

**BACKGROUND PAPER FOR THE 17th SESSION OF THE WIPO STANDING
COMMITTEE ON COPYRIGHT AND RELATED RIGHTS
NOVEMBER 3-7, 2008**

**WHY COPYRIGHT EXCEPTIONS AND LIMITATIONS ARE CENTRAL TO THE
WIPO DEVELOPMENT AGENDA**

The WIPO General Assembly, in its session held in September 2008, adopted the Report on the Sessions of the Committee on Development and Intellectual Property (CDIP) (WO/GA/36/4 Rev.). In adopting decision paragraph 11 of this document, the General Assembly approved the recommendations contained in paragraph 10, which included in section (c) the recommendation “to urge the General Assembly to encourage all Member States, the Secretariat and other relevant WIPO bodies to effectively implement the adopted recommendations.”

In the first and second sessions of the CDIP, Member States affirmed that the Development Agenda work plan must be coordinated horizontally across the organization and that it should be the responsibility of all WIPO committees. The cross-cutting nature of the work plan was a recurring theme at the 2008 General Assembly where many national delegates emphasized the need for the Development Agenda to be addressed in all WIPO bodies and translated into concrete action. At its third session in 2009, the CDIP will discuss coordination of the integration of the Development Agenda as a high priority for the organization.

This week the SCCR is embarking on discussions of four recent studies on limitations and exceptions, discussion of which has evolved in the context of proposals submitted to WIPO from the government of Chile in 2004, 2005, and from the governments of Chile, Brazil, Uruguay and Nicaragua in 2008. In its proposal of November 2004, Chile requested that WIPO include on the agenda of the SCCR the subject of limitations and exceptions to copyright and related rights for the purposes of education, libraries and archives, and disabled persons and “to strengthen international understanding of the need to have adequate limitations, learning from existing models and moving towards agreement on exceptions and limitations for public interest purposes, which, like minimum standards, were to be envisaged in all legislation for the benefit of the international community” (SCCR/12/3).

The need for action to address the needs of visually impaired persons, in particular, is proposed as part of the larger work program on limitations and exceptions. In October 2008 the SCCR received a proposal from by the World Blind Union for a Treaty on Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons. The two main features of the proposed treaty are to provide a minimum standard for limitations and exceptions for the blind and visually impaired, reflecting current technological opportunities, and to allow for the import and export of works in accessible formats by eligible parties. This proposal is a call for concrete action to implement change for the benefit of the public in all nations.

It is widely considered that developing a global approach to limitations and exceptions is one of the central challenges facing the international copyright regime today. The needs of developing societies need even more attention. They will not be adequately addressed, and the goals of the Development Agenda will not be fully realized, if there is not a stronger emphasis on strategies for administering and utilizing intellectual property for the benefit of general education, research, preservation and access to knowledge, and the social good that results from a true balance between intellectual property protections and the public interest in developing and least developed nations. This needs to be realized in the concrete activities of the CDIP work plan. The

time for discussing limitations and exceptions is now; the time has also come to shape this discussion into realities for developing nations.

Documents CDIP/1/3, dated March 3, 2008 and CDIP/2/2, dated June 20, 2008 contain the most recent versions of proposals for activities to be undertaken with respect to the 45 recommendations comprising the Development Agenda. Member States need to implement a link between the work of the SCCR and the CDIP to realize the goals envisioned in the Development Agenda, through adequate limitations and exceptions, national models and practices concerning their implementation, and agreement on a minimum level of limitations and exceptions in national laws.

In the context of specific recommendations of the Development Agenda, and the activities that have been proposed to implement a work program, the following are areas in which work could begin immediately.

WIPO Development Agenda Recommendation 10. “To assist Member States to develop and improve national IP institutional capacity through further development of infrastructure and other facilities with a view to making national IP institutions more efficient and promote fair balance between IP protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with IP.”

Proposed WIPO activities under Recommendation 10 (CDIP/2/2):

“... In future, WIPO shall pay greater heed to the need to take into account the interests of the general public.”

Implementation Recommendation: We encourage institutional support within Member States for the identification and use of information in the public domain, as well as the use of flexibilities, copyright limitations, and exceptions, and public funding and open access policies, to provide appropriate access to all forms of information. This must include improved provisions for visually disabled and other disabled persons, to enable the use of information through any media and regardless of national borders, following the proposal presented to the SCCR in October 2008 for a treaty on copyright limitations and exceptions for blind, visually impaired and other reading disabled persons.

WIPO Development Agenda Recommendation 20. “To promote norm-setting activities related to IP that support a robust public domain in WIPO’s Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.”

Proposed WIPO activities under Recommendation 20 (CDIP/1/3):

“To initiate activities to promote deeper understanding of problems in the field of copyright and related rights related to identification of public domain material (e.g. orphan works, use of rights management technologies, the role of search engines). To support the development of a database containing the repertoire of national copyright and related rights protectable works, including those in the public domain.”

Implementation Recommendation: The public domain is part of the common cultural and intellectual heritage of humanity and is a source of inspiration, imagination, innovation and discovery for creators. The spirit of the proposal is to facilitate access to content in the public domain. We encourage Member States to consider the role that libraries could play in creating such a database. In addition, we encourage the SCCR to consider commissioning a study on

orphan works and comparative legislative and policy responses adopted by Member States and the private sector, to inform Member States of the scope of the issues and potential solutions available under international agreements and in national laws.

WIPO Development Agenda Recommendation 22. “WIPO’s norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration. The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: a) safeguarding national implementation of intellectual property rules b) links between IP and competition c) IP-related transfer of technology d) potential flexibilities, exceptions and limitations for Member States and e) the possibility of additional special provisions for developing countries and LDCs.”

Implementation Recommendation: We commend the work done by the WIPO Secretariat in commissioning the four recent studies highlighting the critical importance of limitations and exceptions, and are grateful to the SCCR delegates for requesting the Secretariat to commission a fifth study on educational exceptions and limitations. It is important that this work lead to further articulation of potential flexibilities, limitations, and exceptions for Member States geared to new technologies and information services. We support immediate consideration of the proposal presented to the SCCR in October 2008 for a treaty on copyright limitations and exceptions for blind, visually impaired and other reading disabled persons. In addition we suggest that an evaluation be conducted of the Berne Appendix, to consider its intended purpose and usefulness for developing nations in the digital age.

WIPO Development Agenda Recommendation 24. “To request WIPO, within its mandate, to expand the scope of its activities aimed at bridging the digital divide, in accordance with the outcomes of the World Summit on the Information Society (WSIS) also taking into account the significance of the Digital Solidarity Fund (DSF).”

Proposed WIPO activities under Recommendation 24 (CDIP/1/3):

“To bridge the digital divide that exists with regard to access to IP education, it is proposed to provide IP course content in as many languages as requested by Member States and make such course material as accessible as possible through mailing, distance learning and CD-ROM.”

Implementation Recommendation: The digital divide exists far beyond access to IP education. In the sincere interest of bridging the digital divide, we urge the development of model provisions on education and distance learning that will enable citizens in developing and least developed countries to benefit fully from the range of technologies available for distance education and the flexibilities available within the international copyright system. We encourage the development of a specific limitation for this purpose that may serve as a standard for developing countries and least developed countries in national laws. Such a limitation could be drafted before the third meeting of the CDIP in 2009, and could be placed on the agenda of both the CDIP and the SCCR in the coming months to serve as a concrete manifestation of the principles of the WIPO Development Agenda.

WIPO Development Agenda Recommendation 25. “To explore IP-related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.”

Proposed WIPO activities under Recommendation 25 (CDIP/1/3):

“To prepare a document, possibly in the form of a guide, which explains the flexibilities contained in international agreements on IP.”

“Provide assistance and advice by exploring and explaining all legal and policy options available to each country under relevant international treaties, while keeping in view the country’s international obligations and its national priorities.”

Implementation Recommendation: As an outcome of the recent studies on limitations and exceptions, and in accordance with Recommendation 25, it is appropriate that a document be prepared which explains flexibilities available in international agreements, as well as those existing in national laws as a common practice, to enable developing countries to fully understand and benefit from different provisions.

WIPO Development Agenda Recommendation 45. “To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations,” in accordance with Article 7 of the TRIPS Agreement.”

Proposed WIPO activities under Recommendation 45 (CDIP/1/3):

“... Such concerns may address a range of issues related to the societal benefits of a well-respected intellectual property system.... Development-oriented concerns may also be examined in the context of measures that aim to prevent abusive enforcement practices, contributing to a balance of rights and obligations.”

Implementation Recommendation: At the 2008 WIPO General Assembly, GRULAC and national delegations urged Member States to base enforcement activities on recommendation 45 of the Development Agenda, which proposes IP enforcement that promotes broader societal interests and development-oriented concerns, technological innovation and the transfer and dissemination of technology, and a balance of rights and obligations. We urge the utilization of flexibilities with respect to enforcement practices, particularly with respect to non-profit educational institutions and libraries.

Conclusion

It is important that the momentum from current discussions shaping the CDIP work plan, and the expertise gained from the recent work done on limitations and exceptions, converge into positive change for developing nations.

As the four studies commissioned by WIPO on exceptions and limitations make clear, many of these proposals could be implemented most effectively by drafting model limitations and exceptions that reflect a range of needs and expectations within developing nations. The need for speedy action to improve the access to protected works for visually impaired persons, in particular, will be addressed by supporting the current proposal of the World Blind Union for discussion of a WIPO Treaty on Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons.

The following organizations endorse these implementation recommendations:

Broadband Service Providers Association
Computer and Communications Industry Association
Electronic Frontier Foundation
Electronic Information for Libraries (eFIL.net)
International Federation of Library Associations
IP Justice
Knowledge Ecology International
Library Copyright Alliance
Public Knowledge