



International Federation of
Library Associations and Institutions

Treaty Proposal on Limitations and Exceptions for Libraries and Archives

(Version 4.3)

Cluster Version according to the 11 topics identified by the WIPO SCCR/23 in November 2011

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Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives

In November 2010 the WIPO Standing Committee on Copyright and Related Rights (SCCR) agreed on a work program on copyright limitations and exceptions for the two-year period 2011-2012.

As part of the SCCR's focus on libraries and archives, the International Federation of Library Associations and Institutions (IFLA), the International Council on Archives (ICA), Electronic Information for Libraries (EIFL) and Innovarte, a library NGO, are pleased to make available a Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives that sets out the key issues for libraries and archives.

We note with gratitude the inclusion of limitations and exceptions for libraries and archives in the Draft WIPO Treaty on Exceptions and Limitations for Persons with Disabilities, Educational and Research Institutions, Libraries and Archives proposed by the African Group (SCCR/22/12). Our text is intended to complement the African Group proposal, and it has been produced to guide Member States in a discussion of library and archive issues.

This cluster version contains the Articles and their Explanatory Notes that refer to the 11 topics, which have been identified by WIPO Member States at SCCR/23 in November 2011.

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Preamble

The Contracting Parties,

Considering that libraries and archives are distinctive guardians of the public trust, specifically designated worldwide as institutions necessary for serving the global public interest with regard to preserving the diverse forms of expression used by societies over time, for facilitating access to and dissemination of knowledge goods, and to further facilitate intellectual interchange accomplished primarily by means of literary, educational, scientific and cultural materials, analogue, digital or any other format to be known;

Acknowledging the essential role of digital technologies in the preservation, access and use of historical records and that such new technologies require appropriate mechanisms to enable libraries and archives to appropriately respond to the new digital environment in order to ensure the progress of research, scholarship, and culture;

Being aware of WIPO Copyright Treaty's recognition of "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works", including "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention";

Committed to improving the effectiveness of measures at international, regional and national levels to ensure that libraries and archives remain effective in their capacity to serve the interests of countries and their citizens in accessing and disseminating information and knowledge necessary for educational, scientific and development purposes especially across territorial borders in order to fulfil the promise of the digital age;

Aware of the importance of copyright to the production of literary and artistic works, whatever may be the mode or form of their expression;

Mindful of the need to respond appropriately to new technological advancements and their impact on the publication, access, and use of literary and artistic works, and of the need that such response be limited to special cases which do not conflict with a normal exploitation of these works, and do not unreasonably prejudice the legitimate interests of their authors;

Recognising the need for a global approach to copyright limitations and exceptions and a minimum level of international harmonisation, to secure the effective and unhindered flow of information essential for global equality of access to research, ideas, and innovation;

Convinced of the educational, political, social, cultural, and entertainment-related benefits of the international copyright system;

Realising that the free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expression are vitally important both for intellectual progress and the cultural development of all societies;

Emphasising the need to incorporate principles in the international copyright system that support the effective operation of such system both in the protection of authors and the provision of public goods such as education and health, as an integral part of national and international development policies;

Conscious of the need not to impair the role of libraries and archives to collaborate and work together in providing citizens of all countries and regions access to a wide diversity of cultural expressions;

Considering the necessity of mutual assistance to accomplish the objective of promoting creativity and the protection of authors and other owners of copyright and users;

Mindful that intellectual property rights should operate to the mutual advantage of creators and users of knowledge goods, limitations and exceptions in the applicable Conventions must enjoy the same legal status as exclusive rights;

Recognising that copyright limitations and exceptions are user rights that maintain a proper balance between the interests of copyright owners and users of copyrighted works within a fair international copyright system.

Hereby agree as follows:

TOPIC 1: PRESERVATION

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right of Preservation of Library and Archival Materials

- 1) It shall be permitted for libraries and archives to reproduce works, or materials protected by related rights, for the purposes of preservation or replacement, in accordance with fair practice.
- 2) Copies that have been reproduced for the purposes of preservation or replacement may be used in place of the original works or material preserved or replaced, in accordance with fair practice.

Explanatory Note

This Article provides an exception to the reproduction right for the purpose of preservation of works and materials protected by related rights by libraries and archives.

The Article permits libraries and archives 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. (Examples of some current preservation standards can be found at http://libguides.wits.ac.za/digitisation_preservation_and_digitalcuration). Sub-paragraph 2 allows libraries and archives 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).

The Article provides 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.

TOPIC 2: RIGHT OF REPRODUCTION AND SAFEGUARDING COPIES

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right to Reproduction and Supply of Copies by Libraries and Archives

- 1) It shall be permitted for a library or archive to reproduce and to supply a copy of a copyright work, or of material protected by related rights, to a library or archive user, or to another library or archive in connection with a request by a user at that library or archive, for the purpose of education, research, or private use, provided that such reproduction and supply is in accordance with fair practice.
- 2) Libraries and archives shall be permitted to reproduce and supply a copy of a copyright work, or of material protected by related rights, to a library or archive user, in any other case where a limitation or exception in national legislation would allow the user to make such copy.

Explanatory Note

This Article provides an exception to the reproduction right for the purpose of allowing libraries and archives to reproduce and supply copies of works and materials protected by related rights that are held in their collections to users, or to another library or archive for the use of a reader there. This would be done under a permitted limitation or exception in accordance with fair practice as determined by national law.

In this Article the limitation of “fair practice” is derived from the use of the term in Article 10 of the Berne Convention. The WIPO Guide to the Berne Convention explains that “fair practice” implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales, circulation, etc.” World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)(Geneva: WIPO, 1978), 58–59.

Libraries and archives in many countries make copies under library and archive exceptions on the user’s behalf and the service is often called a “document supply” service.

TOPIC 3: LEGAL DEPOSIT

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Legal Deposit

- 1) Contracting parties shall ensure that a system of national deposit is in place such that at least one copy of every work published in the country is given to at least one designated repository, to be permanently retained.
- 2) In compliance with national Legal Deposit Regulations:
 - a) It shall be permitted for the designated legal deposit repository or repositories to demand the deposit of copies of published copyright works, or copies of published material protected by related rights.
 - b) It shall be permitted for the designated legal deposit repository or repositories to reproduce publicly available content and demand the deposit of reproductions of copyright works, or material protected by related rights, which has been communicated to the public or been made available to the public.

Explanatory Note

The objective of this provision is to encourage the adoption of national legal deposit laws and systems in order to preserve a nation's cultural and scientific heritage for perpetuity. Legal deposit systems help develop national collections and may help in preservation efforts, particularly if they include many categories of works published in multiple formats. Included in Legal Deposit may be

- *works and material protected by related rights published on media as tangible objects;*
- *works and material protected by related rights and publicly available content made available to the public via electronic networks;*
- *radio or television programmes which have been communicated to the public;*
- *cinematographic works which have been produced for public performance.*

Legal deposit regulations only apply to copyright works and material protected by related rights or publicly online available content which has been produced in the national territory, or by nationals of, or by persons with permanent residence in the contracting party which has issued the legal deposit regulation. Material deposited in legal deposit repositories in compliance with the legal deposit regulations of a contracting party may be used or made available to the public according to the copyright legislation of the contracting party.

Government Publications

- 1) It shall be permitted for libraries and archives to request and disseminate to the public official publications issued by government ministries, departments and agencies.
- 2) Contracting Parties that, at the time of signature of this Treaty, provide copyright protection to official publications issued by government agencies may, in a notification deposited with the Director General of WIPO, declare that such protection will be maintained, when ratifying or acceding to the Treaty.

Explanatory Note

Libraries and archives also serve the public by maintaining and disseminating essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve, and disseminate to the public official publications published by national, provincial, or local government ministries, departments and agencies.

Typical examples of official publications are: treaties, laws, regulations, reports of public inquiries, judicial decisions and other decisions with equivalent effect, parliamentary debates and official publications that set out official policy or that explain the law.

TOPIC 4: LIBRARY LENDING

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right to Library Lending and Temporary Access

- 1) It shall be permitted for a library to lend copyright works incorporated in tangible media, or materials protected by related rights, to a user, or to another library.
- 2) It shall be permitted for a library to provide temporary access to copyright works in digital or other intangible media, to which it has lawful access, to a user, or to another library, for consumptive use.
- 3) Any Contracting Party which at the time of ratification or accession expressly provides for libraries a remunerated limitation or exception to a public lending right of authors may keep such provisions, provided that notification is deposited with the Director General of WIPO at the time of ratification or accession to the Treaty. The Contracting Party may withdraw the notification at any time.

Explanatory Note

This Article introduces a right for libraries to lend copyright works incorporated in tangible media, and to provide temporary access to intangible digital copyright works, for consumptive use. By temporary access is meant time-limited access as a form of distribution. By consumptive use is meant access that allows viewing, reading, listening, or perceiving in any other manner.

The Article is intended to permit libraries to continue the established service known as lending in the physical world. It enables lending of physical works, as an exception to the lending, or distribution right. It enables “digital lending” as temporary access, as an umbrella concept that accommodates an exception to the distribution right, or communication to the public right, or any such right pertaining to digital transmission, that might be adopted in national legislation and that would affect the ability of libraries to provide, upon request, for a limited time, a copy of a work in a digital or intangible format.

The right to lend and to provide temporary access granted by this Article would be upheld in licensing contracts as under Topic 10 and in the application of technological protection measures as under Topic 9.

TOPIC 5: PARALLEL IMPORTATION

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right to Parallel Importation

In cases where the respective Contracting Party does not provide for international exhaustion of the distribution or importation or exportation rights after the first sale or other transfer of ownership of such work or material, libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works or materials protected by related rights that are legally available in any country.

Explanatory Note

This Article provides an exception to the distribution right. Its purpose is 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 and materials protected by related rights by libraries and archives for their collections, whether by purchase or through gift or exchange.

The Article provides that libraries and archives are not restricted by the principle of national exhaustion (whereby the distribution right is exhausted with the first sale in a territory), with regard to the works and materials they can purchase and import from foreign countries, or in their ability to accept donated or exchanged works and materials originating from outside the territory of their location. The Article would apply to both online and offline transactions.

TOPIC 6: CROSS-BORDER USES

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right to Cross-Border Uses

To the extent that it is necessary for the exercise of a limitation or exception provided for in this Treaty, cross-border uses shall be permitted.

Explanatory Note

This Article provides an exception to the making available, communication, transmission and distribution right for the purpose of allowing libraries and archives to share resources across borders and supply copies made under an exception to other libraries and archives regardless of location and international borders.

This Article ensures that copies of works made under an exception in this Treaty may be sent and received across borders.

This is not a carte blanche provision since each exception has a set of conditions and these conditions apply in conjunction with cross-border uses.

TOPIC 7: ORPHAN WORKS, RETRACTED AND WITHDRAWN WORKS, AND WORKS OUT OF COMMERCE

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right to Use of Orphan Works and Materials Protected by Related Rights

- 1) Libraries and archives shall be permitted to reproduce, make available to the public and otherwise use any work, or material protected by related rights, for which the author or other rightholder cannot be identified or located after reasonable inquiry.
- 2) Contracting Parties may provide that, subject to Article 7 of this Treaty, should the author or other rightholder subsequently identify him or herself to the library or archive that used the copyright work or material protected by related rights, he or she shall be entitled to claim equitable remuneration for future use, or require termination of the use.

Explanatory Note

This Article provides exceptions to the reproduction, adaptation and communication to the public rights with respect to ‘orphan works’ insofar as they remain orphan. Its purpose is to enable libraries and archives to copy ‘orphan works’ and communicate them to the public. ‘Orphan works’ are copyright works or materials protected by related rights for which their rightholders cannot be identified or located in order to clear the rights. In practice this Article would enable libraries and archives to digitise their collections and make them available to the public online.

This Article provides an exception for libraries and archives to use ‘orphan works’ when unable to identify or locate the rightholder after reasonable inquiry. 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.

Right to Access Retracted and Withdrawn Works

- 1) It shall be permitted for libraries and archives to reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work, or material protected by related rights, which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the author or other rightholder.

- 2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

Explanatory Note

This Article provides an exception to the communication to the public right for the purposes of preserving and providing access to retracted works in the digital environment for research purposes.

The Article permits libraries and archives to preserve the public record for posterity in the digital environment (as they have done in the analogue environment), including records and documents relating to any modifications or retractions made to it, in order to make it available to researchers. It would ensure access for researchers through libraries and archives to copyright works and materials protected by related rights in digital formats that are no longer available to the public because they have been withdrawn. Contracting Parties would have the option to limit the application of this exception to certain uses or to not introduce it.

TOPIC 8: LIABILITY OF LIBRARIES AND ARCHIVES

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Limitation on Liability for Libraries and Archives

- 1) A librarian or archivist acting within the scope of his or her duties, shall be protected from claims for damages, from criminal liability, and from copyright infringement, when the action is performed in good faith:
 - a) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is being used as permitted within the scope of a limitation or exception in this Treaty, or in a way that is not restricted by copyright; or
 - b) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is in the public domain or under an open content license.
- 2) When a Contracting Party provides for secondary liability regimes, libraries and archives shall be exempt from liability for the actions of their users.

Explanatory Note

This Article 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 (Sub-paragraph 1). Sub-paragraph 2 also protects libraries and archives from liability for secondary infringement where the user of their services has committed the primary infringement.

TOPIC 9: TECHNOLOGICAL MEASURES OF PROTECTION

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Obligations Concerning Technological Protection Measures

- 1) Where the use of copyright protected works and materials protected by related rights are controlled by technological protection measures, Contracting Parties shall ensure that libraries and archives have the means to enjoy the limitations and exceptions provided in this Treaty.
- 2) For this purpose, Contracting Parties shall permit
 - a) the circumvention of technological protection measures for the purpose of making a work, or material protected by related rights, accessible, provided that the beneficiary of the limitation or exception has lawful access to the protected work or material;
 - b) the acquisition of services or tools necessary to carry out such circumvention.

Explanatory Note

This Article provides an exception for libraries and archives to the right to protection from circumvention of technological protection measures (TPMs) for the purpose of permitting a non-infringing use of a work or of material protected by related rights.

The exception allows libraries and archives to circumvent TPMs for non-infringing uses (such as preservation, access to content by disabled people and the user's right to make use of national statutory exceptions to copyright). The exception is limited by the requirement that the library or archive or their user has lawful access to the work or material. It also permits libraries and archives to acquire the tools or services needed for the circumvention.

TOPIC 10: CONTRACTS

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Obligation to Respect Exceptions to Copyright and Related Rights

Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions in copyright adopted by Contracting Parties according to the provisions of this Treaty, shall be null and void.

Explanatory Note

This Article introduces a new provision for the purpose of safeguarding the exercise of the limitations and exceptions, adopted by Contracting Parties under the provisions of this Treaty, in the digital environment. The Article is modelled on Article 15 of the European Directive on the Legal Protection of Databases (Directive 96/9/EC) and Article 9(1) of the European Directive on the Legal Protection of Computer Programs (Directive 91/250/EEC).

The Article provides that contractual agreements may not undermine the provisions for limitations and exceptions in copyright law, by preventing those licence terms that seek to undermine copyright limitations and exceptions from being enforceable against licensees. These provisions would apply in cases where access to and use of works and materials protected by related rights is subject to contracts and licences.

TOPIC 11: RIGHT TO TRANSLATE WORKS

IFLA Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives:

Right to translate works by libraries and archives

Libraries and archives may, for the purpose of teaching, scholarship or research, translate works lawfully acquired or accessed when those works are not available in a language required by such library or archive's users. Such translations may not be used for other purposes.

Explanatory Note

A significant amount of the world's written output is in major languages such as Chinese, English or Spanish. This places large amounts of reading material out of the reach of other language speakers, and acts as a practical barrier to knowledge and information. Libraries and archives are often the primary source of reading materials for researchers, scholars and lifelong learners. New opportunities for search and resource discovery through the Internet has enabled greater access to global materials. In many countries, librarians and archivists are increasingly being asked by patrons to facilitate access to foreign language material through the provision of translation services. New technologies and machine translations are enabling such services. This is especially important to facilitate education and learning in indigenous languages to individuals in multi-lingual developing countries. For example, South Africa has 11 official languages, and India records 32 regional languages.

This provision would enable libraries and archives to translate works upon individual request that are not available in the language of the user. The translation may only be used for education and learning.

The Stockholm Conference for the revision of the Berne Convention (1967) affirmed an implied exception to the right of reproduction with respect to translation (1). Chile and Japan both have provisions in national law for translation by libraries and archives. In Chile, where a work is not available in Spanish within certain time periods, libraries and archives may translate for the purpose of research or study by their users (Article 71, 2011). In Japan, a library may translate a single copy of a work that is publicly available at the request of a user for the purpose of investigation (Article 31(1)(i) and 43(ii)). In addition, the National Diet Library, the National and Parliamentary library, offers translation services for members of parliament.