1st Regional Dialogue for Educators on implications of the copyright for education

Digital Technology in the educational realm

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Thank you very much to the organizers of this meeting, as well as to all of you for staying until the very end, or almost the very end, because this is not going to be the very end of today's discussion.

So, in many ways, what Luis just said encapsulates everything I am going to be saying. This is just going to be longer than what he just said it. I apologize in advance for my cold. I suppose it is in sympathy with my family in Washington DC, it snowed 15 centimetres this morning in Washington. And my wife was annoyed that I wasn't there to help her shovel the snow. So instead I just came down with a cold, in sympathy.

In any event, what we've heard -- especially from the last two speakers -- is this enormous promise of digital technology in the educational realm. It affords all kinds of in-class uses, in a wide variety of contexts -- it could be texts, music, films and images. We've also heard about student generated content based on remixes, the reuse of existing material. With the digital technology can we have out-of-class uses, such as electronic reserve, especially in the university context, where there are specific articles or chapters that you want to access; or distance education, as we heard.

Remixes are particularly important, and are underlying a lot of what we just heard. The use of this media is important because this is the language of the students. This media speaks directly to students of this generation, whether it's entertainment content or items on the Internet. This is their realm.

And finally the digital technology affords easier distribution completely unprecedented in history. So, obviously the digital technology has a lot of promise in the educational context.

But there is a problem posed by copyright and we should be very specific about what the problem posed by copyright is. This goes to Luis' point. If the content the instructor or the student wants to use is copyrighted, then that use might infringe and it might infringe different rights of copyright. This builds on the presentation that Martín made before, that copyright has many different rights. It's what we call in the United States "a bundle of rights." You have a reproduction right, you have a distribution, or a communicating to the public, and a public performance right. One of the challenges of digital technology in the educational context is that almost any reuse of copyrighted content will implicate many of those rights. The simple act of uploading content onto a computer is reproduction. Then when you transmit it to someone else's computer , depending on what right you have in that country, it could be a making available to the public or communicating to the public or a public performance; especially if it is going to multiple students in the class or in a distance education context -- multiple students accessing it in their homes. You have another reproduction when the

content comes to the student's computer from the teacher's computer, or from another student's computer. A copy is made on the receiving student's computer; that is another reproduction.

The point is that when you are dealing with digital technology, you have lots of reproductions, you have lots of performances, you have lots of distributions to the public, and so you need to take the copyright issue very seriously. You need to parse through the copyright questions very very carefully. Because even if you have a license for one of those rights, for a reproduction right, for example, you might not have a license for the making available right. Or if you have permission for the making available right, you might not have it for the reproduction right. Again, going on Martín's theme, this is why everyone hates lawyers.

There really are true solutions to this fundamental copyright problem in the digital era. The traditional solution is an exception or statutory license. Of course, you could say, well, is a statutory license really a solution? A statutory license means you have the right to pay. Right? You have the privilege to use it if you pay. That's better that nothing. But certainly if you are the school system and you have to be paying, that's not a great solution to the problem. It's better than not being able to use it at all, but it's really not an ideal solution.

Then you have a real exception to copyright, and Martín walked through a lot of the exceptions that you have throughout Latin America. But as Martín made quite clear, those exceptions are very limited, and so the exception for reproduction of works applies to brief excerpts, and it also often applies only to reprography. Depending on how the exception is worded, it's not clear that that exception would apply to the loading of content onto the computer, the dissemination over the Internet, and the downloading at the other end. It would just depend and it would certainly only apply to the brief excerpts, it won't apply if you are doing it for more than brief excerpts. So it is very limited.

It also seems from his presentation that you have many exceptions for public performances, but again that covers public performances, it doesn't cover reproductions. Also, in every country what kinds of works are covered vary. As Martín showed in Uruguay, the exception covers all works, but in other countries it only applies to certain classes of works. You have here some exceptions. But the ultimate utility in this context is limited. It doesn't take you all the way, especially with all the uses that the technology permits.

Now, the newer solution -- and this is what we heard about before, earlier in the morning -- the Creative Commons license, and other open access models. I agree completely with Luis, the way to take care of the basic copyright issue with these learning objects is by some kind of open access license. It doesn't have to be specifically a Creative Commons license. Something equivalent to an open access might already be implied. But you should make it explicit that, in exchange for a teacher having the privilege of making her content available on the Portal, the teacher is giving a license for other teachers and students to use the content.

I think the Portal and these learning objects are an extremely exciting phenomenon, and you definitely need to be complimented for having this. In many ways, this is way ahead of where we are in the United States. We have projects like this in isolated places, but certainly nothing like this on a national scale. And so it's incredibly impressive and you are very ahead in the

game. Now I may have misunderstood the translation, but it sounded like a lot of the materials were mostly supplementary and not for the core syllabus. I would hope that over time more of these learning objects fill the space of the actual syllabus, of the required material. That way, over time, all the core educational materials that students need will be in essence open access. And the reuse of it will be free. Now obviously there is a lot of cost up front, and certainly you are subsidizing the creation of the content by paying the teachers. But you know, the truth is that teachers develop materials anyway, and see it as part of their job. My mother is a language teacher and forty years ago, every time before she went to class she was writing out work sheets and then mimeographing them. (You remember the old mimeographs you had to turn by hand?) Her school liked her materials, so she collaborated with several other teachers and they put together whole series of books that ultimately were published. They they received a very small amount of money, but from their point of view they were doing it as part of their job as teachers. They saw this is part of their mission. And I am sure the vast majority of teachers here or elsewhere would see it the same way. They are getting paid for teaching, and these materials make their life easier.

It would be nice if access to the Portal were not limited just to people in Uruguay. Since the materials are in Spanish, they should be available to teachers throughout the Spanish speaking world. As other countries do the same kind of thing, then you would really have a large universe of incredibly valuable content. That really would take care of a big part of the copyright problem.

But we need to stress that this will not take care of the entire copyright problem. And for the very simple reason that Luis said: what students want to use and what teachers want to use is not just limited to educational objects that you are creating. They want popular culture. Sometimes the best way to teach about a certain issue is to include a clip from a television show or a clip from a movie, or as Luis said in his example, a photograph, that was made by someone else. The open access model goes a long way and over time will go further and further as there is more and more content available under such licenses, but it doesn't take you all the way there. You will always need to rely on exceptions. Certainly in the short run and even in the long run, you will want to use popular entertainment content because that speaks to this generation of students, that's what they relate to, it is so prevalent in their lives. I would suspect that even in the most rural parts of Uruguay, children watch television and they see movies. That's what speaks to them and that's how they see the world; they see the world through this media.

So you still need exceptions; and as Martin indicated, the exceptions that are typically available here in Latin America are too limited. He laid out a template of how the exceptions are different in different parts of the world. I'll spend now a couple of minutes on what we have in the United States. We have a mixture of exceptions. On the one hand, we have a variety of very specific exceptions; but on the other hand we also have a general fair use exception. We found this approach to be quite useful. And let me just step back for a second. If you don't take anything else away from this talk, the one thing you should take away is that US law is not what the US government in negotiations with you says it is. US law is not what USTR says it is; It's what I say it is. Either they misunderstanding they intentionally misrepresent the breadth of the exceptions and the flexibility of the US law. We have a specific exception for the performance and display in the course of face to face teaching

activities of the non- profit educational institution. And that sounds very similar to what you have here in Latin America. We also have a new provision – the TEACH Act – which broadens the exception for distance education precisely because of the recognition that you need to talk not only about performances but also reproductions. There was an effort to try to broaden the existing law to the digital situation. Unfortunately, it's very technical and it doesn't really work very well, so this provision is not a good model. But what we also have, and this gets to what Martín was talking about as a general approach, is a fair use exception. We have a general catch-all in the fair use doctrine for the purpose of teaching, including multiple copies for classroom use. But it's including educational uses, and is not limited to them. There are four non-exclusive factors that courts consider. It's extremely flexible and educators have taken this provision as a way of allowing them to do a lot of activities that might not be permitted under the narrower specific exceptions that you have here. The US courts that have interpreted this have recognized that the technology has evolved. Even though this is a doctrine that has evolved over a hundred and fifty years, technology especially in the last decade or two has really evolved very quickly. Fair use allows a lot of flexibility and courts have interpreted it very generously in a wide variety of situations. Fair use has allowed a lot of the kinds of newer uses of technology that otherwise might be prohibited, because there is a lot of flexibility here.

Now, having said that, fair use is not limitless. There has been litigation over the scope of fair use and let me just talk about this one issue and then I will stop. Many universities in the United States have used electronic reserves. Typically a professor might put a chapter of a book or a specific article that he wants his students to read on a website and make it available to students to download. Different teachers use it to varying degrees depending on the level of their technological sophistication. Now the publishers understandably aren't crazy about this and they issued cease-and-desist letters to several universities. Then there were negotiations and the dispute was resolved relatively amicably. But recently with Georgia State University, near Atlanta, the publishers have sued concerning the e-reserve policy. The publishers basically are saying that what Georgia State is doing exceeds fair use. The Georgia State policy has now been changed, but at the time said that you could copy and post up to 20 percent of a book. The publishers said, well, that's too much. The publishers in their complaint gave examples of situations where a professor actually posted much more than that -- six chapters of a book, 150 pages. The publishers claimed that that exceeded fair use. Also, at the time Georgia State started this approach, it did not have any kind of technological protections. Anyone the world who knew it was there could go and download all the material from the Georgia State website. Now they are using technological protections. You have to be a student, you have to put an identification number, you have to be enrolled in a course. They now are using the kinds of technologies that were used at other schools. The irony here is two of the plaintiff publishers suing Georgia State are university presses: Oxford University Press and Cambridge University Press. I have a feeling it the case will eventually settle, particularly given that Georgia State is now using technological protections and has adopted a new policy that doesn't say the professor can post 20 percent of a book.

Without question, fair use is not a perfect solution, it has its problems, you always have disputes over how far it goes. On the other hand, it is a very flexible approach that has been extremely useful in the United States, and I would suggest that that is a very useful model to supplement the growing use of open access. Creative Commons-type licenses plus fair use

take you a long way to solving the copyright problem identified in the educational context with digital technology.

Thank you very much.