other students or by public users of the libraries or documentation centers.

The restriction on copying is an attempt to impede or hinder plagiarism or academic fraud. However, its free dissemination benefits access to knowledge. It can be argued that public interest is represented through access to knowledge.

Copying a monograph or degree thesis is generally a reproduction of a literary work, while their digitization and publication on the internet involves reproducing such works and making them available, all of which is subject to the express prior authorization of the rightholder concerned.

The author's economic rights, beginning in the student's mind in his capacity as author and original owner, may possibly be transferred to educational institutions or others, these often being public or private entities that finance or sponsor these theses or research and that have an agreement with the institution in that respect.

Institutions of higher education may also be interested in having the theses or monographs published electronically, although there are various kinds of restrictions, one of which may be the failure to obtain express authorization granted by the authors concerned who once produced such works and delivered them to the institution.

On that subject, questions such as the following could be asked:

Should a limitation or exception be established to facilitate access or the electronic publication of that kind of monograph or degree thesis?

Apart from the system of limitation or exceptions, how could the electronic publication of degree theses and monographs be promoted so as to further the dissemination of knowledge without affecting the balance of rights and interests?

3.18 Difficulties in accessing scientific databases

Case study

Limited internet access for scientists in the countries in the region. The case of Costa Rica.⁶⁹
The internet is an untapped resource in Costa Rica as Costa Rican scientists rarely use the

⁶⁹ <http://www.scidev.net/es/new-technologies/icts/news/costa-rica-escaso-acceso-de-cient-ficos-a-la-inter.html>

tools that it provides. This can be seen in the report entitled “Towards the information and knowledge society in Costa Rica”, submitted on April 23 by the Information and Knowledge Society project at the University of Costa Rica.

The report devotes one chapter to science in Costa Rica. The concept considers the use of advanced internet resources and *Web 2.0* to establish communication networks between researchers and to produce and manage data and information for scientific purposes.

The authors point out that the state of e-science in Costa Rica “in the early stages”. They are also critical of the lack of national policies to extend the implementation of information technology and to incorporate advanced internet usage.

“Neither the Ministry of Science and Technology nor the National Council for Scientific and Technological Research has a definition in this respect; no activity has ever been carried out to promote e-science,” Saray Cordoba, who was in charge of this chapter of the report, told SciDev.Net.

Following a survey at 16 research centers and universities in Costa Rica, the researchers noted that 56% have attempted to access e-science.

This includes training for researchers, the purchase of equipment and software, data-sharing agreements with universities or research centers, the development of archives and the use of video-conferencing.

Few centers have made use of simulation technologies, virtual laboratories or data visualization to support their research.

Their websites also show that the centers are not making use of available resources. “Their websites show very limited use of online services and there are very few downloadable electronic publications,” she said.

The study notes that some sites do not even include a list of research projects, study areas, research results or databases generated from them.

The report does highlight some positive aspects, such as online databases shared by the libraries of public universities and the existence of almost one hundred Costa Rican scientific journals in electronic format.

To make progress in this area, Saray Córdoba notes that a symposium is planned for September, the aim being for the public universities to meet “in order to find out what we are doing and where we want to go”.

Access to scientific databases is a resource that is fundamental to research work. Many of them can be accessed freely and are available on the internet but many others require the universities or research centers to obtain a license.

(i) Databases that can be accessed free of charge

The following are referred to on the internet portal www.colombiaaprende.edu.co as examples of databases that can be accessed free of charge and that are of interest for research purposes:

- BULB (<http://bubl.ac.uk/>)

Access to databases containing data on various areas of knowledge (dictionaries, books, essays and various resources)

- CINDOC (<http://bddoc.csic.es:8080/index.jsp>)

The Center for Scientific Information and Documentation (CINDOC) analyzes, compiles and disseminates scientific information in all areas of knowledge.

- Databases - AGRIS

(http://www.fao.org/agris/Centre.asp?Menu_1ID=DB&Menu_2ID=DB1&Language=ES&Content=/agris/DB/Current/simple.htm?Language=ES)

Bibliographic database on research in agricultural sciences and technology at the international level.

- Education Resources Information Center - ERIC

(http://www.eric.ed.gov/ERICWebPortal/Home.portal?_nfpb=true&_pageLabel=Thesaurus&_nfls=false)

This is a bibliographical database specializing in education which contains more than 107,000 full-text documents. ERIC is part of the Institute of Education Sciences (IES) in the United States.

- Google Book Search

(<http://books.google.com.co/books?hl=es>)

Online book search where complete works and excerpts from works can be found.

- HighWire

(<http://highwire.stanford.edu/lists/freeart.dtl>)

One of the most extensive scientific databases on the web with more than 15 million full-text articles from 860 journals for use free of charge.

- National Ag Safety Database - NASD (<http://www.cdc.gov/>)

Database intended for the agricultural community on health and safety at work.

- Pub Med (<http://www.ncbi.nlm.nih.gov/sites/entrez?db=pubmed>)

Supported by Medline, a large database specializing in medicine and health sciences. Has collected some 15 million articles since 1950.

(ii) Commercial databases

The following are some examples of commercial scientific databases:

- PROQUEST database

(<http://www.etchwebsite.com/colombia/consorciocolombia/index-1.html>)

This is an electronic collection of millions of articles that were originally published in magazines, journals and newspapers. ProQuest provides thousands of journal and newspaper publications. The retrospective collections date back to previous centuries. Choose from dozens of databases and from modular packages on the arts and humanities, business, science, social studies, education, health, general reference and more. Formats include abstracts and indexes, full text, images and multimedia.

Through this link, users may access the set of 26 commercial databases that the University has subscribed to with ProQuest. The online databases represent a store of approximately 13,000 digital journals, around half of which are full text and full image.

The fields of knowledge covered are Science and Health, Administration, Business, Marketing, Economics, Banking, Engineering, Education, Social Sciences and Humanities, Pure Science, Technology, Agricultural Science, Biology, Veterinary Science and Research in general.

Although virtually 100% of the journals in this database are in English, the subscription to ProQuest has an interface in Spanish which facilitates the use of different strategies to seek and obtain information. The interface also includes a translation service for texts in English and Portuguese.

- E-book database

(<http://www.etchwebsite.com/colombia/consorciocolombia/index-1.html>)

E-book and the ebrary platform claim to be “the future of scientific research”. This system places the main academic contents, teaching notes, research, text, etc. at the service of every library in the world, providing access through DRM (digital rights management). It contains learning tools that were previously unseen.

Through the ebrary platform, E-book provides an efficient and cost-effective way for libraries and other organizations to provide their users with online access to a wealth of high-value content and research capabilities through a unique technology platform.

E-book combines versatile software with high-value copyright-protected content from more than 100 leading publishers in the market, including The McGraw-Hill Companies, Random House, Penguin Classics, John Wiley & Sons, Cambridge University Press, Taylor & Francis, Palgrave and many others.

This platform allows libraries to offer their customers multi-user access to valuable books and current documents in addition to the advanced research tools that the service provides for direct use on their computers.

E-book for libraries is also connected to digital resources and working methods which every library employs, specifically through the use of MARC records.

- INFOTRAC

(<http://www.etchwebsite.com/colombia/consorciocolombia/index-1.html>)

This is a virtual library with full academic, technical and scientific texts. Full-text, full-image journals in Spanish.

With regard to access to scientific databases, it is appropriate to ask questions such as the following:

How can a country in the region encourage its researchers and research centers to access commercial scientific databases?

How can a country in the region promote access to and the use of internet resources for researchers and research centers (e-science)?

CHAPTER 4 CASE STUDIES RELATING TO SOLUTIONS

The need to establish a balance of rights and interests surrounding the use of works and performances in the framework of education and research is a matter that concerns the States and their public policies in the area of culture, education, science and technology.

A fundamental obligation of the State is to provide a legal framework that responds to the current specific needs of each country as well as to the impact which digital technology has had on economic, social and cultural relations. In their legislative function, the States should provide for a balanced environment in every situation where this is required by defining whether a specific act of use or exploitation of the work is subject to:

- (i) a voluntary license permitting the authors and rightholders to exercise their exclusive right to prohibit or authorize such act, freely or against payment, and to decide freely on the conditions under which such use may be made so that the users of the works are under an obligation to obtain such license or authorization in advance and expressly, either by such license being granted directly by the rightholder or his/her representative, or through a collective management organization;
- (ii) a compulsory license granted by the State, with payment being made by interested users to the rightholder, under which the users of the works may turn to the State so that, upon evidence of compliance with certain requirements or conditions, it may authorize them to conduct certain acts of use or exploitation of the works and to fix the amount to be paid in remuneration;
- (iii) a compulsory license granted by law, with fair compensation being paid, which is collected by the rightholders via the collective management organizations and charged to the business sectors that benefit directly or indirectly from this specific act of use or exploitation;
- (iv) a limitation or exception to copyright, on the basis of which this specific act of use or exploitation of the work may be performed by the users freely and without charge, provided that such limitation or exception is in agreement with the three-step rule.

In addition to the above-mentioned legislative measures, there are mechanisms that contribute to the balance of rights and interests, facilitating the availability of works in the public domain whose use for educational and research purposes is free and without charge and in respect of which the States are called upon to define public policies. Such is the case of alternative licensing schemes under which the authors and rightholders are permitted to allow such use of the work or performance by granting licenses or authorizations free of charge within readily understandable standard formats while also imposing such restrictions or conditions of use as they deem pertinent.

In the following we will address each of the questions raised in Chapter 3 with the aim of analyzing the various alternatives that exist for their legislative treatment in an endeavor to guarantee an effective balance of rights and interests.

4.1 Providing solutions with regard to the licensing of reprographic reproductions for educational institutions

The reprographic reproduction of copyright-protected works is an act that involves the right of reproduction and, in principle, is subject to express prior authorization by the holder of the corresponding rights.

It has been seen that some countries of the region establish limitations or exceptions which permit the reprographic reproduction of journalistic articles or brief excerpts from works for the purposes of illustration in teaching. Along the boundaries of this limitation or exception, however, many other cases exist in which reprographic reproduction is subject to express prior authorization either because the extent of the copy exceeds the limits imposed by the limitation or exception or because delivery of the copies to students is not free of charge but performed against payment, for example.

Authorization must therefore be obtained in order to perform mass reproduction of a number of works pertaining to diverse rightholders. The countries in the region therefore need to have reprographic rights organizations (RROs) in place which not only benefit the authors and rightholders who can receive through them financial remuneration for the use of their works, which it would be very difficult for them to collect directly, but which also benefit the users of the works, who thus find a way of obtaining licenses or authorizations for general use or for repertories in order to legalize mass reproduction of the works that are needed in their academic activities, thus making it easier for them to comply with their legal obligations.

The following are examples of this type of society in the region:

Case study

The following reprographic rights organizations (RROs) have formed in Latin America and the Caribbean:

- Argentina: Centro de Administración de Derechos Reprográficos, CADRA.

<http://www.cadra.org.ar>

CADRA has recently signed license agreements with some of the most important universities in the country, including the University of Buenos Aires (UBA)

- Barbados: BCOPY

This organization has recently become a member of IFRRO.

- Brazil: Associação Brasileira de Direitos Reprográficos, ABDR

<http://www.abdr.org.br>

- Chile: Sociedad de Derechos Literarios, SADEL

It has recently been approved by the government of Chile as a reprographic rights organization (RRO).

- Colombia: Centro Colombiano de Derechos Reprográficos, CDR

<http://www.ceder.com.co>

- Ecuador: Asociación Ecuatoriana para la Gestión Colectiva de Derechos Reprográficos de Autor, AEDRA

- Jamaica: Jamaican Copyright Licensing Agency, JAMCOPY
- Mexico: Centro Mexicano de Protección y Fomento de los Derechos de Autor, CeMPro
<http://www.cempro.com.mx>
- Trinidad and Tobago: Trinidad and Tobago Reprographic Rights Organisation, TTRRO
- Uruguay: Asociación Uruguaya para la Tutela Organizada de los Derechos Reprográficos, AUTOR

Panama, Costa Rica, Peru and Bolivia are currently in the process of establishing their own reprographic rights organizations.

Below are some examples of the types of licenses which the reprographic rights organizations grant educational institutions (schools and universities) in Argentina (CADRA), Colombia (CDR), Jamaica (JAMCOPY) and Mexico (CeMPro). These licenses authorize the reproduction of 10% to 30% of written works (books, magazines, newspapers and other periodic publications).

The licenses authorize the uses associated with the educational institutions: educational, recreational or research activities in which users are considered to be students, teachers and lecturers making photocopies on the premises of the educational facilities.

The objective of the authorization granted under this type of license is as follows:

Argentina's Centro de Administración de Derechos Reprográficos "CADRA" grants a license for reproduction to universities under which they are given the non-exclusive right to reproduce by reprographic means the works of the administered repertory, which can be viewed on the website www.cadra.org.ar. Copies are only authorized if they are made by reprographic means or by an analogue system, as well as by digital reproduction and only for the students participating in the course. Authorized reproductions may not be more than 20% of the work except in the case of a chapter of a book or an article of a magazine or periodic publication, in which case the entire chapter or article may be reproduced. Among other exclusions, such authorization does not cover the reproduction of single-purpose works such as school exercise books, workbooks for language study and other non-reusable publications, with CADRA reserving the right to deny the university the authorization to reproduce one or more specific works in the repertory by way of exception and for duly motivated reasons.

In addition, CADRA grants another type of reproduction license to schools (copying centers at educational institutions). This license specifies the same conditions as those mentioned above but, unlike the license given to the universities, it is granted under the proviso that authorized copies are only those copies that are made by reprographic means or an analogue system, meaning that scanning or any type of digital reproduction as well as their storage in a database is not authorized. The license granted to universities, on the other hand, covers digital reproduction by the students participating in the course.

In Colombia, the Centro de Derechos Reprográficos (CDR) grants educational institutions a “reprographic reproduction contract”, under which it gives them the non-exclusive right to reproduce the works in its repertory by reprographic means within the educational establishment, defining reprography as the facsimile reproduction of any category of written or edited works in graphic form, such as that done by means of photocopying, scanning, digital copying, fax, etc. The authorized reproductions may not exceed 15% of printed books or publications that are on sale at the time the copy is made, or 30% when such books and publications are out of print, unless they are articles or works from periodic publications, in which case this percentage may be exceeded, provided that the reproduced object is one and the same article. The authorization expressly excludes the reproduction of single-purpose works such as school exercise books and other non-reusable publications, the reproduction of sleeves or front pages of protected audio or audiovisual works, computer manuals and the production of multiple copies of one and the same work or fragment of a work in a single act or as a consequence of one and the same commission, as well as the distribution of any kind of photocopy of the works in the repertory for commercial purposes.

In the case of Mexico, the Centro Mexicano de Protección y Fomento de los Derechos de Autor (CEMPRO) grants teaching establishments two types of licenses: one of them is called a “non-exclusive license to reproduce literary and artistic works for ‘course packs’”, also said to be “for anthologies”, and the other is called a “non-exclusive license to reproduce literary and artistic works”.

In the first case, the non-exclusive license granted includes the non-exclusive right to make as many partial copies of the works published by those represented by CEMPRO as necessary to compile the literary, artistic or scientific material that will compose the packages of supporting documents intended for the study of the specified subject and for exclusive use by the students and/or teaching staff enrolled in that subject, regardless of whether or not they are charged for that enrolment or course. Although partial copying is authorized, it is understood that each contract will specify the works to be reproduced and the maximum percentage that may be copied from each of them. The authorized reprographic reproduction must be intended solely and exclusively as part of the course “packs” indicated in the respective contract that will be imparted in a specific manner.

In the second case, an educational institution is granted a non-exclusive license for the reprographic reproduction of the works in the repertory provided such reproduction does not affect the normal exploitation of the work or unreasonably prejudice the interests of the authors and/or legitimate holders of copyright in such works. The authorized reproductions may not exceed 10% or more than 50 pages in the case of books or other printed literary or graphic works, whichever is less, of one and the same work.

In both licenses, the reprographic reproduction authorized under this contract comprises any system or technology for the facsimile reproduction of copies of written and other graphic works in any form or size, known or yet to be known, that yields one or more copies of one or more pages of any copyright-protected work in whatever tangible form, including their permanent or temporary storage by electronic means, and even when people need to use suitable equipment to enable them to view the copy of the reproduced work. “Copy” is taken to mean the visual perception of the facsimile reproduction of a copyrighted work, performed by any kind of mechanical, technical, electronic or digital system, including its permanent or temporary storage by electronic means, and even when people need to use suitable equipment to enable them to view such copies.

The above-mentioned licenses share the following characteristics:

- They authorize the non-exclusive right of reprographic reproduction;
- Within the concept of reprographic reproduction, they comprise distinct forms of obtaining tangible facsimile copies as well as digital copies;
- They do not authorize any kind of digital transmission, broadcasting or distribution of the licensed works on the web, which must then be authorized directly by the relevant rightholder.

One example of licensing by a reprographic rights organization for educational institutions which comprises digital uses such as transmission, broadcasting or distribution on digital networks is Jamaica's JAMCOPY, which grants educational institutions two kinds of licenses: one called the "Public Schools' and Colleges' License" and the other "Tertiary Institutions License", which are summarized below.

The objective of these licenses is to grant non-exclusive authorization to:

- produce copies of licensed works;
- compile course packs to be distributed to students enrolled on distance learning courses, either for sale or free of charge;
- make a copy of all or part of a licensed work, where the original is rare or fragile and belongs to a library and for the purpose of preventing its deterioration;
- make a copy of not more than 20% of a published work to replace any damaged or lost pages of a work in a collection of a library belonging or connected to the licensed institution;
- make "alternative copies" of works, defined as those that are intended for vision-impaired people or people with disabilities.

In the case of the "Tertiary Institutions License" the scope of authorization is somewhat broader as it covers, for example, the authorization to make copies of works that are licensed to be sold or used by other persons or entities such as non-profit institutions, libraries, archives or museums.

In regard to the works licensed for digital uses, authorization is granted for the following:

- to digitize a printed work whose rightholder has not offered it commercially in digital form,
- to reproduce the work so digitized for distribution to persons authorized by the contract;
- to store licensed and digitized works in a secure network or on an internal storage disk;
- to distribute licensed works thus digitized in a secure network such as an intranet or on the internet so that they are accessible only to persons authorized by the licensed institution, whose identity is verified when they log onto the network and whose conduct is regulated by the institution;
- to reproduce part of a licensed work in digital form;
- to upload or download the licensed work from an electronic archive by computer or word processor in order to produce paper copies provided such copies are produced immediately after the creation of the electronic archive and that such archive is destroyed after expiry of the license.

As we have seen, the authorization permits a certain form of digital transmission within a “secure network”. However, it is granted with the qualification that the license does not authorize the broadcasting or distribution of an electronic archive in any form, including on a disk or in a computer network, in conditions other than those mentioned.

4.2 Facilitating the use of audiovisual works and media for educational purposes

In Chapter 2 we mentioned the form in which some countries in the region regulate limitations or exceptions on public communication of works for educational purposes, and we mentioned under what requirements or conditions such limitations or exceptions can be applied to audiovisual or radiophonic works.

Notwithstanding the appropriateness of maintaining this type of limitation or exception to copyright and related rights, other relevant alternatives should be mentioned, such as the utilization of audiovisual material as open educational resources (OER), a topic to which we will refer in the following paragraph, or the agreements made by the rightholders themselves with the aim of fostering the use of their audiovisual content and radio broadcasts for educational purposes, as demonstrated in the following example:

Case study

Video recordings and their utilization in classrooms with support from the holders of the copyright in the signals and audiovisual content (Colombia)⁷⁰

In the “Use of Media and New Technologies” program of the Colombian National Ministry of Education, an alliance has been formed with the World Bank, Direct TV, Microsoft and Discovery en la Escuela (“Discovery at School”) for the implementation of a pilot program on the use of educational television.

Through Direct TV technology, 20 Colombian educational institutions will receive educational content via satellite television in an organized and structured manner. The digital video recording (DVR) box will also enable them to record, reproduce and program the content provided by Discovery en la Escuela for use in the classroom. For this purpose, a two-day training course will be given in Bogotá for 60 teachers representing 20 institutions from four regions of the country attached to the departments of education of Amazonas, Armenia, Chocó and Boyacá, from which eight representatives of the quality assurance division will be deployed to participate in the training with the aim of obtaining support from the territorial departments in the monitoring, follow-up and evaluation of this process.

The ministry assesses whether the pilot program ESCUELA PLUS achieves the goals established by the participants and by the enterprises affiliated with it, in which case the program will be extended to other schools and regions in Latin America.

For the ESCUELA PLUS pilot program, DIRECTV provides and installs the DVR boxes required, permitting the schools to access the educational content at no cost. This enables the schools to record all the content and training programs offered for use and reuse at any time

⁷⁰ <http://www.colombiaaprende.edu.co>

by leaders, executives, administrators, teachers and students.

“Discovery en la Escuela” is an educational initiative aimed at enriching the curriculum of schools and colleges in Latin America; it introduces the content of its educational band which is broadcast by the flagship Discovery Channel from Monday to Friday between 11 a.m. and 12 p.m. The contribution of “Discovery en la Escuela” to the project includes training teachers in the effective use of the educational tools of the project and incorporating educational programming of the channel through the training workshops provided for the teachers participating in the project. The methodology and educational strategies for the integration of technology in the classroom, particularly the integration of video in the various areas of knowledge and the navigation and use of the support material contained on the project website, are an integral part of the support offered. Each of the more than 70 programs broadcast on the educational band comes with a support guide which enables more effective use of the content. The three sections of the “Discovery en la Escuela” website provide more in-depth information for the teachers, the parents and the students themselves.

4.3 Facilitating the digitization of works and performances for use in digital distance education

Case study

Making works and performances publicly available for teaching purposes in digital distance education

A virtual course is composed of a series of information resources or study materials published on a website or a virtual education platform on the basis of which students carry out various learning, training and evaluation activities with support from a tutor.

An information resource stored on hard disk and published on the internet may be added or linked in order to be made available as part of the content of a virtual course on a virtual education platform which is accessed by students and authorized personnel.

For example, the virtual education platform Moodle 2008, which is being distributed free of charge under the GNU license, shows the following screen in the course editor, permitting the course administrator or teacher to add (upload or publish) a resource that may consist of a file (text, slide presentation, virtual learning object, etc) or the link to a page or document published on the web.

LOUISE MORAN⁷¹ contends that whatever the mechanism, for distance educators it is fundamental for copyright law to make due provision for limitations or exceptions to copyright as well as “commercial profitability”. With respect to educational institutions, the

⁷¹ LOUISE MORAN. Distance education and copyright. UNESCO, Copyright Bulletin April-June 1999. Page 16.

need for the existence of corresponding limitations or exceptions can be summarized as four principles (Consortium for Educational Technology for University Systems, 1995):

- Higher education's legitimate right to use copyright-protected works must be safeguarded;
- Freedom of access to information, regardless of its format, is essential for the creative and learning processes;
- Higher education's right of fair use must continue in the electronic era unencumbered by terms of licenses or transaction fees;
- Higher education has an obligation to educate its members about intellectual properties and about the lawful uses of copyright-protected material.

The need for a limitation or exception to facilitate the digitization of works and performances is one of the central themes surrounding digital distance education.

It has been seen how the reproduction rights organizations (RROs) existing in the region grant licenses for digital reproduction as an authorized mode of reprographic reproduction; however, this authorization does not cover online uses of works, such as those required within the framework of distance education.

In this regard we consider the following to be necessary:

(i) To establish limitations or exceptions to the right of reproduction that are applicable in a digital environment in order to permit the digitization of works and performances for the purpose of using them in distance education. Establishing a limitation or exception that is specifically applicable to the digital environment is more convenient than seeking to apply by analogy the limitations or exceptions on reproduction for teaching purposes that are applicable in the analogue environment.

By establishing a limitation or exception for this purpose, the countries can set the necessary conditions or requirements that are necessary in order to ensure that their exercise complies with the three-step test. It is worth remembering that the United States TEACH Act permits this limitation or exception on condition that the obtained digital copies be retained only by the institution and used only for the transmissions authorized under that law and, in the case of digitization of analogue works, that no digital version of the work is available that is free from technological protection which would prevent the previously authorized digital transmissions.

It would also be useful to have an international instrument that standardizes the parameters, conditions or requirements for the applicability of this limitation or exception, given that this is a phenomenon which is typical of the digital online environment, where no physical boundaries exist between the countries and where it is in appropriate for the laws of each country to give different treatment to a use which has global significance.

(ii) In those cases in which the required digitization goes beyond the boundaries of the limitation or exception that would have to be established and that would therefore be subject to express prior authorization by the corresponding rightholder, it is appropriate to provide the interested user (a teacher or educational institution, for example) with the possibility of contacting the rightholder or his representative and, where the rightholders are willing to authorize such digitization, to obtain the corresponding license.

It would be useful if this kind of authorization could be obtained from the reproduction rights organizations (RROs) through licenses obtainable and payable online.⁷²

(iii) In this regard it is also relevant to mention once again that the availability of digitized content which is usable in distance education benefits from the existence of open educational resources (OER) and, in general, of works in the public domain.

4.4 Facilitating the digital transmission of works and performances for digital distance education

Various people and organizations have been claiming that there was a need for applying a limitation or exception to this use. In its document “The IFLA Position on Copyright in the Digital Environment”,⁷³ the International Federation of Library Associations (IFLA) maintains that “resource sharing plays a crucial role in education, democracy, economic growth, health and welfare and personal development. It facilitates access to a wide range of information, which would not otherwise be available to the user, library or country requesting it. Resource sharing is not a mechanism to reduce costs but to expand availability to those who, for economic, technical or social reasons cannot have access to the information directly. (5) Providing access to a digital format of a protected work to a user for a legitimate purpose such as research or study should be a permitted act under copyright law”.

The aspects relating to digitization referred to in the previous section and in regard to the appropriateness of establishing a limitation or exception to copyright and related rights, facilitating licensing solutions in cases that go beyond the boundaries of such limitation or exception, promoting the existence in any case of open educational resources (OER) that can be used as educational resources in digital online education, and defining policies on the availability of works in the public domain are applicable to the online transmission of works for distance education purposes.

The limitation or exception applicable to online transmission for distance education must be subject to various conditions or requirements to make it compatible with the three-step test. It deserves to be mentioned, with reference to comparative law, that the TEACH Act of the United States establishes requirements that may be outlined or summarized as follows:

- The material may not be work originally created for use in instructional activities transmitted through digital networks
- The material must not exceed the quantity comparable to that used in class presentations
- The material must be used by accredited non-profit educational institutions
- The material may not be work which the educator knows or has reason to believe has not been acquired or generated by legal means

⁷² One example of this kind of licensing is the Copyright Clearance Center of the United States, www.copyright.com

⁷³ IFLA document “The IFLA Position on Copyright in the Digital Environment”, available at <http://www.ifla.org/en/publications/the-ifla-position-on-copyright-in-the-digital-environment>

- The material may not be textbooks, course packages or other materials typically acquired by students individually
- The material may not be indirect educational activities. This concept sets a limit on the types of materials which an educator may incorporate for reading in class, that is, it covers the works that an educator may present or interpret or read during class, such as a film or musical videos, pictures of works of art or poems; it does not, however, include material that an educator may ask a student to study, read, listen to or watch outside class at a time of his or her choosing.
- Interpretation and presentation should be a normal part of indirect educational activity; it is performed by an educator or under his or her direction or supervision; it is directly related to and used as support material for the content being taught; and it is intended for – and technologically limited to – the students enrolled in the class. The condition that the interpretation of presentation must be “technologically limited” to the students means that the technological protection measures must exclude those who are not part of this circle from accessing it.
- The educational institution must have policies and provide information on the fact that the materials used may be copyright protected; it must apply technological measures that reasonably prevent the recipients from retaining the works outside the lessons and subsequently distributing them; and it must not interfere with the technological measures taken by the rightholders with the objective of preventing the works from being retained and distributed.

As in the case of the limitation or exception regarding the digitization of works for use in distance education, it would also be useful in the case of the limitation or exception regarding digital transmission for there to be an international instrument that standardizes the parameters, conditions or requirements for the applicability of this limitation or exception, given that this is a phenomenon which is characteristic of the digital online environment.

In the absence of such requirements or those that would have to be established in the framework of the three-step test, voluntary licenses need to be granted that develop the ability of the author or rightholder to prohibit the digital transmission of his or her works or performances, in which case licensing solutions such as the ones mentioned in the following example may usefully be provided:

Case study

Licenses for online uses granted by reprographic rights organizations.

The following are some examples of how this type of license is granted, as presented by the International Federation of Reprographic Rights Organizations (IFRRO)⁷⁴:

⁷⁴ IFRRO “Collective Management in Reprography”. Document available at <http://www.ifrro.org/upload/documents/924S%20IFRRO%20Study%20printA5.pdf>

In the United States, the COPYRIGHT CLEARANCE CENTER (CCC) grants licenses for limited-access digital uses, that is, for internal uses both in academic and in corporate networks and for distribution via the internet and by electronic mail through its Digital Permissions Service (DSP) and its Republication Licensing Service (RLS). Another service is called "Rightslink", which enables editors and other content providers to provide their copyrighted material online, instantly delivering both permission and the content, while maintaining security and tracking use of the content.

In Canada, the CANADIAN COPYRIGHT LICENSING AGENCY (ACCESS COPYRIGHT) has offered a Post Secondary Electronic Course Content Service (PECCS) since 1999 to provide universities with an electronic licensing system. Most publishers and creators have now issued new mandates regarding digital importation and conversion rights, so that the online licensing system allows for transactional licensing of the digital use of works.

In Australia, the COPYRIGHT LICENSING AGENCY (CAL) applies a press clipping license that allows agencies to scan, store and distribute newspaper articles to their clients, and a downstream license that allows government and corporate clients of these agencies to distribute the clips internally by e-mail or through their respective internal networks (intranet). Moreover, the Australian Copyright Act allows electronic reproduction and/or communication of works without the prior consent of the copyright owner in certain specific cases. Remuneration is collected by the COPYRIGHT AGENCY LIMITED (CAL) and payable to rightholders in two cases: statutory educational license and government copying provisions.

In France, the CENTRE FRANÇAIS D'EXPLOITATION DU DROIT DE COPIE (CFC) licenses not only press clipping agencies for their distribution of digital press reviews to their clients, but also companies and government agencies for displaying these digital reviews through their respective internal networks (intranet).

In Denmark, the extended collective license, as a form of legal support for voluntary licensing, has been extended to cover digital copying in education. COPY-DAN WRITING, which has licensed analogue copying for educational purposes, has extended its area of licensing to include scanning of published works in closed networks such as intranets. It also covers certain digital uses in research libraries.

In Spain, the CENTRO ESPAÑOL DE DERECHOS REPROGRÁFICOS (CEDRO) provides licenses for digital reproduction by scanning and making printed works available in closed networks (intranets).

In the United Kingdom, the COPYRIGHT LICENSING AGENCY (CLA) offers a trial blanket scanning license to the further education sector. On a similar basis, blanket scanning licenses, authorizing e-mail attachments of scanned published material, have been issued to the commercial and professional sectors for company-wide use.

In Germany, the Verwertungsgesellschaft (VG WORT) currently licenses off-line (CD-ROM) and on-line use of relatively old material, and digitization and intranet use of material which has not been published in digital form, as long as the original publisher makes this new digital edition himself or consents to such digital edition being generated.

As previously mentioned, the reproduction rights organizations (RROs) existing in the region grant licenses for digital reproduction as an authorized form of reprographic reproduction; however, this authorization does not cover online uses of works, such as those required in distance education.

On the other hand, other reproduction rights organizations (RRO), such as those mentioned in this case, have responded to the need to provide solutions to the issue of licensing of certain forms of online uses of digital copies and have been obtaining authorization for the management of this type of rights, either in accordance with the mandates that they have received from their members or on the basis of current legislation.

4.5 Educational use of works protected under alternative licensing models: free licenses and open educational resources (OER).

In 2002 UNESCO held the “Forum on the Impact of Open Courseware for Higher Education in Developing Countries”, where the term “open educational resources” (OER) was coined. Together with the Flora and William Hewlett Foundation, UNESCO maintains an international discussion forum on this topic whose purpose is to take in ideas, exchange information, push for standards and be a catalyst for international cooperation.

A commonly accepted definition of OER is “teaching, learning and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or re-purposing by others”.⁷⁵

Open educational resources (OER) comprise educational content (literary, artistic, audiovisual, etc.) protected under alternative licensing models that permit open and free access and facilitate the production, distribution and use of such content.

The authors of OER grant anyone the freedom to use, modify, translate or improve such educational content and to share it with others, although some licenses place restrictions on modifications or commercial use. Most OER are in digital format, which makes them easy to share and adapt.

There are three types of OER: educational content, tools and implementation resources, i.e.:

- (i) Educational content: full courses (educational programs), course materials, content modules, learning objects, textbooks, multimedia materials (text, sound, video, images, animation), examinations, compilations, periodic publications (newspapers and magazines), etc.
- (ii) Tools: software to support the creation, delivery (access), use and improvement of open educational content. They include tools and systems for creating content, registering and organizing content, managing learning and developing online learning communities.
- (iii) Implementation resources: intellectual property licenses that promote the open publication of materials, design principles, content adaptation and localization, and materials or techniques for supporting access to knowledge.

⁷⁵ <http://www.hewlett.org/oer>

Free access to educational materials, the collaborative work that goes into their production, and the development of knowledge between peers existed in the educational environment even before digital technology. The online digital environment, however, makes OER generation easier in many ways and enables mass distribution. Likewise, the use of alternative licensing models and schemes provides legal security and makes the terms of use of such content clear and easy to comprehend.

Open access has been defined as information for which intellectual property rights exist and which is made available to the public by its rightholder, who waives part of the rights to which he or she is entitled with the objective of enabling knowledge to circulate on the web and in other media.⁷⁶

Information provided through open access mechanisms, also designated as “open content”, is subject to licensing contracts that restrict certain acts. In some cases, prices charged for the content are actually very low. This system has been inspired by the open software movement.

Some experts on cyberspace and intellectual property, taking the parameters of open software and the trends of open access and open content as a basis, have created a non-profit organization whose purpose is to promote open access to copyright-protected content so that those creators who do not see fit to exercise the prerogatives which copyright confers upon them have a space on the internet where they can share their works (the authority to use, modify and distribute them) with the public in accordance with flexible and standardized parameters.

The name of the organization is Creative Commons.⁷⁷ Its Board of Directors includes LAWRENCE LESSIG, chair of the organization, JAMES BOYLE and MICHAEL CARROL, as well as students from the Berkman Center for Internet and Society of Harvard University. The organization is supported by the Law School of Stanford University and its Center for Internet and Society.

Creative Commons seeks to solve two basic problems in the digital environment of the internet. First and foremost, its promoters consider that by virtue of the principle of copyright protection in the absence of formalities, the copyright derives from the act of intellectual creation without there being a need for its registration. In the minds of the authors, however, there is no easy mechanism that allows them to clearly express their desire not to exercise the competences which the right confers upon them. Second, members of the public who wish to copy and make use of certain works cannot easily identify those for which free use is permitted.

For this purpose, Creative Commons has developed formulas which provide people with a medium on the web in which to publicize their works and make them freely available so that they may be copied, redistributed and/or modified. The movement seeks not to deny copyright but the opposite: to acknowledge the free will which the authors have to waive their rights for the benefit of the cyber-community.

⁷⁶ OAULK UHLIR. Draft Policy Guidelines for the Development and Promotion of Public Domain Information, Paris, UNESCO, 2003, p.14.

⁷⁷ www.creativecommons.org

Not all rights need to be waived, and Creative Commons therefore equips the works with the mechanisms that permit flexible and completely free access to the works where their creators so decide.

These mechanisms are characterized licenses, which are similar to the previously mentioned GPL on open software, as they are of public use. Under these licenses, authors or rightholders waive their prerogatives and place their works in the public domain or tolerate certain uses under specific conditions.

Among the existing licenses is the “attribution license”, which permits the copying, distribution, exhibition and performance of a copyright-protected work and the creation of derivative works as long as the source is mentioned. Another type of license is the so-called “non-commercial license”. It permits the reproduction, distribution, communication and transformation of a work as long as it is not intended for commercial purposes.

A third type of license is one that prohibits the creation of derivative works. In this case, any act such as the reproduction, distribution and communication of the work is accepted but not the transformation into a derivative work. Finally, there is the “Share Alike” license, which applies solely to derivative works and requires the creation to be shared or distributed only on the same terms as the original license that was acquired.

This means that, for example, if a person submits a text they have produced under “non-commercial” and “Share Alike” terms, others who want to use the text on the internet to create a derivative work have to make their creation available on the same terms as those in the “non-commercial” and “Share Alike” licenses.

The Creative Commons movement includes the initiative referred to as CREATIVE COMMONS LEARN (ccLearn), which is supported by the Flora and William Hewlett Foundation and works on the following:

- (i) To enable various education stakeholders to share study materials under licenses that permit interoperability between them. One example of this is the “Creative Commons” license which allows users to modify, reuse and redistribute educational materials freely. Moreover, by training authorities, educators and students it will promote among them the concepts of copyright and fair use in relation to teaching.
- (ii) To encourage the use of technical standards and tools that permit interoperability of the resources.
- (iii) To promote among teachers and students the use of educational resources available on the internet and to build on them in order to generate new content or to improve existing content.

One of the most ambitious ccLearn projects is the creation, in collaboration with Google, of a search engine specialized in open educational resources (OER). This new tool will enable teachers to locate resources of this type on the internet and will constitute an important step towards large-scale access and use of OER.

In order to turn this international project into reality, ccLearn invites all individuals or organizations all over the world who publish OER to report the web addresses of their materials so that they can be included in a database.

The following examples highlight the importance of the use of OER in education and research:

Case study

The open course platform (OpenCourseWare – OCW) of the Massachusetts Institute of Technology – MIT

The OCW project dates back to early 2001 as an experimental model for free and open production and distribution of educational intellectual works. For this purpose a common platform of educational content was created, the regular graduate and postgraduate courses were opened up and access was given to teachers, learners and autodidacts from all over the world with the intention of obtaining feedback on the experiment.

The maturing of the project required two fundamental components. First, a common platform for the collaborative production of intellectual works was produced using various open software applications. Second, access to content produced during normal academic activity was granted. Opening up the content did not require extra planning or the performance of additional tasks over and above the normal production of intellectual works for the educational process.

Administrators, teachers/tutors and learners continued to carry out their academic tasks as usual. To this end they used a Creative Commons license specially created for the project [CC-MIT-OCW].

These two points have been the pillars of the success of the project. Since 2003 its design has enabled the generation of educational value to be rapidly captured, produced and utilized on a continuous, common and open basis.

To date, the MIT has published more than 1,700 courses on the internet which are being accessed by more than one million users every month, not only MIT students but people from all over the world.

More than 60% of the visitors to the MIT programs are not Americans and almost half of them are autodidacts – people who are at present neither enrolled in a graduate program nor teaching. The internationalization also makes this a multilingual phenomenon.

Currently, the Open Courseware Consortium, a network of more than 150 members from all over the world created for the purpose of increasing the production and use of open educational programs on an international scale, estimates that, to date, some 4,200 open courses have been published – which gives the MIT a quota of 40%, a percentage which is declining given the contribution of other similar initiatives.

Case study

The PLOS (Public Library of Science) project in the United Kingdom.

This organization releases a series of scientific publications in areas such as biology, genetics, medicine, etc., and has adopted an open access policy under a scheme in which, first, the publication is paid for through mechanisms other than fees from the readers and, second, the authors and copyright holders permit them to make unrestricted reproductions. With this formula the publication earned top ranks among its peers within a few years, evolving into a mandatory reference ahead of the hundreds of traditional publications of its kind in the United Kingdom and providing access to knowledge while proving to be economically viable.

Case study

The Faculty of Arts and Sciences of Harvard University permits open access to its works

The lecturers in the Faculty of Arts and Sciences of Harvard University voted unanimously in favor of not automatically assigning their copyright to the publishers so that their articles can be accessed freely while they retain the copyright.

The proposal approved by these Faculty members consists of “making their scholarly articles available while retaining the copyright in these articles”.

The text adds that “in legal terms, the permission granted by each Faculty member is a non-exclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same, provided that the articles are not sold for a profit”.

It is understood that all articles are publicly available unless the author expressly requests in writing that this should not be the case.

In this way, the Faculty intends to anticipate new legislation that will come into effect this year obliging all researchers whose work is publicly funded to send a copy of their work to the database PubMed, which will provide public access to scientific databases in the field of medicine.

Case study

The Creative Archive of the British Broadcasting Corporation [BBC]⁷⁸

⁷⁸ <http://creativearchive.bbc.co.uk/>

The Creative Archive is a project that the British Broadcasting Corporation (BBC) is developing together with other parties (the British Film Institute, Channel 4 and the Open University) in Great Britain and Northern Ireland.

The CA is a space that enables the public in the UK to search, republish, distribute and re-utilize jointly different multimedia content (radio, TV, documentaries, clips, images, audio). For this purpose, access has been provided to goods that were developed with government resources as common capital and basic input for the development of the citizens' creative efforts (the BBC is a public service broadcasting company operating with public and private capital). The central idea behind the CA is that the digitized works and their derivatives should contribute to creative development in the social, economic and, in particular, the educational sphere.

The CA has developed a platform for sharing works and a specific license based on the Creative Commons model.

More than a proposal for consumption, the CA is essentially a project of cultural experimentation on new models that seek to connect various heterogeneous interests in the digital environment by harmonizing socio-political development, the promotion of an educational internet, corporate business models and the development of the internet market in the United Kingdom.

Case study

The Internet Archive [IA]⁷⁹

This project was launched in 1996 and is being managed by a non-profit NGO. Its aim is to build a library of digital content and digital historical collections that are freely accessible to researchers, historians and scholars all over the world. The AI is a space for the archiving, publication and distribution of all kinds of cultural works, both from the present and from the past, which are in the public domain or openly licensed, such as images, photographs, text, audio, video, software and even records of works that have disappeared and for various reasons can no longer be found on the web.

Ariel Vercelli⁸⁰ believes that the relationship which AI has with education is fundamental because it allows us to maintain a critical vision of the common past. It safeguards and recovers works which have been lost in time for different reasons (WayBack Machine). Like a window to the past, the AI allows works or webpages that have been lost or modified over time to be recovered and revisited. It functions like an openly accessible collective memory of a constantly evolving web. It has quickly turned into a gigantic library that allows the socio-technical and cultural intelligence to be preserved for all future generations. The persons

⁷⁹ <http://www.archive.org/>

⁸⁰ VERCELLI Ariel, "Aprender la Libertad, el diseño del entorno educativo y la producción colaborativa de los contenidos básicos comunes". Buenos Aires, 2006. Available in Spanish only at <http://www.aprenderlalibertad.org/aprenderlalibertad.pdf>

responsible for the AI understood some years ago the importance which free and open access to knowledge has for creation, collaborative re-creation, education and the defense of democratic values.

Case study

The NEALS (National Education Access License for Schools) project (Australia)

This licensing scheme operates in Australia and permits State schools to share textbooks and educational materials produced by them without any restrictions on copying, distribution and modification, provided they have produced such material using public funds.

NEALS has enabled substantial savings in copyright payments for the material which the schools themselves produce in this specific environment.

Case study

Collaborative creation and production of content for education and research. Some examples:

- Wikipedia

The “free encyclopedia”, or Wikipedia, founded by Jimmy Wales in 2001 and currently operated by the Wikimedia Foundation, is a multilingual free-content encyclopedia that permits users to produce, freely edit and distribute its content.

Because of its collaborative, continuous and peer-based production method, the free encyclopedia is an information resource whose content can be created, edited and shared freely by anyone at any time and from anywhere in the world.

It currently publishes millions of articles in more than 200 languages and has a growing number of anonymous contributors. It is inspired by a horizontal layout designed for production of content among peers, it uses a Free Documentation License from the Free Software Foundation, and it runs on open-source software (Wiki from MediaWiki).

- Enciclopedia Libre Universal en Español (Free Universal Encyclopedia in Spanish)

http://enciclopedia.us.es/index.php/Enciclopedia_Libre_Universal_en_Espa%C3%B1ol

This collaborative project is derived from Wikipedia, but it has been incorporating materials such as dictionary entries or historic documents, all of them in Spanish.

- Citizendium

http://en.citizendium.org/wiki/Welcome_to_Citizendium

Citizendium is another collaborative project derived from Wikipedia but proposes a much stricter system for the editing of articles; it does not permit anonymous editing and imposes a

hierarchical order among its users based on the intellectual merits attributed to them. Its ultimate objective is to overcome the shortcomings of the present Wikipedia which are associated with the lack of confidence in the quality of its content.

- The Literary Encyclopedia

<http://www.litencyc.com>

This is an encyclopedia that specializes in predominantly Anglo-Saxon literature and includes a section on the history of philosophy. It is one of the few large-scale publishing spaces in the world not published by a large publishing house or institution but by the contributors themselves in a collaborative effort. Most of them are scholars specializing in this area.

- WikiDoc

<http://wikidoc.org>

This is a collaborative project in the field of medicine which publishes news, images, videos and articles.

- Jurispedia

<http://es.jurispedia.org/index.php>

Jurispedia is an encyclopedic project of university origin devoted to the laws existing in the world and to legal and political sciences.

Case study

Project UNIVERSIA

UNIVERSIA is the largest Ibero-American collaborative network for universities, consisting of 1,126 universities and institutions of higher education in 18 countries. The member universities of Universia represent 72% of the total number of students and staff in the countries where it operates, with 10.9 million students and 885,000 staff. This network is run by a non-profit organization sponsored by Banco Santander of Spain.

As its activities were being developed, the Consorcio OpenCourseWare Universia was formed with the aim of promoting the presence of the Latin American institutions of higher education in the global OCW consortium, an initiative of the MIT, and to promote open publication of its courses and other educational content. Currently, 66 Latin American universities are participating in the initiative with more than 150 subscriptions available for users.

UNIVERSIA also offers a portal of videos and academic podcasts (universia.tv) and serves as a platform for the Biblioteca Universitaria de Recursos de Aprendizaje (university library for learning resources), which currently contains 8,403,698 resources from 130 collections.

(<http://biblioteca.universia.net/>)

As we can see, the existence and availability of OER has turned into an element of fundamental importance that should be taken into account in public policy, not only in the sphere of education, science and technology, but also in the field of copyright and the promotion of artistic and literary creation.

4.6 Creating a limitation or exception that permits the digital transformation or manipulation of works by students preparing academic assignments

The digital medium facilitates the manipulation or modification by members of the public of information content which is largely copyright protected (literary works, audiovisual, musical and photographic works, drawings, etc.), and digital networks place the works thus modified at the disposal of the public.

The possibility of students modifying pre-existing works or generating derivative works within the framework of the academic assignments is particularly relevant in the digital environment. Yet the currently existing limitations or exceptions do not appear to specifically cover the regulation of the use of works within user-generated content, much less when this is done within the framework of the activities of an educational institution.

The preparation of academic assignments that involve the digital transformation of works and performances generally takes the following form:

- (i) A work or performance exists which is protected by copyright or related rights (literary, artistic, audiovisual or musical work, phonogram, etc.) and is available in digital format either in the online digital environment or offline;
- (ii) A teacher subsequently asks his or her students to prepare an academic assignment as part of their learning activities which involves the need to create certain information content (video, phonogram, slide presentation, concept map, text, multimedia, etc.) permitting the use of pre-existing works and performances in its preparation;
- (iii) One of these students decides to use one of the works mentioned in (i) in his academic assignment. For this purpose he makes a digital reproduction of it and modifies it or uses it to produce a derivative work with the aid of a computer program. In this modification the student expresses his own creation or creates added value;
- (iv) The student has to submit this assignment to his teacher for assessment. Assignments submitted by students are often published so that other students, teachers and other members of the academic community may get to know them.

The scenario described above applies both to face-to-face education as well as to digital distance education.

In Chapter 3 we suggested the need for a limitation or exception to be established to permit the digital transformation or manipulation of works by students preparing academic assignments. With regard to the European Directive, the Green Paper on Copyright in the Knowledge Economy prepared by the European Commission suggests that a limitation or exception in this regard should consider the following aspects:

(i) Its objective should be to permit the creation of transformative content by the users. In particular, the Gowers Review recommended the introduction of a limitation or exception for “creative, transformative or derivative works” within the parameters of the Berne three-step test. A limitation or exception in this sense would encourage innovative uses of works and stimulate the production of added value.

(ii) Before introducing a limitation or exception for transformative works, the conditions under which transformative use would be permitted should be established carefully so as not to prejudice the economic interests of the rightholders of the original work.

(iii) In the framework of the Berne Convention, transformative use would be covered first by the right of reproduction and the right of adaptation. The limitations or exceptions to these rights would have to pass the three-step test. In particular, they would have to be more precise and refer to a specific political justification or to types of justified uses. They would also have to be limited to short excerpts (short passages, except for very distinctive excerpts), which would therefore not infringe the right of adaptation.

Considering all the above, we believe that this limitation or exception should not only permit reproduction and transformation but also certain acts of public communication, distribution or making available of the work so transformed to the extent necessary to enable other members of the academic community (students, teachers, researchers, administrative staff associated with an institution of learning) to become familiar with the academic works prepared by the students and to generate on the basis of these works an analysis or debate, either because the works prepared may serve as an educational resource that facilitates better understanding of a certain subject of academic study or to inspire the creative spirit and demonstrate the progress made by the students in the diverse fields of knowledge or artistic and literary creation. This dissemination of assignments that have been prepared is inherent in the activities that characterize an institution of learning and is done without gainful intent.

Nevertheless, permitting certain acts of distribution of transformed works within this limitation or exception creates the risk that the students and other persons authorized to access them may for their part reproduce and/or undertake new unauthorized distributions of them, disseminating them beyond the persons who make up the academic community. For this reason we deem it appropriate for a limitation or exception established in order to permit certain acts of distribution to be conditional upon the adoption by the educational community of effective technological measures that reasonably prevent such infringement.

Given this state of affairs, we believe that the limitation or exception regarding the digital transformation of manipulation of works by students preparing academic assignments could be worded as follows:

“To reproduce and transform works and performances available in digital format for the purposes of performing academic assignments within the framework of the activities of an educational institution. The works or performances so transformed may only be communicated, distributed or made available to permit access to the members of the academic community without gainful intent, provided that the educational institution adopts technical measures designed to prevent the work so transformed from being newly reproduced, communicated, distributed or made accessible.”

4.7 Facilitating private copying which ensures a balance of rights and interests

Compensatory remuneration for private copying was established with the aim of offsetting the losses incurred by holders of copyright and related rights as a result of mass reproduction of their works and performances under the limitation or exception on private copying.

By virtue of that compensatory remuneration, the law provides for payment by manufacturers of apparatus, devices or media that enable the reprographic reproduction of works – for the benefit of authors and publishers – and the domestic reproduction of sound recordings and audiovisual works – for the benefit of authors, performers and producers.

Case study

Provision for compensatory remuneration for private copying in the countries in the region (Dominican Republic, Ecuador, Paraguay, Peru)

Although none of the countries in the region has introduced a system of compensatory remuneration for private copying, the laws of the Dominican Republic, Ecuador, Paraguay and Peru provide for it, in the terms summarized below:

With regard to the devices and media on which compensatory remuneration is due, the following provisions are made: In Ecuador, this applies in respect of works fixed in phonograms and videograms that are the subject of reprographic reproduction. In Paraguay, it applies to works published in graphic form, by means of videograms or phonograms or any type of audio or audiovisual recording. In the Dominican Republic, this applies in respect of works disclosed in the form of books or other publications, as well as phonograms, videograms or other audio, visual or audiovisual media. In Peru, it applies to works or artistic performances in the form of videograms or phonograms on media or materials capable of embodying them.

The beneficiaries of the limitation or exception are stipulated as follows: In Ecuador, beneficiaries are authors, artists, performers, producers and, in case of literary works, authors and publishers. In Paraguay, they are the holders of rights in the works. The executive branch of the government, at the proposal of the National Directorate of Copyright, shall determine the holders entitled to the said remuneration. In the Dominican Republic, the beneficiaries are authors, performers, phonogram producers, the producers of audiovisual works in the form of videograms and publishers. In Peru, they are performing artists, authors, publishers, producers of phonograms and producers of videograms, whose performances, works and productions have been fixed in phonograms and videograms.

The following are obliged to pay compensatory remuneration pursuant to the laws in the region: In Ecuador, payment is due from the manufacturer or importer at the time when the work is placed on the domestic market. The person, whether natural person or legal entity, who offers material capable of embodying a sound or audiovisual fixation or reproduction apparatus to the public without having paid compensatory remuneration and shall be jointly liable with the manufacturer or importer for the payment of the remuneration. In the Dominican Republic, the debtor is the manufacturer or importer into the territory of the Dominican Republic in case of the initial sale of the equipment or, in their absence, the distributors, whose liability for payment will be equal to that of the aforementioned. In Peru,

the remuneration must be paid by the domestic manufacturer and the importer of suitable materials or devices that permit reproduction; those purchasing media or materials capable of containing protected works and performances outside Peruvian territory, for commercial distribution or use within that territory; distributors, wholesalers and retailers, subsequent purchasers of the above media or materials capable of embodying protected works or productions, shall be jointly liable to pay the remuneration with the debtors who have supplied those items, unless they can provide evidence of actually having paid the remuneration.

With regard to the equipment and media which give rise to payment, in Ecuador these are media capable of embodying an audio or audiovisual fixation (tapes or other physical media capable of embodying a sound or audiovisual fixation) or equipment for reproducing phonograms and videograms, equipment for reprographic reproduction. N.B. Resolution No. CD-IEPI-03-133 sets the compensatory remuneration for (i) recording systems and similar phonographic recording media (audio cassettes), (ii) recording systems and similar audiovisual recording media (video tapes), (iii) recording systems and dedicated digital phonographic media (phonographic recording equipment, recording media), (iv) recording systems and dedicated digital audiovisual media (videographic recording equipment and recording media) and (v) multiplatform recording systems and media, which should be applied in the Ecuadorian market on all units sold in the market based on data CD and data DVD technology. This Resolution is not applied in practice. In Paraguay, these are equipment, non-typographical technical apparatus and materials suitable for reproduction. The executive branch of the government, at the proposal of the National Directorate of Copyright, shall regulate the procedure for determining the equipment and media subject to compensatory remuneration. In the Dominican Republic, these are tapes, compact discs and material media capable of embodying an audio, visual or audiovisual fixation, material or digital media capable of embodying literary or graphic works, equipment permitting the reproduction or (non-typographical) storage of works disclosed in the form of books or other publications, as well as phonograms, videograms or other audio, visual or audiovisual media, units for the copying of sound and audiovisual media included in a personal computer or manufactured or imported for use in a peripheral manner. Peruvian law does not clearly establish the equipment and media which lead to payment. It is only stated that payment must be made by the domestic manufacturer and the importer of suitable materials or media for reproduction. It is also stated that the compensation is determined according to the appropriate media, created or established, for making that reproduction.

Lastly, with regard to tariffs, in Ecuador a percentage rate is calculated on the basis of the price of the recording material or reproduction apparatus and shall be determined and laid down by the Board of Directors of the IEPI. In Paraguay, the executive branch of the government, at the proposal of the National Directorate of Copyright, shall regulate the procedure for determining the amounts. The Dominican Republic provides for a percentage rate determined by mutual agreement between the manufacturers and importers and the relevant rightholders, or the collective management organizations mandated to represent them. If no agreement is reached, what is established in Article 4(3) of the Regulation on Remuneration for Private Copying, Decree No. 548-04, shall apply. In Peru, the law provides for a percentage amount determined by mutual agreement between the collective management organizations; if no agreement is reached, the Copyright Office may set rates which shall remain in force for one year. If an agreement cannot be reached 30 days after issuing this ruling, the management organizations may appeal to the Copyright Office, which shall place the dispute settlement mechanisms at their disposal. If no agreement is reached, the Copyright

Office may set temporary tariffs which will remain valid for one (1) year. In order to set those tariffs, the Copyright Office will base its decision on technical and economic criteria, market studies and so on. At the end of the year, if the collective management organizations cannot reach agreement on the tariffs to charge, the temporary tariffs may be extended at their request for a period of the same length.

As already stated, although the above-mentioned laws provide for its existence, in practice none of the countries in the region has introduced a system of compensatory remuneration for private copying. This opens the debate about the need and appropriateness of providing for the said compensatory remuneration or fair compensation, even more so when various reproductive technologies and new means of storing works are disseminated, which allow the general public to mass reproduce works and enjoy them in optimal quality conditions, regardless of whether a price or remuneration is charged that enables rightholders to receive financial rewards for the use of their works by the public.

4.8 Establishing a limitation or exception on private copying in the digital environment

Case study

An example of how compensatory remuneration for private copying in the analogue and in the digital environment is dealt with (Spain)

The recast text of Article 25 of the Spanish Intellectual Property Law, amended by Article 4 of Law No. 23 of July 7, 2006, includes the following provisions regarding digital copying:

“Article 25. Right to Remuneration for Private Copying
(...)

“6. For equipment, apparatus and material media for digital reproduction, the amount of compensation to be paid by each debtor shall be that approved jointly by the Ministries of Culture and of Industry, Tourism and Trade, in accordance with the following rules:

“1. On a biennial basis starting with the last administrative review, the Ministries of Culture and of Industry, Tourism and Trade shall publish in the ‘Boletín Oficial del Estado’ and shall communicate the start of the procedure for determining the equipment, apparatus and media required to pay fair compensation for private copying, as well as the amounts determined, if any, that debtors must pay to the creditors under this concept, to the intellectual property rights management bodies and trade associations identified by the Ministry of Industry, Tourism and Trade, representing mostly the debtors referred to in paragraph 4.

“The biennial scheduling of administrative reviews referred to in the preceding paragraph may be reduced by agreement of the two aforementioned ministries. This amendment shall take account of technological developments and market conditions.

“2. Following the publication referred to in the previous rule, the interested parties referred to therein shall have four months to provide the Ministries of Culture and of Industry, Tourism and Trade with the agreements which have been concluded as a result of negotiations or, alternatively, the absence of such an agreement.

“3. Within three months from the notification or from the expiry of the period referred to in the previous paragraph, the Ministries of Culture and of Industry, Tourism and Trade, shall

establish, by joint decree, the list of equipment, apparatus and media, the amounts applied to each of them and, as appropriate, a breakdown of the various forms of audio and visual or audiovisual book reproduction, having consulting the Council of Consumers and Users and on the basis of a report from the Ministry of Economy and Finance. The aforementioned joint ministerial decree will be required if its content differs from the agreement reached by the negotiating parties. Pending approval of this ministerial decree, the validity of the above shall be extended.

“(4) For the purposes of approving the joint decree referred to in the preceding paragraph, as part of the negotiation process, the negotiating parties and, in any case, the Ministries of Culture and of Industry, Tourism and Trade, must take account, among other things, of the following criteria:

“(a) The prejudice actually caused to the rightholders by the reproductions referred to in paragraph 1, bearing in mind that in case of minimum prejudice being caused to the rightholder, this shall not give rise to an obligation to pay.

“(b) The extent to which the said equipment, apparatus or media is/are used to make the reproductions referred to in paragraph 1.

“(c) The storage capacity of the equipment, apparatus and media.

“(d) The quality of the reproductions.

“(e) The availability, degree of implementation and effectiveness of the technological measures referred to in Article 161.

“(f) The period of retention of the reproductions.

“(g) The amounts of compensation applicable to different types of equipment and apparatus must be financially proportionate to the average end-price charged to the public for them.

“7. The following are exempted from the payment of compensation:

(...)

“(2) Computer hard disks as defined in the joint ministerial decree provided for in paragraph 6 above, whereby this exemption may in no case be extended to other storage devices or reproduction.

(...)

As an example of the rates set for the digital fee, those set for 2008 were as follows:

Digital fees in 2008

GROUP I: Recording equipment (new in 2008)

CD recorder €0.60

CD/DVD recorder €3.40

Desktop DVD recorder €3.40

Internal hard drives €12.00

TV recorder HDD €12.00

MP3 devices €3,15

MP4 devices €3.15

Mobile telephone / MP3 €1.50

GROUP II: Recording media (already in force)

CD-R €0.17

CD-RW €0.22

DVD-R €0.44
DVD-RW €0.60
USB/Flash memory devices €0.30

GROUP III: Multifunction copiers (already in force)

MF inkjet €7.95
MF laser €10,00
Scanner €9.00
Copiers up to 9 ppm €13.00
Copiers 10-29 ppm €127.70
Copiers 30-49 ppm €169.00
Copiers 50-69 ppm €197.00
Copiers 70 or more ppm €227.00

The collection of compensatory remuneration or fair compensation for private copying pursuant to Article 25 of Law on Intellectual Property was the subject of intense debate in Spain, particularly in relation to the collection of this compensation on devices and media that allow works and productions to be reproduced digitally, better known in Spain as the collection of the “digital fee”.

It is appropriate to refer briefly to the arguments in favor or against the collection of the aforementioned fair compensation as a means of illustrating the case of those countries in the region where to date its appropriateness and necessity needs to be discussed and analyzed.

Prior to the reform introduced in Spain by Law No. 23 of 2006, provision was made for compensatory remuneration for private copying without any express distinction being made between analogue and digital copying. At a result of court cases it began to be recognized that a fee could also levied on certain digital reproduction media. However, there were evident difficulties in attempting to apply to digital reproduction parameters and rules stipulated in legislation that clearly referred to or was intended for analogue reproduction.

In accordance with legal precedents, rightholders could include various stipulations in contracts or agreements with users to enable recovery of the digital fee. However, this was a provisional solution which was binding only on the parties to the contract. The rates set in these agreements between owners and users were used by the legislator as the basis for establishing the digital fee rates in the reform introduced by Law No. 23 of 2006.

The reform introduced by the aforementioned Law distinguishes between analogue copying, for which the system of fixed amounts is upheld by law, and digital copying, for which the amounts must be defined first and foremost by those concerned as part of a negotiation process that takes place every two years and then, if no agreement is reached, by the State through the Ministries of Culture and of Industry (Industry, Tourism and Trade). In all cases, these entities must ratify or validate any fee-paying arrangement concerning rightholders and users.

The mandatory compliance criteria for setting the digital fee rates are as follows: the rightholders are effectively prejudiced by private copying; the extent to which the equipment, apparatus and media for private copying is used; storage capacity; quality of the reproductions; availability, degree of implementation and effectiveness of technological

measures; period of retention of the reproductions; and the existence of a proportionate relationship between the amount of the fee and the average end-price of the equipment, apparatus and media.

Computer hard disks are thus exempted from paying the digital fee.

As stated, the countries in the region are called upon to analyze and discuss the necessity and advisability of providing for compensatory remuneration or fair compensation, even more so with respect to the limitation or exception on private copying, to compensatory or fair compensation for that copying, as well as the interface between the limitation or exception on private digital copying and the legal protection of technological protection measures.

The need for a regulation to be established in this respect arises because this is evidently a vitally important scenario where a balance of rights and interests must be guaranteed.

4.9 Updating or adapting the limitations or exceptions on note-taking and audio or audiovisual recordings of classes or lessons

Case study

Class notes published on distance education platforms or on the web (Spain)

The PROMETEO program is an educational platform that makes use of the latest technological advances at the University of Las Palmas de Gran Canaria (ULPGC) and has been developed by Neuronal Software, a company that has been in existence for less than a year.

This program multiplies the virtual tools available to both teachers and students. Unlike educational platforms such as MOODLE, the PROMETEO platform allows notes to be posted on the internet so that they can be downloaded by students. While the MOODLE platform has a virtual reprographic function, also in order to improved communication between students and between students and teachers, with PROMETEO the aim is to go much further.

One of these possibilities is to video-record face-to-face classes given by teachers so as to place them on the platform later. Students who were unable to attend the class or who did not fully understand the lesson can thus go over it again in the program by watching the video. Another of the new applications in PROMETEO is useful for subjects such as economics, and involves the use of interactive graphics where the student can see the changes made by changing variables. These resources help students to get a better grasp of the concepts, although there is never any attempt to replace the teacher.

Chapter 3 presented various difficulties that may arise with regard to the recording or filming of classes or lectures at educational establishments by students for whom they are intended. Reference was also made to the facility with which students can publish their class notes on the internet.

We believe that it is necessary to analyze whether it is appropriate to update or adapt the limitations or exceptions to copyright for the purposes of allowing the lessons given by

teachers in educational institutions to be noted down or collected freely by the students for whom they are intended. The term “collect” is used with reference to the possibility of making sound or audiovisual recordings of the lessons by any technological media, including digital processes.

The restriction of not being able to collect or publish the reproduction of the lessons should be maintained and brought up to date with regard to the prohibition on making available such notes or recordings to the public on the internet or intranet without the express prior authorization of the respective teacher or lecturer. The use of technological resources to make sound or film recordings of the lessons in accordance with a limitation or exception should be for the sole purpose of facilitating personal study by each of the students. If the teacher also wishes to contribute to the universal dissemination of knowledge, he may grant authorization or a license for the lessons or lectures recorded or collected in this manner to be disclosed to the public.

Likewise, we believe that the possibility of reproducing or disclosing slide shows in any form with which the teacher illustrates his presentation should be conditional upon his express prior authorization being given. It does not seem reasonable for the law which assists students to obtain a reproduction of the lesson or lecture given by their teacher to extend to all the teaching materials produced or prepared as a support or educational resources for the teacher’s lesson. The slides and materials often include copyright-protected works which are reproduced and used by the teacher in accordance with the limitation or exception for the purpose of illustration of teaching. To allow students to freely reproduce those slides or educational resources would involve allowing many new reproductions of the works, which would be detrimental to the balance of rights and interests and for copyright holders.

4.10 Giving educational establishments legal certainty with regard to their liability for violations of copyright by students

Case study

Just as the liability of internet service providers (ISPs) is limited or specified, could or should the liability of educational institutions, libraries and documentation centers that provide internet access for students and users be limited (as in the DMCA in the United States)?

In 1998, the United States Congress enacted the Digital Millennium Copyright Act (DMCA), a legal instrument aimed at implementing the obligations arising for the United States as a result of signing and ratifying the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 1996, also known as the “Internet Treaties”. Through this extensive law, a series of measures was also adopted to regulate the digital environment and, in particular, to protect copyright-protected works circulating through internet networks. These measures have a far wider impact than that required by the “Internet Treaties” and showed the world a clear trend in the United States’ medium-term and long-term policies on digital material.

Specifically, Title II of the DMCA, the “Online Copyright Infringement Liability Limitation Act”, which was incorporated into Section 512 of Chapter 5 of Title 17 of the United States Code, which comprises all the United States’ legislation on copyright, contains a detailed,

innovative regulation on the limitations on the liability of internet service providers (ISPs) for breaches of copyright which are committed through the internet, this regulation having been incorporated into the various texts of the bilateral free trade agreements signed by the United States with their different partners.

Under a series of charges and requirements, these provisions seek to exempt ISPs from any liability for cases in which they act in a timely manner and in good faith with regard to the notification of any infringement of copyright that occurs as a result of third parties using the services and benefits that they provide.

The United States thus became the first country in the world (followed two years later by the European Union) to involve ISPs in the procedure concerning the digital infringement of copyright-protected works via the internet – on the understanding that an ISP is the ideal agent with the installed capacity to monitor effectively and quickly what is happening through the network.

It has been seen that educational institutions facilitate access by their students to works used to illustrate teaching. It has also been mentioned that facilitating access to works in digital format or in the digital network environment multiplies the risk of the students being able to misuse those works, thereby infringing copyright or related rights.

The question is raised as to whether provisions of this kind, envisaged not only for ISPs but also for the holders of copyright and related rights, might not also lead to a system that specifies the scenarios in which institutions that provide physical facilities for facilitating or gaining access to the internet could assume liability for infringements of copyright or related rights.

LOUISE MORAN refers to several other issues that directly or indirectly affect the responsibility of educational institutions for the management of copyright and require the adoption of measures such as already mentioned and such as the following:

- knowing exactly what can be placed on publicly accessible websites without compromising the university's intellectual property rights;
- seeking the most cost-effective and equitable ways of allowing secure access to online material for the university's students whether in Australia or overseas;
- the need for new protocols on responsibilities of staff in relation to electronic copyright, and an educational awareness program, especially recognizing that few are familiar with the intricacies of copyright requirements;
- quality assurance arrangements in terms of intellectual content, presentation and interactions in online delivery.

LOUISE MORAN⁸¹ says that there are also other problems regarding the use of hyperlinks to courses or materials located elsewhere. At one level, these issues include the appropriate forms of permission and citation of electronic sources, payment arrangements in the absence of national legislation and statutory licenses and the courtesies of advising the other site that students may “hit” on it. At another level, the problems concern the ethical, legal and cost implications impact of “passing off”, where the link made to material at another site may not be easily perceived by the user, who may then assume that the material is part of the original course. This is compounded by the educational desirability of making learning materials as easy to traverse as possible.

On the subject of liability for breach of copyright,⁸² IFLA gives two approaches that apply both to libraries and documentation centers and to educational institutions:

“Although libraries as intermediaries have an important role to play in ensuring compliance with copyright law, liability should ultimately rest with the infringer.”

“Copyright law should enunciate clear limitations on liability of third parties in circumstances where compliance cannot practically or reasonably be enforced.”

4.11 Gaining effective access to works in the public domain and resolving the issue of orphan works

Case study

Policy Guidelines for the Development and Promotion of Governmental Public Domain Information (UNESCO)⁸³

Since 1997, UNESCO has been developing various activities that are intended to facilitate access to public domain information, the aim being to establish, over the long term, a general electronic repository of all public information relating to international organization’s areas of competence.

In 2004, UNESCO published a series of recommendations to member countries concerning the development of public policies to promote the availability of governmental public domain information. The key elements and bases of public policies in this regard include the following:

- (i) Define the scope of available public domain information produced by governments

⁸¹ LOUISE MORAN. Distance education, copyright and communication in the information society. UNESCO, Copyright Bulletin, April-June 1999, page 15.

⁸² The International Federation of Library Associations (IFLA), “The IFLA Position on Copyright in the Digital Environment”, available at <http://www.ifla.org/en/publications/the-ifla-position-on-copyright-in-the-digital-environment>

⁸³ UNESCO “Policy Guidelines for the Development and Promotion of Governmental Public Domain Information”, available at http://portal.unesco.org/ci/en/files/15863/10857529457policy_guidelines.rtf/policy_guidelines.rtf

according to the nation's needs;

- (ii) Establish the legal right of access to and use of public information;
- (iii) Develop and implement a comprehensive governmental public Information Policy Framework for the management and dissemination of public information resources;

As part of the policy, provision is made for:

- (a) creating the appropriate public information management structure;
- (b) defining the public information management policy requirements;
- (c) adopting strategies on information systems and information technology management;
- (d) key procedural elements for the development of a national Information Policy Framework.

The countries are entitled to adopt public policies where the availability of works in the public domain for the benefit of education and culture is compatible and in harmony with the protection of copyright and related rights, through which literary and artistic creation and the production of cultural goods is encouraged and made possible.

It is argued that there has traditionally been a system of restricted access based on copyright, which is controlled by publishers and has set a high cost for scientific publications or publications of academic interest.

The advent of digital technology and information networks has produced a phenomenon regarding sources of academic information on the internet, in which educational institutions have been involved by creating spaces where public domain educational materials can be accessed, either because their period of protection under copyright or related rights has ended or because their authors or rightholders have relinquished their rights or adopted alternative licensing schemes intended to permit certain types of use – such as for the purpose of examinations – freely and without payment.

A new model of communication and open access to educational resources and scientific literature via the internet is thus proposed, funded by institutions or where the author pays for publication.

Since 1992, as a result of initiatives such as the Open Society Institute and the Budapest Initiative for Open Access, the open access model has sought to strengthen the transmission of knowledge. On the basis of that model, educational institutions assume a leading role in disseminating knowledge: when released on the internet, access to knowledge is maximized, which is compatible with the desire of authors to communicate their research and to gain professional prestige. Likewise, artists who want to share their work and have access to other works so as to be more creative may be interested in expanding the public domain.

This has led to initiatives such as institutional archives or open educational resources, which seek to achieve interoperability standards.

The movements that advocate alternative licensing models have their origins in the idea of protecting the public domain to promote the universal dissemination of culture and knowledge and better distribution of opportunities arising from education. Open education is a global phenomenon. Alternative licensing schemes have set themselves the task of minimizing legal, technical and social barriers to sharing and using educational materials.

Public policies to strengthen the public domain need to be developed to address difficulties such as public accessibility of public domain works and differing legal treatment, which spread confusion about what belongs to the public domain, etc.

4.12 Developing legislation on limitations and exceptions on technological measures in order to promote education and on the interface with the limitations and exceptions for the benefit of education and research

Case study

Limitations or exceptions regarding technological measures for educational purposes in the DMCA and the provisions that implement it (United States)

Legal protection of technological measures is provided for in section 1201 of the Copyright Code of the United States of America. This protection is subject to limitations or exceptions that permit certain uses to be made of the protected works, which include the following references to education and research:

- (i) Limitation or exception on technological measures for controlling access, in favor of non-profit libraries, archives and educational institutions, which allows them to obtain information in order to take a decision about whether to acquire or obtain authorized access to a work of interest to them (section 1201(d));
- (ii) Limitation or exception on technological measures controlling access, in order to permit encryption research for the purpose of identifying possible flaws and vulnerabilities and of developing encryption products (section 1201(g));

The DMCA having created an administrative procedure for establishing new limitations or exceptions on technological measures (section 1201 (a)(1)(B)(e)), it has been established that criteria which need to be taken into account when establishing such limitations or exceptions include, among other things, the availability of works for educational use as well as the impact of the prohibition of circumventing technological measures to protect education, science or research.

The limitations or exceptions that were adopted in 2006, with effect from 27 October 2009, include:

- (i) Limitation or exception on technological measures controlling access, in the case of audiovisual works in the libraries of colleges or universities with courses in audiovisual or cinematographic media when the technological constraint is lifted or circumvented in order to make compilations of such works for educational use in the classroom

Case study

Exceptions on technological measures for educational purposes in the European Directive

In Article 6 of the Directive, the list of limitations and exceptions on technological measures provides for the following relating to educational and research purposes:

- (i) Limitation or exception on technological protection measures which are provided for, in the absence of an agreement by which the rightholders may voluntarily exercise that limitation or exception, in order to permit reproduction by libraries, educational establishments or museums, or by archives, which are not for direct or indirect commercial advantage, where that beneficiary has legal access to the protected work or subject-matter concerned (Article 6(4) and Article 5(2)(c));
- (ii) Limitation or exception on technological protection measures which are provided, in the absence of an agreement by which the rightholders may voluntarily exercise that limitation or exception, to permit use for the purposes of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, when that beneficiary has legal access to the protected work or subject-matter concerned (Article 6(4) and Article 5(3)(a));

As already stated, the limitations and exceptions on technological measures referred to in the European Directive do not apply to works and productions that have been made available to the public in accordance with what has been contractually agreed for the online digital environment, i.e. so that specific individuals from the general public may access them wherever and whenever they choose.

The obligation to give legal protection to technological protection measures applies in the countries in the region that are signatories of the WCT and the WPPT (Argentina, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru). Notwithstanding the foregoing, apart from Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua, the provisions of these conventions have not yet been implemented in most of our countries. That situation is exacerbated if one considers that other issues have been added to the agenda for the protection of works in the digital environment, such as the definition of cases in which it is permissible to overcome or circumvent a technological measure to restrict the unauthorized use of works, or the liability of internet service providers for violations of copyright committed by third parties through their infrastructure.

Given the above and, moreover, because in the countries in the region, the interface between the legal protection of technological protection measures and limitations and exceptions for education and research has not been dealt with, there is no alternative but to answer the question in the negative, as this is another topic area or scenario in which the countries in the region are called to develop provisions for the balance of rights and interests.

Even in countries which have developed limitations or exceptions on the protection of technological measures (e.g. Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua), the balance of rights and interests can be improved through the procedure for providing periodically for new limitations or exceptions by administrative means. By referring to comparative law and given that the countries have adopted provisions

fairly similar to those in the DMCA of 1998 in the United States, they could also adopt the limitation or exception on technological measures controlling access in the case of audiovisual works in the libraries of colleges or universities with courses in audiovisual or cinematographic media when the technological constraint is lifted or circumvented in order to make compilations of such works for educational use in the classroom.

It is worth recalling that for the countries in the region, it is appropriate to refer to comparative law to draw on the experience in other legal systems, just as it is also valid and desirable to develop their own legislative initiatives that are the result of debate and analysis among the various sectors of interest, rightholders and users of works in each country, because, as we have said, the balance of interests comprises the specific features of each time and place.

4.13 Initiatives to facilitate free access or to reduce the cost of cultural goods

Case study

Several producers of computer programs offer educational institutions special licensing at lower prices. This is the case of Microsoft, which offers four different types of licenses to provide more favorable conditions for the use of its computer programs by students, teachers and administrative staff.

The benefits that teaching establishments obtain by using these licensing schemes are summarized below:

1. Microsoft Open Academic License

License packs can be purchased at discount prices over a period of two years, with the possibility of extending the period for two more years if a minimum volume or number of licenses are purchased. The bulk acquisition of licenses enables teaching establishments to manage overall costs, to implement uniformity and to maintain control over the authorized use of Microsoft software products. Under this scheme, discounts of up to 65% on the estimated non-academic purchase price can be obtained. This discount varies depending on the number of licenses purchased and the license for Encarta Encyclopedia and Encarta Atlas is offered as a bonus.

2. Microsoft Schools License

This scheme makes it possible to license applications for periods of 12 to 36 months by paying an annual fee that is far less than what would be paid for permanent licenses. On termination of the contract, the options are (i) renew the license, (ii) leave the program by purchasing permanent licenses and (iii) remove the software from the computers.

3. Microsoft Academic Select License

This applies to educational institutions with 250 computers or more, offering a flexible system of prices for purchases made within a period of three years, with large discounts on non-academic prices.

4. Microsoft Campus License

The Campus License is an agreement to lease computer programs that enable a university to use Microsoft products on all its computers for a period of one or three years. The university pays an annual fee depending on two factors, the number of lecturers and staff members who are employed for more than 200 hours a year and the products for which licensing is required.

Case study

Fixed-price or single-price policies for books⁸⁴

The fixed price or single price for books consists of stipulating that a book must be sold at the same price set by the publisher or importer and maintained throughout the territory of each country, in all outlets and at any time of year.

Various countries have adopted provisions on the single book price in their laws. In 1837, Denmark was the first country to adopt it, although the United Kingdom was where the theory was formulated and where it first spread. Since then it has been implemented in other countries, either through agreements between business companies, as was the case in central and northern Europe, or through laws, as was the case in southern European countries such as France and Spain.

Some of the countries that established this measure through business or corporate agreements (e.g. Denmark and Germany) have a tradition of market regulation by the former professional corporations that dates back to the Middle Ages.

The French law of 1981 sets out to harmonize consumer protection and free competition, promoting “the equality of citizens in relation to books, which will be sold for the same price throughout the national territory; the maintenance of a very dense decentralized distribution network, especially in disadvantaged areas; support for pluralism in creation and editing, especially for difficult works”.

In order for this to be implemented, the law stipulates that the discounts granted to (traditional or internet) booksellers or distributors on the price set by the publisher (or importer) may not exceed 5%, with limitations or exceptions for special cases.

In the region, this measure is provided for in the Law to Encourage Reading and Books in Mexico, and in Argentina in Law No. 25.542, known as the Law on the Protection of Book-selling (Ley de defensa de la actividad librera).

JENS BEMMEL, Secretary General of the International Publishers Association established in Switzerland, is of the opinion that for a reading society to exist, books must be accessible to

⁸⁴ Fabio Sá-Earp and George Kornis. “El precio único del libro: solución frágil para un problema grave” in *Pensar el Libro* No. 4, August 2006. Regional Centre for the Promotion of Books in Latin America and the Caribbean (CERLALC), Bogotá, Colombia.

everyone, they must be available everywhere (supermarkets, petrol stations), not only in bookshops, and they must also be affordable. He says that many small bookshops have disappeared because the large ones do not allow them to survive. Small publishing companies have to be able to compete with large bookshops and it is therefore important for book prices to be stable. Although setting a single price for a book may be a controversial issue in some free market countries, there is no doubt that the States that have adopted a single price have found a successful way to promote and boost reading.

The following are some of the benefits of setting a single or fixed book price:⁸⁵

- The same price is guaranteed throughout the territory of each country and, consequently, prices are stable and lower;
- Support is given for the broader dissemination of many books, especially scientific and technical works;
- Shortages and misuse are avoided, especially in places where, because of geographical conditions, competition is less prevalent or non-existent, and fair competition among booksellers is ensured;
- The existence of a wide-ranging, diversified supply is enabled and favored, which promotes and encourages impulse buying;
- Authors' royalties can be fairly and easily calculated;
- The establishment and development of modern bookshops is permitted, in that the principle of offsetting losses against profits has started to be applied.
- Bookselling – and, ultimately, the development of the publishing industry – is encouraged; writers have more publishing houses for their works, more works are published, print runs are increased and many more books are sold.

Case study

Public policy for free textbooks (Mexico)

Mexico's National Commission for Free Textbooks⁸⁶ gives its history as follows: "From 1944, the then Secretary of Public Education Jaime Torres Bodet – an outstanding Mexican man of letters, academic and diplomatic – was greatly concerned by the books which were used to educate the children in the country's compulsory education system. A young lawyer, Adolph Lopez Mateos, noticed at that time that the principle of basic education being free of charge – enshrined in the Constitution – he was not fully observed because textbooks were excessively expensive, of poor quality and unaffordable for most of Mexican families.

"When he became President of the Republic in 1958, Lopez Mateos was faced with a population which had high levels of illiteracy and poverty that undermined fair access to

⁸⁵ Rafael Martínez Arlés. "Preguntas y respuestas sobre el precio fijo" in *Pensar el Libro* No. 4, August 2006, Regional Centre for the Promotion of Books in Latin America and the Caribbean, CERLALC. Bogotá, Colombia.

⁸⁶ www.conaliteg.gob.mx

educational services. ‘The school can do little for the children if their parents do not have the resources to buy textbooks for them,’ he said. In order to tackle such problems, Lopez Mateos chose someone who had been a disciple of the teacher Jose Vasconcelos to occupy, for the second time, the Secretariat of Public Education: Jaime Torres Bodet.

“Torres Bodet launched an extensive literacy campaign throughout Mexico with one firm idea: that each student at the compulsory level would attend school with a textbook under his arm, paid for by the Federation. The idea was thus born of establishing the National Commission for Free Textbooks (CONALITEG), with the vision of free textbooks being more than a social right, a vehicle that enabled dialogue and fairness at school.

“CONALITEG was finally founded by President Lopez Mateos on February 12, 1959. The initial criticism of so great project were not long in coming, since the Commission, as a public body, granted books free to private institutions from the outset; the President simply replied: ‘They are all children and belong to our people.’”

Case study

Book exchanges and access to information and culture

A first method does not exactly consist of “swapping” or exchanging, but of placing books in public places, and stemmed from a private initiative in which people left copies of books in public places so that others might pick them up at no cost and read them, and possibly return them to the same place so that still others could enjoy them. In Bogotá (Colombia), in connection with the city being named the World Book Capital 2007, the District Institute of Culture carried out the “Book to the Wind” program (Libro al Viento) using that method, placing bookstands at the stations in the public transport system, with works by various Latin American authors published by that Institute.

Exchanging books or book-crossing enables people to offer their used books to other interested people, who then give a used book which might be of interest in exchange, with no money changing hands.

Book-crossing festivals or events are held at several places in Latin America and the Caribbean. In Tijuana (Mexico), for example, DAYTODAY is organized by an NGO whose aim is based on communication processes, movement and exchange as a response to the effects of capitalism. In Santiago de Cuba (Cuba), the exchange is organized on the instigation of the José Soler Puig Literary Promotion Center and the Provincial Center for Books and Literature in Santiago de Cuba. In Bogotá, the book exchange takes place each year, with the slogan “someone has the book you’re looking for and someone is looking for the book you have”; it is organized by the Bogotá Institute for Culture and Tourism (IDCT) and the Regional Center for Book Development in Latin America and the Caribbean (CERLALC).

The rules established by the organizers for such exchanges include the ruling that texts that have been stamped by libraries or other institutions, school textbooks, technical or specialized books, pirated or photocopied books and books in poor condition may not be exchanged and that no money is allowed to change hands.

Book-crossing websites have now been set up. In Spain, those in charge of the website <http://cambia.es> offered book-crossing at the Madrid Book Fair and are continuing to operate a book exchange via their website. In the United State, the best known and fastest growing book-crossing website is Bookmooch. On that website, people list the books that they have read and want to exchange. Other people then choose one of them and ask for it to be sent. The person offering the book is obliged to send it otherwise, if he repeatedly refuses to do so, he can be excluded. Other exchange sites work with point systems (e.g. www.Paperbackswap.com); by offering a number of books, people gain points that they can use to order books. The more books are offered, the more can be chosen. Other exchange sites are www.interplanetaria.com, www.el-recreo.com and <http://libros.creatuforo.com>.

Case study

Electronic textbooks as a cost-cutting resource

The following report was issued by the AFP news agency in May 2009 on the elimination of paper textbooks in California (USA):

“The Governor of California imposes the digital age and eliminates school paper textbooks

“Republican Arnold Schwarzenegger said that traditional math and science books were outdated. This statement could cause heart palpitations, nervous breakdowns and perhaps sudden baldness among teachers, education ministers and staff at publishing companies. But that ‘threat’ is becoming increasingly tangible, a real success for California Governor Arnold Schwarzenegger.

“The famous Governor yesterday announced a plan to eliminate school textbooks in favor of digital learning, which he thinks will make savings at a time when his state needs to plug a huge budget hole.

“‘There’s no reason why our schools should have our students carry around these antiquated, heavy and expensive textbooks,’ Californian Governor Arnold Schwarzenegger said.

“The measure – dubbed the Digital Textbook Initiative – will see California schoolchildren ditch ‘outdated’ traditional math and science textbooks for digital versions by next September, The Times reported today.

“‘Kids, as you all know, today are very familiar with listening to their music digitally and online and to watch TV online, to watch movies online, to be on Twitter and participate in that and on Facebook,’ the Governor told a group of children at a school in Sacramento.

“‘California is the first state in the United States to introduce such an initiative,’ Schwarzenegger said. The move comes as Schwarzenegger looks to narrow California’s projected 24 billion dollar budget deficit, AFP reported.

“With the average price of a school textbook coming in at between 75 and 100 dollars per

student, the Governor said initial savings from the plan would be between 300-400 million dollars.

“‘The state has a tremendous lack of money; therefore we had to make severe cuts to schools, billions of dollars of cuts, so we have to find every possible way to think outside the box,’ the Republican said.

“‘In the rich state of California, home to a major industrial sector in the United States, in order to reduce the budget deficit the severest measures are being implemented in the education and health sectors and in the prison system, where all cases are being reviewed with a view to releasing those serving sentences for minor offences.

“‘However, the million-strong budgets for security and the police forces with resources similar to those of an army in large cities such as Los Angeles and San Francisco are left untouched.’”

With regard to electronic book-reading devices and their use in academic circles, Jens Bommel, General Secretary of the International Publishers Association, refers to Ireland, where electronic books are being used at various high schools. Teachers, parents and students are thrilled with the device, but at the end of the year they realized that the destruction rate was too high. This involves an educational cost that is difficult to sustain.

In Spain, in April 2009, the Government’s Regional Ministry of Education announced the start of a new program in which dozens of secondary schools will transmit up to 60% of the curriculum content to over ten thousand students in a digitized manner. The authorities will have to change many things – from adapting classrooms and other facilities to take the large number of computers to renting computers to students for no more than €10 a month.

In Finland, the education system has already integrated virtual tools (such as online schoolbooks) into its classrooms. However, only 10% of schools have adopted this format, since several studies have shown that the level of concentration on screen is not the same as on a sheet of white paper.

An electronic book (e-book) is a digitally formatted version of a book that is intended to be read in a similar manner to a book published on paper, unlike hypertext which aims to structure the information through links or hyperlinks.

Electronic books can be read on a computer monitor, can be transferred to mobile devices or telephones (e.g. Apple’s iPhone) or can be read using electronic reading devices (e.g. Sony Reader, iLiad, HanLin, Star eBook, Booken Cybook and Kindle, which is Amazon.com’s electronic book reader, the company having announced that it is working on a special version for students), which typically emulate the versatility of traditional paper-based books in terms of mobility and autonomy (mobile devices with low energy consumption to allow lengthy reading periods without the need to be recharged), and screens that are similar in size to a book page and with a high level of contrast even in full daylight.⁸⁷ Electronic book reading seems to have the same versatility through ultra-light computers such as (e.g. Asus Eee, Dell Mini, Mini Note) with the advantage that, in addition to permitting reading, they have the functions of any other computer.

⁸⁷ www.es.wikipedia.org

Electronic books usually have technological protection devices or measures that prevent unlawful copying (e.g. Adobe Reader).

As a result of this technology and its impact on the market, the business of virtual bookstores selling electronic books has been growing (e.g. *www.amazon.com* or the virtual shop *www.scribd.com*, a document interchange site with 60 million users each month). However, it is still a small segment of the market: in the United States, sales of electronic books represent only 0.6% of the market; in the United Kingdom, 0.1%. In France, during the Christmas period in 2008, there was a large campaign to promote the Sony Reader reading device, 6,000 of which were sold, but since then only 15,000 electronic books have been downloaded.

The publishers that have recently announced that they are starting to sell the titles in their book catalogue as electronic books include Simon & Schuster and Random House. Other publishers such as Santillana, Planeta or Mondadori announced in June 2009 that they are conducting negotiations with authors on their digital publication or electronic edition rights and the income distribution percentages (it is estimated that royalties for e-books are between 25% and 40%, in contrast to the figure of around 10% that is now paid in royalties).

4.14 Electronic publication of scientific journals protected by alternative licensing models

Case study

The Network of Scientific Journals of Latin America and the Caribbean, Spain and Portugal (Redalyc)

Redalyc, the Network of Scientific Journals of Latin America and the Caribbean, Spain and Portugal (<http://redalyc.uaemex.mx>), publishes electronically in open access mode 550 scientific journals and 114,329 full-text articles in pdf format on the following areas of knowledge:

- Social Sciences and Humanities

Agrarian Studies / Anthropology / Art / Culture / Demography / Economics / Education / Environmental Studies / Geography / Health / History / Information Sciences / International Relations / Language and Literature / Law / Multidisciplinary Studies (Social Sciences and Humanities) / Philosophy and Science / Politics / Psychology / Public Administration / Sociology / Territorial Studies

- Natural and Exact Sciences

Agroscience / Architecture / Astronomy / Atmospheric Science / Biology / Chemistry / Computing / Engineering / Geography / Geology / Geophysics / Mathematics / Medicine / Multidisciplinary Studies (Natural and Exact Sciences) / Multidisciplinary Studies / Oceanography / Physics / Veterinary Science.

Redalyc is a project initiated by the National Autonomous University of Mexico in cooperation with hundreds of Ibero-American institutions of higher education, research centers, professional associations and publishing companies. It is a non-profit-making, open-

access academic project for scientific literature, which means that it complies with the definition of the Budapest Open Access Initiative (BOAI, 2001). In accordance with a Creative Commons License 2.5, which is used by the publishers of the scientific journals that are published in that project, the materials can be used for educational, informational or cultural purposes, while there is a restriction on the use of works for commercial purposes as well as on modification or the production of a derived work. Likewise, the name of the author, the publisher and the institution must be given.

One of Redalyc's main policies is that no database is authorized to download files (scientific studies) in pdf format to place on their own sites. However, full authorization is given for links to be made to related materials; if these links are established by a database or a commercial site, the link to the electronic texts is authorized provided that explicit indication is given that the Redalyc materials are open access materials and that neither they nor Redalyc receive financial remuneration arising from the links.

There is an increasing tendency to publish scientific literature in electronic publications, especially through the internet. The advantages of scientific publishing by electronic means relate to the reduction in publishing costs, the broad dissemination of the published articles, easy distribution, the speed of communication between publishers and authors, publication speed, greater interaction between authors and readers, unlimited space for the published articles, multimedia integration, ease of access and the reduction of library maintenance costs.⁸⁸ However, whether or not all articles in a scientific journal can be consulted online depends on how – as in the past – the contracts and licenses with the authors have been handled.

Promoting this kind of publication can be part of a public policy regarding the availability of public domain information.

4.15 Facilitating access to the results of research conducted with public funds

Case study

The largest and most influential institutions funding research at the global level – the National Science Foundation (NSF) and the National Institutes of Health (NIH) – require research funded by the United States to be accessible to the scientific community. Non-compliance threatens the future funding of these institutions by both agencies. Similarly, private foundations are beginning to require similar commitments with a very simple incentive: “If you want our money, this is what you must do.”⁸⁹

⁸⁸ FORERO Dimitri and BOHORQUEZ Clara Isabel, “La Publicación Electrónica: ¿El Futuro de la Publicación Científica?” at http://www.ornitologiacolombiana.org/boletinespdf/publicaciones_electronicasBoletin3.pdf

⁸⁹ Timothy J. Killeen, “Data in the public domain”, published in Spanish on <http://docs.google.com/gview?a=v&q=cache:QE5DLsWzVGAJ:editorenjefe.ecologiabolivia.googlepages.com/Editorial43-1.pdf+investigaciones+financiadas+por+el+estado&hl=es&gl=co>

As part of a public policy regarding the availability of information in the public domain, which may be developed by countries as a result of initiatives such those being developed by UNESCO and the discussions and analysis taking place at WIPO, the need arises for information obtained as a result of research paid for by public funds to be available to the public freely and without charge. Allowing the opposite would amount to misappropriation of public property.

Following that same argument, research would benefit not only from the free dissemination of information derived from research. In general, any other governmental public domain information could possibly be of use for scientific and technical research purposes throughout society, this being the case of many factual databases that are compiled by government entities or with government funding.

4.16 Promoting access to the consultation of scientific and technical journals by patent offices

Case study

The aRDi⁹⁰ will give patent offices free access to scientific and technical journals

The aRDi program gives IP offices and other institutions in developing countries free or low-cost access to scientific and technical journals.

aRDi is the English acronym for the “Access to Research for Development and Innovation” program, which is coordinated by the World Intellectual Property Organization (WIPO) together with its partners in the publishing industry with the aim of promoting and increasing the availability of scientific and technical information in developing countries.

By providing access to specialist literature in various scientific and technological fields, it seeks to reinforce the capacity of developing countries to participate in the global knowledge economy and to support researchers in developing countries in creating and developing new solutions to technical challenges faced on a local and global level.

Currently, 12 publishers provide access to over 50 journals for 107 developing countries through the aRDi program.

The above example takes account of the fact that international cooperation can be a means of facilitating research and of providing access to knowledge in developing countries.

This project ensures a multiplier effect for access to scientific and technological knowledge and takes account of the fact that the national patent offices that take advantage of this program can establish documentation centers or libraries that enable not only their officers or patent examiners to consult journals but also researchers and the general public.

⁹⁰ Available at <http://www.scidev.net/es/science-communication/news/oficinas-de-patentes-tendr-n-acceso-libre-a-revist.html>

4.17 Electronic publication of degree theses or monographs by educational institutions

Case study

In the United States, an estimated 43,000 students produce doctoral theses each year. Unfortunately, very few of them circulate outside the university libraries. Limited readership restricts the possibility of making a significant contribution. According to Gail McMillan, Head of the Digital Library at Virginia Tech, the probability of electronic theses and dissertations being consulted is 100 times higher than for printed versions.

As an example, the studies archived in the Networked Digital Library of Theses and Dissertations (www.ndltd.org) are read by thousands of people. On the other hand, a private company, UMI, which in the past 50 years has been the repository and disseminator of printed doctoral theses, has now digitized the theses and has converted them into PDF archives that may be consulted online (www.umi.com). Users can view thesis descriptions and previews of up to 24 pages.

In that country, various universities allow students to restrict access to campus servers. This is primarily for fear of broader access being considered previous publication and hence impeding publication in indexed journals. However, 83% of publishers do not consider the fact that a thesis is available online as previous publication.⁹¹

UNESCO has published a Guide to Electronic Theses and Dissertations (ETDs) (<http://www.etdguide.bibliored.cl/>), which is a document that seeks to collect the experience of experts on electronic theses and dissertations worldwide. On the other hand, there are online repositories of electronic theses such as CYBERTESIS (<http://www.cybertesis.net/>), which is a portal whose aim is to provide a tool giving easy access to full-text ETDs published at various universities worldwide.

The following are some examples of digitized and electronically published university degree theses from the countries in the region:

- CYBERTESIS PERU – Sistema de Bibliotecas UNMSM (Peru)
<http://www.cybertesis.edu.pe/sdx/sisbib/>

This is a project sponsored by UNESCO, the University of Chile and the University of Lyons. This initiative, directed in Peru by the Central Library for the Major National University of San Marcos (UNMSM), seeks to develop and implement digitization and electronic publication processes for theses and other documents on the basis of international standards.

- SISIB – System of Information and Library Services, University of Chile
<http://www.cybertesis.cl/>

This website provides access to the theses of various faculties and institutes at the University of Chile as well as information about writing or publishing a thesis.

⁹¹ Interview with Tom Moxley, available in Spanish at <http://www.universia.net.co/tesis-de-grado/destacado/las-universidades-deben-requerir-tesis-y-disertaciones-electronicas.html>

- SBU – UNICAMP Digital Library (Brazil)

<http://libdigi.unicamp.br>

The objective is to disseminate the scientific, academic and intellectual production of the university in electronic/digital format, e.g. articles, photographs, illustrations, theses, works of art, sound recordings, journals, videos and other documents of interest for scientific, technological and socio-cultural development.

- Institutional Thesis Repository of the University of the Andes, Merida (Venezuela)

<http://tesis.ula.ve/harvester/>

The Institutional Thesis Repository at the University of the Andes provides free access to the full text of special degree theses and studies produced during undergraduate and postgraduate programs.

- Thesis bank of the National Autonomous University of Mexico (UNAM)

<http://biblioweb.dgsca.unam.mx/derecho/>

The National Autonomous University of Mexico (UNAM) has established a thesis bank, in which, when posting their document, thesis writers sign a liability agreement in which they state that they are not infringing any copyright and agree to their document being displayed in the university's media.

An academic thesis is a written study on original research by a student or a written analysis of others' publications on a given subject. Both types of theses are necessary to fulfill the requirements of various academic degrees.⁹²

There are various reasons why universities should make use of electronic theses and dissertations (ETDs).

The existence of a digital library on the internet is becoming increasingly seen as proof of the quality of a university institution. Broader dissemination of academic studies is beneficial for students, teachers and researchers, who are not only able to access valuable information in their own interest but may also take advantage of better employment opportunities and greater professional recognition.

Electronic publication of degree theses is deemed to increase the possibility of the academic studies being better or more relevant, but the universities need to provide the resources required to facilitate electronic publication and hold training workshops for students.

4.18 Facilitating access to scientific databases

Case study

⁹² Source: *http://es.wikipedia.org/wiki/Tesis_doctoral*

CINCEL project (Chile)⁹³

CINCEL is a private company established by the 25 universities in the Council of Rectors of Chilean Universities, the Chilean Antarctic Institute and the National Commission for Scientific and Technological Research (CONICYT), which was officially established in July 2003. As the founding partner, CONICYT is also the company's Executive Secretary.

CINCEL was established to carry out specific tasks within the framework of the National Program for Online Access to Scientific Information driven by CONICYT. The first thing it did in this connection was to take out a joint subscription to online access to the Web of Science, a high impact product that is essential in the research world.

The joint subscription to the Web of Science, launched in 2002, is the first in a series of initiatives relating to the joint acquisition of products and services through participation in CINCEL. ISI Web of Science enables its users to consult scientific databases, making it possible to:

- use cited reference data to move backward in time in order to track the research that has influenced an author's work;
- use "Times Cited" to move forward in time in order to trace the impact of a paper on current research;
- use the function "Related Records" to locate and display relevant factors common to one or more cited reference;
- expand a search using keywords extracted from the references cited in an article (KeyWords Plus);
- search cited references in primary and secondary authors (for articles in the ISI citation indexes);
- search the update for the current week, the past two weeks, four weeks, particular years or all available years;
- search cited references in primary and secondary authors (for articles in the ISI citation indexes);
- order full-text documents directly in the network and receive them through the ISI Document Solution;
- export archives directly to leading bibliographic management programs End Note, Reference Manager and ProCite.

Case study

Uruguay finances online access to scientific journals⁹⁴

The National Agency for Innovation and Research (ANII) of the Eastern Republic of Uruguay

[Continuación de la nota de la página anterior]

⁹³ http://www.cinzel.cl/index.php?option=com_content&task=view&id=12&Itemid=28

⁹⁴ Available at <http://www.scidev.net/es/science-communication/science-publishing/news/uruguay-financia-acceso-a-revistas-cient-ficas-en-.html>

signed an agreement with Elsevier Science Publishers which will allow it to give Uruguayan researchers free access to more than 2,000 journals published by the Dutch company worldwide.

In accordance with the agreement, ANII will finance the subscription to the journals. This agreement, which is part of the Timbo program, a bibliographic portal, will provide free online access to journals for the scientific community in Uruguay, which was previously unable to afford to subscribe to these materials.

In the past, some study and research centers in Uruguay earmarked part of their budget to subscribe to a few of these journals. The creation of the portal makes a saving which helps to resolve the issue of broadening bibliographic access. In 2009, the program budget is US\$1.2 million, but a 5% increase per annum is envisaged. ANII is currently negotiating with two more publishing companies.

For computer support, the plan is to use the academic network of the University of the Republic, the State institution, to reach national researchers. Agreements will also be concluded to enable the service to be used by other public and private organizations.

Free or subsidized access to journals and scientific databases explains the growth of research taking place in developing countries.⁹⁵

By consulting this kind of databases, a large volume of literature and scientific and technological data can be accessed, e.g. technical and scientific journals, books and monographs, technical reports, degree theses, numeric data, documents on lectures, reports, maps, standards and specifications, patents, etc.

The databases provide information of scientific interest in all fields of knowledge, facilitating information retrieval and its subsequent use by means of computerized search and online access.

Access to this kind of information and its use form a vital instrument in the application of a technological development strategy which seeks to promote a link between the scientific and technological system and a country's production sector, in order to streamline the flow of imported technology and to enhance capacity building for the local technology supply. State support that aims to give the university institutions access to scientific databases must be part of a public policy regarding scientific and technological research and access to international scientific and technological information.

⁹⁵ Katherine Nightingale at <http://www.scidev.net/en/science-communication/science-publishing/news/subsidised-access-may-be-behind-developing-country.html>

CHAPTER 5 ANALYSIS OF THE QUESTIONS AND SOLUTIONS

5.1 Contrast and balance of rights and interests

Legally, individual rights are not absolute in that their exercise is subject both to respect for the rights of others, the public interest and compliance with the law. Rights are given to the society in which they apply rather than to the individual and are therefore considered relative rather than absolute. Each of those rights has its own rationale and a mission to accomplish and each of them pursues an objective within society, hence the exercise of one or another right must be reconciled, striking a balance which ensures that the rights can be exercised and fulfilled as far as possible, i.e. subject to appropriate necessary and proportionate restrictions that ensure harmonious coexistence. If, however, subjective rights were considered absolute, it would be impossible for rights to coexist since the right of each individual would tend to be exercised at the expense of the rights of another person, favoring one over the other, a highly impractical situation in respect of equally valid rights.

Where rights coexist, the weighting of conflicting or opposing rights presupposes that no hierarchical system exists, but rather a pattern of relative preferences that depend on the specific circumstances of each case, through which equitable treatment and a balance of rights can be achieved.

The legislative function of the State is offset by the search for a balance between the various rights and interests, in pursuit of the general interest. To achieve this balance between copyright and the various rights and interests represented in access to and enjoyment of works and performances, the legislator relies on resources such as the following:

- definition of the period of protection of the economic rights;
- definition of the type of creations belonging to the public domain and excluded from copyright protection;
- providing for the possibility of the State expropriating the economic rights and defining on what grounds this can be done; and
- establishing a system of limitations and exceptions to copyright and related rights.

In addition to the foregoing, the balance of rights and interests may benefit from the contribution of authors who, of their own volition, decide to waive their economic rights, thereby placing their works in the public domain, or who make use of alternative licensing models or schemes which facilitate free public access to certain acts in respect of the work, albeit in accordance with certain restrictions or conditions.

The balance of rights and interests translates into the fact that in a country, the copyright obligations are fulfilled and carried out at the same time and to a similar extent as the right to education, to information and to culture and, in general, social interests. Nonetheless, for copyright obligations to be genuinely fulfilled and carried out in a country – basically the task of obtaining appropriate economic remuneration as an incentive for artistic and literary creativity – what is necessary is not only that the country has relevant legislation which may be part of international conventions, but also has recourse to other conditions such as the existence of cultural and entertainment industries, collective management organizations and adequate levels of compliance with the laws, which are able to lift copyright out of the theoretical realm and into practice. For this combination of conditions to be called a

“copyright system”, it must be affirmed that the system is a basic element in the balance of rights and interests as there can be no balance if the general public has free and open access to the enjoyment of the works and fulfills its right to education while authors and their rightholders see that their rights are written in black and white and enshrined in the law but are without practical application.

The reality and priorities in respect of copyright and the right to education are different in each country, so that the determination of the balance of rights and interests must also differ from one place to another. This equilibrium or balance can hardly be presented or formulated as a rigid parameter regardless of whether the relevant laws will be implemented, for example, in a developed country or in a developing country, in a country where conditions exist for obtaining appropriate financial remuneration for artistic and literary creation (legislation, compliance with the laws, collective management, cultural industries, etc.) or in another without such conditions, in a country with high human development indices or in another with illiteracy and low educational levels, etc.

This does not mean that a developing country with considerable needs in terms of education should disregard copyright protection. On the contrary, it can achieve a balance of rights and interests that facilitates or favors access by its people to quality education by making use of the resources provided by law and by international copyright conventions.

Likewise, the balance of rights and interest may need to be adjusted or modified as time goes by and in the light of technological development as the advent of new technologies brings about a change in the business form or model by which authors and rightholders exploit their works and productions, as well as a change in the way in which the general public accesses enjoyment of the work, so that copyright as well as the right to education, culture, information etc. need to be fulfilled through new mechanisms and new legal provisions.

5.2 Is copyright incompatible with the right to education and access to knowledge?

Copyright protection is not ruled out by the effective fulfillment of the rights to education and access to knowledge, as mechanisms exist within the copyright laws that allow the possibility of creating a scheme of balance in which one right or another may be reasonably fulfilled. Those mechanisms include limitations and exceptions to copyright, the limited duration of the period of protection of economic rights, the expropriation of the author’s economic rights enshrined in some laws, not to mention that, under certain conditions, the existence of alternative licensing models favor free and open access to the works when this is carried out, for example, without gainful intent.

In many countries, the political constitution provides for the protection of private property. However, since the first decades of the twentieth century there has been talk of a social state of law in which private property is an inherent part of a social function that implies obligations. Intellectual property and, in particular, copyright can be understood as a form of private property that, unlike common property, has to do with intangible goods represented in original intellectual creations that are literary or artistic in nature. Copyright is not contrary to the social function of property and is thus called to evolve in pace with social, cultural and economic developments in order to ensure effective protection for the holders of copyright and related rights within a framework of respect for and harmony with the needs of society as a whole, one of which is currently adequate enjoyment of the opportunities and possibilities

that digital technology and digital networks afford for the benefit of culture, information, education and access to knowledge.

It is appropriate to ask whether copyright imposes a restriction on education and research in that more extensive copyright protection leads to less extensive dissemination of knowledge and less access to that knowledge, which would defeat the original objective of copyright. In that regard, one is forced to conclude that copyright can hardly be an obstacle when it operates as a system of incentive for artistic or literary creation, leading to the authors providing more and better works. In other words, education and dissemination of the knowledge need the creation and ongoing production of cultural goods, which requires an incentive system to ensure fair remuneration for intellectual labor as the human labor that it is.

Copyright cannot be seen as a means of appropriating knowledge, restricting the free dissemination of knowledge. Knowledge is not appropriated in that copyright merely recognizes a property right in the original expression with which each author gives shape to artistic or literary creation and hence the ideas or conceptual contents of the works cannot be appropriated, meaning that ideas may circulate freely and that each individual is free to make use of the knowledge contained in the works as he sees fit.

It could be falsely assumed that access to all creation should be free and open, especially when access is for the purposes of education or research, in order to access knowledge or increase it, so that free and open access would be obtained at the expense of depriving the owners of copyright and related rights of the remuneration due to them in respect of the necessary works and productions for education and research. VICTORIANO COLODRON rightly points out that similar arguments are not put forward to make other items free of charge and to eliminate costs that students and educational institutions have to bear at present, thus enabling them to use free of charge other goods and services that are used in education and giving them free access to knowledge, e.g. from the teachers' remuneration for their work to payment of water and electricity charges, the cost of furnishings, internet connections, etc. Why should these services not be free for education and research centers? Does having to pay for them not also constitute an obstacle to educational development? Although questions as the foregoing seem slightly absurd, COLODRON asks why it is not just as absurd to claim that the works of authors and publishers should also be available freely and free of charge without their work receiving the remuneration that it deserves.⁹⁶

Assertions can often be heard or read on the internet to the effect that the copyright system has become obsolete because it is part of a business model based on traditional technologies, which is destined to disappear in the face of the advent of new technologies. It is enough to recall that copyright law has managed to keep pace with technological change in the form of the phonograph, radio, television, photocopying etc. and now digital technology and information networks. Copyright law is undergoing the same transformation being experienced by different areas of social, cultural and economic relations. Copyright law is based on immanent principles, e.g. that everyone is entitled to receive remuneration for their work, and that every society should encourage culture and the advancement of knowledge. Business models are determined by economic conditions, not by laws. The way in which consumers have access to enjoyment of the works in the digital environment may vary in accordance with the pace of technological change and market forces. Whoever places copyright-protected cultural goods on the market must also adjust his business model to the

⁹⁶ COLODRON Victoriano. Op. cit. p. 3

pace of that change. Regardless of the situation, the important thing is that the effective legal protection guarantees the copyright commitments.

It is also often questioned whether the copyright regime does not favor the creator but others instead (producers, publishers), who impose a system of contracts that strips them of their exploitation rights. In that respect, we believe that the importance of cultural industries for the countries and the need to promote and encourage their existence should not be discounted since it is through them that works reach the general public, thus spreading culture and knowledge and creating jobs and income for the countries' economies. By regulating the details of contract, copyright law is called upon to procure equitable terms of contract and public order provisions that cannot be modified by the parties, while legislators should procure equilibrium conditions in contractual relationships in which the creator is in an extremely weak position.

At the one extreme, it is tempting to think, especially in developing countries, that piracy will favor the free dissemination of knowledge, access to information, and entertainment for sections of the population whose needs are not being met. Suffice it to say that it is the State with its public policies and public resources that should give the population living in poverty access to knowledge, information and entertainment, not authors or the cultural industries. Under the pretext of favoring one section of the population, the authors and the artistic and literary creation industry cannot be deprived of their work. In the digital environment, those most frequently committing piracy are those with sufficient resources to be able to afford an internet connection, PC, iPod or mobile phone, at least.

It is an irrefutable fact that humankind has never had a tool for disseminating information and knowledge and for ensuring freedom of expression that is as effective as the internet. It is appropriate to ask whether copyright law, as currently conceived, has become a barrier to the enjoyment, service and benefit of this technology.

We think that the freedom that is characteristic of the internet should not be confused with anarchy. Referring to "cyberspace" as a freely accessible public area does not mean that someone can exercise his freedom at the expense of the rights of others. For example, a square or a park in any city is a public place to which people have open access but people are not free to destroy the furniture in that place or to harm other people.

Human beings are required to live together in an environment based on the exercise of individual freedom and respect for others' rights. In addition to education of the population, the laws and the legal system are required to achieve that objective. Copyright law is one of the various laws required to exist peacefully in the said "cyberspace" or any other scenario of social interaction.

Much of the criticism that is heard with regard to copyright assumes that it gives a dominant position in the market to an industry which has inflated unreasonably the price of books and school textbooks. In that regard, we believe that account should be taken of the fact that copyright is outside the commercial behavior of companies and individuals who may or may not engage in monopolistic practices that restrict free competition. The copyright regime is a tool which can be put to good or bad use, but the need and desirability of protecting copyright cannot be disregarded because there are companies or individuals who do not comply with the conditions of free competition.

Having mentioned some of the most frequent criticisms, which often seem to suggest that copyright and the right to education and access to knowledge are incompatible, it must be recalled that neither copyright nor the right to education and access to knowledge is in a position of being able to override the other, individual rights not being absolute but relative as their exercise is subject to respect for the rights of others, public interest and compliance with the law. We have said that rights are given to the society in which they apply rather than to the individual, both copyright and the right to education and access to knowledge have their rationale and a role to play in society, hence the exercise of one or another right must be reconciled, striking a balance which ensures that the rights can be exercised and fulfilled as far as possible, i.e. subject to appropriate necessary and proportionate restrictions that ensure harmonious coexistence.

Technology must not be prohibited but must be used for the benefit of society. The conditions which determine the balance of rights between copyright protection and the right to education and access to knowledge in developed countries differ from those in developing countries. Specifically, a developing country must give priority to access to education and to improving its quality as a vital condition for its economic, cultural and social growth and development.

In the developing countries, high percentages of the population live in poverty, their basic needs not being met, and for various reasons they have no access to education or there are high school drop-out rates. Even in countries where the political constitution states that education is universal and compulsory and that public education is free of charge, there are high school drop-out rates in the poorest sections of the population, corresponding also to high rates of child labor and higher birth rates and teenage pregnancy rates.

In a similar situation, the barriers to access to education are many and diverse in origin. These problems cannot be attributed solely to the cost of education or, far less, to the cost of the educational materials involved in works and productions that are protected by copyright and related rights. In their laws, developing countries must not only guarantee the right of the entire population to education but are also challenged to provide the conditions making access to quality education real and effective. The response to these problems involves dealing with a number of areas of public policies and directly concerns the States.

Education is of fundamental importance in all societies but in developing countries education plays a vital role as it is the main factor leading to an improvement in the living conditions and human development, allowing the social inclusion of marginalized sections of the population and a better distribution of opportunities. Investing public resources in education is seen as the best way to achieve the development of those countries.

From one perspective, it can be assumed that copyright protection represents a restriction on the dissemination of knowledge through literary and artistic works used for teaching purposes.

It can be assumed that nothing is more contrary to a country's development aspirations, its ambition of generating its own technology and its competitiveness objectives than any form of restriction to free access to knowledge or increases in the cost of education.

It can be said that history provides evidence that various countries that are today part of the developed world and have the capacity to compete in the generation of technology did not provide in their laws for the protection of intellectual property – at least as far the protection of foreign intellectual creations is concerned – until they were able to develop the capacity of

local industry to produce and export manufactured goods based on and with an aggregate value in technology.

Another view is that an international intellectual property protection system favors only those countries that manufacture and export goods and services protected by industrial property rights or copyright and that have the capacity to use the protection system to generate income for their economies.

Basing public policy decisions on such a vision can cause a country to raise its levels of protection of intellectual property rights to the minimum, as far as their obligations to international conventions permit, or even to commit the same offence by ignoring such obligations.

It is appropriate to ask whether, in a developing country, such a situation would benefit education and access to knowledge.

Students would not be able to acquire books free of charge, not necessarily because the publishers would assume different costs of raw materials, layout, printing, warehousing, distribution, advertising, etc., costs that would inevitably have to continue to be borne by the purchaser. The same situation would arise with photocopying or the reproduction of other materials used for teaching purposes.

Lowering the purchase prices of works intended for teaching, or their reproduction, does not necessarily mean a contribution to the quantitative and qualitative improvement of education and its outcome.

As the outcome of a similar policy decision, local cultural industries based on copyright would be destined to disappear, to the detriment of the growing contribution that these industries have been making to the Gross Domestic Product (GDP) and the generation of employment in the countries in the region.

National cultural industries generate wealth and employment and play an important role in preserving cultural diversity by disseminating, through works, the artistic and cultural expressions that are characteristic of the identity of those countries.

Cultural industries make it possible for creators to work, and the creators provide their artistic works and productions for the enjoyment and benefit of society; they can be sure that their work will be paid for, thus guaranteeing suitable standards of living to which any worker is entitled.

If any kind of literary or artistic works should be produced nationally or locally, then it is precisely works intended for education. A country can hardly preserve its cultural identity if it educates new generations of people on the basis of foreign cultural models. In other words, if cultural diversity should be preserved in any area, then it is in the field of education, in the contents of information on the basis of which the teaching-learning process takes place.

CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS

In the introduction to this document, a series of questions was formulated regarding the balance of rights and interests between copyright and the right to education and the pursuit of knowledge. This chapter presents the conclusions to the study, giving answers to the questions that constituted its starting point.⁹⁷

- Should the scientific and research community take part in licensing systems with publishers in order to improve access to works for educational or research purposes? Are there satisfactory examples of licensing systems that permit the online use of works for educational or research purposes?

In this regard, we consider it appropriate for the online use of protected works and productions to be generally subject to the exclusive rights of the holder of the copyright and related rights, but specific acts of digitization or electronic publication also need to be carried out freely and free of charge in order to improve the balance of rights and interests with regard to education and research.

In the countries in the region, the online use of works for educational purposes and, in general, any use of a work in the digital environment, requires the express prior authorization of the copyright holder. In order to obtain that authorization or license, the user concerned must make direct contact with each of the holders of the related rights and negotiate the price and the conditions of the authorization. This kind of license or authorization cannot be obtained through collective management organizations.

In this document, three examples were presented of copyright holders providing licenses for their works especially intended for the needs of educational establishments, none of which refers to the online use of the works:

1. reprographic reproduction licenses for educational institutions (see 4.1) granted by reprographic rights organizations;
2. general, global or repertory licenses which make it easier for educational establishments to make reprographic reproductions in order to compile course packs (see 4.1) and which are also granted by reprographic rights organizations;
3. licensing schemes for special computer programs for the academic world (see 4.13) granted by the producer himself.

As already stated, none of the licenses specifically intended for educational use refers to the online use of works.

⁹⁷ Most of the questions were formulated or stated as topics for discussion in the Green Paper on Copyright in the Knowledge-based Economy published by the European Commission on July 16, 2008 and in the discussion forum published on the WIPO website under the title “What is the impact of copyright law, both at international and national levels, on education and research?” (<http://www.wipo.int/ipisforum/en/index.html>)

On the other hand, users of the works may find it difficult to obtain express prior authorization since, in the region, rightholders have not implemented a collective management system for rights, making it easier for users to obtain the licenses or authorization that they need for digitization or electronic publication and the online use of the rightholders' works. The obligation to contact each of the rightholders and to carry out as many negotiations as the works intended to be used does not seem to be in line with current market needs and the volume and diversity of the works required for use in the digital environment. Perhaps those who have been most concerned about facilitating or expediting the legitimate mass use of protected works and productions are those who advocate the use of alternative licensing models (e.g. Creative Commons licenses) to allow certain uses of their work to be freely available and free of charge.

From the user's point of view, not being able to obtain a license for online use of the works through a collective management organization or another licensing scheme facilitating contact and negotiation with the rightholders is an obstacle that makes the use and enjoyment of the works difficult, favors the infringement of copyright and deprives the authors and rightholders of the opportunity of receiving financial remuneration for the use of their works.

We believe that, in that respect, the following alternative solutions should be considered:

1. The definition of what online use of the works could be freely available and free of charge in order to promote education and research;
 2. With regard to online use requiring the author or his beneficiary to give his authorization or a license, it needs to be made easier for the user to obtain that authorization or license through collective management organizations or other licensing schemes or mechanisms. Another form of this simplified process could also consist of consulting lists of work and productions and concluding the licenses online, likewise paying the royalties over the internet.
- Should the limitation or exception for educational and research purposes be clarified so that it can be brought into line with modern forms of distance learning?

We believe that the countries in the region should develop limitations and exceptions that are applicable to the digital environment in order to promote digital distance education and that they should adopt public policies and develop other areas of legislation with a view to ensuring the balance of rights and interests in digital distance education. In specific terms, the following are the measures that we consider necessary:

1. Provide for a limitation or exception intended to facilitate, in certain cases, the digitization of works and productions for their use in virtual education (see 4.3);
2. Provide for a limitation or exception intended to facilitate, in certain case, the digital transmission of works and performances for the purposes of digital distance education (see 4.4), which implies facilitating the digital transmission of audiovisual works for educational purposes (4.2);

3. Regulate private copying so as to ensure a balance of rights and interests (see 4.7) and to settle the matter of the applicability of the limitation or exception on private copying in the digital environment (see 4.8);
 4. Develop legislation on limitation and exceptions on technological measures in order to promote education and to regulate the interface or interaction between the legal protection of technological measures and the limitations or exceptions for the benefit of education and research (see 4.12);
 5. Formulate and develop public policies with regard to the use for educational purposes of works protected by alternative licensing models, i.e. free licenses and open educational resources and to facilitate the reuse and transformation of virtual learning objects (see 4.5);
 6. Give educational establishments legal certainty with regard to their liability for violations by students of copyright in the digital environment (see 4.10).
- Should it be specified that the limitation or exception for educational and research purposes is not only applicable to material used in the classroom or in educational centers but also to works used at home for study purposes?

As we have argued, specific limitations or exceptions that are applicable to online digital education need to be established. Another of these limitations or exceptions should take account of the use that students make of works connected with their academic studies and that, in each case, takes place in their homes, as well as of the possibility of manipulation permitted by digital media. In that respect, we believe that a limitation or exception should be established to permit digital transformation or manipulation of works by students as part of their academic studies (see 4.6), with the exception that the work thus transformed should not be used outside the academic community and should not be subject to any kind of marketing or financial exploitation.

- Should there be minimum compulsory rules for the length of excerpts from works that may be reproduced or made available for educational and research purposes?

As any limitation or exception, that which is intended to facilitate, in certain cases, the digitization of works for their use in digital distance education should be subject to terms or conditions such as the following:

1. Such copies should be preserved solely by the educational institution and used solely for authorized digital transmissions;
2. A digital version of the work in question should not be marketed by the rightholder free of technological protection that can block digital transmissions;
3. If digitization is carried out on the basis of a “physical” copy of the work, the said copy should not be manufactured or obtained by infringing copyright.

Likewise, the limitation or exception intended to facilitate, in certain cases, the digital transmission of works within the context of distance education should also be subject to conditions such as the following:

1. The digital transmission shall be intended solely and exclusively for students who have enrolled on the course in question and access by unauthorized third parties shall be restricted;
 2. The digital transmission shall be of articles lawfully published in newspapers or magazines or short excerpts from lawfully published works;
 3. The works were not originally created for use in educational activities (educational works);
 4. The educational institutions are officially recognized as such;
 5. The digital transmission shall not be made for direct profit-making purposes;
 6. The digital version of the work made available to students shall be subject to a reasonably effective technological measure restricting alteration of its content or the generation of new digital copies from it.
- Should there be a minimum compulsory requirement to the effect that the limitation or exception shall apply to both education and research?

We do not think so. We have found that, in the field of scientific research, the answer to the questions has more to do with the definition and development of public policies than with the provision for limitations or exceptions to copyright.

Indeed, the solutions that we consider necessary take the form of measures such as the following:

1. Promoting the electronic publication of scientific journals protected by alternative licensing models (see 4.14);
 2. Facilitating access to results of research that was conducted with public funds or that, with regard to scientific publications thus acquired, promotes the use of alternative licensing models (see 4.15);
 3. Promoting access to the consultation of scientific and technical journals by patent offices (see 4.16);
 4. Promoting the electronic publication of degree theses or monographs by educational institutions (see 4.17);
 5. Facilitating access to scientific databases (see 4.18).
- 6.1 Should a minimum standard of limitations or exceptions to copyright be established?

The same regulatory rules, however good they may seem, need not be applied indiscriminately to all countries in disregard of the particular needs and circumstances prevailing in their individual stages of development.

The initiative of providing for a minimum legal standard relating to limitations and exceptions at the level of international conventions leads us to consider that while the interests regarding copyright, the right to education and access to knowledge may be essentially the same everywhere, the balance of rights and interests should be worded differently in each place in order to take account of its particular conditions and needs.

As on a set of scales where balance is achieved by adding or removing weights or counterweights to each side, certain factors specific to each case should come to be regarded with greater or lesser relative emphasis. The particular conditions under which the separate components of the copyright system (legal framework, cultural industries, collective management, compliance with laws, public policies) evolve in each country form part of that balance, as do the particular needs and government policies on education, science and technology, through which the developed countries seek to maintain or improve their competitiveness while developing countries try to ensure universal access to the education system, allowing for better distribution of opportunities and the social inclusion of people whose basic needs are not being met or who are illiterate.

To achieve the tasks inherent in the copyright system and, at the same time, to ensure access to education and knowledge, countries must be left to develop the conditions determining the balance of rights and interests in accordance with their needs and priorities and in accordance with the three-step rule.

Notwithstanding the foregoing, we believe that the only case in which a homogeneous regulation is needed at the international level is with regard to the limitations and exceptions applicable to the use of works and productions in the online digital environment. That is the case of limitations and exceptions intended to facilitate digital distance education, where an international instrument could well ensure uniform management of copyright for all the works and in all the countries, thus overcoming the difficulties arising from the fact that the different treatment afforded in each country to a medium such as the internet that transcends borders and differences between the legal systems.

- Is the business model used to market works in the digital environment in line with the current needs of education and research?

We believe that copyright should not be identified with a business model or with the defense of a particular scheme or system through which the economic exploitation of works is effected, but with inherent principles that call for the legal protection of intellectual creations at any time and in any place for the benefit of the whole of society.

With regard to the current licensing scheme for the online use of works, the difficulties that may be encountered by an educational body using the works in endeavoring to obtain a license or authorization to use the work online (e.g. digital transmission) are apparent. In this connection, we believe that the authors or rightholders are called to provide market solutions for licensing that are in line with market needs and restructure, if necessary, the current

scheme of rights management. Our response to the question asked must therefore, of necessity, be negative.

Nonetheless, the need to redesign the business model for marketing works in the digital environment, while not in line with current needs in terms of education and access to knowledge, does not mean that the rule of limitations and exceptions needs to be changed immediately, extending the list of uses that are freely available and free of charge as the only possible alternative. Indeed, many of the solutions can be found by providing online licensing solutions for educational or research institutions or by the possibility of obtaining general, global or repertory licenses for the online use of works.

On the other hand, the solution to the problem raised through the question may not depend solely on legislators and policy-makers. With regard to the business models enabling the exploitation of the work and giving consumers access to enjoyment of the work, regardless of whether or not “physical” copies of the works exist, we have said that the determination of those models is outside the sphere of the legislator as it is the economic relations and market forces, not laws, which determine which business model prevails. The way in which consumers have access to enjoyment of the works in the digital environment may vary in accordance with the pace of technological change and the dynamism of the cultural industries. Anyone who places copyright-protected cultural goods on the market is called to bring the business model up to date with the pace of change.

Technological change is accompanied by economic, social and cultural change. That transformation is also accompanied by new opportunities and new conflicts requiring a legal solution, which may consist of updating the current legal provisions or of preparing new rules which ensure a better interpretation of the new reality and which are more effective in upholding the principles of justice, in accordance with the political, economic and social context in which the legal ruling applies.

All that is but to repeat that it is not the laws which impose one business model or another that has to be in line with technological developments. The role of the legislators and public policy-makers is to be aware of changes taking place as part of those developments in order to establish rules governing relations between individuals and ensuring a peaceful coexistence, thereby fulfilling the rights of all citizens.

- Are the current limitations and exceptions being used in such a way as to meet the needs of education and research?

In Chapter 2, we considered the way that the countries in the region have provided in their laws for limitations or exceptions in order to promote the right to education and access to knowledge. If these provisions are compared with those described in Chapter 1, the conclusion is reached that at present the provisions in the copyright laws of the United States or in the European Union give greater recognition to education and research than those in the current laws in Latin America and the Caribbean. An example of provisions that have favored the balance of rights and interests is the case of the limitations or exceptions applicable to the digital environment in favor of distance education that the United States provided for within the context of the TEACH Act of 2002, or the treatment given by the European Directive to the interface between the protection of technological protection measures and limitations or exceptions in favor of education.

This situation seems contradictory since it is the developing countries which should be more proactive in seeking to achieve a balance of rights and interests that facilitates access to works for the benefit of education and research. The developing countries are called upon to respond to their needs regarding access to information and knowledge by making use of the resources provided by the international laws and conventions on copyright. This is achieved not only by demanding new standards of international protection, but by beginning to update their own laws in pursuit of a balance of rights and interests and by developing the conditions of the local copyright system.

The countries in the region are not only called upon to develop similar provisions with regard to copyright in the digital environment; they should also make use of limitations or exceptions currently available for the use of works in the equivalent context, which could contribute to the balance of rights and interests.

- What role can be played by the Appendix of the Paris Act of the Berne Convention to ensure access to the texts needed for education?

None of the countries in the region, with the exception of Cuba, has made the declaration provided for in Article I(1) of the Appendix to the Berne Convention in order to qualify for the special provision for developing countries to replace the exclusive rights of translation and/or reproduction by a non-voluntary licensing regime.

As far as the non-voluntary translation licenses for developing countries are concerned (Article II of the Appendix to the Berne Convention), their use relates solely to the use of works in the analogous context, in that it applies to “works published in printed or analogous forms of reproduction”.

The same situation applies to non-voluntary reproduction licenses for developing countries (Article III of the Appendix to the Berne Convention), given that paragraph 7 of Article III provides that “the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction”.

Hypothetically, the non-voluntary license is another of the various alternatives that may be used by countries when creating mechanisms for the balance of rights and interests in the digital environment. However, this would require an amendment of the international conventions currently in force which provide, as exclusive rights, for reproduction for the purpose of digital storage and for making works available to the public in digital networks.

- Is the legal protection of technological protection measures compatible with the current needs of education and research?

The obligation to give legal protection to technological protection measures applies in the countries in the region that are signatories of the WCT and the WPPT (Argentina, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru).

Notwithstanding the foregoing, the full development of the provisions of these conventions still seems to be a pending task for most countries in the region. That situation is exacerbated if one considers that other issues have been added to the agenda for the protection of works in the digital environment, such as the definition of cases in which it is permissible to overcome or circumvent a technological measure to restrict the unauthorized use of works, or the liability of internet service providers for violations of copyright committed by third parties through their infrastructure.

Given the above and, moreover, because in the countries in the region, the interface between the legal protection of technological protection measures and limitations and exceptions for education and research is not dealt with, there is no alternative but to answer the question in the negative, as this is another topic area or scenario in which the countries in the region are called to develop provisions for the balance of rights and interests.

Even in countries which have developed limitations or exceptions on the protection of technological measures (e.g. Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua), the balance of rights and interests can be improved through the procedure for providing periodically for new limitations or exceptions by administrative means. By referring to comparative law and given that the countries have adopted provisions fairly similar to those in the DMCA of 1998 in the United States, they could also adopt the limitation or exception to technological measures controlling access in the case of audiovisual works in the libraries of colleges or universities with courses in audiovisual or cinematographic media when the technological constraint is lifted or circumvented in order to make compilations of such works for educational use in the classroom.

It is worth recalling that for the countries in the region, it is appropriate to refer to comparative law to draw on the experience in other legal systems, just as it is also valid and desirable to develop its own legislative initiatives that are the result of debate and analysis among the various sectors of interest, rightholders and users of works in each country, because, as we have said, the balance of interests comprises the specific features of each time and place.

- Is a sufficient volume of works available in the public domain to be of benefit to education and research in the digital environment?

Free access to information is one of the interests evident in the needs of education and research and which must be consistent with the interest developed by copyright.

In a situation in which rights and interests are in balance, the users of works and productions protected by related rights should be able to choose between obtaining an expensive license for the use of the works or performances of interest in the digital environment or using other works freely and free of charge under the limitations or exceptions on copyright or alternative licensing models or dealing with works and productions in the public domain. The many different alternatives for the consumer of cultural goods and free and fair economic competition among those placing the cultural property on the market are necessary conditions for the balance of rights and interests.

It is to be noted that the alternative licensing schemes contribute to increasing the availability of works and productions that may be used freely and free of charge for the benefit of

education and research. Those alternative licensing schemes are not opposed to the system of copyright but, conversely, are part of the system since they arise through the right of the authors and owners to dispose of their works and productions freely, free of charge or for a fee, and contribute to the availability of works which may be used freely and free of charge, satisfying interests that otherwise – in the absence of such alternative licensing schemes – could be met only at the expense of restricting the exclusive rights of authors or owners.

We believe that it is fully appropriate for public policies dealing with the balance of rights and interest in each country to give consideration to the use of alternative licensing models while at the same time developing promotional measures and incentives for cultural industries and promoting free and fair economic competition among market participants for the benefit of such industries and consumers of cultural goods.

In this context, the existence and availability of works and performances in the public domain favors interests associated with education and research, and consideration given to the lengths of the protection periods and the discussion and analysis of the treatment of so-called “orphan works” proves to be important.

- What tasks are outstanding in the countries in the region in order to ensure an adequate balance of rights and interests?

In separate parts of this document reference has been made to things that could be done by the countries in the region in this respect and that, for the purposes of this chapter may be summarized as follows:

1. With regard to the use of works and productions for educational and research purposes in the analogue environment,
 - (a) promote the existence and strengthening of reprographic rights organizations and the granting of reprographic reproduction licenses for educational institutions;
 - (b) facilitate private copying which guarantees the balance of rights and interests.
2. With regard to the use of works and productions for educational and research purposes in the digital environment,
 - (a) facilitate the digitization of works and productions for their use in digital distance education;
 - (b) facilitate the digital transmission of works and productions for the purposes of digital distance education;
 - (c) establish a limitation or exception that permits the digital transformation or manipulation of works for students carrying out academic work;
 - (d) facilitate the digital transmission of audiovisual works and recordings within the framework of distance education;

- (e) regulate the applicability of the limitation or exception on private copying in the digital environment.
3. With regard to limitations or exceptions on technological measures and their interface with the limitations or exceptions,
- (a) develop legal limitations or exceptions on technological measures to facilitate education;
 - (b) regulate the interface or interaction between the legal protection of technological protection measures and the use of limitations or exceptions for the benefit of education and research.
4. With regard to other areas of legislation,
- (a) give educational establishments legal certainty with regard to their liability for violations by students of copyright in the digital environment.
5. With regard to public policies,
- (a) promote the use for educational purposes of works protected by alternative licensing models, i.e. free licenses and open educational resources;
 - (b) promote other initiatives to facilitate free access or to reduce the cost of cultural goods;
 - (c) develop public policies regarding the price of cultural goods as an obstacle to access to quality education;
 - (d) promote licensing schemes for special computer programs for the academic world;
 - (e) facilitate access to the results of research conducted with public funds;
 - (f) promote the electronic publication of scientific journals protected by alternative licensing models;
 - (g) promote access to the consultation of scientific and technical journals by patent offices;
 - (h) promote the electronic publication of degree theses or monographs by educational institutions;
 - (i) develop public policies aimed at developing a copyright system that in practice and effectively fulfills the tasks of paying for the work of the author and holders of related rights and providing an incentive to be creative. The components of that system are the legal framework, the cultural industries, collective management and compliance with laws.

- What role can WIPO play regarding the balance of rights and interests between copyright and the right to education and access to knowledge?

We believe that, in that regard, WIPO could:

1. promote an open and constructive debate among the various sectors representing the rights and interests of authors and cultural industries and, on the other hand, educational institutions and research centers;
2. further work towards an international instrument on limitations and exceptions applicable to the use of works and productions in the digital environment for the purposes of distance education;
3. provide support for the initiatives being taken by developing countries with a view to guaranteeing an appropriate balance of rights and interests;
4. provide support for the initiatives being taken by developing countries for the purpose of developing separate components of the copyright system (legal framework, cultural industries, collective management, compliance with laws, public policies);
5. establish indicators to measure the completion of the tasks relating to the copyright system and evaluate the state of the balance of rights and interests, on the basis of which the countries can carry out statistical studies and establish their public policy decisions;
6. provide ongoing support for the initiatives that are being promoted at the global level and in the UNESCO scenario for the creation and use of open education resources by cooperative contribution, in pursuit of which those initiatives genuinely contribute to achieving a balance of rights and interests and in turn promote and encourage intellectual creativity;
7. provide ongoing support for the initiative developing at the global level to determine how to deal with rights regarding orphan works and the availability of works in the public domain;
8. take the lead in studying the cultural social and economic impacts that occur as a result of the development of information and communication technologies, promoting an analytical perspective in which those technologies represent new opportunities and benefits for authors and rightholders and for the whole of society rather than a threat to them.

[The Annex follows]

LEGISLATIVE ANNEX

ANTIGUA AND BARBUDA

The Copyright Act, 2002

Use of Work for Educational Purpose

56. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

57. (1) The inclusion in a collection intended for use in educational establishments of a short passage from a published literary or dramatic work does not infringe copyright in the work if—

(a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for the use of educational establishments;

(c) the collection consists mainly of material in which no copyright subsists; and

(d) the inclusion is accompanied by a sufficient acknowledgement.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author—

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

58. (1) A recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

59. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorized by this section if, or to the extent that, licenses are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) Where a license is granted to an educational establishment authorizing the reprographic copying of passages from any published literary, dramatic or musical work, for use by the establishment, then, any term of that license which purports to restrict the proportion of work which may be copied (whether on payment or free of charge) to less than that permitted under this section shall be of no effect.

60. (1) Where a copy of a work would be an infringing copy if the making thereof were not authorized under section 56, 58 or 59 and such copy is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing and, if that dealing infringes copyright, for all subsequent purposes.

(2) In subsection (1) "dealt with" means sold, or let for hire or offered or exposed for sale or hire.

ARGENTINA

Law No. 11.723 of 1933 – Legal Intellectual Property Regime

Article 36. The authors of literary, dramatic, dramatico-musical and musical works shall enjoy the exclusive right to authorize:

- (a) the recital and public performance of their works;
- (b) the public broadcasting by any means of the recital and performance of their works.

However, the performance and recital of literary or artistic works already published, in public acts organized by educational institutions, or linked with the fulfillment of their educational purposes, study plans and programs, shall be lawful and shall be exempt from the payment of copyrights and performers' rights as established in Article 56, provided that the event in question is not broadcast outside the place where it occurs and the performers gather and perform free of charge.

The performance of pieces of music in concerts, auditions and public performances by orchestras, bands, ensembles, choirs and other musical organizations belonging to national State institutions, as well as those from the provinces or municipalities, shall also be exempt from the payment of copyright to which the previous paragraph refers, provided that public

attendance at such gatherings is free. (Text according to Laws No. 17.753, 18.453 and 20.098.)

THE BAHAMAS

Statute Law. Chapter 323

62. (1) Copyright in a literary, dramatic, musical, choreographic or artistic work is not infringed by its being reproduced in the course of instruction or of preparation for instruction, provided the reproduction is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in sound recordings, motion pictures, and audiovisual works, is not infringed by its being reproduced in a single copy or phonorecord in the course of instruction or of preparation for instruction, in the making of motion pictures or motion picture soundtracks, provided the reproduction is done by a person giving the instruction and such copy reproduced is retained by the department of educational establishment in which the instruction is being given.

(3) For the purposes of subsection (2), the educational establishment must be one with an accredited degree program in motion pictures.

(4) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

63. (1) The inclusion in a collective work created specifically for use in educational establishments of a short passage from literary, musical or dramatic works published in copies does not infringe copyright in the work if—

(a) the collective work is described in the title and in any advertisements thereof distributed by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for use of educational establishments;

(c) the collective work consists mainly of public domain works; and

(d) the inclusion is accompanied by a sufficient acknowledgement.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collective works published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author—

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

64. The transmission of a performance or display may be reproduced in a single copy or phonorecord by an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the work if such performance or display is directly related to the course content.

65. (1) Subject to the provisions of this section, the reproduction of copies from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work.

(2) Not more than five per cent of any work may be reproduced by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

66. (1) Where a reproduction of a work would be an infringing copy or phonorecord if the making thereof were not authorized under section 62, 64 or 65 and such copy or phonorecord is subsequently dealt with, it shall be treated as an infringing copy or phonorecord for the purposes of that dealing as if that dealing infringes copyright for all subsequent purposes.

(2) In subsection (1), “dealt with” means sold, or let for hire or offered or exposed for sale or hire.

BARBADOS

Copyright Act 1998

Use of Work for Educational Purposes

55. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, if the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound track in the course of instruction, or of preparation for instruction, in the making of films or film sound tracks, if the copying is done by a person giving or receiving instruction.

(3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

56. (1) The inclusion in a collection intended for use in educational establishments of a short passage from a published literary or dramatic work does not infringe copyright in the work if

(a) the collection is described in the title and in any advertisement thereof issued by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for the use of educational establishments;

(c) the collection consists mainly of material in which no copyright subsists; and

(d) the inclusion is accompanied by a sufficient acknowledgment.

(2) Subsection (1) does not authorize the inclusion of more than 2 excerpts from protected works by the same author in a collection published by the same publisher over any period of 5 years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

57. (1) Subject to subsection (2), a recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational institution for the educational purposes of that institution without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

(2) Subsection (1) shall not apply if or to the extent that there is a licensing scheme certified pursuant to section 100 for the purposes of this section.

58. (1) Subject to this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational institution for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational institution by virtue of this section in any one period of three months.

(3) Copying is not authorized by this section if, or to the extent that, licenses are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) Where a license is granted to an educational institution authorizing the reprographic copying of passages from any published literary, dramatic or musical work, for use by the institution, then, any term of that license which purports to restrict the proportion of work which may be copied, whether on payment or free of charge, to less than that permitted under this section is of no effect.

BELIZE

Copyright Act. Chapter 252

Revised edition 2000

Showing the Law as at 31st December, 2000

Use of Work for Educational Purposes

60. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film soundtrack in the course of instruction or of preparation for instruction in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

61. (1) The inclusion, in a collection intended for use in educational institutions, of a short passage from a published literary or dramatic work does not infringe copyright in the work if—

(a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for the use of educational institutions;

(c) the collection consists mainly of material in which no copyright subsists;

(d) not more than one other such passage or part from works by the same author is published by the same publisher within the period of five years immediately preceding the publication of that collection; and

(e) the inclusion is accompanied by a sufficient acknowledgement.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author—

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

62. (1) The performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment—

(a) by a teacher or pupil in the course of the activities of the establishment, or

(b) at the establishment by any person for the purposes of instruction, is not a public performance for the purposes of infringement of copyright.

(2) The playing or showing of a sound recording, film, broadcast or cable program before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright.

(3) A person is not for this purpose directly connected with the activities of the educational establishment simply because he is the parent of the pupil at the establishment.

63. (1) Subject to subsection (2), a recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

(2) Subsection (1) shall not apply if, or to the extent that, there is a licensing scheme under which licenses are available authorizing the making of such recordings or copies, and the person making the recordings knows or ought to have been aware of that fact.

64. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorized by this section if, or to the extent that, there is a licensing scheme under which licenses are available authorizing the copying in question and the person making the copies knows or ought to have been aware of that fact.

(4) Where a license is granted to an educational institution authorizing the reprographic copying of passages from any published literary, dramatic or musical work, for use by the institution, then, any term of that license which purports to restrict the proportion of work which may be copied (whether on payment or free of charge) to less than that permitted under this section shall be of no effect.

65. (1) Where a copy of a work would be an infringing copy if the making thereof were not authorized under sections 60, 63 and 64 and such copy is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright, for all subsequent purposes.

(2) In subsection (1), "dealt with" means sold, or let for hire or offered or exposed for sale or hire.

BOLIVIA

Andean Decision No. 351 of 1993

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby;

(...)

j) effect the performance or execution of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution;

(...)

BRAZIL

Law No. 9610 of 1998. Amends, updates and consolidates the law on copyright and gives other protection

Article 46. The following shall not constitute violation of copyright:

(...)

VI. stage and musical performance, where carried out in the family circle or for exclusively teaching purposes in educational establishments, and where devoid of any profit-making purpose;

(...)

CHILE

Law No. 17.336 of 1970

Article 38. It shall be lawful, without remuneration and without obtaining the authorization of the author, to reproduce in cultural, scientific or educational works, fragments of protected works by other people, provided that their source, title and author are stated.

Article 41. Lessons given in universities, colleges and schools may be annotated and collected in any form by those to whom they are addressed, but they may not be published fully or partially without the author's consent.

Article 47. For the purposes of this Law, use of the work, including phonograms, within the family circle, in non-profit educational establishments and other similar institutions shall not be deemed public communication or performance, provided that this use pursues no profit-making purpose. In such cases, it is not necessary to remunerate the author or to obtain his authorization. (...)

COLOMBIA

Andean Decision No. 351 of 1993

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

(b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby;

(...)

(j) effect the performance or execution of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution;

(...)

Law No. 23 of 1982

Article 32. It shall be permissible to make use, to the extent justified by the purpose, of literary or artistic works, or parts thereof, by way of illustration in works intended for teaching, by means of publications, broadcasts or sound or visual recordings, or to communicate, without gainful intent and for teaching purposes, works broadcast for use in schools, education, universities and professional training, subject to the obligation to mention the name of the author and the title of the work thus used.

Article 40. Lectures or talks given at establishments of higher, secondary or primary education may be freely noted and collected by the students to whom they are addressed, but their full or partial publication or reproduction shall be prohibited without the written authorization of the person who gave them.

Article 164. For the purposes of this Law, it shall not be considered public performance when a performance is made for strictly educational purposes within the grounds or buildings of the educational establishment concerned, provided that no admission charge whatever is made.

Article 178. The preceding articles of this Law shall not apply where the acts referred to in those articles are concerned with:

(...)

(c) use solely for the purposes of teaching or scientific research; (...)

COSTA RICA

Law No. 6683 of 1982

Article 73 (as amended by Law No. 8686 of 2008). Theatrical and musical performances shall be free when they take place in the home for the sole benefit of the family circle. Such performances shall also be free when they are used solely by way of illustration for educational activities, to the extent justified by the educational purpose, provided that the normal exploitation of the work is not affected and the legitimate interests of the holder of the rights are not unreasonably prejudiced thereby. Furthermore, the source and the name of the author must be stated, if that name is featured in the source.

Likewise, it shall be lawful to use and reproduce, to the extent justified by the purpose, works by way of illustration for the purposes of education in publications, such as anthologies, broadcasts or audio or visual recordings, provided that such utilization is compatible with fair practice and that the name of the author is stated, if that name is given in the source.

Article 73a (added by Law No. 8686 of 2008). The following exceptions to the protection provided for under this Law for the exclusive rights of performing artists, phonogram producers and broadcasting organizations shall be permitted, provided that the normal exploitation of the performance, phonogram or broadcast and the legitimate interests of the holder of the rights are not unreasonably prejudiced thereby:

(...)

(d) where the use is exclusively for teaching purposes or scientific research.

Law No. 8039 on Procedures for the Enforcement of Intellectual Property Rights

Article 54. Unauthorized reproduction of literary or artistic works or phonograms (...) The reproduction without gainful intent of literary or artistic works or phonograms to the extent required for illustrative purposes associated with teaching will not be punishable, provided that the reproduction complies with proper use and that the source and the name of the author are stated, if the name is given in the source.

CUBA

Law No. 14 of 1977, Copyright Law

Article 38. The following shall be lawful, without the author's consent and without paying him any remuneration, but subject to the obligation to name the author and the source, provided that the work is accessible to the public, and respecting its specific values:

(a) to reproduce quotations or fragments in written, audio or visual form for the purposes of teaching, information, criticism, illustration or explication, to the extent justified by the purpose being pursued;

(b) to use a work, including in its entirety if this is justified by its short length and nature, by way of illustration for the purposes of teaching, in publications, radio or television programs, films or sound or video recordings; (...)

(d) to represent or perform a work, provided that the presentation or performance pursues no profit-making purpose;

(e) to reproduce a work by means of a photographic or other similar process, where the reproduction is made by a library, a documentation center, a scientific institution or an educational establishment, provided that this is done without gainful intent and that the number of copies is limited strictly to those needed for a specific activity; (...)

DOMINICA

Copyright Act 2003

67. (I) Notwithstanding the provisions of section I O(I)(a), Reproduction for the following acts shall be permitted without the authorization of teaching the author or other owner of copyright

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose;

(b) the reprographic reproduction, for face-to-face teaching in educational institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of work, to the extent justified by the purpose, provided that

(i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions; and

(ii) there is no collective license available (that is, offered by a collective administration organization of which the educational institution is or should be aware) under which such reproduction can be made.

(2) The source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under subsection (1).

(3) Where a reproduction permissible under subsection (1) or (2) is subsequently reproduced, such reproduced copy shall be treated as an infringing copy.

DOMINICAN REPUBLIC

Law on Copyright

Law No. 65-00

Article 32. For teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works may be reproduced by reprographic means, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby.

Article 36. The publication of a portrait shall be free where it relates to scientific, educational or cultural purposes in general or to facts or events of public interest or that have occurred in public.

Article 40. Lectures or talks given at establishments of higher, secondary or primary education may be freely noted and collected by the students to whom they are addressed, but their full or partial reproduction, distribution or communication shall be prohibited without the written authorization of the person who gave them.

Article 44. The following shall be considered as the sole exceptions to the right of public communication under this Law:

(1) communications that are made for strictly educational purposes, and are not reproduced, within the grounds or buildings of educational institutions, provided that no charge whatever is made for admission; (...)

Article 187. Unauthorized circumvention of any effective technological measure controlling access to a protected work, interpretation, performance or phonogram or other material subject to protection is prohibited.

Para. (1). The exceptions to the activities prohibited under this Article are limited to the following activities, provided that they do not impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures: (...)

(e) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram to which there is no other form of access, with the sole aim of taking decisions about its acquisition; (...)

Article 194. When, during penal proceedings relating to the circumvention of effective technological measures and rights management information, it is established that a person has taken part intentionally and in order to achieve a commercial advantage or private financial gain in unauthorized circumvention of any effective technological measure controlling access to a protected work, interpretation, performance or phonogram or other material subject to protection or in a prohibited activity relating to rights management information, he shall incur a prison sentence of between six months and three years and a fine of fifty to one thousand minimum monthly wages and shall be subject to the proceedings set forth in Articles 171 to 175 of this Law.

Para (I). Penal sanctions shall not be imposed on a non-profit-making library, archive, educational institution or public broadcasting authority.

ECUADOR

Andean Decision No. 351 of 1993

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

(b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby;

(...)

(j) effect the performance or execution of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution;

(...)

Law No. 83 of 1998

Article 83. The following acts, which shall not require authorization by the owner of the rights or be subject to any remuneration, shall exclusively be lawful subject to respect for proper practice and provided that the normal exploitation of the work is not adversely affected or the owner of the rights prejudiced thereby:

(a) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, and also that of isolated works of three-dimensional, photographic, figurative or other character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, comment or critical assessment; such use may only take place for teaching or research purposes to the extent justified by the purpose of the incorporation, and the source and the name of the author of the work used shall be stated; (...)

(k) lessons and lectures given in universities, colleges, schools and teaching and training centers in general, which may be annotated and collected by those to whom they are addressed for their personal use.

EL SALVADOR

Decree No. 604 of 1993. Law on the Promotion and Protection of Intellectual Property Rights

Article 44. The following communications shall be lawful without the authorization of the author or payment of remuneration: (...)

(c) (Amended by Decree No. 912 of 2005 Article 19) those shown to be for exclusively educational purposes, in personalized teaching activities at accredited institutions and without gainful intent, in a classroom or similar place devoted to teaching; (...)

Article 45. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration: (...)

(c) the reproduction by reprographic means, to the extent justified by the purpose, of articles, brief extracts or lawfully published short works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use is made in accordance with proper practice; (...)

Article 85d (added by Decree No. 912 of 2005, Article 37). Effective technological means is deemed to be any technology, device or component that, in the normal course of its operation, controls access to a work, performance, phonogram or other protected material, or protects any copyright or any rights related to copyright.

The following are prohibited:

(a) The unauthorized circumvention of any effective technological measure which controls access to a work, performance, phonogram or other protected material,

(b) Manufacturing, importing, distributing, offering or supplying to the public, or illegal trading in, devices, products or components, as well as offering or supplying services to the public, where:

(1) they are promoted, advertised or marketed for the purpose of avoiding an effective technological measure;

(2) they have only a limited purpose or commercially significant use other than to evade an effective technological measure; or

(3) they are designed, produced or performed primarily for the purpose of enabling or facilitating the circumvention of any effective technological measures.

Violation of the prohibitions set forth in the preceding paragraph shall result in civil action, regardless of any violation of copyright or related rights that might occur. The holder of the rights protected by an effective technological measure shall be entitled to carry out the actions specified in Chapter XI of Part II of this Law.

No order shall be issued for payment of damages by a non-profit-making library, archives, educational institutions or public broadcasting entity which provides evidence to show that it was unaware and had no reason to know that its acts constituted a prohibited activity.

Any natural or legal person who is not in charge of libraries, archives, an educational institution or a non-commercial public broadcasting authority without gainful intent and who has been involved intentionally and in order to achieve a commercial advantage or private financial and commercial gain in any activities that are prohibited pursuant to the second paragraph of this Article shall be subject to the procedures and sanctions stipulated in the Penal Code.

Provided that they do not impair the adequacy of the legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures, the following shall constitute exceptions to any measure implementing the prohibition stipulated in section 2 (b) of this Article, regarding technology, products, services or devices to evade effective technological measures controlling access to, and in the case of subsection (a) of this section, protect any copyright or related rights in a protected work, interpretation or performance, or phonogram referred to in the second paragraph of subsection (b) of this Article: (...)

Likewise, the activities listed in the preceding paragraph and the following activities, provided that these do not impair the adequacy of the legal protection of the effectiveness of the legal remedies against the circumvention of effective technological measures, shall constitute exceptions to any measure implementing the prohibition referred to in subparagraph (a) of the second paragraph of this Article:

(a) access by a library, archive or non-profit educational institution to a work, interpretation or performance, or phonogram, to which they would not otherwise have access, for the sole purpose of taking decisions on its acquisition; (...)

Article 85e (added by Decree No. 912 of 2005, Article 37). Rights management information, when any of the items of information listed in the subsections of this Article is attached to a copy of the work, interpretation, performance or phonogram or appears in connection with the

communication or making available to the public of the work, performance or phonogram, is taken to mean:

(a) information which identifies the work, interpretation or performance, or phonogram, the author of the work, the artist or performer of the interpretation or performance, the producer of the phonogram, or the holder of any rights in the work, interpretation or performance, or phonogram;

information about the terms and conditions of use of the work, interpretation or performance, or phonogram; or

any number or code that represent such information.

Anyone who, without authorization and knowingly, or with respect to civil remedies having reasonable grounds to know, that the following acts would induce, enable, facilitate or conceal an infringement of copyright or related rights, is prohibited from:

knowingly removing or altering any rights management information;

distributing rights management information or importing it for distribution, knowing that rights management information has been removed or altered without authority; or

distributing, importing for distribution, transmitting, communicating or making available to the public copies of works, performances or phonograms, knowing that rights management information has been removed or altered without authority.

Violation of the prohibitions set forth in the preceding section shall result in civil action, regardless of any violation of copyright or related rights that might occur. The holder of the rights may carry out the actions specified in Chapter XI of Part II of this Law.

No order shall be issued for payment of damages by a non-profit-making library, archives, educational institutions or public broadcasting entity which provides evidence to show that it was unaware and had no reason to know that its acts constituted a prohibited activity.

Any natural or legal person who is not in charge of a non-commercial, non-profit-making library, an archive, an educational institution or a public broadcasting authority and who has been involved intentionally and in order to achieve a commercial advantage or private financial and commercial gain in any activities that are prohibited pursuant to the second paragraph of this Article shall be subject to the procedures and sanctions stipulated in the Penal Code.

Any lawfully authorized activities carried out by employees, agents or government contractors to implement the law, intelligence activities, national defense, essential security and other similar government purposes shall constitute exceptions to any measures to implement the prohibitions set forth in the second paragraph of this Article.

GRENADA

Copyright Act 1989

34. (...)

(2) The following acts do not constitute an infringement of copyright or neighboring rights—
(...)

(g) publishing in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, short passages from published literary or musical works, or small parts of artistic works, not themselves published for the use of educational institutions, in which copyright subsists. but only if–

(i) not more than two such passages, or parts, from works by the same author are published by the same publisher during any period of five years; and

(ii) the publication is accompanied by a sufficient acknowledgement;

(h) the reproduction of a protected work or protected production by a teacher or pupil in the course of instruction:

Provided that the reproduction is not made by means of an appliance capable of producing multiple copies;

(ii) as part of the questions to be answered in an examination: or

(iii) in answer to such questions;

(...)

(I) the performance, in the course of the activities of a school or other educational institution designated by Order of the Minister, of a literary or musical work or of an audio-visual production or broadcast, or the use of a record of a protected performance, by the staff and students of the school or institution if the audience is composed entirely of any or all of the following–

(i) staff and students of the school or institution;

(ii) parents or guardians of the students;

(iii) other persons directly connected with the activities of the school or institution;

GUATEMALA

Law on Copyright and Related Rights,
Decree No. 33-98

Article 63. The works protected by this Law may be lawfully communicated, without the necessity of authorization by the author or payment of any remuneration, where the communication: (...)

(b) is carried out for exclusively educational purposes, in the course of the activities of a teaching institution by the staff and students of that institution, provided that the communication pursues no direct or indirect profit-making purpose and the audience is composed solely of the staff and students of the educational center or parents or teachers of students and other persons directly associated with the institution's activities. (...)

Article 64. With regard to works that have already been disclosed, the following shall also be permitted, without the authorization of the author, in addition to the provisions of Article 32:

(a) the reproduction by reprographic means of articles or short extracts from lawfully published works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use has no adverse effect on the normal exploitation of the work and that the legitimate interests of the author are not unreasonably prejudiced thereby. (...)

Article 66. The following shall be lawful, without the authorization of the holder of the rights and without payment of remuneration, with the obligation to acknowledge the source and the name of the author of the work used, if indicated: (...)

(d) inclusion in a given work of fragments of other, different works in written, audio or audiovisual form, as well as works of three-dimensional, photographic, figurative or similar character, provided that the works have already been disclosed and that their inclusion is by way of quotation or for analysis, for teaching or research purposes.

Article 67. Lectures or lessons given at educational establishments may be freely noted and collected but their full or partial publication or reproduction shall be prohibited without the written authorization of the person who gave them.

Article 69. The publication of the portrait or photograph of a person solely for informational, scientific, cultural or educational purposes, or where it relates to facts or events of public or social interest, shall be free, provided that the prestige or reputation of the person is not undermined and such publication is not contrary to morality or decency.

Article 133 *quinquies* (added by virtue of Article 106 of Decree No. 11-2006). (...)

A non-commercial, non-profit-making library, archive, educational institution or public broadcasting authority cannot be ordered to pay civil damages if it demonstrates that it had no intention of committing a prohibited activity. (...)

Article 133 *sexties* (added by virtue of Article 107 of Decree No. 11-2006). (...)

With regard to Article 133 *quinquies* (b) on the effective technological measures that protect any copyright or related rights in a work, performance or phonogram, the activity described in subsection (a) of this section shall be lawful, provided that it does not prejudice the lawful protection or the validity of legal remedies against the circumvention of effective technological measures: (...)

2. With regard to Article 133 *quinquies* (a), in addition to the activities described in section 1 (a), (b), (c) and (d), the following activities shall be lawful, provided that they do not undermine the lawful protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:

(a) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram which is not available in another form, with the sole aim of taking a decision about acquisition; (...)

Article 133 *septies* (added by virtue of Article 108 of Decree No. 11-2006). (...)

A non-commercial, non-profit-making library, archive, educational institution or public broadcasting authority cannot be ordered to pay civil damages if it demonstrates that it had no intention of committing a prohibited activity. (...)

HAITI

Decree on Copyright, 2005

Article 9. Notwithstanding the provisions of Article 7, the following shall be allowed, without the author's consent and without payment of remuneration, provided that the source and the author's name are stated, if that name is stated in the source:

(1) the use of a lawfully published work by way of illustration in publications, broadcast programs or audio or visual recordings intended for teaching; and

(2) the reproduction by reprographic means for teaching or the holding of examinations at educational establishments, provided that activity has no direct or indirect profit-making purpose and to the extent justified by the purpose, of isolated articles that have been lawfully published in a newspaper or magazine, of short extracts from lawfully published works or lawfully published short works.

HONDURAS

Law on Copyright and Related Rights Decree Law No. 4-99-E

Article 50. Reproduction by reprographic means, for the purpose of teaching or the holding of examinations in educational institutions, provided that there are no profit-making purposes and to the extent justified by the purpose, of articles, lectures, lessons, brief extracts from works or lawfully published short works is permitted, on condition that the use is in keeping with proper practice.

Article 56. Stage and musical performance, where carried out in the home for the exclusive benefit of the family circle or the family's guests at parties or gatherings shall be free. It shall also be free when it takes place in teaching establishments for educational purposes, civic celebrations or social, cultural and sporting activities, provided that no profit-making purpose is pursued and that no financial compensation of any kind is paid.

Implementation of the Free Trade Agreement between the Dominican Republic, Central America and the United States, Decree Law No. 16, 2006

Article 33. Violation of the prohibitions set forth in the preceding Article shall result in civil action, regardless of any violation of copyright or related rights that might occur. The holder of the rights protected by an effective technological measure shall be entitled to carry out the actions specified in Chapter II of Part VII of this Rule.

No order shall be issued for payment of damages by a non-commercial, non-profit-making library, archive, educational institution or public broadcasting authority which provides evidence to show that it was unaware and had no reason to know that its acts constituted a prohibited activity.

Any natural or legal person who is not the holder of a non-commercial, non-profit-making library, archive, educational institution or public broadcasting authority and who has been involved intentionally and in order to achieve a commercial advantage or private financial and commercial gain in any activities that are prohibited by this Article shall be subject to the procedures and sanctions stipulated in the Penal Code.

Article 35. Likewise, the activities described in Article 34 and the following activities shall constitute exceptions to the prohibition stipulated in Article 32 (1), provided that they do not

impair the adequacy of the legal protection or the effectiveness of the legal remedies against the circumvention of effective technological measures:

(a) access by a non-profit-making library, archive or educational institution to a work, performance or phonogram to which there is no other form of access, with the sole aim of taking decisions about acquisition;

(...)

Article 38. Violation of the prohibitions set forth in Article 37 shall result in civil action, regardless of any violation of copyright or related rights that might occur. The holder of the rights protected by an effective technological measure shall be entitled to carry out the actions specified in Chapter II of Part VII of this Rule.

No order shall be issued for payment of damages by a non-commercial, non-profit-making library, archive, educational institution or public broadcasting authority which provides evidence to show that it was unaware and had no reason to know that its acts constituted a prohibited activity.

Any natural or legal person who is not the holder of a non-commercial, non-profit-making library, archive, educational institution or public broadcasting authority and who has been involved intentionally and in order to achieve a commercial advantage or private financial and commercial gain in any of the aforementioned prohibited activities shall be subject to the procedures and sanctions stipulated in the Penal Code.

JAMAICA

The Copyright Act

Use of Work for Educational Purposes

56. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instructions and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

57. (1) The inclusion in a collection intended for use in educational establishments of a short passage from a published literary or dramatic work does not infringe copyright in the work if—

(a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;

- (b) the work was not itself published for the use of educational establishments;
- (c) the collection consists mainly of material in which no copyright subsists; and
- (d) the inclusion is accompanied by a sufficient acknowledgement.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author—

- (a) shall be taken to include excerpts from works by him in collaboration with another; and
- (b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

58. (1) Subject to subsection (2), a recording of a broadcast or cable program or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

(2) Subsection (1) shall not apply if or to the extent that there is a licensing scheme certified pursuant to section 102 for the purposes of this section.

59. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than five per cent of any work may be copied by or on behalf of an educational establishment by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorized by this section if, or to the extent that, licenses are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) Where a license is granted to an educational establishment authorizing the reprographic copying of passage from any published literary, dramatic or musical work, for use by the establishment, then, any term of that license which purports to restrict the proportion of work which may be copied (whether on payment or free of charge) to less than that permitted under this section shall be of no effect

MEXICO

Federal Law on Copyright

Article 148. Literary and artistic works that have already been disclosed may only be used in the following cases without the consent of the owner of the economic rights and without remuneration, provided that the normal exploitation of the work is not adversely affected thereby and provided also that the source is invariably mentioned and that no alteration is made to the work: (...)

IV. reproduction of a literary or artistic work once, and in a single copy, for the personal and private use of the person doing it, and without gainful intent.

A legal entity may not avail itself of the provisions of this subparagraph except where it is an educational or research institution, or is not devoted to trading activities; (...)

Article 151. The use of performances, phonograms, videograms or broadcasts shall not constitute a violation of the rights of the performers, producers of phonograms or videograms or broadcasting organizations where:

- (I) no direct economic benefit is sought;
- (II) only short fragments are used for information on current events;
- (III) the use is made for educational or scientific research purposes;
- (IV) the cases concerned are those contemplated in Articles 147, 148 and 149 of this Law.

NICARAGUA

Law on Copyright and Related Rights
Law No. 312 of 1999

Article 33. Without the authorization of the author, reproduction, by reprographic means and for teaching purposes, of isolated articles published in the press or short extracts of a work shall be permissible, provided that both of them have been published, on condition that such reproduction takes place in educational establishments, does not pursue a direct or indirect commercial purpose and is carried out to the extent justified by the objective to be attained, in accordance with fair practice and quoting the source and the name of the author, if his name is given in the source.

Article 36. Lectures or lessons given at educational establishments may be freely noted and collected but their full or partial publication or reproduction shall be prohibited without the authorization of their author.

PANAMA

Law on Copyright and Neighboring Rights
Law No. 15 of 1994

Article 47. The following shall be lawful communications without authorization from the author or payment of remuneration: (...)

- 3. those shown to be for exclusively educational purposes in teaching establishments, provided that they are communications without gainful intent. (...)

Article 48. With regard to works that have already been lawfully disclosed, the following shall be allowed without authorization from the author or remuneration: (...)

3. the reproduction by reprographic means of articles or extracts from lawfully published short works for teaching or the holding of examinations at educational establishments, provided that there is no gainful intent and to the extent justified by the aim pursued, and on condition that the use is made in accordance with proper practice.
(...)

PARAGUAY

Law on Copyright and Related Rights,
Law No. 1328 of 1998

Article 38. The intellectual works protected by this Law may be lawfully communicated in the following cases without need for the permission of the author or payment of any remuneration: (...)

3. in the case of single, personal copies that are used solely for teaching purposes by teaching staff at educational establishments; (...)

Article 39. The following is permitted without authorization by the author or payment of remuneration in relation to works already disclosed:

1. reproduction by reprographic means, for the purposes of teaching or the holding of examinations at educational establishments, provided that there is no gainful intent and only to the extent justified by the objective pursued, of articles or short extracts from lawfully published works, on condition that the use is in keeping with proper practice; (...)

PERU

Andean Decision No. 351 of 1993

Article 22. Without prejudice to the provisions of Chapter V and those of the foregoing Article, it shall be lawful, without the authorization of the author and without payment of any remuneration, to do the following:

(...)

(b) reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby;

(...)

(j) effect the performance or execution of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution;
(...)

Copyright Law
Legislative Decree No. 822 of 1996

Article 41. The intellectual works protected by this Law may be lawfully communicated, without the necessity of authorization by the author or payment of any remuneration, in the following cases: (...)

c) where the acts are shown to have an exclusively educational purpose, being performed in the course of the activities of a teaching institution by the staff and students of that institution, provided that the communication pursues no direct or indirect profit-making purpose and the audience is composed solely of the staff and students of the institution or parents or teachers of students and other persons directly associated with the institution's activities. (...)

Article 42. Lectures given either in public or in private by the lecturers of universities, higher institutes of learning and colleges may be annotated and collected in any form by those to whom they are addressed, provided that no person may disclose them or reproduce them in either a complete or partial collection without the prior written consent of the authors.

Article 43. With regard to works that have already been lawfully disclosed, the following shall be permitted without the author's consent:

(a) reproduction by reprographic means, for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and to the extent justified by the aim pursued, of articles or brief extracts from lawfully published works, on condition that the use made of them is consistent with proper practice, involves no sale or other transaction for consideration and has no direct or indirect profit-making purpose; (...)

SAINT LUCIA

Copyright Act No. 10 of 1995

Use of Work for Educational Purposes

62. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

SAINT VINCENT AND THE GRENADINES

Copyright Act, 2003

56. (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by being copied in the course of instruction or of preparation for instruction, provided the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable program is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction.

(3) Copyright in a work is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to candidates or answering the questions.

57. (1) The inclusion, in a collection intended for use in educational institutions of a short passage from a published literary or dramatic work does not infringe copyright in the work if

(a) the collection is described in the title and in any advertisements thereof issued by or on behalf of the publisher, as being so intended;

(b) the work was not itself published for the use of educational institutions;

(c) the collection consists mainly of material in which no copyright subsists;

(d) the inclusion is accompanied by a sufficient acknowledgement; and

(e) not more than one other such passage or parts from works by the same author is published by the same publisher within the period of five years immediately preceding the publication of that collection.

(2) Subsection (1) does not authorize the inclusion of more than two excerpts from protected works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage, the reference in subsection (2) to excerpts from works by the same author

(a) shall be taken to include excerpts from works by him in collaboration with another; and

(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

58. (1) The performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational institution and other persons directly connected with the activities of the institution,

(a) by a teacher or pupil in the course of the activities of the institution; or

(b) at the institution by any person for the purposes of the instruction;

is not a public program for the purposes of infringement of copyright.

(2) The playing or showing of a sound recording, film, broadcast or cable program before such an audience at an educational institution for the purposes of instruction is not a playing or showing of the work in public for the purposes of the infringement of copyright.

(3) A person is not for this purpose directly connected with the activities of the educational institution simply because he is the parent of the pupil at the institution.

59. (1) Subject to subsection (2), a recording of a broadcast or cable broadcast program or a copy of such a recording may be made by or on behalf of an educational institution for the educational purposes of that institution without thereby infringing the copyright in the broadcast or cable program or in any work included in it.

(2) Subsection (1) shall not apply if or to the extent that, there is a licensing scheme under which licenses are available authorizing the making of the recordings or copies, and the person making the recordings knows or ought to have been aware of that fact.

60. (1) Subject to the provisions of this section, reprographic copies of passages from published literary, dramatic or musical work may be made by or on behalf of an educational institution for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement.

(2) Not more than one percent of any work may be copied by or on behalf of an educational institution by virtue of this section in any quarter, that is to say, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September, 1st October to 31st December.

(3) Copyright is not authorized by this section if, or to the extent that, there is a licensing scheme under which licenses are available authorizing the copying in question and the person making the copies know[s] or ought to have been aware of that fact.

(4) Where a license is granted to an educational institution authorizing the reprographic copying of passages from any published literary, dramatic or, musical work, for use by the institution, then, any term of that license which purports to restrict the proportion of work which may be copied whether on payment or free of charge, to less than that permitted under this section shall be of no effect.

61. (1) Where a copy of a work would be an infringing copy if the making thereof were not authorized under section 56, 59 or copy if the making thereof were not authorized under section 56, 59 or 660 and such copy is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing and, if that dealing infringes copyright, for all subsequent purposes.

(2) For the purposes of this section “dealt with” means sold, or let for hire or offered or exposed for sale or hire.

TRINIDAD & TOBAGO

The Copyright Act, 1997
(No. 8 of 1997, as amended by Act No. 18 of 2000)

Reproduction for teaching

11. (1) Notwithstanding the provisions of section 8(1)(a), the following acts shall be permitted without authorization of the owner of copyright:

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that such reproduction is compatible with fair dealing and does not exceed the extent justified by the purpose;

(b) the reprographic reproduction, for face-to-face teaching in educational institutions the activities of which do not serve direct or indirect commercial gain, of published articles, short works or short extracts from works, to the extent justified by the purpose, provided that–

(i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions; and

(ii) there is no collective license available (that is, offered by a collective administration organization of which the educational institution is or should be aware) under which such reproduction can be made

(2) The source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under subsection (1).

URUGUAY

Copyright

Law No. 9.739

Article 44. The following are, among others, special cases of unlawful reproduction:

(A) Literary works in general:

1. The printing, fixation, reproduction, distribution, communication or making available to the public of a work without the author's consent;
2. Reprinting by the author or the editor in breach of the agreement between them;
3. Printing by the editor of more copies than agreed;
4. The transcription, adaptation or arrangement of a work without the authorization of the author;
5. The publication of a work with deletions or modifications not authorized by the author or with typographical errors that, by virtue of their number and significance, constitute serious adulteration.

(B) Dramatic, musical, poetic or cinematographic works:

(1) The representation, performance or reproduction of works in any form or by any means in theatres or in public places without the authorization of the author or rightholders. For the purposes of this Law, representation, performance or reproduction in a public place is understood to be any outside the home. However, performances given at strictly family gatherings outside the home shall not be deemed unlawful when they meet the following requirements:

(1) The representation, performance or reproduction of works in any form or by any means in theatres or in public places without the authorization of the author or rightholders. For the purposes of this Act, representation, performance or reproduction in a public place is understood to be any outside the home. However, performances given at strictly family gatherings outside the home shall not be deemed unlawful when they meet the following requirements:

(I) that the gathering has no profit-making purpose;
(II) that discotheque, audio or similar services are not used and that live artists do not take part;
(III) that only home (non-professional) musical equipment is used. Within the framework of the competences recognized under this Law, the collective management bodies may verify compliance with the aforementioned requirements. Nor shall performances at private or public academic institutions and at places intended for religious worship be deemed unlawful, provided that they have no profit-making objective.
[Text of subsection (A), paragraph 1, of Article 44 given by Article 13, and text of subsection (B), paragraph 1, of Article 44 given by Article 14, both from Law No. 17.616 of 10 January 2003]

Article 45. The following shall not constitute unlawful reproduction:

- (1) The publication or broadcast on the radio or in the press of works intended for teaching, extracts, fragments of poetry and selected articles, provided that the name of the author is stated, except as provided in Article 22.
- (2) The publication or broadcast on the radio or in the press of oral lessons given by teachers, speeches, reports or talks pronounced in deliberative assemblies, in courts of justice or at public meetings. (...)

VENEZUELA

Law on Copyright

Article 43. The following shall be considered lawful communications: (...)

3. those made for strictly scientific and teaching purposes in educational establishments, provided that there is no gainful intent.

Article 44. The following shall be considered lawful reproductions: (...)

3. reproduction by reprographic means, for the purpose of teaching or the holding of examinations in educational institutions, provided that there are no profit-making purposes and to the extent justified by the purpose, of articles, brief extracts from works or lawfully published short works, on condition that the use is in keeping with proper practice. (...)

8. the copying of works of art strictly for purposes of study. (...)

[End of the Annex and of the document]