

## **Access to Textbooks in Schools in Developing Countries, Copyright, and the Right to Education – Embracing the Concept of Extraterritorial State Obligations under International Human Rights Law for Intellectual Property Law**

Klaus D. Beiter\*

Textbooks are crucial for education, particularly in developing countries. However, textbooks are a rare commodity in many of these countries. Digital content, for many reasons, proves not a wondrous solution. Cheaply (translating and) reproducing textbooks would be a strategy. However, reprography is highly regulated under copyright law. Access to textbooks constitutes an essential element of the right to education. While notions of fairness, morality, and *ordre public* in intellectual property law may serve to temper the harshness of existing copyright law, viewed in isolation, the application of these concepts appears more a matter of discretion or goodwill, and their content remains vague. IP law has so far refrained from endorsing the concept of extraterritorial state obligations (ETOs) under international human rights law, i.e. of human rights obligations of states towards those living beyond their own territory. In particular, international assistance and co-operation obligations are implicated in this context. This reluctance is regrettable if it is borne in mind that most IP law has its basis at the international level, where ETOs could thus play a significant role in “civilising” IP law. Drawing on the expert Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011, and applying a tripartite typology of obligations to respect, protect, and facilitate human rights, this paper will show that conventional and customary international law, as well as its “general principles,” create clear obligations for states relating to the application (and revision) of Berne, TRIPS, and TRIPS-plus copyright rules, so as to facilitate access to textbooks. These obligations would, for example, constrain voting behaviour within WIPO or the WTO; require states to scrutinise the conduct of foreign publishers sufficiently linked to their sphere of control; create a duty to reform the Berne Appendix, adopt a legal instrument, calling for a balanced interpretation of the three-step test, and formulate a Doha-type of declaration on TRIPS (and Berne) and educational materials; as well as expect developed states to assess negative effects of free trade agreements on developing states’ ability to guarantee access to textbooks. Amongst others, therefore, the ETOs concept helps determining when and to what extent the application of notions of fairness, morality, and *ordre public* in IP law is mandatory, and it helps elucidating their specific content in the light of well-established norms of international human rights law.

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\* B.Iur. LL.B. (UNISA, Pretoria), Dr. iur. (LMU Munich); Associate Professor, North-West University (Potchefstroom Campus), Faculty of Law, South Africa.