



Background information
on the 11 topics identified by WIPO Member States
during the 23rd meeting of the Standing Committee on Copyright and Related Rights (SCCR/23)
in November 2011

1. Preservation

A preservation article would provide an exception to the reproduction right for the purpose of preservation of works and materials protected by related rights by libraries and archives.

Libraries and archives need to be able to reproduce for preservation purposes as many copies of works or materials in as many formats as are technically needed in accordance with the standards of best professional preservation practice. They should be able to use a preservation copy as the working copy in order to preserve the original work (which may be very old, very fragile, rare or precious or in the digital environment may need to be in a different format to be usable).

Libraries and archives need an exception on preservation to give them the flexibility to copy, format-shift and migrate copyright works and materials to different platforms and to use these copies in place of the original, so that the original itself is not damaged and is preserved for posterity.

2. Right of Reproduction and Safeguarding Copies

This is one of the most widely accepted exceptions and limitations to the right of reproduction in national copyright laws. Libraries, who serve the real needs of individuals, have to be able to make copies of copyrighted material for creative, educational, and informative purposes. It would be impractical if permission had to be obtained for each and every copy, and it would hamper the free flow of information in society. Libraries should be able to provide users with the means for making these reproductions, regardless of the format of the material.

In practice, libraries and archives in many countries, including developed industrialised countries, make copies under library and archive exceptions on the user's behalf and the service is often called a 'document supply' service. Yet, although some national laws allow for document supply services, others contain no provision at all which artificially limits the services that libraries and archives in these countries could provide in support of research or private study and lifelong learning.

An exception for right of reproduction and supply is therefore essential for libraries and archives offering document supply services. Supply of copies also enables an activity called 'inter-library document supply'. These services can be critical for facilitating access to materials from other libraries. Inter-library document supply generally serves the purpose of providing a copy of a work to a

library in order to fulfil the request of an individual user. That user usually receives (and may keep) the copy for private study. Inter-library document supply is important for all types of libraries and in all parts of the world. The small public library in a remote town may depend heavily on inter-library document supply for receiving a great deal of materials that it likely cannot justify to purchase. An academic library may rely on borrowing copies of articles in specialized journals from a large research university. A corporate library may similarly need to obtain articles from a university library to support its pharmaceutical research.

3. Legal Deposit

Information to follow.

4. Library lending

The right of libraries to lend is a core activity of libraries essential for education, learning, research, and culture, which lies at the heart of what libraries do. It is in the public interest that library lending be maintained as a vital service, free at the point of use.

While many countries enjoy the ability to lend library materials, all libraries require the right to lend works or materials to their users. A provision on lending is essential for facilitating access and dissemination of knowledge, which are cornerstones of library principles.

It should be noted that some countries have a public lending right with systems of remuneration. An exception would not seek to remove or reduce the public lending right that already exists in certain countries.

5. Parallel Importation

Parallel importation would provide an exception to the distribution right. Its purpose would be to ensure that the principle of international exhaustion (whereby the distribution right is exhausted after first sale anywhere in the world) applies to the acquisition of works by libraries and archives for their collections, whether by purchase or through gift or exchange.

It would mean that libraries and archives are not restricted with regard to the works they can purchase from suppliers in foreign countries, or in their ability to accept donated or exchanged works originating from outside their country.

Libraries have comprehensive collections to meet the needs of library users. Sometimes the books that libraries wish to provide for their users are not available locally. For example, libraries often wish to buy different editions of the same work, or a hardback edition or a format not be available locally. For this reason, they sometimes need to purchase, and import, works from authorised sources abroad.

Libraries and archives need this exception so that they are not hindered by territorial distribution barriers from acquiring significant works for their collections simply because of their geographical locations. This exception would particularly benefit developing countries.

It is important that copyright law does not create a monopoly on importation, and that competition for the legal purchase of books is encouraged. This not only helps to prevent abusive pricing, but also promotes a healthy, open book market for the benefit of libraries and society as a whole.

6. Cross-Border Uses

Cross-border transfer of works between libraries and between archives is a well-established practice. International requests are on the rise, especially among libraries and archives serving researchers where collaboration is increasingly interdisciplinary and global. With the shift from copyright law to licence agreements to establish use permissions, it is essential to reaffirm an important channel of access in support of research, teaching and learning.

Addressing cross-border transfer of works would provide an exception to the distribution right for the purpose of allowing libraries and archives to share resources across borders and supply copies made under an exception to users or to other libraries and archives regardless of location and international borders.

This exception would be crucial to the development of library and archive services in the global information society as it would provide legal certainty to send documents to individuals or other libraries and archives in foreign countries that had been reproduced under an exception. This would not be a carte blanche provision since all the exceptions in any proposed Treaty would be 'special cases' under the Three-Step Test – meaning they may only be implemented in national laws in compliance with the Three-Step Test.

This exception is particularly important to developing countries, which do not have in their libraries the range of published material that exists in developed countries and which do not have the resources to enable researchers to travel to visit major libraries or to visit archives overseas so that they may study unique documentary materials.

7. Orphan Works, Retracted and Withdrawn Works, and Works Out of Commerce

Orphan Works

Orphan works can be defined as follows: Copyright works or materials protected by related rights for which their rightholders cannot be identified or located in order to clear the rights. A provision for orphan works would provide an exception to the right of reproduction and communication to the public.

Mass digitising of cultural heritage is one of the major tasks of libraries. But with regard to copyright protected materials, rightholders have to be asked for permission to digitise and communicate the works to the public. In many cases, these rightholders cannot be found and – as a consequence – not asked for permission. The inability to identify or locate rightholders often leads to gaps in access to important local and unique collections. Fearing liability, libraries forgo the use of these “orphan” works, even when the use is for non-profit purposes, such as preservation. A mechanism to reduce the risk of liability for libraries with respect to orphan works would help to expand access to millions of works.

A provision for orphan works can help libraries to satisfy their challenge: After having accomplished a “reasonable inquiry” (to be defined on national level) without identifying and locating the rightholder(s), libraries and archives should be permitted to make use of the works for digitisation and make them available to users via Internet. It also allows equitable remuneration for the rightholder, should he or she come forward, and allows the rightholder to require cessation of use of the work or material.

It is important to adopt an international regulation, because the use of orphan works and the right to communicate them on the Internet should be mutually recognised worldwide.

Withdrawn and Retracted Works

This addresses a relatively new problem for libraries which is a side effect of electronic publishing. Consider, for example, an academic article published in a print journal, subject to the distribution right. Distribution right is subject to exhaustion, also known as the first sale doctrine i.e. once a work has been distributed, the right is exhausted. This means that if an article is withdrawn or retracted by the author or publishers, the library can retain copies it already holds.

This ensured that libraries and archives can fulfill their duty to preserve the public record for posterity, including any modifications or retractions made to it.

Journals, especially in the scientific, technical and medical fields are increasingly only available electronically in databases to which the library subscribes via a license. This means that the works are subject to the right of communication to the public, not distribution. Unlike distribution, the right of communication to the public is not subject to exhaustion.

An important safeguard for libraries and archives who have a duty to maintain and preserve the public record regardless of the format of the material is removed. If works can be retracted for a variety of reasons e.g. plagiarism, falsifying scientific data, etc. then gaps in the public record will appear as a result.

A provision in this area would try to resolve this problem by enabling libraries to provide access to retracted works especially for research purposes.

8. Liability of Libraries and Archives

Any treaty would need a provision that introduces the protection of limited liability to libraries and archives, their employees and agents for primary copyright infringement that may result inadvertently from their good faith interpretation and application of national copyright law. Such a provision should also protect libraries and archives from liability for secondary infringement where the user of their services has committed the primary infringement.

9. Technological Measures of Protection (TPM)

The need for an exception in this area is absolutely essential for the preservation and conservation of digital works and media, since it is necessary to make preservation copies on receipt of a new item, not when it has started to deteriorate. Formats, software and hardware platforms quickly become obsolete and digital materials in conservation need to be constantly adapted and moved to new platforms so that their content is not lost.

It should therefore be permitted for libraries and archives to circumvent a technological protection measure (TPM) for the purpose of making a non-infringing use of a work. The WIPO Copyright Treaty permits exceptions, but few countries have enacted exceptions to the anti-circumvention law for the benefit of libraries and archives. Instead, implementation of anti-circumvention legislation in many nations exceeds the requirements of Article 11 of the WIPO Copyright Treaty, effectively eliminating existing exceptions in copyright law.

Furthermore TPMs often prevent sufficient access to digital materials and works by disabled people and can interfere with any user's right to make use of a statutory exception, e.g. TPMs can prevent the user from printing out an extract from an e-book. In some cases, the TPM has rendered works unusable because the lock prevents it from being moved to a new platform and no key is obtainable because the publisher has gone out of business.

10. Contracts

Private contracts are overriding the public policy goals in copyright law. Most licences for digital products acquired by libraries and archives override statutory limitations and exceptions supporting library and archive activities¹. Some of the major problems with the terms of contracts and licences lie in the differing set of variables for permitted acts within contracts. Examples include restrictions on downloading, printing and sending to a third party, putting in a virtual learning environment, students' access, printing multiple copies, use in a lecture or for teaching, circulating internally, and extracting content.

¹ The British Library had analysed 100 contracts offered to it and found numerous examples of the diversity of contracts and licences, as well as demonstrating that contracts and licences often override the exceptions and limitations allowed in copyright law. British Library: Analysis of 100 contracts offered to the British Library.
<http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=691>

More and more information goods are becoming subject to licensing: already print journals are rapidly giving way to exclusively electronic journals and it is likely that global e-book sales will in a very few years overtake printed book sales which will affect what works libraries will be able to offer for research and lending. The situation also makes impossible the development of new exceptions for activities such as text and data mining by libraries of born-digital journal articles to identify medical and scientific trends. Given the global nature of digital information, action is needed at international level to maintain a balance between private contracts and public copyright law. The licensing framework now underpins much of the content online and contracts, rather than copyright law, dictate how content can be used. This imbalance must be addressed, as licenses should never substitute for legislation on core matters such as exceptions and limitations.

A provision in this area is therefore necessary to ensure that contracts cannot override limitations and exceptions. The goals and policies providing for exceptions are important statements of national and international principle and should not be varied by contract. It is essential to introduce an obligation to respect exceptions to copyright and related rights – by voiding terms in contracts and licenses for information goods that impede or remove statutory limitations and exceptions in national laws.

11. Right to Translate Works

Information to Follow.