CHAPTER SIX

MODELS OF PRACTICE RELATING TO LIMITATIONS AND EXCEPTIONS TO COPYRIGHT FOR EDUCATIONAL PURPOSES

6.1. INTRODUCTION

The Berne Convention and the TRIPS Agreement grant states the discretion to determine the conditions under which certain copyrights can be exercised and to impose limitations on the enjoyment of those rights. It is important to remember that international law does not impose on states to provide limitations or exceptions, but rather grants permission to establish them at the national level. In other words, limitations and exceptions are permissive and not mandatory. Therefore, in general, how states take advantage of this ‘permission’ affects how they balance the enjoyment of copyrights and access to copyrighted works by the public, through limitations and exceptions. Inevitably, where the state is not able to effectively use the flexibility – in a developing country for example – it cannot achieve a balance between private interests in copyright and the public interest of education or access to knowledge.

In the preceding chapters, we demonstrated that developing countries cannot use the two major exceptions, the three-step test and compulsory licensing under the Berne Appendix, to promote access to copyrighted works for educational purposes. In this chapter, we shall explore possible models of practice for access to protected works beyond the specific exceptions provided under the Berne Convention, three-step test and the Berne Appendix.

National courts now contribute to the development of international intellectual property law. Indeed, when compared with the traditional negotiation of treaties, national court development of ‘international law’ is more responsive to social conditions and hence more dynamic; and it is more readily subject to refinement by a range of national political institutions. Therefore, in this chapter emphasis is placed on the role that courts,

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and not just legislators, might play in crafting case-by-case educational exceptions in a way that makes WTO retaliation harder.

A survey of national legislation on limitations and exceptions reveals a mixture of the Anglo-American and the continental system in providing for flexibilities. The former system supplements statutory limitations and exemptions with the so-called “fair use” or “fair dealing” doctrine. These are close to, but not the same as, “fair practice” as it is used in the Berne Convention. On the other hand, the continental legal tradition essentially provides a number of statutory exemptions, allowing the use of the published copyrighted materials without the copyright owner’s authorization.

In this chapter, we examine commonly used flexibilities, like fair use, fair dealing, compulsory licensing or quasi compulsory licensing outside the Berne Appendix and government use, in developed and some developing countries in an attempt to illustrate possible models of practice for developing countries for access to education. Although compatibility of fair use with the three-step test has been questioned,3 our starting point is that there exists a factual acceptance by developing countries of the fair use or fair dealing principles. We, however, devise a “fairness” model that answers to the special needs and national realities of developing countries.

We believe that the flexibilities selected require minimum financial input for implementation. These respond better to the economic needs of developing countries described in chapter two.4 At the same time, the use of fairness principles and compulsory licensing (outside the Berne Appendix) to facilitate access to copyrighted material are widely acceptable practices, especially among developed countries, who are the major producers of copyrighted material.

6.2. FACTUAL ACCEPTANCE OF FAIR USE AND FAIR DEALING BY DEVELOPING COUNTRIES

It may be observed that a number of states have either officially endorsed the concept of fair use/dealing by including it in their national legislation or relied on it for guidance in

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3 We return to this at a later stage in this chapter.
4 There are other possible solutions which fall outside copyright. These include Open access to publicly funded research and granting of prizes instead of copyright for innovation. As an example of the former, the US National Institute of Health (NIH) makes public all publicly funded research. The NIH ensures that the public has access to all published results of NIH funded research to help advance science and improve human health. (see information on www.publiaccess.nih.gov). The EU has a similar programme. See Commission on the European Communities, Brussels, 20 August, 2008, document C(2008) 4408 final, available at http://ec.europa.eu/research/press/2008/pdf/decision_grant_agreement.pdf. On prizes to stimulate innovation, see a compilation of different projects on the website of Knowledge Ecology International, at: http://www.keionline.org/content/view/4/1/. In both cases, so far the focus is on medicine or science. These are good initiatives but they are hard to implement by developing countries. In the case of publicly funded research, the government has to fund the research or find means to do so (the EU has provisions for co-funding projects with a party outside the EU). This is economically not viable for developing countries. The same goes for prizes. There has to be a prize pool, money for paying those who win the prizes. In most cases, such pools are funded by donors who have interest in the projects for which there is competition. It is not possible to take into account the interest of developing countries.