

# Copyright Limitations and Exceptions and the Trans-Pacific Partnership Agreement

## *Introduction*

Any copyright regime must foster creativity, promote innovation, protect citizens' ability to access information on fair terms, and protect citizens' fundamental freedoms, such as the freedom of expression. In order to achieve these goals, the regime must provide a robust set of exclusive rights as well as a robust set of limits to these rights.

Exceptions and limitations are an important part of an efficiently functioning copyright system. They allow creators to access, and build upon the knowledge generated by others. Without exceptions and limitations, the copyright system would not be able to achieve its fundamental purpose of spurring creation and innovation for the benefit of humankind. They also allow countries to create tailored access regimes, to meet national needs and public priorities, such as exceptions for distance education.<sup>1</sup>

Without these exceptions and limitations, copyright protection would undermine socially, culturally, and economically significant uses such educational uses, uses for scholarship and research, and use by the disabled. In addition, absence of proper limits to exclusive rights would prevent innovation by exposing Internet and electronics companies to liability for facilitating infringement.

From the very first written copyright law, the British Statute of Anne (1710), the encouragement of learning and dissemination of knowledge as a means to enhance the general welfare have been a chief goal behind the grant of exclusive rights to authors. All of the international copyright agreements, including the Berne Convention and TRIPS,<sup>2</sup> permit countries to make

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<sup>1</sup> <https://www.eff.org/wp/making-knowledge-accessible-across-borders-case-ma>

<sup>2</sup> The Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement) concluded under the auspices of the World Trade Organization (WTO) in 1994, recently reflected and reaffirmed this basic precept by describing the overarching objective of intellectual property protection under the Agreement as "the mutual advantage of producers and users of technological knowledge . . . conducive to social and economic welfare." TRIPS Agreement, supra n. 4, art. 7. See also id, Art 8.1.

certain exceptions to the rights we have described thus far. Most countries have indeed made such exceptions. The purposes of these exceptions vary. Some are justified by the need to respect freedom of expression or privacy. Others are intended to prevent copyright law from frustrating rather than fostering creativity. Still others recognize the impossibility of monitoring and charging for some uses. In general, the exceptions should be considered just as important as the rights they qualify. Together, they are intended to strike a balance between the interests of authors and the interests of users and the public at large. For this reason, it is sometimes said that the exceptions create "user rights."

Policy has evolved over the years on how and where to place this balance, affecting authors, publishers, the open source movement, archives, libraries, and, of course, schools and their students. Policy generally maintains three primary types of exceptions and limitations to copyrights: those due to fundamental freedoms, those that support the public interest, and those that ameliorate market dysfunction.

Many countries with very well established copyright regimes, in particular the US, recognize the importance of copyright limitations and exceptions and provide for them within their domestic laws. Other TPP economies must have a similar opportunity to adopt robust limitations and exceptions suitable to the digital age.

### ***Types of Exceptions and Limitations Regimes***

The exceptions take one of two forms. Exceptions of the first type identify specific and enumerated permissible activities: they provide for an exhaustive list of acts that do not constitute infringements. This is the approach adopted, for instance, by European countries and Latin American countries. The second general approach is to state some general guidelines for permissible uses and then delegate to the courts responsibility for applying those factors to individual cases. The premier example of this approach is the fair use doctrine in the United States.<sup>3</sup>

### ***The US Fair Use Approach<sup>4</sup>***

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<sup>3</sup> section 107 of the U.S. Copyright Act

<sup>4</sup> [https://w2.eff.org/IP/eff\\_fair\\_use\\_faq.php](https://w2.eff.org/IP/eff_fair_use_faq.php)

In essence, fair use is a limitation on the exclusive rights of copyright holders. The US Copyright Act gives copyright holders the exclusive right to reproduce works for a limited time period. Fair use is a limitation on this right and all exclusive rights. A use which is considered "fair" does not infringe copyright, even if it involves one of the exclusive rights of copyright holders. Fair use allows consumers to make a copy of part or all of a copyrighted work, even where the copyright holder has not given permission or objects to your use of the work.

The goals of this bargain are to give copyright holders an economic incentive to create works that ultimately benefit society as a whole, and by doing so, to promote the progress of science and learning. Congress never intended Copyright law to give copyright holders complete control of their works. The bargain also ensures that created works move into "the public domain" and are available for unlimited use by the public when the term of the copyright protection expires. In addition, as part of the public's side of this bargain, US copyright law recognizes the doctrine of "fair use" as a limitation on copyright holders' exclusive rights over their works during the initial protected time period.

The public's right to make fair use of copyrighted works is a long-established and integral part of US copyright law. Courts have used fair use as the means of balancing the competing principles underlying copyright law since 1841. Fair use also reconciles a tension that would otherwise exist between copyright law and the First Amendment's guarantee of freedom of expression. The Supreme Court has described fair use as "the guarantee of breathing space for new expression within the confines of Copyright law".

Fair use is decided by a judge, on a case-by-case basis, after balancing the four factors listed in Section 107 of the Copyright statute. The factors to be considered include:

- 1 The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes - Courts are more likely to find fair use where the use is for non-commercial purposes.
- 2 The nature of the copyrighted work - A particular use is more likely to be fair where the copied work is factual rather than creative.
- 3 The amount and substantiality of the portion used in relation to the copyrighted work as a whole - A court will balance this factor toward a finding of fair use where the amount taken is small or insignificant in proportion to the overall work.

- 4 The effect of the use upon the potential market for or value of the copyrighted work - If the court finds the newly created work is not a substitute product for the copyrighted work, it will be more likely to weigh this factor in favor of fair use.<sup>5</sup>

### ***The World Intellectual Property Organization (WIPO) on Exceptions and Limitations***

In the last decade, the delineation of the conditions of access to copyrighted works, as well as the integration of viable access mechanisms into the international copyright regulatory framework have become one of the most controversial topics in international copyright law.

The development of innovative new technologies offers the possibility, for the first time in human history, of providing the world's citizens with access to the collective knowledge of humankind. New technologies are helping to digitize the collections of the world's great libraries. Volunteer efforts such as Project Gutenberg have made available on the Internet over 10,000 books in the public domain in the United States. Other new collaborative software technologies—wikis—have helped to create the world's most comprehensive and globally relevant free encyclopedia, Wikipedia. Any student who has access to the Internet anywhere in the world can now watch university lectures on content hosting platforms such as YouTube, and listen to free downloaded audio recordings of lectures on their mobile phones. Other new ICTs could provide access to global online education platforms, and to materials that could be used to create locally-relevant curricula to help educate citizens that have no access to books.

However, all of these projects face obstacles because of current international copyright law. First, different countries have varying exceptions and limitations in their national copyright regime so students and teachers who want to use digital copyrighted information obtained from outside of their home country cannot be sure that they can use it legally within their country. Second, providers of information such as online libraries, Project Gutenberg, Wikipedia and content hosting platforms such as YouTube, also face uncertainty about what information they can make available without fear of legal liability because of variations across national copyright laws, the national territorial limits of copyright regimes and uncertain scope of application of rules of private international law to cross-border communication on the Internet, and most importantly, the lack of internationally-harmonized copyright exceptions and limitations. Appropriate exceptions and limitations to international copyright law are required in order to build

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<sup>5</sup> Check EFF Fair Use check-list at <https://www.eff.org/files/corynne-bootcamp-handout.pdf>

internationally accessible digital libraries and archives, and make use of copyrighted works for cross-border education.

Additionally, the emergence of technological protection mechanisms (TPMs), often reinforced by one-sided contractual provisions, have enabled copyright owners to exercise an unprecedented level of control over both the access to and the utilization of creative works worldwide, occasioning what has been labeled by some as the “privatization” of copyright law.

In 2004, WIPO country members have recognized the need for clear exceptions and limitations, and have asked the WIPO to develop studies on the need of international instruments on exceptions and limitations for visually impaired people and people with printing disabilities, libraries and archives, and for education.

In 2008, WIPO submitted a series of studies on exceptions and limitations for the visually impaired, libraries and archives.<sup>6</sup> This positive agenda is moving in WIPO in the form of three distinct but related international instruments, which will hopefully have the nature of a binding international treaty.

### ***The TPP’s Copyright Chapter Must Contain Provisions on Limitations and Exceptions***

Limitations and exceptions must be a feature not only of domestic copyright laws but also international copyright agreements, including the TPP. This approach is essential to ensure that the detailed and prescriptive copyright provisions of the TPP do not constrain the ability of countries to craft their own limitations and exceptions. An example of the TPP’s detailed and prescriptive approach is found in Article 4 of the February 2011 leaked US proposal. This provision calls for protection of exclusive reproduction right even in for temporary electronic copies. "Read literally, this provision subject all temporary copies, even those made in the course of lawful uses, to the exclusive right of the copyright owner." To prevent such a result, the TPP must include a provision that would permit limitations and exceptions to apply to the reproduction right to permit temporary copies made in the course of lawful uses.

### ***Provisions on Limitations and Exceptions Should go Beyond a Mere Restatement of the Three-Step Test***

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<sup>6</sup> [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192/](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192/)

While the three-step test has been portrayed as the most prominent provision relating to limitations and exceptions in many agreements, the test is not a codification of any particular limitation or exception. Rather, it is a mechanism to measure whether limitations and exceptions of countries comply with a particular agreement. Scholars have pointed out that interpretations of the test have focused on preserving rights holder's interests and have hindered adoption of public interest limitations and exceptions. As the declaration of the Max Planck Institute indicates a better interpretation of the test that permits incorporation of public interest limitations and exceptions is possible and desirable. Yet, the controversy surrounding the test is likely to prevent countries from confidently relying on it while crafting limitations and exceptions. Therefore, limitations and exceptions provisions in the TPP must go beyond a mere restatement of the three-step test.

The Office of the United States Trade Representative (USTR) has proposed one provision on limitations and exceptions in the TPP. Leaks reveal that these provisions restates the three-step test, lists purposes for which limitations and exceptions can be devised, and subjects all of them to the three-step test. This approach does nothing to solve some of the confusion surrounding the three-step test.

### ***Our Take: An Alternative Approach for TPP***

To avoid the uncertainties associated with the three-step test provisions on limitations and exceptions in the TPP should do the following:

- 1 Provide a statement of purpose indicating that limitations and exceptions must seek to further public interest objectives such as promoting education, competition, creativity, and innovation. This statement would aid in the interpretation of the agreement. Articles 7 and 8 of the TRIPS agreement provide examples of such statements.
- 2 Explicitly recognize the importance of fair use and fair dealing provisions present in the laws of many TPP countries. Further, these provisions should not be subjected to further limiting principles and the TPP must acknowledge the right of TPP countries to adopt similar provisions.
- 3 Preserve the ability of TPP countries to craft provisions designed to prevent the abuse of IP rights, including the use of IP for anti-competitive purposes.
- 4 Provide for a minimum set of mandatory limitations and exceptions that would promote education, library preservation and lending, and use of works by the disabled.
- 5 Prevent use of TPMs to frustrate user's ability to rely on limitations and exceptions.

The objectives and activities of WIPO and the World Trade Organization (WTO) are central to cooperation and coordination in the realm of international intellectual property law. TPP negotiations should not undermine the positive agenda being negotiated in WIPO and defer to those in regard to broad and digital age appropriate exceptions and limitations for visually impaired people and people with printing disabilities, libraries and archives and for education. Such WIPO instruments also have doctrinal basis and moral imperative in a wide variety of international, regional, and national codifications of human rights and freedoms.

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### **Additional Resources and Sources:**

- More details on the information contained here is available at:  
<http://www.publicknowledge.org/files/PKCopyrightLimitsExceptions.pdf>
- More analysis on copyright aspects of TPP is available at <http://tppinfo.org>.
- Okediji, Ruth L. and Hugenholtz, Bernt. (2008). *Conceiving an international instrument on limitations and exceptions to copyright. Final report* [online]. Available from:  
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