

Access to and usages of copyright works in the digital world

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0. IFRRO – THE INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS

For those who do not know IFRRO, it is the main network of rightholder bodies in the print media sector with 145 members in 83 countries. 91 member organisations are RROs (Reproduction Rights Organisations), the collective management organisations in the sector, and 54 are rightholder bodies comprising creators' and publishers' associations.

1. INTELLECTUAL PROPERTY – THE DRIVER OF THE KNOWLEDGE ECONOMY AND CULTURE

The creative sectors, based on copyright, are fundamental to economic growth and, in particular, it fuels the knowledge economy! They are a driver of the knowledge society, and among the most important contributors to the economy and employment, both in developed economies and those under development. Studies carried out in more than 40 countries using a methodology developed for the UN body WIPO also document that “*There is a significant and positive relation between the contribution of copyright industries to GDP and the GDP per Capita*”; “*the Global Competitiveness Index*”; and “*innovation*”¹.

Similarly, the copyright sector is pivotal in sustaining national culture and cultural identity. The creation of artistic and literary expressions unique to the specific culture is essential in defining and projecting national identity.

To prosper and grow, the creative sectors depend on an appropriate copyright legal framework. A well-functioning copyright system plays a central role in nourishing them. The incentive for individuals to create, and for publishers to publish works is weakened, or may be removed entirely, by a system which condones, or even merely ignores, their protected nature. Removal of unauthorised copying of protected works stimulates and helps developing their markets.

2. THE COPYRIGHT ECOSYSTEM

Copyright provides creators with a living and enables them to create new works. It is a principle recognised also in the Universal Declaration of Human Rights: Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. A world that values cultural diversity, knowledge and economic development also values its creators.

The copyright ecosystem has three main components: Primary markets, secondary markets and copyright exceptions. Each of these components is important – but they are not equally important. The primary market contributes most to the publishing ecosystem. It consists of authors and their publishers operating in a competitive, commercial environment. Their business model produces works, which are responsive to user needs, is self-sustaining and needs little, if any, government intervention.

¹ http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf

3. INCOME FROM THE SECONDARY MARKET IS VITAL TO THE AUTHORS AND PUBLISHERS

The income that authors and publishers receive from secondary uses of their works is, likewise, fundamental to them: For instance in the UK, 25% of the authors derive more than 60% of their income from secondary uses, whilst such income is vital to publishers in the digital transition².

The secondary market includes typically photocopying, or digitisation of already published works and other uses administered by RROs, the collective rights management organisations in the publishing sector. It is best able to respond to local conditions – user needs, copying practices, domestic laws - as well as to deal with technological changes (opportunities as well as threats) - while at the same time delivering benefits to all stakeholders in the value chain. The secondary market complements the primary market, but it is never meant to supplant it.

4. HOW DOES EXCEPTIONS AND LIMITATIONS BENEFIT THE ECONOMY?

Exceptions are important but unremunerated exceptions must be limited to instances where primary and secondary markets cannot fulfil a market need efficiently and effectively. Sometimes there is a crossover between exceptions and the secondary market, especially in cases where the exceptions are remunerated.

In the discussions, we have seen and will continue to see attempts to show that unremunerated exceptions benefit society, with the claim that broad exceptions yield economic output. Is it possible that such claims have relevance? Can potential ‘benefits of free use’ of works to develop new works, equipment or activities exceed those triggered by remunerating copyright holders for the use of their works? Is it possible that “a broadly flexible regime of exceptions in copyright” results in “higher rates of growth in value-added output” through countries’ economies?

Reports on positive effects of broad exceptions and limitations of no value

In short, there is no evidence to support assertions that unremunerated exceptions stimulate the economy! The Brussels-based think-tank Lisbon Council made an attempt to substantiate such statements through a Report on the Intellectual Property and Economic Growth Index, released in May 2015. The Economy and Statistics expert, Dr *George S. Ford*, Chief Economist at the Phoenix Center for Advanced Legal and Economic Public Policy Studies totally slaughtered the Report. He ridiculed both its methodology and findings, depicting them as pure “*junk science*”³, and a document of no value, other than showing the lack of skill and sloppy and nonsensical analysis of its author: Clearly, the authors had started from the desired conclusion and subsequently cherry-picked data and statistics to prove them. Dr Ford describes the Report as “*A showcase of Methodological Blunder*”, which should be ignored, and if it could be said to demonstrate anything at all, then it is that there is no meaningful statistical relationship between copyright flexibility and economic outcomes. He advises policymakers to “*run, not walk from the Lisbon Council’s analysis*”

Another Lisbon Council sponsored Report purporting to show positive effects of the introduction of ‘fair use’ in the Singapore copyright legislation received the same thorough analysis by Dr Ford, who concluded that this was “another junk science” report from that Group. As those, who argue in favour of broader exceptions and limitations often point to the US ‘fair use’ regimes, PwC released

² https://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf ; See also PwC, An economic analysis of education exception in copyright https://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf

³ <http://phoenix-center.org/perspectives/Perspective15-03Final.pdf>

a Report earlier this year on the possible consequences on the Australian economy of introducing such a regime in the Australian legislation, and concluded that it could result in a loss of GDP in the order AUD 1.3 billion.

Copyright protection stimulates creativity and thus its contribution to the economy

On the other hand, there is evidence that protection of copyright and copyright holders has positive effect on the economy and creativity. In addition to the WIPO studies I previously referred to, which also show that the copyright sectors often have a stronger growth rate than other economic sectors of the economy, there is, for instance, the study of the Stanford University economists *Michela Giorcelli* and *Petra Moser* of some 2,600 operas performed in eight Italian states between 1770 and 1900⁴. In 1770, none of the states had copyright laws. All eight States introduced copyright legislation with the Napoleon Code, which included protection of intellectual property, creative expressions and the creator, but at different periods, starting with Lombardy and Venetia in 1801.

What the two economists found was that, protection of the creator against infringement on his copyright work, or from uses that he has not authorized, or can claim payment for, stimulates significantly the creation of new quality works: *“After all, if you think your song could easily be ripped off with no consequences, why write in the first place?”* (Vox). *“Copyright laws created significantly more operas that also had staying power and were of higher quality. States with copyrights ended up producing 2.68 additional operas per year, a 121 percent increase over states without copyrights. Historically popular operas (as measured by the Annals of Opera) grew by 47 percent, and durable operas grew by 80 percent”* (Vox)

The negative effect of broad exceptions and limitations

Furthermore, in addition to documented positive effect of copyright protection, there are examples of negative consequences from broadening unremunerated exceptions: In Canada, it resulted in⁵⁶:

- Increased legal uncertainty
- Immediate direct losses to authors and publishers of CAD 22 million (€17 million), expected to increase to a yearly loss of some CAD 40 million (€30 million) by 2016
- More than 1/3 of the authors affiliated to Access Copyright declared that they will reduce the creation of new works following reduced income
- Primary sales declined by 11% in the primary and secondary education sector,
- McGraw-Hill Ryerson’s sales of the primary and secondary education (K-12) content dropped by 27%
- Fernwood Publishing lost an annual revue equalling the salary of one full time employee
- Oxford University Press Canada closed the division of its publishing programme for primary and secondary schools, and eliminated a number of jobs
- Publishers have moved their business, headquarters and divisions out of Canada, mainly to the USA
- Publishers have reduced their overall investment into educational publishing, impacting, in particular, investment in digital transition; the SMEs suffering the most

⁴ <http://ifrro.org/content/copyright-and-creativity-%E2%80%93-evidence-italian-operas>

⁵ <http://ifrro.org/content/ifrro-sends-open-letter-european-commission-vice-president-kroes>; See also PwC Report, accessible, with short intro from IFRRO home page <http://ifrro.org/content/canada-future-educational-publishing-jeopardized-refusal-take-licences-and-pay-fair-remunera>

⁶ <http://ifrro.org/content/canada-future-educational-publishing-jeopardized-refusal-take-licences-and-pay-fair-remunera>

So, in addition to negative impact on the economy and employment, there was clearly, and not unexpectedly, no benefit to copyright holders from the broadening of exceptions in the Canadian legislation.

The reports from Canada support the findings of the PwC Report on the effect of introducing broader educational exception in the UK, which documented that income from secondary uses to authors and publishers by far outweighed any potential positive effect of educational exceptions.⁷ A 10% decline in income from the UK RRO, CLA, for creators would result in 20% less output, whilst a 20% decline would mean a drop of 29% in output or the equivalent of 2,870 works in the educational sector per year. For publishers, the PwC study revealed that the incentive to invest in new content development depends on the income from the UK RRO, CLA. I.e. it is the transition to digital, which is at stake.

In summary, no study, to my knowledge, has shown positive correlation between unremunerated exceptions and economic output. On the other hand, there are studies, which show positive relationship between copyright protection and investment in copyright, and its contribution to and positive impact on the economy and employment.

5. DOES ‘FREE USE’ AND BROAD EXCEPTIONS BENEFIT USERS?

One could go on to asking; does not broad unremunerated exceptions and ‘free use’, especially those directed towards education and libraries, benefit user communities, especially those involved in education and research, and thus society at large? Does not exclusive rights and payment to rightholders limit access to knowledge? Would not all benefit from intellectual property being as freely available, without as few restrictions, as possible? The requests for exceptions that we often hear mentioned are:

- Libraries should be allowed, under an unremunerated exception, to offer access online to works
- Libraries also ask for a general exception in favour of e-lending, both for works in and out of commerce.
- An exception should be allowed for “illustration for teaching”

Instinctively, it may seem to be a fair assumption that such exceptions benefits education and others users of copyright works, does it not? Although I shall not exclude that this could be the case for some user environments on a short term, I would argue that the broadening of exception approach also represents a fairly short-sighted one. In Canada, for example, the broadening of exceptions without payment to authors and publishers and the lack of collective licensing resulted in increased costs for students; this was in addition to the detrimental impact it had on the creative and publishing sector. The assumption was that broader exceptions would lead to cheaper educational material for the students and others. What has been the reality? The prices of course packs to students have risen – in certain cases with up to more than 300%, following the broadening of the exceptions. With the Student’s magazine at the Ryerson University, Toronto:

“Course readers for approximately 60 classes have increased in price as a result of Ryerson letting its Access Copyright⁸ licence expire at the end of last year. Under the university’s five year

⁷ https://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf ; See also PwC, An economic analysis of education exception in copyright https://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf

⁸ The Canadian RRO, English speaking part of Canada

agreement with Access Copyright, a Canadian copyright licensing agency, each Ryerson student was charged \$13 per semester as part of their tuition fees. Access Copyright distributes money to copyright-holders when content is copied, remixed and shared. []. Before 2012, education was not a permitted exception under Canada's Copyright Act. Because of this, Ryerson relied on the Access Copyright agreement to print required materials. The Act was modified at the end of 2012 to include education, which meant the university could copy short excerpts of works without permission from the copyright holder or publisher and didn't need to renew the existing agreement.⁹

The Student's magazine goes on to offering *inter alia* the following example: *"During the first lecture of the semester, Ryerson political science professor Abbas Gnamo told his students that the reader would cost them \$25 — the same price as last semester. When he found out the reader was being sold for \$104.95 (a 320 per cent price increase) he sent a memo to his class, writing that he didn't imagine the price could rise so drastically."¹⁰*

How is this possible, is not this totally illogic? No, it is not! The student's magazine received the following explanation from the university: *"Ann Ludbrook, copyright and scholarly engagement librarian at Ryerson, said in a statement that any course pack containing excerpts of copyrighted textual work has a per page increase to account for the royalty fee to be paid to the publisher. The cost is dependent on how many pages of the original work are reproduced."* It is logic that rights clearance is more costly when it has to be done author by author, publisher by publisher, including with foreign authors and publishers, work by work, than through a one-stop shop and an upfront authorisation by a blanket licensing agreement with a RRO representing thousands of authors and publishers.

Anyone in the rightholder community could and actually had explained that to the politicians before the copyright law was changed and the university cancelled the licensing agreement with the RRO. Because the short fragments, which can be made under an exception that is not in conflict with international copyright conventions, are not sufficient for the needs of the students and the researchers. And work by work clearance of rights may be more cumbersome and costly than when it is done through a collective agreement with the RRO. This is in addition to the risk of impoverished educational material in the long run.

In Turkey, this is not a part of the experience, as collective licensing of educational and research institutions, and of libraries is not pervasive in the country. No wonder therefore that it may be difficult for many to realise that strengthening collective rights management and offering easy legal access to copyright works through collective rights management, supporting agreements directly with authors and publishers, represents the simplest, fastest, safest, most innovative, most convenient and most cost efficient way to grant seamless access to content from multiple rightholders as a response to dynamic needs in education and research.

Some may ask: why is that? Well, opening up for the reproduction or other usages of larger portion of works, would be in conflict with the normal exploitation of works and international copyright legislation, which also Turkey is party two, whilst shorter passages do not satisfy user needs, and therefore encourages unauthorised use and piracy:

- 'Illustration for teaching is exactly what it says: illustration, and not large-scale copying of educational material

⁹ <http://ifrrro.org/content/canada-price-course-packs-rising-after-expiration-licence-signed-rrro>

¹⁰ <http://theyeopener.com/2016/02/damn-that-course-pack-is-expensive/>

- Publishers enable libraries the possibility of e-lending and to offer online-access to their patrons, based on contracts; if unremunerated e-lending on the basis of an exception should become widespread, there would be no market for e-books, so why would the publishers continue to put them on the market?

Broadening of exceptions undermines the national culture

I reiterate that exceptions are important but unremunerated exceptions must be limited to instances where primary and secondary markets cannot fulfil a market need efficiently and effectively. Overly broad exceptions do also not benefit users, especially not on a medium and longer term.

Students, teachers, researchers and other users at all levels - society needs resources for access to copyright works. They also require contributions from environments, which take as a starting point contexts with which they are familiar. A national copyright policy, which allows for broad 'free use' of copyright works, undermines its own national publishing sector, as we have seen, for instance in Canada. The dependency on import of intellectual work, with the obvious cultural, intellectual and other influences as a result, increases. It is playing the game of dominant cultures. Such a policy frequently leads to enhanced unauthorised and unremunerated uses, with the risk also of foreign works being withdrawn from the country's market, as there are healthier ones elsewhere. Gradually outdated information causing an intellectual poverty trap could be the ultimate result.

6. RATIONALE FOR COPYRIGHT

To authors and publishers, the question is no longer authorise or not authorise legitimate user requests for access and usages of their works; the issue is now: offer a solution, or solutions will be implemented for them. Copyright has become a part of everyday life, and a vital component in economic development. Users and policy makers therefore request access to copyright works and a right to use them. Imposed solutions to enable access to copyright works come generally in two forms: illegal access, often in the form of piracy, resulting in well-functioning illegal markets; or, when legislators develop the solution, they come in the form of exceptions and limitations, too often without obligation to remunerate authors and publishers for the use of their works. This is not in the interest of anyone in the long run. Authors and publishers must therefore be proactive in offering solutions.

In conclusion, it is difficult that broadening of exceptions and limitations without obligations to remunerate authors and publishers benefits anyone: it cannot offer the same legal certainty and usages as uses based on agreements with authors, publishers and RROs. Solutions for easy legal access and usages of text and image copyright material already exist in many countries, and they work! Reduction of the remuneration to authors and publishers for the uses of their work, will impact negatively on the publishing sector in any country, and result in increased dependency on the importation of intellectual property. Broadening the unremunerated exceptions only create losers:

- Users will lose as an unremunerated exception cannot possibly offer the same legal certainty, and the broad access to published works as they currently have or can have, for instance, on the basis of agreements with RROs
- Authors and publishers lose, receiving less money, inevitably resulting in a reduction in the creation and publication of new quality work; which again gives as a result
- Society loses through fewer works created locally, and increased dependency on import of foreign works



Access to copyrighted works through agreements and licenses with authors, publishers and RROs is what best meets dynamic user needs to access content from multiple rightholders. -END -