AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY

Statement of Sean Flynn, Program on Information Justice and Intellectual Property

Standing Committee on Copyright and Related Rights: Thirty-First Session
December 7-11, 2015 (Geneva, Switzerland)

Thank you for recognizing me.

Although I have been monitoring the SCCR for the last two years intermittently, this is my first time addressing the committee. I would therefore like to begin by congratulating the Chair on his re-election and to the Secretariat for its leadership role.

I represent the Program on Information Justice and Intellectual Property, a research program of American University Washington College of Law. I also serve as the coordinator of the Global Expert Network on Copyright User Rights, a multinational research network of copyright scholars from over 30 countries around the world.

Many of the issues that educational institutions face are the same as libraries. And therefore the discussion of merging parts of the two discussions is appropriate.

I think it helpful to think of the desirable products of this Committee in two categories:

1. a set of norms (whether in the form of principles or binding text) and,

2. a set of soft law technical guidance materials.

The set of norms should be abstract. They should accommodate multiple legal systems.

The guidance should be more specific but less prescriptive. It should present different ways to meet the abstract norms. E.g. through model laws, or collection or classification of options for meeting the norms.

Many of the norms needed for education may be included within the library norms already being discussed.

Toward this aim, three norms are paramount.

1. Requirement to balance

The most important thing that countries can do to promote both the interests of educators and libraries is to have sufficient flexibility in their laws to meet the needs of changing times.

A good model for an international commitment to promote such balance is contained in the IP chapter of the Trans Pacific Partnership Agreement:

> Article 18.66: Balance in Copyright and Related Rights Systems
>
> Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate *purposes such as*, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, *and other similar purposes*; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

One aspect of this clause that is notable and useful is that it is an open standard. It uses the terms "such as," "not limited to," and "other similar purposes," so as to not confine the range of purposes that can be legitimately pursued. But it nevertheless defines a binding standard to promote balance. Indeed this aspect could be made more clear by removing the "endeavor to" proviso.

Similar open language is used in first clause of document SCCR/29/4, CONSOLIDATION OF PROPOSED TEXTS CONTAINED IN DOCUMENT SCCR/26/3 *prepared by African Group, Brazil, Ecuador, India and Uruguay*. It requires allowing libraries to make copies "for purposes **such as** education, research and preservation of cultural heritage."

This first clause in SCCR/26/3 could be expanded to include a broader range of library, education, archive and museum missions, as well as the needs of people with other than visual impairments.

2. Limitation of liability

A second key issue that educators share with libraries concerns enforcement. Non-profit educational and learning institutions can be brought within the scope of Topic 8 in the libraries discussion, and be similarly insulated form damages when acting in good faith reliance on limitations and exceptions existing in local law.

An example of combining liability protections for libraries, educational institutions, museums, and other cultural institutions can be found in TPP Art. 18.74(17)(b) (concerning technological protection measures):

> a Party may provide that damages shall not be available against a nonprofit library, archive, educational institution, museum or public noncommercial broadcasting entity, if it sustains the burden of proving that it was not aware or had no reason to believe that its acts constituted a prohibited activity.

3. TPM (Anti-circumvention) Exceptions

A final issue of congruence between the interests of educators and librarians concerns exceptions to prohibitions on circumventing technological protection measures (TPM). Countries need to be free to make exceptions to TPM provisions for any use of a product that is permitted by the copyright law; otherwise such user rights may themselves be technologically prohibited. The TPP, in provision 18.68(4) permits such exceptions. Language that is perhaps even more clear on this issue can be found in footnote 9 to the Beijing Treaty:

> It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party's national law.

I hope this small intervention might help the committee. We remain committed to helping the committee in any way we can, including sharing the results of our research on these topics as they are available.