

License to read?

—IFLA's role in advocacy for building a global library

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1 Introduction

It has always been the aim of IFLA to create a global library, a system that makes it possible for users all over the world to get access to any published book, journal article or otherwise relevant library material. In the 70'ties IFLA developed the UAP principles. This means Universal Availability of Publications, specifying that every country had the responsibility to preserve and make available its national literature through the Inter Library Lending system. This has worked admirably well. I remember when I was a student of philosophy, I had books and pamphlets written by the Australian moral philosopher, J.J.C Smart sent to me in Aarhus from Australia. I was full of admiration at a system that made this possible.

Today students would hardly admire a library system requiring weeks or months for supplying them with literature. The development of the Internet has revolutionized this process. Newly published literature is available in databases and may be accessed by the user anytime, and even old journal articles which only exist in print may be scanned and transferred via e-mail within hours or minutes.

The Internet has made the Global Library technically possible so, why is it not realized yet? Because publishing is a private sector business enterprise which requires investments, a return on investments, and preferably also a profit to enable new investments.

The challenge for modern, digital publishing is to make money. The printed book can only be used by one person at a time; in contrast the digital book may be made available to the public in a database and be used by a multitude of persons simultaneously. While the intellectual content used to be fixated on the medium, the physical copy, in the digital world the intellectual content has become truly immaterial, readily available for anyone to access.

The physical barriers have been replaced by legal barriers. When I was a student in the 60'ties the oceans separated me from the books of the Australian philosopher, now it is copyright legislation. Copyright or intellectual property right existed before digital publishing, but is has become incomparably more important.

Copyright is a set of rules to protect the interests of creative workers and the creative industry. These rules were originally crafted under very different technological conditions. They consist of the granting of certain rights to the author of a work, and some exceptions to these rights which apply in certain special cases to the benefit of the general public, e.g. for people with special needs or for special uses. The challenge under the new technological conditions – the digital age – is to define the rules in a way that preserves the exceptions for people with special needs or for special uses without jeopardizing the business of the creators or the creative industry.

The international forum for this is WIPO – World Intellectual Property Organization, an UN organization placed in Geneva which administers the existing international treaties on copyright (e.g. the Berne Convention) and is the forum for the negotiation and eventual adoption of new international copyright treaties, with the exception of TRIPS (Trade-Related aspects of Intellectual Property rights) which is a WTO treaty. Working to realize The Global Library it is, therefore, natural for IFLA to seek influence in this forum.

2 General structure of Copyright Treaties

The most recent international copyright treaties are the WCT (WIPO Copyright Treaty) and WPPT (WIPO Performances and Phonograms Treaty) adopted in Geneva on December 20, 1996. The purpose of these treaties was to safeguard author's and other right holder's rights in the digital age.

The general structure of international copyright treaties is that they specify the author's rights and that exception to these rights are left for "national treatment" according to a general governing principle, the so called "three step test". The three step test specifies that the contracting parties may, in their national legislation, provide for limitations of or exceptions to the rights granted.

- 1) in certain special cases;
- 2) that do not conflict with a normal exploitation of the work;
- 3) and do not unreasonably prejudice the legitimate interests of the author (or other right holders).

A consequence of this structure is that rights are "harmonized" but exceptions are not. What users or libraries are allowed to do with copyright protected works may vary quite considerably, even within the European Union. In some countries it is allowed to make copies for private purposes, in others not. In some you may make digital copies, in others only reprographic (photo) copies are allowed. In some countries you may make copies of works for educational purposes, in others this requires a license. In some countries libraries may make digital copies of printed material for preservation purposes, in other countries format shifting is not permitted.

Another important factor is that copyright is geographically defined. Even when rights are defined in international treaties, these treaties have to be implemented in national law, and it is the national law that defines the right. Likewise, the use of an exception has to be specified in the national law and cannot be applied across the border in another country. E.g. a library of one country may be permitted to send by electronic means (e-mail) digital copies of journal articles to end-users. However, this may only be done within the borders of the country, not across borders to users in other countries. That would require a license from the rights holders.

A third important factor is that contracts in most cases override exceptions. Except for the moral rights of authors, copyright legislation is declaratory and not prescriptive. This means that the right holder and the user are free to define the conditions for use of the protected works, and that their agreement will override whatever exceptions to author's rights may be specified in national legislation. This has become of special importance with the development of click-on contracts which are non-negotiable. Only a few countries do not accept that con-

tracts may override statutory exceptions, e.g. Ireland, in general, and EU concerning database rights.

These three factors, that exceptions are not harmonized, that copyright is geographically defined and that contracts in most cases may override statutory exceptions, are serious stumbling blocks for people with special needs and the main barriers for realizing the global library. Since 2004 IFLA's endeavors in WIPO has been focused on changing that.

3 WIPO 2004 – 2010

In 2004 some developing countries, led by Brazil, Chile and Argentine, started a revolt in WIPO. The underlying view was that WIPO now for years had one-sidedly concentrated on the protection of author's and related right holder's rights, culminating with the adoption of the two new treaties in 1996. The balance between the protection offered and the interests of society had now tipped in favor of the right holders, much to the disadvantage of developing countries which are deeply dependent of the creative industries of developed countries.

This dependency is especially marked in the fields of education, scientific and medical research, and technology transfer. In this respect it has been considered particularly aggravating that the pharmaceutical industries of developed countries systematically exploit the traditional knowledge of indigenous peoples concerning medical plants and genetic recourses, which they develop commercially and protect by patents. In this way it is argued, developing countries may be forced to become customers to their "own" genetic recourses. Likewise, biotechnological industries modify the genomes of agricultural plants in a way that may well give larger output but on the other hand willfully are modified so that the crops cannot be used as seed the next year. Consequently seeds have to be bought afresh every year from the very same agro-industrial firms.

This development perfects a picture of copyright being used to imbed developing countries in a set of rules which serve to keep them in deep – some may say – life threatening dependency of the agro-industrial and pharmaceutical industries of the developed countries.

These and similar views in many developing countries led to the establishment of a WIPO committee which under the heading *The Development Agenda* was asked to produce proposals which might lead to a better balance between the interests of the developing and the developed countries. This work was actively supported by IFLA and other NGOs, especially EIFL (Electronic Information for Libraries). Throughout the whole period there has been a very close cooperation between the energetic Program Manager of the EIFL copyright program, Teresa Hackett, and IFLA / CLM.

The work on the Development Agenda led to many proposals. One of them was a proposal tabled by Chile that Exceptions and Limitations should become a topic on the agenda of the Standing Committee on Copyright and Related Rights (SCCR), which is the committee which prepares international treaties. The objective was the establishment of "agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in

all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors.”*

This initiative eventually resulted in a study by Kenneth Crews on copyright exceptions and limitations for libraries and archives.[†] Parallel to this the World Blind Union (WBU) succeeded in having Judith Sullivan commissioned with preparing a study on exceptions limitations and for the benefit of the visually impaired.[‡]

While these studies were prepared WIPO ran into a serious crisis. This crisis had nothing to do with the studies undertaken but were reflections of the increasing tensions between developing and developed countries due to the emerging changes in economic and political power; tensions that were also reflected in other UN organizations. Here the crisis had two elements: Some countries were dissatisfied with the Director General, Kamal Idris, and wanted him to step down, which eventually happened in September 2008; the other element was that WIPO in its norm setting activity was felt to have become increasingly impotent.

The treaty negotiations in 1996 had left two issues unresolved: Protection of databases had not been included in WCT and the WIPO Performances and Phonograms Treaty (WPPT) had not extended the protection to audiovisual performances.

Only the EU was really interested in a treaty for the protection of databases, and the matter was effectively drowned in preliminaries.

There was more widespread interest in the protection of audiovisual performances, e.g. by India, which has a large film industry. At the Diplomatic conference in December 2000 in Geneva, agreement was reached on all issues but one, the transfer of rights. EU wanted to make the transfer of rights dependent on the explicit consent of the performer, whereas USA wanted the treaty to allow for the automatic transfer of rights from performer to producer. It was not possible to bridge this gap. Decisions in WIPO require consensus, and so the treaty could not be adopted.

At the end of the 90’ies negotiations had also started on the protection of Broadcasts, and developing countries urged that a treaty for the protection of Traditional Knowledge and Cultural Expressions was much needed.

The negotiations for the Broadcast Treaty dragged on for more than 10 years. Developing countries were not interested in having yet another layer of protection on top of the protection of author’s and related rights. USA, not being a party to the Rome Convention, argued that a treaty was needed to prevent signal theft and were supported by the EU. However, USA insisted that webcasting be included in the treaty, something most others, including EU, opposed. In this situation it was an easy task for the developing countries to derail the process.

* Proposal by Chile, on the Analysis of Exceptions and Limitations, Document prepared by the Secretariat. Standing Committee on Copyright and Related Rights, Thirteenth Session, Geneva, November 21 to 23, 2005. SCCR/13/5 SCCR/15/7.

† Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews, Director, Copyright Advisory Office, Columbia University. Standing Committee on Copyright and Related Rights, Seventeenth Session, Geneva, November 3 to 7, 2008. SCCR/17/2.

‡ Study on Copyright Limitations and Exceptions for the Visually Impaired, prepared by Judith Sullivan, Consultant, Copyright and Government Affairs. Standing Committee on Copyright and Related Rights, Fifteenth Session, Geneva, September 11 to 13, 2006. SCCR/15/7.

Despite the fact that USA in the fall of 2006 gave in on webcasting, negotiations came to a halt in 2007. Whether serious negotiations will be resumed is still open to question.

On the other hand, EU and USA have not been particularly helpful in promoting serious negotiations for a treaty on the protection of Traditional Knowledge and Cultural expressions, which – that must be admitted – is a matter of much greater conceptual and legal complexity than the Broadcast Treaty could ever aspire to. The issue has been dealt with by a separate committee, The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) without much progress. Especially the protection of traditional cultural expressions and folklore may become important for archives, libraries and museums. Traditional cultural expressions and folklore are in the Public Domain, i.e. the copyright protection – if there has ever been one – has expired. The idea is somehow to re-create a copyright protection. How this may be done and administered is still an open question, and IFLA has so far not expressed any opinion on the matter.

As can be seen from this ultra short overview, WIPO's norm setting activities since 1996 has not been particularly successful. This need not be WIPO's fault; WIPO can facilitate negotiations, but at the end of the day it is the Member States who have to agree, and in the prevailing political climate the will to compromise has not been very outspoken.

4 Treaties for Limitations and Exceptions

It was in this aura of stalemate that the negotiations on Exceptions and Limitations started in November 2008 with the presentation of the studies on copyright limitations and exceptions for libraries and for the visually impaired. SCCR had reserved three days of a five days meeting exclusively for this issue, and it was with a sense of being witness to a turning point and a new beginning for WIPO that I attended the meeting.

Most of the interventions were positive and constructive, and there was a general positive attitude to finding a solution for the visually impaired and the needs of reading disabled persons. However, publishers were negative and IFRO (The International Federation of Reproductions Rights Organization) lobbied energetically against having exceptions, arguing that the problems might be solved by licensing agreements.

Many argued against this, drawing attention to the fact that the orphan works problem would make license agreements impossible. Only the Nordic countries allow for extended collective licensing, which is a way to bypass the problem of unknown or un-locatable authors. It was also argued that it would be right-out immoral to demand remuneration from handicapped people from the poorest parts of the world when unremunerated exceptions in rich countries allow blind or visually impaired persons to access audio versions of literature. Nevertheless, 45 minutes before the conclusion of the meeting, EU made an attempt to sabotage the process, by demanding that license solutions may be considered at the expense of having exceptions. This stirred much anger. EU did not succeed, but it was an ugly incident and a bad omen.

In the meantime WBU prepared a treaty text to be presented at the next SCCR meeting in May 2009. Brazil, Ecuador, and Paraguay tabled the proposal.* Also IFLA / CLM and EIFL have been working on a draft for a treaty on Minimum Exceptions and Limitations for libraries.

I will not here go into the content of these texts. The important issue in this context is to understand the political situation.

There *ought* not to be serious objections to accepting a treaty for the blind, visually impaired or reading disabled. They have a morally strong case and it is difficult to argue against it. Most developed countries have these exceptions and they have not had negative economic effects on publishers and authors. The problem is that publishers and other rights holders fear that by accepting this proposal, they would be opening the gates for similar demands, and that the next step will be a demand for a treaty for the benefit of education and libraries.

There is some truth in this. For years IFLA, EIFL and other NGOs have argued that we need a common minimum level of limitations and exceptions, and that a treaty granting this would be desirable. This is no secret. And even though IFLA and EIFL give a treaty for the blind, visual impaired and reading disabled priority by supporting the proposed timetable for its adoption in 2012, it is still a dilemma, that the proposal for this treaty is not judged by its merits, but by the presumed consequences.

This dilemma became very clear when the African Group at the SCCR meeting in June this year tabled a proposal that also included exceptions for other disabled persons, educational and research institutions, and libraries and archive centers,[†] and insisted that the proposals for these other exceptions should be dealt with at the same time. It was impossible to reach agreement on this, and the meeting ended without conclusion.

5 Conclusion

The situation now is the following

- Brazil, Ecuador, and Paraguay, later joined by Mexico, have proposed a treaty in accordance with WBU's wishes and the needs of reading disabled persons.
- USA has proposed a soft law approach, i.e. a recommendation to the Member States that is restricted to allow exportation and importation of works in Braille or in formats especially adapted for blind and reading disabled persons via "trusted intermediaries" like e.g. libraries. EU has come up with a similar soft law proposal.

* Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU). Standing Committee on Copyright and Related Rights. Eighteenth Session. Geneva, May 25 to 29, 2009. SCCR/18/5.

[†] Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group. Standing Committee on Copyright and Related Rights. Twentieth Session. Geneva, June 21–24, 2010. SCCC/20/11.

- Last but not least, the African Group has proposed that also exceptions for other disabled person, education, research and libraries &c. should be dealt with at the same time.

IFLA and EIFL will work with the African Group, other regional groups and allied NGOs to try to find agreement on a way forward before the next meeting in November 2010.

The situation is not easy. However, one should not forget the immense development in WIPO during the last 6 years. *The Development Agenda* has changed the Agenda for WIPO. Exceptions and limitations have come to stay. Progress may be slow, and there will be setbacks, but there is no way back.