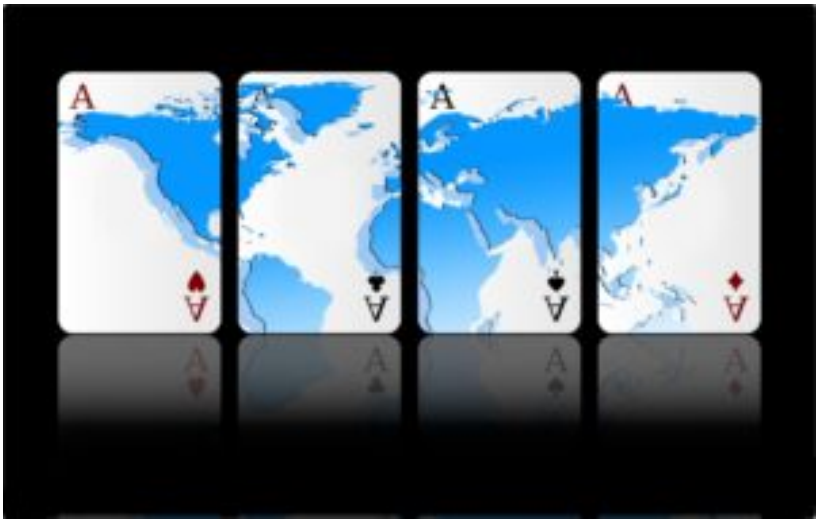
Kluwer Copyright Blog

A Proposal for an International Agreement: The International Instrument on Permitted Uses in Copyright Law

Reto M. Hilty, Valentina Moscon (Max Planck Institute for Innovation and Competition) · Friday, March 19th, 2021



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Introduction

A few weeks ago, the "International Instrument on Permitted Uses in Copyright Law" (hereinafter, the Instrument) was published with open access.

The Instrument is the outcome of an international academic initiative that brought together around twenty outstanding copyright experts from various countries around the world. The group of experts convened its first meeting in 2012 at the Max Planck Institute for Innovation and Competition (MPI) in Munich. On that occasion the group embraced the idea of elaborating concrete legal provisions conceived as a set of minimum uses permitted under copyright, that could eventually be adopted as an international treaty.[1]

Background

To fully understand this project and its outcome (the Instrument), it is worth exploring the context in which it developed. Between 2011 and 2012 some nation states signed the Anti-Counterfeiting Trade Agreement (ACTA). This agreement not only provoked animated academic discussions but

also prompted vehement public demonstrations. It was clear, in fact, that ACTA aimed at strengthening the rights holders' position at the expense of the interests of users. ACTA failed in the end, but the initiative for the Instrument continued to be pursued in the following years.

The idea of developing the Instrument was originally conceived by some members of the expert group that had drafted the "Declaration for a balanced Interpretation of the Three-Step Test in Copyright Law" (the Declaration). This Declaration, published in 2008, aimed at offering a more flexible interpretation of the three-step test in copyright law to achieve more balance between all the interests involved. The initiative received broad international recognition. However, its impact on politics, jurisprudence and legislation remained limited. One of the criticisms of the Declaration is that it adopts an abstract approach, failing to provide real guidance on how legislators should design their exceptions and limitations to achieve the desired balance of interests. Indeed, most countries continue their efforts to establish increasingly higher standards of IP protection, largely ignoring public interests. In practice, these efforts have found success through new strategies. States that wish to impose strong protection to preserve their own industrial interests have learned from the failure of ACTA. Instead of struggling with international agreements like ACTA, they now increasingly impose obligations for more rigorous protection in bi-lateral or regional free-trade agreements. In doing so, they often threaten the sovereignty of counterparties, especially if those counterparties are economically dependent. In fact, such free-trade agreements limit the freedom of weaker countries to design their own copyright legislation in line with domestic cultural, social and economic needs. These international power politics emerged for instance in a recent case involving South Africa. In June 2020, the President of the African National Congress, Cyril Ramaphosa, returned to Parliament the Copyright Amendment Bill, which had been approved at the end of 2018. The Bill included fair use provisions and other exceptions and limitations to copyright. The President claimed the proposed copyright-permitted uses violated South Africa's international obligations. In particular, the Bill was deemed in conflict with the three-step test. Both the United States and the European Union pressured South Africa to defer this legislation. The request was leveraged based on trade agreements and the threat of withdrawn investments.

Goals and Content

Considering these developments, the group of international experts coordinated by the MPI came to the conclusion that an international agreement on permitted uses in copyright law – based on the Instrument – was the best way to counteract them. Firstly, this agreement obliging prospective contracting parties to adopt minimum permitted uses would foster a balance of interests in copyright law. Also, it would generate a certain international harmonization of permitted uses. Secondly, the existence of an international obligation to adopt minimum permitted uses might facilitate cooperation amongst countries, helping them to assert their common interests on an equal footing with groups of countries imposing higher standards of protection in international negotiations. However, these goals enabling individual states to defend themselves against pressure attempts, e.g. from the USA or the EU, could only be achieved if the Instrument became international law. Those states that wished to do so could achieve that by concluding a state agreement. They would not need the consent of other members of the Berne Convention, for example. The Berne Convention – together with the and WPPT – does not prevent members from committing to an international agreement with the aim of providing for further limitations and exceptions as long as the latter are compatible with the three-step test. This is where the Declaration comes into play again. The Instrument interprets the three-step test in line with the Declaration, and a group of member states is free to do so collectively in a way that suits their

domestic needs. What is needed though is the political will of governments of important states to take this step. Therefore, it is crucial that policy makers become aware of the existence and usefulness of this proposal.

A few words to briefly outline the content of the Instrument. First of all, a language choice must be explained. The working group decided not to use the wording “exceptions and limitations”. Exceptions and limitations evoke and are in fact generally understood as tools correcting copyright exclusivity and therefore not standing on the same level as the exclusive right. On the contrary, according to the authors of the Instrument, right holders’ protection and permitted uses are both equally essential in ensuring that copyright will have positive effects on the information economy and society in general. Therefore, they intensively discussed the term “user’s rights” as an alternative. It is true that this terminology has been used by some courts, including the Court of Justice of the European Union (CJEU) and the Canadian Supreme Court. However, no legislature has yet explicitly implemented this wording in its copyright statutes. Moreover, it is doctrinally disputed whether user’s rights standing on an equal level as the exclusive right really exist. Therefore, the working group finally decided to apply a terminology that does not confuse prospective contracting parties, but simply requires them to implement “permitted uses” in their national laws.

The Instrument is composed of three parts. In Part A, five groups of permitted uses are codified. These permitted uses include those already known in international law (such as Article 10(2) Berne Convention or the Marrakesh VIP Treaty) and in national rules in this area. Each group of permitted uses is organised around the objectives pursued. For instance, the first paragraph of Part A.I. (“Freedom of expression and information”) states that “Contracting Parties shall permit uses for the purpose of freedom of expression and information to the extent justified by the purpose of the use”. The second paragraph mentions a non-exhaustive list of permitted uses (such as criticism, review, parody and caricature) that are meant to serve the values enunciated in the first paragraph. Contracting Parties are required to implement the listed permitted uses and are free to introduce further permitted uses that pursue the goal established in the first paragraph of the provision.

Part B defines general principles aimed at guiding Contracting Parties in the implementation of the Instrument in their national legal orders. For instance, Part B.I.1. states that: “Contracting Parties are obliged to adopt the measures necessary to ensure the effective application of this Instrument”. This obligation is at the very heart of the Instrument as it aims precisely to counterbalance the traditional “minimum protection approach” of the international copyright legislation with the minimum permitted uses approach of the Instrument. Contracting Parties are free however to determine the method of implementation (e.g. creating general clauses such as fair use or fair dealing or listing specific permitted uses).

Part C deals with competition law as an external limit to copyright and is based on the modern understanding that competition law and copyright law are complementary legal fields, pursuing the objective of increasing the market offer of creative works. The Instrument clarifies that there can be no per se exemption of copyright from the general rules of competition law (Part C.I.).

Dissemination

In order for the Instrument to become international law, its dissemination is an essential part of this project. Even though the Instrument contains material rules that are in line with international law and that in principle could be implemented by any sovereign state, it is clear that the establishment

of the Instrument is not a foregone conclusion. It is crucial that policy makers become aware of this academic proposal and its usefulness.

Unfortunately, the current restrictions related to the pandemic have so far limited the possibilities to present it at conferences and other public events. But the Instrument, together with its explanatory notes, has been published widely and openly, e.g. in IIC and SSRN. Thus it is to be hoped that some of the states that might benefit from the existence of the envisioned treaty will seize the opportunity and take an active role towards its adoption.

However, even if no legislative implementation should take place in the near future, the Instrument will hopefully become an academic milestone fostering additional opportunity to advance the international discussion on copyright law.

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[1] The participants in that meeting were Denis Borges Barbosa (Brazil), who has unfortunately since passed away, Michael Carroll (United States), Carlos Correa (Argentina), Thomas Dreier (Germany), Séverine Dusollier (France), Christophe Geiger (France), Jonathan Grif?ths (United Kingdom), Henning Grosse Ruse-Khan (United Kingdom), Reto M. Hilty (Germany), Kaya Köklü (Germany), Annette Kur (Germany), Lin Xiuqin (China), Ryszard Markiewicz (Poland), Sylvie Nérisson (France), Gül Okutan (Turkey), Alexander Peukert (Germany), Jerome Reichman (United States), Jan Rosén (Sweden), Martin Senftleben (the Netherlands), and Raquel Xalabarder (Spain).

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