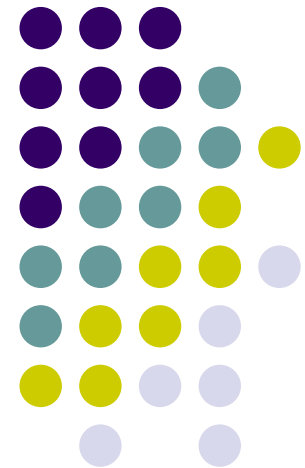


Statutory regulations in copyright law for document delivery

Model laws in theory and reality

IFLA Gothenburg 10-15 August, 2010

Harald Müller



Statutory regulations in copyright law for **document delivery**



From facts to model laws in „three part harmony“

1. Facts & findings – WIPO studies
2. National examples – Bahamas, Australia, Germany
3. Model law – Tunis & Wittem projects

Standing Committee on Copyright and Related Rights

Twentieth Session
Geneva, June 21 to 24, 2010

Second Analytical Document on Limitations and Exceptions

Document prepared by the Secretariat

Studies related to limitations and exceptions commissioned by WIPO 2003-2009



- WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by Mr. Sam Ricketson, (document SCCR/9/7) (the Ricketson Study)[\[1\]](#);
- Automated Rights Management Systems and Copyright Limitations and Exceptions, prepared by Nic Garnett (document SCCR/14/5) (the Garnett Study)[\[2\]](#);
- Study on Copyright Limitations and Exceptions for the Visually Impaired, prepared by Judith Sullivan (document SCCR/15/7) (the Sullivan Study)[\[3\]](#);
- Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews, Director (document SCCR/17/2) (the Crews Study)[\[4\]](#);
- Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean Juan Carlos Monroy Rodríguez (document SCCR/19/4) (the Monroy Study)[\[5\]](#);
- Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa Joseph Fometeu (document SCCR/19/5) (the Fometeu Study)[\[6\]](#);
- Study on Limitations and Exceptions for Copyright for Educational Purposes in the Arab Countries Victor Nabhan (document SCCR/19/6) (the Nabhan Study)[\[7\]](#);
- WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia prepared by Daniel Seng (document SCCR/19/7) (the Seng Study)[\[8\]](#);
- Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, Raquel Xalabarder (document SCCR/19/8) (the Xalabarder Study)[\[9\]](#);

- [\[1\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805
- [\[2\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952
- [\[3\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696
- [\[4\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192
- [\[5\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130303) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130303
- [\[6\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241
- [\[7\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130302) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130302
- [\[8\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249
- [\[9\]](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393

Studies related to limitations and exceptions commissioned by WIPO 2003-2009



- ▶ **Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews, (document SCCR/17/2) (the Crews Study 2008)**
>>> IFLA conference Quebec 2008:
Copyright exceptions and limitations for libraries: an elusive quest?
KENNETH CREWS (Columbia University, New York City, USA)
- ▶ **Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, Raquel Xalabarder (document SCCR/19/8) (the Xalabarder Study 2009)**

WIPO



E

SCCR/17/2

ORIGINAL: English

DATE: August 26, 2008

WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

**STANDING COMMITTEE ON COPYRIGHT
AND RELATED RIGHTS**

**Seventeenth Session
Geneva, November 3 to 7, 2008**

STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS
FOR LIBRARIES AND ARCHIVES

*prepared by Kenneth Crews**
Director, Copyright Advisory Office, Columbia University

Facts & findings on document delivery



Crews Study 2008, pp. 57-63:

Part IX: Document supply or interlibrary loan

- “ILL is important for all types of libraries and in all parts of the world. It generally serves the purpose of providing a copy of a work to a library in order to fulfill the request of an individual user.”
- 149 countries with translated statutes:
 - 128 at least have one statutory library exception
 - 21 have no library exception

Facts & findings on document delivery



Crews Study 2008, pp. 57-63:

- Statutes on ILL copying = **6** countries
- Statutes on supplying = **17** countries
- Case study = Germany
 - „The new statute ... is causing some confusion.“
- *“The general nature of library exceptions is to place the responsibility on the librarians to determine whether they are acting within the meaning of the law.”*

Facts & findings on document delivery



Crews Study 2008, pp. 57-63: Exceptions for Supplying to Other Libraries

- **Algeria**: ... if it is impossible to obtain a copy under reasonable conditions.
- **Antigua and Barbuda**: ... where it is not reasonable practicable to purchase a copy.
- **Belize**: ... if the library could not reasonably ascertain the rightsholder.
- **Fiji**: ... if the receiving library has not in the preceding six months been able to obtain the work at a commercial price.
- **Ireland**: Copies are not allowed if the library could reasonably obtain the consent of the rightsholder.
- **Republic of Korea**: ... works that are out of print.
- **Singapore**: The copy may not be added to the library collection in substitute for a purchase of the work or a subscription to the periodical.
- **United States**: The “supply” statute is limited to the ability to make copies of unpublished works “for deposit for research use” in another library.
- **“Law of the Bahamas broadly permits libraries to make and receive copies of works with no significant restriction.”**

WIPO



SCCR/19/8

ORIGINAL: English

DATE: November 5, 2009

E

WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

**STANDING COMMITTEE ON COPYRIGHT
AND RELATED RIGHTS**

**Nineteenth Session
Geneva, December 14 to 18, 2009**

STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS
FOR EDUCATIONAL ACTIVITIES IN NORTH AMERICA, EUROPE, CAUCASUS,
CENTRAL ASIA AND ISRAEL

*Raquel Kalabarder**
Professor of Law
Universitat Oberta de Catalunya (UOC), Barcelona, Spain

Facts & findings on document delivery



Xalabarder Study 2009, pp. 117-121:

F. Library uses

- Discrimination of **digital** libraries and uses
 - Library exceptions tend to cover only the act of “*reproduction*” (sometimes, analog or digital), but nothing is said as to communication to the public or distribution.
 - Delivering an analog copy to the researcher is not an act of *distribution* to the public.
 - On-line delivery of protected works to the researcher is an act of *communication* to the public.

Facts & findings on document delivery



Xalabarder Study 2009, pp. 117-121:

F. Library uses

- Interaction of exceptions and licenses (& DRMs)
 - Restrictions for **online** uses often result directly from licensing conditions and DRMs.
 - i.e., the exception provided in Art.53a of German law applies as long as the work is not available on the basis of a license.

Facts & findings on document delivery



Xalabarder Study 2009, pp. 117-121:

F. Library uses

- The **burden** is on the librarian -
 - to check the purpose intended by the teacher or researcher,
 - whether the specific use (and scope) is exempted or not by law,
 - whether a license exists to allow it (or not),
 - decide whether the copy can be made and delivered or not and in what format (digital or paper).
- The **choice** is on the right holder -
 - *the decision as to what digital uses for teaching and educational purposes are allowed (and which are not) is ultimately in the hands of the right holders.*
- **National laws fail to fully address the needs of digital libraries.**

Studies commissioned by WIPO 2003-2009

Facts & findings

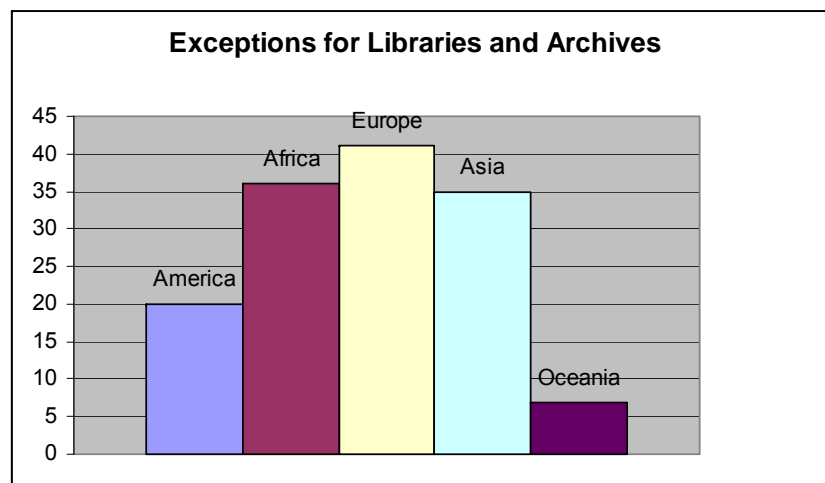


“Document delivery” or “inter-library loans”

- 6 countries

“Supplying of copies”

- 17 countries



Limitations & restrictions in national copyright laws



- in favour of document delivery -

- Bahamas



- Australia



- Germany



Statute law of the Bahamas: CHAPTER 323 COPYRIGHT



68. Distribution by librarian of copies or phonorecords of published works

- (1) The librarian of a prescribed library or the archivist of a prescribed archive may **reproduce a single copy** or phonorecord work or **distribute such copy** or phonorecord, if the following conditions are complied with -
 - (a) the collections of the library or of the archive are open to the public, or available not only to researchers affiliated with the library or archive or with the institution of which it is a part, but also to persons doing research in a specialised field; and
 - (b) the reproduction or distribution of the work includes a notice of copyright.
- (2) The conditions prescribed pursuant to subsection (1) shall include the following -
 - (a) that copies shall be supplied only to persons satisfying the librarian or archivist that they require them for purposes of research or private study, and will not use them for any other purpose; and
 - (b) that persons to whom copies are supplied are required to pay a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.

Statute law of the Bahamas: CHAPTER 323 COPYRIGHT



69. Supply of copies and phonorecords to other libraries.

The librarian of a prescribed library or archivist of a prescribed archive may, if the prescribed conditions are complied with, **reproduce and distribute to another prescribed library** or prescribed archive a single copy or phonorecord of a published work without infringing any copyright in the work.

70. Replacing copies of works.

- (1) The librarian of a prescribed library or archivist of a prescribed archive may, if the prescribed conditions are complied with, **reproduce** a single copy or phonorecord from any published work in the permanent collection of the library or archive for the **purpose of** -
 - (a) **preserving or replacing** the item by placing the reproduction in such permanent collection to or in place of the work;
 - (b) **replacing** in the permanent collection of another prescribed library or prescribed archive a work which has been lost, destroyed or damaged, without infringing the copyright in any work.
- (2) The prescribed conditions shall include provisions restricting the reproduction of copies or phonorecords to cases where it is not reasonably practicable to purchase the work in question for the purpose.

Bahamas: Distribution of copies



- To **persons** under these conditions:
 - library open to the public
 - notice of copyright included
 - research or private study purposes
 - a sum not less than the cost
- To **libraries** under these conditions:
 - preservation
 - replacement



Australia:



COPYRIGHT ACT 1968 - SECT 49

Pt. 1



Reproducing and communicating works by libraries and archives for users

(1) A **person** may furnish to the officer in charge of a library or archives:

(a) a request in writing **to be supplied with a reproduction** of an article, or a part of an article, contained in a periodical publication or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and

(b) a declaration signed by him or her stating:

(i) that he or she requires the reproduction for the purpose of research or study and will not use it for any other purpose; and

(ii) that he or she has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives.

Australia:



COPYRIGHT ACT 1968 - SECT 49

pt. 2



Reproducing and communicating works by libraries and archives for users

- (2) Subject to this section, where a request and declaration referred to in subsection (1) are furnished to the officer in charge of a library or archives, an authorized officer of the library or archives may, unless the declaration contains a statement that to his or her knowledge is untrue in a material particular, make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person who made the request.
- (2A) A person may make to an authorized officer of a library or archives:
- (a) a request to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
 - (b) a declaration to the effect that:
 - (i) the person requires the reproduction for the purpose of research or study and will not use it for any other purpose;
 - (ii) the person has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives; and
 - (iii) by reason of the remoteness of the person's location, the person cannot conveniently furnish to the officer in charge of the library or archives a request and declaration referred to in subsection (1) in relation to the reproduction soon enough to enable the reproduction to be supplied to the person before the time by which the person requires it.
- (2B) A request or declaration referred to in subsection (2A) is not required to be made in writing.
- (2C) Subject to this section, where:
- (a) a request and declaration referred to in subsection (2A) are made by a person to an authorized officer of a library or archives; and
 - (b) the authorized officer makes a declaration setting out particulars of the request and declaration made by the person and stating that:
 - (i) the declaration made by the person, so far as it relates to the matters specified in subparagraphs (2A)(b)(i) and (ii), does not contain a statement that, to the knowledge of the authorized officer, is untrue in a material particular; and
 - (ii) the authorized officer is satisfied that the declaration made by the person is true so far as it relates to the matter specified in subparagraph (2A)(b)(iii);
- an authorized officer of the library or archives may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person.
- (3) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) or (2A) relates, subsection (2) or (2C), as the case may be, does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.
- (4) Subsection (2) or (2C) does not apply in relation to a request for a reproduction of, or parts of, 2 or more articles contained in the same periodical publication unless the articles are requested for the same research or course of study.
- (5) Subsection (2) or (2C) does not apply to a request for a reproduction of the whole of a work (other than an article contained in a periodical publication), or to a reproduction of a part of such a work that contains more than a reasonable portion of the work unless:
- (a) the work forms part of the library or archives collection; and
 - (b) before the reproduction is made, an authorized officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

Australia:



COPYRIGHT ACT 1968 - SECT 49

pt. 3



Reproducing and communicating works by libraries and archives for users

- (5AA) For the purposes of subsection (5), if the characteristics of the work are such that subsection 10(2) or (2A) is relevant to the question whether the reproduction contains only a reasonable portion of the work, then that question is to be determined solely by reference to subsection 10(2) or (2A) and not by reference to the ordinary meaning of **reasonable portion**.
- (5AB) For the purposes of paragraph (5)(b), in determining whether a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price, the authorized officer must take into account:
- the time by which the person requesting the reproduction requires it; and
 - the time within which a reproduction (not being a second-hand reproduction) of the work at an ordinary commercial price could be delivered to the person; and
 - whether an electronic reproduction of the work can be obtained within a reasonable time at an ordinary commercial price.
- (5A) If an article contained in a periodical publication, or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of a library or archives collection, the officer in charge of the library or archives may make it available online within the premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives:
- make an electronic reproduction of the article or work; or
 - communicate the article or work.
- (6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the article, or of a part of the article, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.
- (7) The copyright in a published work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the work, or of a part of the work, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.
- (7A) Subsections (6) and (7) do not apply to the making under subsection (2) or (2C) of an electronic reproduction of:
- an article, or a part of an article, contained in a periodical publication; or
 - the whole or part of a published work, other than such an article;
- in relation to a request under this section for communication to the person who made the request unless:
- before or when the reproduction is communicated to the person, the person is notified in accordance with the regulations:
 - that the reproduction has been made under this section and that the article or work might be subject to copyright protection under this Act; and
 - about such other matters (if any) as are prescribed; and
 - as soon as practicable after the reproduction is communicated to the person, the reproduction made under subsection (2) or (2C) and held by the library or archives is destroyed.
- (7B) It is not an infringement of copyright in an article contained in a periodical publication, or of copyright in a published work, to communicate it in accordance with subsection (2), (2C) or (5A).
- (8) The regulations may exclude the application of subsection (6) or (7) in such cases as are specified in the regulations.
- (9) In this section:
- "archives"** means an archives all or part of whose collection is accessible to members of the public.
- "library"** means a library all or part of whose collection is accessible to members of the public directly or through interlibrary loans.
- "supply"** includes supply by way of a communication.

Australia: COPYRIGHT ACT 1968



- SECT 50 Reproducing and **communicating** works by libraries or archives for other libraries or archives
- SECT 51 Reproducing and **communicating** unpublished works in libraries or archives
- SECT 51AA Reproducing and **communicating** works in care of National Archives of Australia
- SECT 51A Reproducing and **communicating** works for preservation and other purposes

Australia: COPYRIGHT ACT 1968



- Complexity of document supply
 - Search of the market
 - Filing of declarations
 - Lack of availability
 - Purpose of research or study
 - Reason of the remoteness
 - Further conditions for a digital copy
- Division 5—Copying of works in libraries or archives
 - Printout (TimesNewRoman12pt) = **18 pages long**

Germany:

Copyright law amendment, Jan. 2008



Art. 53a Dispatching of copies to order

- (1) *The copying and communication to individual order of individual contributions published in newspapers and periodicals as well as small extracts from a published work is admissible if dispatched by post or fax by public libraries to the extent that use by the party ordering is admissible pursuant to art. 53. The copying and communication in any other electronic form is admissible exclusively as a graphic file and as an illustration for teaching purposes or for scientific research purposes to the extent justified to serve non-commercial purposes. The copying and communication in other electronic form is furthermore only admissible, if access to the contributions or small extracts from a work is not obviously accessible to members of the public from places and at times of their choice by means of a contractual agreement and on reasonable conditions.*
- (2) *The author shall receive a fair remuneration for the copying and communication. The claim may only be asserted by a collecting society.*

Document supply: step ONE



Art. 53a **allows** document supply by libraries :

- Paper copy as letter mail or fax
- Digital copy



BUT

German librarians are frustrated because of the complexity of digital document supply

>>>>> Next four steps

Document supply: step TWO



(1)The copying and communication to individual order of individual contributions published in newspapers and periodicals as well as small extracts from a published work is admissible if dispatched by post or fax by public libraries to the extent that use by the party ordering is admissible pursuant to art. 53.

Conditions for paper copy supply by post or fax:

- text in newspaper & periodical, or
- small part of book, and
- individual order, and
- admissible pursuant to art. 53 (private, scientific or other use)



Document supply: step THREE



*(2) The copying and communication in any other electronic form is admissible exclusively as a **graphic file** and as an illustration for **teaching purposes** or for **scientific research purposes** to the extent justified to serve **non-commercial purposes**.*

Additional conditions for digital copy supply:

- teaching or research purposes
- graphic file (PDF)
- non-commercial purposes



Document supply: step FOUR



*(3) The copying and communication in other electronic form is furthermore only admissible, if access to the contributions or small extracts from a work is not obviously **accessible** to members of the public **from places and at times of their choice** by means of a **contractual agreement** and on reasonable conditions.*

Prohibiting conditions for digital copy supply:

- accessible from places of choice, and
- accessible at times of choice
- by contract
= commercial direct supply



Document supply: step FIVE



*(3) The copying and communication in other electronic form is furthermore only admissible, if access to the contributions or small extracts from a work is **not obviously accessible** to members of the public from places and at times of their choice by means of a contractual agreement and **on reasonable conditions**.*

Additional conditions for digital copy supply:

- commercial direct supply is **NOT** obviously accessible
- commercial direct supply is **NOT** on reasonable conditions
- = digital copy supply by library is **admissible**



Germany

Copyright law amendment 2008



- A statute is generally expected to bring some certainty to the law.
- The language of this statute immediately began causing confusion among librarians.
- Libraries are ultimately determining whether they may deliver the copy in paper form (85%) or by digital means (15%).
- German librarians feel left alone between Skylla and Charybdis (the bad and the evil).

Facts & findings on document delivery



The general nature of library exceptions is to place the responsibility on the librarians to determine whether they are acting within the meaning of the law.

Does a suitable model law exist?

Tunis Model Copyright Law of 1976



The WIPO / UNESCO proposal:

(v) *The **reproduction**, by photographic or similar process, by public libraries, non-commercial documentation centers, scientific institutions and educational establishments, of literary, artistic or scientific works which have already been lawfully made available to the public, provided that such reproduction and the number of copies made are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author . . .*



The Wittem Project

European copyright code

April 2010

www.copyrightcode.eu

Wittem Group

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Chapter 5: Limitations

Art. 5.2 – Uses for the purpose of freedom of expression and information



...

(2) The following **uses** for the purpose of freedom of expression and information are **permitted without authorisation**, but only against payment of **remuneration** and to the extent justified by the purpose of the use:

- (a) use of single articles for purposes of internal reporting within an organisation;
- (b) use for purposes of **scientific research**.

Art. 5.3 – Uses permitted to promote social, political and cultural objectives



...

(2) The following **uses** for the purpose of promoting important social, political and cultural objectives are permitted without authorisation, but only against payment of remuneration, and to the extent justified by the purpose of the use:

(a) reproduction by a natural person for **private use**, provided that the source from which the reproduction is made is not an obviously infringing copy;

(b) use for **educational purposes**.

Conclusion



- Document delivery:
 - **23 of 184** countries = **statutory regulation**
 - **2 of 184** countries = **statutory regulation** for electronic docdel
 - **No** country = regulation for **international** docdel
- All statutory regulations are more or less **complex**
- **The burden is always on the libraries**
- The Wittem model law is far too revolutionary to become reality
- IFLA: Libraries provide access to information. They stand for freedom of information.

Freedom of information



Freedom's just another word for nothing' left to lose:

Nothin' ain't worth nothin' but it's free.



Me and Bobby McGee by Kris Kristofferson & Fred Foster

THANK YOU VERY MUCH FOR YOUR ATTENTION !