



FAIR ACCESS to KNOWLEDGE

Latin American Civil Society Alliance
for Fair Access to Knowledge

A Review on the State of Copyright Flexibilities in Latin American Countries

We need new flexibilities to copyright to
promote education, culture and research



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A Review on the State of Copyright Flexibilities in Latin American Countries

| EDUCATIONAL PURPOSES | | | | | |
|---|--|---|---|--|------------------------------------|
| <i>Purpose: Promote face-to-face and online education</i> | | | | | |
| Country | Communication (face-to-face) | Reproduction (face-to-face) | Anthologies / Compilations | Online Education | DRM Circumvention |
| Argentina | Law 11723 art. 36 inc. 2 | | | | There is no regulation on DRM |
| Bolivia | Decision 351 of the Andean Community art. 22 J (of direct application) | Decision 351 of the Andean Community art 22 B (of direct application) | | | There is no regulation on DRM |
| Brazil | Law 9610 art. 46 paragraph VI | | | | |
| Chile | Law 17336 art. 71 N and Q | Law 17336 art. 71 B, D, M and Q | | Law 17336 art. 71 M and Q | |
| Colombia | Law 23 art. 32, art. 98 paragraph 2 and art. 164 | Law 1915 art. 16 e, and Law 23 art. 40 | | | Law 1915 art. 13 paragraph 4 |
| Costa Rica | Law No. 6683 art. 73 and 73 bis paragraph 1 d | Law No. 6683 art. 73 (final paragraph) and 74, and Executive Decree No. 24611-J art. 35 bis | Law No. 6683 art 73 (final paragraph) and Executive Decree No. 24611-J art. 35a | Law No. 6683 art 73, 73 bis paragraph 1 d and Executive Decree No. 24611-J art. 35 bis | |
| Cuba | Law No. 14 art. 38 b, ch | Law No. 14 art. 38 a, b, ch, d | | Law No. 14 art. 38 b and d | There is no regulation on DRM |
| Dominican Republic | Law No. 65-00 art. 44 paragraph 1 | Law No. 65-00 art. 32 and 40 | | | |
| Ecuador | Ingenios Code art. 212 paragraph 17 and 28 | Ingenios Code art. 212 paragraph 14 and 15 | Ingenios Code art. 212 paragraph 1 subparagraph 2 | Ingenios Code art. 212 paragraph 15 | Ingenios Code art. 130 |
| El Salvador | Intellectual Property Act art. 44c | Intellectual Property Act art. 45c | Intellectual Property Act art. 49-C | Intellectual Property Act art. 44c, art. 45c and 49-c | |
| Guatemala | Copyright Act art. 63b | Copyright Act art. 64 a, 66d and 67 | | | |
| Honduras | Decree No. 4-99-E art. 56 | Decree No. 4-99-E art. 50 | | | |
| Mexico | Federal Copyright Act art. 16 IV and 151 III | Federal Copyright Act art. IV 148 | | | Federal Copyright Act art. 114c IV |
| Nicaragua | | Law No. 312 art. 33 and 36 | | | |
| Panama | Law 64 art. 67 paragraph 3 | Law 64 art. 69 paragraph 1 (snippets/reprographic media) | | | Law 64 art. 146 paragraph 1 and 3 |
| Paraguay | Law 1328 art. 38 paragraph 3 | Law 1328 art. 39 paragraph 1 | | | |
| Peru | Legislative Decree 822 art. 41c | Legislative Decree 822 arts. 42 and 43 a | | Legislative Decree 822 arts. 41c and 43a | Legislative Decree 822 art. 196B |
| Uruguay | Law 9739 art. 44 subsection B paragraph 1 final subparagraph | | | | |
| Venezuela | Copyright Act art. 43 paragraph 3 | Copyright Act art. 44 paragraph 3 and 8 | | | |

Glossary - Purpose: Promote face-to-face and online education

Communication

Communication for educational purposes: this type of exception enables the communication of works for purely educational purposes. We find countries that provide a broad scope and exempt all acts of non-profit communication that have didactic or educational purposes. On the other hand, there are countries that raise very specific exceptions, circumscribing acts of communication for educational purposes to a physical space (for example, within the classroom or within a teaching institution), to a type of institution (for example, only in public education) or to certain types of work (for example, only literary and musical works).

Reproduction

Reproduction for educational purposes: this type of exception allows certain types of reproduction of works for educational and non-profit purposes (for example, single chapters of books, articles or illustrative images).

Selection of readings

Selection of readings for educational purposes: another usual exception in comparative law is the possibility of

selecting and compiling readings for educational purposes or for exclusive use in educational institutions.

Online teaching

The exceptions that enable the use of works for educational purposes now need greater detail than in the past, and it is often necessary to explicitly define how they operate in different technological contexts. It is necessary to explicitly establish that the exceptions for communication and reproduction for teaching purposes apply to face-to-face, blended, online and distance education or learning processes.

DRM circumvention

Digital rights management (DRM) measures are anti-copying or access control mechanisms used by copyright holders to limit some uses of digital works. The vast majority of countries have incorporated into their legislation provisions that penalize circumvention. For this reason, DRM circumvention must be explicitly enabled when DRM circumvention is performed to exercise an exception. It is useless to offer users copyright exceptions without offering the guarantee that they will be able to circumvent the obstacles caused by DRM measures in order to use those exceptions.

A Review on the State of Copyright Flexibilities in Latin American Countries

LIBRARIES AND ARCHIVES

Purpose: Promote access to and preservation of cultural heritage

| Country | Public Lending | Inter-library Loan | Reproduction services | Preservation | Access to withdrawn works | Orphan works | Cross-border uses | Parallel import | Translation services | Sold out or not available works | DRM circumvention |
|--------------------|--|--|-----------------------|---|---------------------------|-------------------------|-------------------|--|----------------------------------|--|--------------------------------------|
| Argentina | | | | | | | | | | Law 11723 art. 6 | There is no regulation on DRM |
| Bolivia | | | | Decision 351 of the Andean Community art 22 C (of direct application) | | | | | | Law No. 1322 art. 25 and 26 | There is no regulation on DRM |
| Brazil | | | | | | | | | | | |
| Chile | Law 17336 art. 18 paragraph e subparagraph 2 | Law 17336 art. 18 paragraph e subparagraph 2 | Law 17336 art. 71J | Law 17336 art. 71 I a | Law 17336 art. 71 I | | | Law 17336 art. 18 paragraph e subparagraph 2 | Law 17336 art. 71L | | |
| Colombia | Law 1915 art. 16 paragraph b and c | Law 23 art. 38 | | Law 23 art. 38 | Law 23 art. 38 | Law 1915 arts. 18 to 27 | | Law 23 art. 38, art. 12, art. 166 and art. 172 | | | Law 1915 art. 13 paragraph 4 |
| Costa Rica | | | | | | | | | | | Law No. 8039 art. 62 e |
| Cuba | | Law No. 14 art. 38 d | Law No. 14 art. 38 d | Law No. 14 art. 38 d | | Law No. 14 art. 38 d | | | Law No. 14 art. 38 d and art. 39 | Law No. 14 art. 36, art. 37 and art. 38 d | There is no regulation on DRM |
| Dominican Republic | Law No. 65-00 art. 38 | Law No. 65-00 art. 38 | | Law No. 65-00 art. 38 | | | | | | Law No. 65-00 arts. 45, 46, 47, 48 and Dec. 362-01 arts. 25 and following (regulates only art. 48 licenses for public utility) | Law No. 65-00 art. 187 Paragraph I e |

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| Ecuador | Ingenios Code art. 125 and art. 212 paragraph 9 v | Ingenios Code art. 212 paragraph 9 b and v | Ingenios Code art. 212 paragraph 9 i | Ingenios Code art. 212 paragraph 9 a | | Ingenios Code art. 212 paragraph 16 and art. 214 | Ingenios Code art. 212 paragraph 9 VI | Ingenios Code art. 125 and art. 212 paragraph 9 VI | Ingenios Code art. 212 paragraph 9 III and IV | Ingenios Code art. 212 paragraph 16 and art. 217 paragraph 4 and 5 | Ingenios Code art. 130 |
| El Salvador | | | Intellectual Property Act art. 45 b | Intellectual Property Act art. 45 d | | | | | | Intellectual Property Act art. 45 b | Intellectual Property Act art. 85-D paragraph 7 a |
| Guatemala | Copyright Act art. 65 | | | Copyright Act art. 64 b and 71 | | | | | | Copyright Act art. 64 b | Copyright Act art. 133 sexties 2 a |
| Honduras | | Decree No. 4-99-E art 49 | | Decree No. 4-99-E art 49 | | | | | | Decree No. 4-99-E art 49 | Decree Law 16-2006 art 35 a |
| Mexico | | | | Federal Copyright Act art. 148V | | | | | | Federal Copyright Act art. 147 and Regulation art. 38 to 43 | Federal Copyright Act art. 114 quarter IV |
| Nicaragua | Decree No. 22-00 art. 21 | | | Law No. 312 art. 35 | | | | | | | |
| Panama | Law 64 art. 69 paragraph 6 | | | Law 64 art. 69 paragraph 2 | | | | | | Law 64 art. 68 paragraph 2 | Law 64 art. 146 paragraph 1 and 3 |
| Paraguay | Law 1328 art. 39 paragraph 5 | | | Law 1328 art. 39 paragraph 2 | | | | | | Law 1328 art. 53 | |
| Peru | Legislative Decree 822 art. 43f | | | Legislative Decree 822 art. 43c | | | | | | | Legislative Decree 822 art. 196B |
| Uruguay | | | | | | | | | | | |
| Venezuela | | | | Copyright Act art. 44 paragraph 4 | | | | | | | |

Glossary - Purpose: Promote access to and preservation of cultural heritage

Public lending

Public lending is a form of distribution of works (an exclusive right of the author). Non-profit public lending of works is one of the essential services provided by libraries and archives and should be a permitted use. Countries that consider that copyright is exhausted after the first sale of a copy of any work do not need a public lending exception, since in this case the distribution of those copies is free.

Lending and donations between libraries

Some laws allow libraries to donate or lend works to other libraries, as well as make copies of works in their collection to provide to other libraries.

Reproduction services

This type of exception allows libraries and archives to make and supply copies of short extracts, single articles or a chapter of a work available in their collections to the public for the purpose of research or study.

Preservation

This type of exception enables the reproduction of works that are part of the collections of heritage institutions for preservation purposes, as well as the change of format and the migration of protected works to new supports and platforms, allowing in some cases to use those copies instead of the original copy.

Access to withdrawn works

This type of exception addresses a problem currently faced by libraries in relation to electronic publications. When it comes to works that circulate in physical format, libraries can keep the copies they have acquired even though the work has been withdrawn from the market. The possibility of retaining withdrawn copies guarantees libraries and archives the preservation of the public record, also allowing them to identify any modification or retraction.

Orphan works

Orphan works are those for which it is not possible to determine that they are in the public domain and/or whose owners cannot be identified or located in order to enforce their rights. Several countries establish in their legislation a procedure by which libraries or archives can request the declaration of an orphan work to a public authority after a reasonable search of the owner of the rights.

Cross-border uses

Cross-border interlibrary uses include international loans, as well as communications, transmissions, and other acts of distribution that enable libraries and archives to share resources (including works in digital formats) internationally. Countries that consider copyright to be exhausted after the first sale of a copy of any work (both domestically and internationally) do not need this type of exception for acts of physical distribution, but do need this type of exception for acts such as communications or transmissions.

Parallel imports

It is necessary to establish an exception to allow libraries to import works that are not sold in the national market when the national legislation does not provide for the international exhaustion of the right of distribution (including export and import).

Translation services

The exceptions that enable the translation of works by libraries and archives are essential to support education and research activities. This is an aspect of special social interest in countries with populations that speak different languages or dialects and also in the case of less developed countries.

Sold out or not available works

This type of exception covers the case of works sold out on the market or that are not available for any other reason. Several countries establish mechanisms tending to favor access. Some legislations include, within the concept of unavailable works, those that are offered at an excessive price in relation to similar works.

DRM circumvention

Digital rights management (DRM) measures are anti-copying or access control mechanisms used by copyright holders to limit some uses of digital works. The vast majority of countries have incorporated into their legislation provisions that penalize circumvention. For this reason, DRM circumvention must be explicitly enabled when DRM circumvention is performed to exercise an exception. It is useless to offer users copyright exceptions without offering the guarantee that they will be able to circumvent the obstacles caused by DRM measures in order to use those exceptions.

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RESEARCH AND NEW TECHNOLOGIES

Purpose: Allow the use and development of new technologies and uses not yet foreseen

| Country | Links and frames | Software: Backup | Software: Adaptation for private/personal use | Reverse engineering | Text and data mining | Non-consumptive uses (technical processes) | Transformative uses | General copyright exception (open) | DRM circumvention |
|--------------------|-------------------------------------|--|--|---|--|--|---------------------|------------------------------------|---|
| Argentina | | Law 11723 art. 9 paragraph 2 and 3 | | | | | | | There is no regulation on DRM |
| Bolivia | | Supreme Decree No. 24,582 arts. 15 and 16 | | | | | | | There is no regulation on DRM |
| Brazil | | Law 9609 art. 6 paragraph I | Law 9609 art. 6 paragraph III and IV | | | Law 9610 art. 30 paragraph 1 | | | |
| Chile | | Law 17336 art. 71 Ñ paragraph a | Law 17336 art. 71 Ñ paragraph a | Law 17336 art. 71 Ñ paragraph b and c | | Law 17336 art. 71 O | | | |
| Colombia | | | | Law 1915 art. 13 a, b, d, f | | Law 1915 art. 16 a | | | Law 1915 art. 13 |
| Costa Rica | | Executive Decree No. 24611-J art. 9 | Executive Decree No. 24611-J art. 10 | Law No. 8039 art. 62 a, b | | | | | Law No. 8039 art. 62 a, b |
| Cuba | | Gazette 42/2020 Resolution 23 art. 5b and art. 7 | Gazette 42/2020 Resolution 23 art. 5 a, d and art. 8 | Gazette 42/2020 Resolution 23 art. 5 c, d | | | | | There is no regulation on DRM |
| Dominican Republic | | Law No. 65-00 art. 74 | Law No. 65-00 art. 74 | Law No. 65-00 art. 187 Paragraph I a, b, c, d | | | | | Law No. 65-00 art. 187 Paragraph I a, b, c, d |
| Ecuador | Ingenios Code art. 212 paragraph 24 | Ingenios Code art. 134 paragraph 2 | Ingenios Code art. 134 paragraph 1 and art. 137 | Ingenios Code art. 134 paragraph 3 and 4 | Ingenios Code art. 212 paragraph 9 viii (only in libraries and archives) | Ingenios Code art. 212 paragraph 23 | | Ingenios Code art. 211 | Ingenios Code art. 130 |
| El Salvador | | Intellectual Property Act art. 45 g, h | Intellectual Property Act art. 49 | Intellectual Property Act art. 85-D paragraph 6 a and b | | | | | Intellectual Property Act art. 85-D paragraph 6 a and b |
| Guatemala | | Copyright Act arts. 32 and 33 | Copyright Act art. 34 | Copyright Act art. 133 sexties 1 a, b, d | | | | | Copyright Act art. 133 sexties |

RESEARCH AND NEW TECHNOLOGIES

Purpose: Allow the use and development of new technologies and uses not yet foreseen

| Country | Links and frames | Software: Backup | Software: Adaptation for private/personal use | Reverse engineering | Text and data mining | Non-consumptive uses (technical processes) | Transformative uses | General copyright exception (open) | DRM circumvention |
|-----------|------------------|---|---|---|----------------------|--|---------------------|------------------------------------|--|
| Honduras | | Decree No. 4-99-E art. 53 | | Decree No. 4-99-E art. 34 a, b, d | | | | | Decree No. 4-99-E art. 34 and 35 |
| Mexico | | Federal Copyright Act art. 105 | | Federal Copyright Act art. 114 quater I, III, VI and VII and quinquies I and II | | | | | Federal Copyright Act art. 114 ter, quater and quinquies |
| Nicaragua | | Law No. 312 art. 39 | Law No. 312 art. 39 | | | | | | |
| Panama | | Law 64 art. 27 | Law 64 art. 28 | Law 64 art. 29 and art. 145 | | | | | Law 64 art. 145 and art. 146 paragraph 3 |
| Paraguay | | Law 1328 art. 71 | Law 1328 art. 71 and 72 | | | | | | |
| Peru | | Legislative Decree 822 art. 74 | Legislative Decree 822 art. 75 | Legislative Decree 822 art. 76 and 196B | | | | | Legislative Decree 822 art. 196B |
| Uruguay | | | | | | | | | |
| Venezuela | | Copyright Act art. 44 paragraph 5 and 6 | | | | | | | |

Glossary - Purpose: Allow the use and development of new technologies and uses not yet foreseen

Links and frames

Links can be considered as acts of public communication of works and, despite being the soul of the web's operation, they are subject of controversies. For that reason, an express exception is necessary to enable their lawful use.

Software: Backup

This exception allows a backup copy of a computer program for maintenance and/or loss prevention. Some legislations also provide for the possibility of making a copy to test the program and determine if it

is suitable for the intended use.

Software: Adaptation

This exception allows copying and adapting a legally acquired program, to the extent that it is necessary to be able to use the program or for it to function according to the intended use. For example, it allows the person using an application or program to translate the graphical interface into their language.

Reverse engineering

Reverse engineering is a process that consists of analyzing a system or program in order to identify

its components and represent its operation. Reverse engineering requires copying the program at least once and is used for various purposes such as study or research, security checks, achieving interoperability with other programs, or developing competitive programs. The development of competitive programs is an activity that is excluded in most legislations that provide an exception for reverse engineering.

Text and data mining

Text and data mining techniques (TDM) have become one of the most important ways to analyze and extract new knowledge. To carry out a TDM analysis on a database (databases are considered works), it is necessary to copy the database and process data (clean, reorder, standardize, etc.). The same thing happens when we intend to carry out the same type of analysis on texts or when compiling metadata from digital collections of works. All these acts of copying and transformation of databases and works, despite the fact that they are mostly carried out in an automated manner, require prior authorization from the person who owns the rights, unless there is an exception that covers them.

Non-consumptive uses (technical processes)

The operation of digital technologies involves technical processes that copy the contents, compress them, split them into packets, transmit the packets and reassemble them, generating reproductions, transformations and distributions over and over again. “Non-consumptive use” is the use of a work, enabled by technology, that is not based on the underlying expressive and creative purpose of the work, and therefore does not compete with the normal exploitation of that work in its original expression. This exception should generically enable uses such as caching, temporary copies needed for streaming, as well as indexing and many other technical processes involved in the operation of computing devices and the Internet.

Transformative uses

Transformative use is derived from the doctrine of ‘fair use’ and implies the use of pre-existing works to create something new, which is not merely a substitute

for the previous work. The uses that can be considered transformative include quotes, parody, caricature and pastiche, as well as more modern uses, such as those that involve sampling, mashup and remixing of works. Some examples of transformative use are works of appropriationist art, such as Andy Warhol’s serigraphs or Marcel Duchamp’s *Mona Lisa*. Mashups are also transformative uses, as are memes made from movie clips, and even the use of copyrighted graphics as thumbnails in search engine results.

General copyright exception

This type of exception consists of a general clause that is open and flexible, so that it can protect new and emerging uses that are of social interest and do not harm authors.

An example of this type of exception could be the “fair use” doctrine, originated in the jurisprudence of the United States and expanded to other countries. It takes into account several factors: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work. In short, it is a flexible and open clause, through which different uses may be permitted based on certain previously defined factors. It is worth clarifying that a general, open or flexible copyright exception always accompanies a system of specific exceptions, serving as an outlet when the need arises to enable certain uses not explicitly listed.

DRM circumvention

Digital rights management (DRM) measures are anti-copying or access control mechanisms used by copyright holders to limit some uses of digital works. The vast majority of countries have incorporated into their legislation provisions that penalize circumvention. For this reason, DRM circumvention must be explicitly enabled when DRM circumvention is performed to exercise an exception. It is useless to offer users copyright exceptions without offering the guarantee that they will be able to circumvent the obstacles caused by DRM measures in order to use those exceptions.



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