

DRAFT COMPILATION ON LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND  
ARCHIVES

*Compilation prepared by the Secretariat on the basis of comments made by Member States  
delegations*

## TOPIC 1: PRESERVATION

### Proposed Texts

#### 1. African Group's Proposal

##### Preservation of library and archival materials

1. It shall be permitted to make limited copies of published and unpublished works, regardless of their format, to meet the needs of libraries and archives, without the authorization of the owner of copyright;
2. The copies of the work referred to in paragraph (a) shall be used solely to meet the needs of teaching, research, and preservation of cultural heritage;
3. The copies referred to in paragraph (a) shall be made for non-profit uses, in the general interest of the public and for human development, without conflicting with the normal exploitation of the work or unreasonably prejudicing the legitimate interests of the author; this activity may be exercised in situ or remotely.

#### 2. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

##### 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, in accordance with fair practice.

#### 3. Principles and objectives on the subject proposed by the United States of America

##### Objective:

Enable libraries and archives to carry out their public service role of preserving works.

##### Principles:

Exceptions and limitations can and should enable libraries and archives to carry out their public service role of preserving works that comprise the cumulative knowledge and heritage of the world's nations and peoples.

To that end, exceptions and limitations can and should enable libraries and archives to make copies of published and unpublished works for purposes of preservation and replacement, under appropriate circumstances.

The need for such preservation exists in a variety of media and formats and may include the migration of content from obsolete storage formats.

## Comments made to the Proposed Texts (November 22, 2011)

### 4. United Kingdom

With respect to the preservation, we note that some of the texts also cover other usage and we wonder whether a usage such as lending should be dealt with under other headings; the discussion should be focused on the ability of Libraries and Archives to preserve the work. It's important to look at the definition of work and also the definition of who may enjoy these privileges and again looking at the American colleagues' suggestions, we may well look at whether or not museums should also be added to the list of libraries and archives in order to enable them to preserve their cultural. Furthermore the exception by a library or archive should be used only if it is not practical to obtain a copy from the rightholders. Finally, it is necessary to use concepts that are technology and format-neutral so there's no need to return to them when new developments occur.

### 5. Austria

Such a limitation should be based on the following elements: any work published or not should be covered, but the limitation should be restricted to the original work which is in the possession of the collection. Preservation copies should not be used as an item additional to the original work in the collection but must be used instead of the original work.

### 6. Italy

As reflected in the national implementation of the European Directive, there should be three fundamental principles: firstly, the work has to have been legally and lawfully acquired; secondly, a copy can only be made in order to preserve works that are in the collection; and no other purpose than to allow the work to remain in the collection. African proposal makes reference to teaching and research, which is something different; in accordance with our system it can only be copied in order to allow it to remain within the collection and thirdly this has to be done not for profit purposes.

### 7. France

The national implementation of the European Directive imposes that the exception as applied to reproduction right, cannot be used for commercial purposes. This exception is foreseen purely for conservation or preservation purposes, possible for works to be replaced, or it may also be the case of a digital copy of a work in order to prevent its further deterioration of the work's medium upon which it is to be found.

### 8. Greece

Reproduction shall be permissible only if an additional copy cannot be obtained on the market promptly and on reasonable terms. It may take place only if specific requirements are met. First, if it's made by a nonprofit library or archiving organization; second, if the copy is made from a work that belongs to the library or archives permanent collection. Third, if the reproduction is aimed to retain the additional copy, or to transfer it to another nonprofit library or archive. Lastly, reproduction is deemed necessary since it is not

possible for the library or archive to obtain an additional copy from the market promptly and in reasonable terms.

9. Germany

Archival library has to be acting in the public interests and to pursue no direct or indirect economic or commercial purpose with the copies is making.

10. Japan

The reproduction of works by libraries is permitted if the works have been actually damaged in a severe manner and the reproduction is necessary for their preservation.

11. Mexico

In limiting the right to reproduction, it would be highly appropriate to establish conditions particularly to define the quantity of copies, what kind of works can be reproduced, e.g. published or unpublished works. In some legislations there are moral rights referring to disclosure, therefore the suggestion in principle is to talk about published works. As regards to the second paragraph, more than a teaching and researching purpose, it is a questions of security. It has been pointed out for those cases where the work is exhausted, no longer cataloged, or in danger of disappearing. Here I'm talking about limiting the right of reproduction, while in the last paragraph we are making reference to the fact that consultation could be made in situ or remotely, which implies other rights such as the right of making available or the public communication. Lastly, we reaffirm that should be applicable only to published works.

12. Spain

The national legislation which establishes copyright limitations for Libraries with purposes of reproduction, lending, consultations in specialized terminals, is drafted in such way the rightsholders cannot oppose to the reproduction when it's done for nonprofit purposes by libraries, museums, public archives, cultural and scientific institutions and as long as it's done for research purposes or preservation.

13. Ecuador

The second paragraph within the stated principles that the Delegation of the United States has submitted is a good basis to approach the issue. We could have a norm stating that exceptions and limitations can and should enable libraries and archives to make copies of published and unpublished works for the purpose of preservation and replacement. However, the final concept: "under appropriate circumstances" is a non-legal term which might create many doubts of interpretation and, it would be easier to replace it by "under appropriate circumstances of the practice". We could use a wording of that sort which could be flexible but also could be an emphasis on the need to focus on honest practice at the international level.

14. United States of America

One of the questions for us is that although the Africa Group text is entitled "Preservation of library and archival material", it then says in number two "To meet the needs of teaching and research", which is clearly a different topic. Similarly number three, "Which shall be made for nonprofit uses in the general interests of the public and for human development", strikes us again, as this language is tremendously more expansive than the straightforward concept of preservation as it is known in the library community. We have some great concerns about if this text actually reflects in any way what libraries would consider their preservation mission.

15. Canada

Copying is limited to the maintenance or management of a library, archive or museum's own permanent collection, or of another library, archive or museum and so the preservation or maintenance has six specific functions or purposes. First, a copy can be made if the original is rare or unpublished and is lost or at risk of deterioration or becoming damaged or lost. Second, it is for the purpose of on site consultation if the original cannot be viewed, handled or listened to, because of its condition or because of the atmospheric conditions at which it must be kept. Third, a copy can be made in an alternative format if the original is currently in an obsolete format or if the technology required to use the original is unavailable. There is also the possibility of making a copy if the technology or format is becoming unavailable in order to read the material. Fourth, a copy can be made by the library, museum or archive for catalogue making. Fifth, for insurance purposes or police investigations; and sixth, if necessary for restoration. Along these six purposes, there is a limitation for the first three purposes which is that the exception does not apply where an appropriate copy is commercially available in the medium and of a quality that is appropriate for the purposes of those preservation purposes. If a person needs to make an intermediate copy to accomplish one of the purposes in the first section, that intermediate copy must be destroyed as long as it is no longer needed.

16. China

Libraries, archives and museums are institutions that can preserve their own collections by making or reproducing copies. In our regulations, we also have some rules concerning the digitalization of copies that clearly provides that libraries, museums and archives could, in conformity with law, digitalize their own collections under two conditions: one, if the original works are damaged or almost damaged or lost, or if the format is out of date. Second, if the works are not available in the market, or if they could only be obtained for a price evidently higher than the original. When such two conditions are met, libraries and archives could digitalize or reproduce some of the works of their collection.

17. Kenya

In relation to paragraph two of our Article 14, we are talking about copies being used solely for the needs of teaching or researching. It must be taken into account that the draft of this particular proposal needs to be looked in a wider context, not just limited to exceptions in relation to Libraries and Archives. It is also important to note that we are preserving the works in the archives and libraries mainly for research and teaching purposes.

18. United States of America

We understand the context in which Article 14 of the African Group proposal appears to be drafted. When we are discussing preservation, we should not be discussing dissemination of copies for purposes of the needs of researchers, nor the way Libraries aid and assist the institutions of teaching and the teaching functions. We should be very clear when we are talking about preservation because it is the distinctive function of our libraries and archives, it is the definitional function of archives throughout the world.

19. Korea

Libraries, under the national legislation, may reproduce books, documents, records, and other materials for public use, for the purpose of preserving them when necessary.

20. Nigeria

The context on which the text of preservation was formulated originally was broader, and despite that, this particular paragraph does not seek to expand, but rather tries to limit and redefine in a narrow manner the use to which such material would be reproduced. It is possible to re-phrase this particular text and would welcome any suggestions from the Delegate of the United States.

21. Algeria

All legislations look at the issue of preservation of library and archival materials in such a way as to ensure that an exception is provided if the purpose of reproduction of a work is not indirectly or directly a commercial one. Some legislations have provisions relating to digitization and others, including the Algerian legislation, tend to deal with more conventional type documents, the kind we usually have in libraries and archives. The fundamental approach is the same. We are generally speaking about providing an exception for them if what they do is done not for profit purposes and if they provide a copy without the authorization of an author in order to respond to a request from another library, that is also permitted, and if a work has been damaged, lost or made unusable and therefore requires to be copied again that is provided for. In Algeria there are two conditions to be abided: firstly, it has to be impossible for the library or archival center in an acceptable and lawful way to acquire new copies and secondly this reproduction has to be seen as a one-off, isolated type of case.

22. Azerbaijan

We have a system where, in accordance with Article 9 B of the Berne Convention, makes possible without the authorization of an author or another rightholder and without any payment, to reproduce under certain circumstances; namely if it is for a non-profit purpose; if the published works have been lost, damaged or tampered with in some way; if it is to make copies at the request of other libraries and archival centers, again, in order to replace lost or damaged or unusable works that they had in their collections. What we need today is a new international standard as we enter into the digital era, where in some cases works need to be moved from one medium to another, and we need to ensure that we can have works made available to libraries in the appropriate format that they may find acceptable.

23. Senegal

The context within which the African Group elaborated its proposed provisions, is to make possible to copy works in certain cases and to safeguard such copies when for instance, there have been problems with the original, by being lost or damaged. What we have to bear in mind is that we are talking about something being reproduced, to be able to be consulted for teaching or research purposes.

**Written comments made to the Proposed Texts**

24. Japan

We would like to make a brief comment on reproduction for collecting Internet materials under the National Diet Library Act. In article 42 ter of Japanese copyright law, it is permissible for the chief Librarian of the National Diet Library to record in memories used by National Diet Library such works as included in Internet materials of government and local public bodies to extent deemed necessary for collecting such Internet materials. With regards to materials collected at the National Diet Library that have already deteriorated or have been damaged, under the current provision of the National Diet Library Act, reproduction of works at libraries, etc. is permitted if the works have been actually damaged in a severe manner, and the reproduction is a necessary for the preservation of the works. Nevertheless, the National Diet Library may not sufficiently fulfill its mission of preserving materials for public use in the future even if it digitizes materials that is already deteriorated or damaged. The amendment to the copyright law in 2009 makes it possible to digitize collected materials at the National Diet Library immediately after the materials are delivered in order to ensure that publications, as cultural assets, are preserved as in good condition as the condition immediately after the delivery.

## TOPIC 2: RIGHT OF REPRODUCTION AND SAFEGUARDING COPIES

### Proposed texts

25. African Group's Proposal:

Supply of works

It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.

26. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

Reproduction and Distribution of Copies by Libraries and Archives

1. It shall be permitted for a library or archive to reproduce and to distribute a copy of a copyright work, or of material protected by related rights, to a library user, or to another library or archive, for purposes of:

- a. education;
- b. requests by users for research or private study;
- c. interlibrary document supply;

provided that such reproduction and distribution is in accordance with existing international obligations, among them the Berne Convention.

2. Libraries and archives shall be permitted to reproduce and distribute a copy of a copyright work or material protected related rights, to a user, in any other case where a limitation or exception in national legislation would allow the user to make such copy.

27. Principles and objectives on the subject proposed by the United States of America

### Comments made to the Proposed Texts (November 23, 2011)

28. Kenya

Article 11 of the proposal of the African Group basically deals with the supply of works. One of the main reasons to elaborate that particular part was to emphasize on fair use practice as determined by national law.

29. Senegal

The possibility to use right of reproduction in order to provide a safeguard or backup copy is something also enshrined in the African Group proposal. In its second line we accentuate the lawful acquisition of the work, making it possible to generate copies regarding works that are protected by authors' rights. The legality is mentioned as a source of greater security for the rights' holders. Libraries and archives can exchange information between each other, but only as much as this practice is compatible with what is enshrined in national legislation.

### 30. European Union

This is an issue that has been dealt with by the Information Society Directive where community law establishes that Member States may provide for exceptions and limitations in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments, museums, and archives provided these are not in direct or indirect commercial advantage. It is not a blank permission and it clearly refers to a specific act of reproduction. It does limit the beneficiaries to those that are publicly accessible and where they have a nonprofit purpose in their activities. The common characteristic of these beneficiaries is that they pursue scientific and/or educational goals. Member states are strictly framed by the three-step test, and they can only apply these limitations in certain special cases which do not conflict with the normal exploitation of the work or other subject matters because of course it applies to related rights and does not unreasonably prejudice the legitimate rights of the rights holders. It is altogether a framework that allows for flexibility in its implementation to Member States while being rigorous in framing it within the balance and respect of copyright. This is important and indeed reflects a reality of Member States of the European Union where there are different legal traditions and approaches as to the establishment or not of limitations to the benefit of libraries and archives as regards these activities. This has been approached by different jurisdiction, allowing libraries to undertake the required activities without enough of the Member States necessarily taking the shape of a limitation. There are also licensing systems and of course Member States remain free to provide the possibility of remuneration to authors and others of related rights.

### 31. Egypt

The purpose of reproduction should not only be limited to research, but also it should meet the needs of different institutions of education, that as well require a copy of the work in question, within the framework of cooperation between libraries and in order to disseminate knowledge and information. This should not be limited only to reproduction for reference purposes, it should be extended to translation as well.

### 32. Pakistan

With regard to the right of reproduction and safeguarding copies, one thing that we have noted is that the purpose of reproduction is something which has been highlighted in the proposal in the third column. We do believe the point raised by the Delegate from Egypt is valid in the terms that it can be for education purposes, scientific purposes or research purposes. We also saw this from the intervention from the Delegation of EU; their law includes educational and scientific research purposes. We need to be more holistic in terms of having the purposes elaborated with regard to the permission where we are going to have the right of libraries to full reproduction.

33. Mexico

The last part of the text clarify that this has to be fair practice determined in national law which could be used for education and scientific research, as well. Would it be possible to see what we mean when we say obtained legally? We would have to also remove rights to look at the question of digital transfer, so as to comply with other types of rights that are contemplated

34. United States of America

The question of the right of reproduction and the supply of copies is very much a question not just of the activity but of the purpose and the intent of the reproduction and the supply of copies. This is very important because the making and supplying of copies brings libraries directly into the activities we normally associate with authors and publishers. For that reason, we must craft very carefully the relationship between the two and recognize proper limitations to the limitation. The question of reproduction and the supply of copies really breaks into two types of activities that are reflected differently in the proposals in the comparative document. First, there is the occasion when a library supplies a copy to another library, and secondly, there is the occasion when a library supplies a copy to an end user. The Africa Group proposal addresses only what we might call interlibrary supply of copies, while the Ecuador, Brazil and Uruguay proposal recognizes supply of copies to end-users and supply of copies to other libraries, which is the approach taken in American law. In the United States, there is not just the question of to whom a copy is supplied, but there is the question of how much is supplied. First of all, in the case of the provision of all copies by libraries, we have a number of conditions that we think are important to ensure that the exception or limitation in Copyright law is properly crafted. It is important, that the library believe that the copy will be used for private study, scholarship or research and not for commercial purposes, direct or indirect. It's also important that the copy provided carry a notice of the Copyright that protects the work. And it is also important that the material becomes, in the case of an end user or library, the actual possession of the end user, whether it's a researcher or the library. It is important to determine how much is being copied? And we draw a distinction between those occasions when libraries wish to send each other or to provide to end-users copies of single scholarly articles or small parts of Copyrighted collections or small parts of Copyrighted works such as a chapter or limited number of pages versus when a copy of an entire work is being made. Obviously when a copy of an entire work is being made, there is the question of substantially adverse market effects to the publishers and authors. It is also important that this type of activity not be done in a systematic way, but that it would be a single occasions at the requests of libraries. There is a danger that one library could end up making copies for all libraries, essentially taking away an author's market to the entire country once one copy is sold to one library. We recognize that the IFLA proposal addresses this question through fair practice. In contrast the Brazil, Ecuador and Uruguay proposal uses the limitations and the three-step test as the Berne Convention. The topic of fair practice and fair use is very important. It is indeed seminal to our exceptions and limitations and it is imperative and important for the practices of our libraries. But we would be concerned about any international standard that simply referred to fair practice without having that be a clearly developed concept the in all national laws. For our perspective on initially reading the comparative proposals, we believe that Brazil, Ecuador and Uruguay's proposal better describes international Copyright law that does not at the international level have a clear delineation of fair practice across different jurisdictions. So we would have concerns about that and would be eager to hear more as we develop this discussion on how the fair practice criteria might ensure that the reproduction and supply of copies by libraries conducting good faith efforts with one another and good faith efforts to serve their users does not have adverse market impacts.

35. Ecuador

After listening to the proposal made by the Delegate of Egypt regarding the inclusion of the exception of translation within the context of the exception of reproduction, it is important to point out that within the various exceptions that are provided by the Berne Convention, there are the ones recognized by the Stockholm Convention; when looking at the scope of these three exceptions, the translation is an implicit exception to the exception of reproduction; and so consequently in those cases where it's possible to have reproduction within the framework of Berne Convention, it's implicit that translation is possible. That was just in the wake of the proposal made by Egypt; their proposal would be in compliance with the Berne Convention. I wouldn't see any problem whatsoever in accepting that proposal made by Egypt.

36. India

The Berne Convention in its article 10 clearly mentions that it shall be permissible regarding the quotation this same thing. Providing that the making is compatible with the fair practice and that extent does not exceed what is justified by the purpose. Fair practice is the purpose also there, and so the same phrase can be adopted for this purpose.

37. United States

The Delegate of India referred to the provision of the Berne Convention that recognizes fair practice in the context of quotation, not of reproduction of entire works. To address the comments made by the distinguished Delegate of Ecuador, we would have to think very carefully about that since the right of translation is a different right than the right of reproduction. For those Delegations who are concerned about the protection of the author's moral rights, that is a significant concern, and we would not think that an exception crafted addressing the right of reproduction and rights related to distribution automatically covers translation.

38. Italy

The respect of the three-step test should already be assured by the texts that we're discussing. It is not just something that should be left up to domestic legislation only. We should already accommodate its requirements in the texts we're discussing; and if we look at the text of the three countries, Brazil, Ecuador and Uruguay, we see that the respect for the three-step test does not exist. When talking about reproduction and distribution, the reproduction is without any limits and the concept of distribution implies a sort of limitless dissemination to anybody. We could consider that this text is going to introduce a free-of-charge parallel market. The purpose of education is a very general and ambiguous concept because a large number of people might be interested in education. We believe that great attention should be paid to the wording of a text when talking about limits. They should be precise and there should be the respect for the three-step test.

39. Brazil

The possibility of producing safeguard copy is going to be limited to the strict minimum. It is not a question of giving that permission or on allowing libraries and archives not only to make a safeguard copy for themselves, but also of making safeguard copies for other

libraries or archives. The most important condition for being able to use this possibility is that the work is lawfully available. When a work infringes Copyright, no exception or limitation can be made. We respect the principles regarding limitations to the right of reproduction. We rule out any possibility of engaging in any economic activity regarding the safeguard copy, and we insist on the fact that the mention of domestic legislation simply allows national legislation to ensure that if any remuneration is provided, then it should be effective.

40. Kenya

In the elaboration of Article 11 of the African proposal, one of the reasons why this article was drafted in that particular way, was taking into consideration the different traditions we have in relation to fair use, fair practice and fair dealing in the various legal systems, so we left it to be within the national laws.

41. Brazil

United States is right when it has concluded that in our proposal, jointly presented with Ecuador and Uruguay, when we refer to international obligations, we are referring to the three-step test. Relating to the translation right, our legislations are not so comparable because Brazil has not implemented in its national legislation the appendix of the Berne Convention. Regarding the comments by our colleague from Italy, I was not sure if he was referring to our joint proposal with Ecuador and Uruguay, or he was referring to our legislation. If he was referring to our legislation, I would like to make clear that the three-step test is part of the Brazilian legal system. Second point, if you consult Brazilian jurisprudence you will find references to the three-step test. So when you refer to the Brazilian legal system regarding Copyright, you have to include the specific legislation, the Berne Convention, the agreements into force, and also the jurisprudence.

42. Russian Federation

Would like to draw the attention to the need of a cautious approach to exceptions and limitations to Copyright. We are also extremely concerned at providing this opportunity such as the right of translation to libraries under the Berne Convention. We agree with the opinion expressed by Italy that if we give these exceptions and limitations to libraries, we shouldn't go to the extremes and give unlimited possibilities to libraries to use all copyrighted material, particularly when we are talking about translations and the full use of copyrighted material, as there might be a very serious danger to the publishing market in taking these decisions, as we might in fact destroy the whole publishing market.

43. Iran

Is it possible to change what is suggested by the African Group as it reads: "including digital transmission, provided that such use is compatible with fair practice as determined in national law to such reproduction"? In the Background Paper and the Brazil, Ecuador and Uruguay Proposal, it is clarified that the fair practice refers to the reproduction itself, and not to the use. We are discussing here the reproduction, not the use to solve this concern that is well-clarified by the United States. We ask the African Group to clarify if possible, if the use will be changed to the reproduction itself, or not.

44. United States of America

The distinguished Delegate of Senegal had mentioned a couple times that her interpretation of this provision, Article 11, is addressed to safeguard copies or backup copies. Our reading of the text is that it is not so limited. We just wanted to clarify that with the African Group. If it is a provision intended only to address backup copies or safeguard copies, then it would be a very different circumstance and perhaps a different wording. We wondered if we could get that clarification.

45. Italy

In reply to the question put to us by the Brazilian Delegation, we are not acquainted with the Brazilian legislation, so our comments are limited to the text which we have before us.

46. Ecuador

Would like to supply another bit of legal input on the application of the concept of fair practice. Since fair practice, as correctly pointed out by India, is applied to quotations under the Berne Convention, it expressly states that it allows use for educational purposes. It is also possible to consider that the fair practice standard can be used for reproductions provided for illustrating teaching, and under the Berne Convention the standard of fair practice would be applied therefore. The scope of the three-step test in regard to reproductions in general, according to the joint proposal by Brazil, Ecuador and Uruguay, states that reproductions will be in accordance with the standards under existing international obligations subscribed to the parties of this agreement. There is a matter protected by neighboring rights that is not subject to international standards and therefore to the three-step test. For example, in the case of broadcasting, radio broadcasts are not subject to the three-step test because this is governed either by the Rome Convention or by TRIPS. And so, unless there is an international instrument that imposes the three-step test in that area that does not apply.

47. Portugal

Our legislation following the European Directive on Copyright, it is possible for these institutions to reproduce published works. The reproduction and number of copies should satisfy the internal needs of the institution and not of the public. Without any lucrative-economic implications, institutions have to pay a fair remuneration for private copies, which are negotiated with the authors and publishers. The needs of public institutions should cover the objectives of archives and the preservation of works and also for the purposes of research. Institutions may also, within their walls, allow people to have access to these works, to read them and engage in research. There's an important legal situation that is that contracts established between the rightsholders and the users may not contradict the exceptions and limitations provided for by the law.

48. Chile

In Chile, reproduction for private use, just as in the United States, establishes a quantitative parameter, it refers to fragments. However, we believe that an international standard or rule would not necessarily have to provide a precise definition of this quantity. If it is defined that the rule should be compatible with international obligations, the necessary limitations would be defined by each country in its own context. The right to

reproduction should also consider the possibility of making reproductions in all formats, present or future, in which knowledge and information is transmitted. Consequently, consideration should be given to electronic or digital copies and a neutral language should be used which should pave the way for future new formats.

49. Germany

We are confronted with two different scenarios when we look at the activities of libraries and their daily workings. One is the service that a library provides to another library, and the other scenario would be services that libraries render to end-users. The solution that the German legislation found for the second scenario was the following "it shall be permissible in response to an individual order for public libraries to reproduce and transmit by post or facsimile individual contributions released in newspapers and periodicals and also small parts of a released work so far as the exploitation by the person placing the order is permissible pursuant to Article 53", which states that limitations to reproduction right must be in accordance with the Directive which means that it is our national rule which allows reproduction for private and other personal uses. Please note the very close link between what it is that we allow libraries to do and the individual limitation and exception which privileges an individual user. "Reproduction and transmission in other electronic form, such as email, for instance, shall be permissible solely as graphic data file and for the purpose of illustration, for teaching or for scientific research to the extent justified by the noncommercial purpose to be achieved. Reproduction and transmission in other electronic form shall moreover be permitted only where it is not made manifestly possible upon agreed contractual terms for members of the public to access these contributions or small parts of a work from a place and at a time individually chosen by them and on terms that are adequate". Publishing houses offers made online have to be considered first; they have priority over the dispatch of copies by libraries. Paragraph 2 of the said Article, states that "an equitable remuneration shall be paid to the author for the reproduction and transmission. The claim may only be asserted by a collecting society". I can only urge ourselves to be careful when we embark on this discussion as not to impose solutions that are so fine-tuned that there is no room left for Member States to find the balance that they deem appropriate.

50. Senegal

In response to the question that was put to us by the United States of America, it referred to a backup copy but we're talking about an exchange practice, practical exchange between libraries or archives. That's what was to be understood by our position. We are a little bit obsessed by the question of security. Everybody is talking about safeguard, but it's just an exchange, in fact, between the librarians or archivists, that's what it is.

51. United States of America

Our law also is sensitive to whether or not a market copy is available at a fair and reasonable price when the entire work is being reproduced. We agree that we cannot have a too precise definition in an international norm. We are trying to craft a kind of norm that will be meaningful and useful for many jurisdictions. As to fair practices' appearance in our existing international treaty obligations, it appears only in Article 10 of the Berne Convention, in 10.1 in relation to quotation, as we have already discussed. But it also appears in 10.2 in relation to use of a work "by way of illustration in publications, broadcast or sound or visual recordings for teaching". We believe that's what the Delegate from Ecuador was referring to when he said fair practice is already used for education. But fair

practice in Article 10.2 is limited as a modification for "broadcast or sound or visual recordings for teaching."

52. France

France has implemented an exception by transposing the Directive that provides for quite a flexible framework for members to comply with national traditions within member countries of the European Union, introduced in virtue of L102.5, article of the Intellectual Property Code. It provides for the reproduction of a work and its representation, two different rights that seek to preserve the possibility of consultation for reasons of research or private study by private individuals within the facilities of a library and on a dedicated terminal in libraries accessible to the public or to archive departments in so far as they do not seek to derive from this any economic or financial advantage. There's no question of networking as consultation can only be made within the library.

53. Ecuador

There are some areas subjected of intellectual property and especially related rights of the broadcasting organizations, for which there is no international standard that makes obligatory the application of the three-step test. In no case did we say that the three-step test is not to be applied to authors' rights when it comes to broadcasting.

54. Austria

Austrian Copyright Act does not explicitly express reproduction by libraries or archives for their clients. However, the general framework provided for its Sections 42 to 40-P and reproduction for personal or private use are of relevance for these institutions, as well. Those provisions apply to libraries and archives and lead to the results that the Austrian Copyright Act permits libraries and archives to reproduce works for their customers as long as they provide either analog copies only or they provide digital copies for non-commercial research purposes. However, the amount of copies is limited, and how books or articles may only be reproduced for this purpose if they are out of print or not available in sufficient number. Private copying levy applies for this use.

### **Written comments made to the Proposed Texts**

55. Japan

In our copyright law it is permissible for libraries to reproduce a work included in library materials such as books, documents and other materials held in the collection of libraries, for limited cases and purposes under some strict conditions within the allowance of three step test. The followings are the conditions for an exception to libraries in Japanese copyright law:

1. Libraries mean the national diet library as well as libraries and other establishment designated by cabinet order.
2. Reproduction shall not be for the purpose of profit making business.
3. Only libraries are allowed to reproduce works.
4. The original shall belong to the libraries.
5. Any of the further following conditions is required:

- The reproduction shall be at a request of users who conduct survey research and be a single copy of a part of the original, but if an individual work is reproduced in a periodical already published for a considerable period of time, the reproduction of all of the original is allowed.
- The reproduction shall be necessary for the purpose of preserving library materials.
- The original is not available through normal trade channel at the other libraries because it is out of print.

In addition, digitalization of materials housed in National Diet Library for the purpose of avoiding damages will be permissible under the following conditions:

1. The digitizing shall be for the purpose of preventing the loss, the destruction or the damage of such original.
2. The electronic copy shall be used for the public use instead of such original.
3. The digitalizing shall be permitted to the extent of minimum necessary.

### TOPIC 3: LEGAL DEPOSIT

#### Proposed Texts

56. African Group's Proposal:
57. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal
58. Principles and objectives on the subject proposed by the United States of America

Objective:

Encourage the adoption of national legal deposit laws and systems.

Principles:

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.

Libraries and archives also serve the public by maintaining essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve, and disseminate government works.

#### Comments made to the Proposed Texts (November 23, 2011)

59. Mexico

We would simply like to sketch out a number of items that have to be looked at; such as to identify what was the obligation when it comes to making available to a library or libraries different materials; the time frame during which the material is to be made available; the time of production; the time of publishing; who is responsible for the preservation or custody of these materials; and then also move toward an obligation when it comes to providing publicity or making available information on this type of material.

60. Spain

The regime that we have in force in Spain when it comes to legal deposit goes back to 1617, but some legal modifications have been made this year. The main objective is that the sound, visual, audiovisual material is to be available to the citizens, complying with the intellectual property Law in force in Spain. The objectives pursued by this law is to recompile and conserve in public administrations different copies of works and gather information to be able to generate statistics and also make available access and consultation to the works in the installations where the works are kept or through databases used for restricted use.

61. Czech Republic

As far as legal deposit is concerned there is a special law regulating obligations of publishers, books, journals, magazines, newspapers and so on. In that area, there is an obligation to send a number of copies of work published by them to the number of the most important public libraries, for example the National Library and some other most important libraries, and also, by the way, the Special Library for the visually impaired. Moreover, publishers are obliged to offer a number of copies to some other public libraries listed in the law for acquisition or purchase. Now, there are discussions going on in the Czech Republic concerning a possibility to extend this obligation also for digital-borne materials, not fixed on a video.

62. Argentina

In Argentina, this obligation is something borne by the publisher once a work has been published. If it is to post on a nationwide scale, then the publisher has to make available three copies of that work within three months' time. And these three copies are for the National Library, the Library of Congress and the national archives of the nation. If this obligation were not complied with, then the publisher could have to pay a fine. The amount of the fine is calculated as 10 times the value of the work. Legal deposit is very important to make sure that bibliographic acquisition is maintained in our libraries.

63. United States

An objective of Copyright exceptions and limitations for libraries and archives should be to encourage the adoption of national legal deposit laws and systems. Our first principle in the principles and objectives document is that 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. Legal deposit systems not only develop national collections and help in preservation efforts, but are particularly important for those works which a nation identifies as important for its own cultural heritage. United States law provides for copyrighted works published in the United States in the Library of Congress. While these deposits are frequently made as part of the United States' registration system, the two systems are technically separate. We should emphasize that this is not a formality in the Copyright system, and Copyright protection does not turn on the deposit, what would not be permissible, as we understand international copyright law. We ask publishers to give two copies of the best edition as determined by the Librarian of Congress, and if those best additions are not deposited, the Registrar of Copyrights is authorized to demand their deposit. Deposit systems are now faced with the acknowledged challenge of how to deal with digital works, including web pages and all types of Internet copyrighted works. The question of how legal deposit systems develop and respond to the digital environment is one that many of our countries are now facing. Our second principle under legal deposit is that libraries and archives also serve the public by maintaining essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve and disseminate government works. The second element of our principle is the copyright restrictions in government materials, which we acknowledge exist in some countries, although they do not exist in the United States. We believe that copyright restrictions on government materials should not limit the ability of libraries and archives who are serving a deposit function to receive, preserve and disseminate those government works as widely as possible.

64. Malaysia

The principle put by the United States is to encourage the production of the national deposit. The question is the obligation, if this is to be put in this text, so as maybe it can cause some publishers to their librarians and also their archive that will adopt to this.

65. Japan

National Diet Library collects Japanese governmental publications as well as private publications in an exhaustive manner under the book delivery system based on the National Diet Library Act, and the preservation of materials itself is a great mission.

66. India

India has a separate Act for the legal deposit, not linked to the Copyright Act of 1957. Legal deposit act is titled as the delivery of books and newspapers to public libraries Act of 1954, existing before the Copyright Act, and being independent of it. As per this each copy of book needs to be given to the four major libraries. Any failure of the publisher to provide a copy is punishable minimum punishment of \$1. Now the Ministry of Culture is amending this Act in order to extend it to digital works as well.

67. Egypt

On the subject of legal deposit, the national law only of 2002, in Article 184 obliges publishing houses and televisions and those that provide fixed copies, to register and deposit a copy or maximum 10 copies. These copies have to be deposited in libraries and account should be taken of the nature of these works. Legal deposit is not just a condition, and this is what article 184 of the Egyptian law on the subject says, that there should be no infringement of copyright or neighboring rights. So the purpose of legal deposit should be to preserve works and should therefore take into account the interests of copyright, not only being a simple mere condition for the protection. (Aunque me parece raro, el delegado afirma 2 veces que el deposito es una condición para la protección!)

68. Canada

In Canada, libraries and archives protect the cultural heritage of the country made available to all citizens. It includes the publication of archives, sound recordings, etc., in cooperation with other libraries and archives. It can also manage certain administrative and federal documents in accordance with the law. Canadian publishers under the law have to send a copy of their work in the week following the publication, the numbers vary according to the numbers published and then a description is added of each work to the database, that is accessible throughout Canada and the world. It doesn't matter what the media is. It could be books or audiovisual recordings or microformats. The legal deposit of these works is not official registration under Copyright, which is under a separate law. Since 2007, these regulations also cover online maps and publications and it involves all editors, associations and federal instances and ministries and the publishers of commercial reviews and so on. Choice is offered of different types of access to publications and free access, which means that everybody can consult and download these publications of Internet or restricted access via certain terminals without the possibility of downloading or printing or transferring the files, and then there are differences at the level.

69. United Kingdom

The United Kingdom legal deposit has been in effect since 1662. There is a specific act from 2003 which deals with legal deposit. In our legal deposit system six copies of every publication put into circulation in the United Kingdom must be deposited: one for the British library, one for the National Library of Scotland, one for the National Library of Wales, and the others remains for the leading universities. The definition of publication is very wide and broad, including as an example: books, publications, magazines, newspaper, maps, charts, plans, etc. The UK is also looking at how we can update the legal deposit so that it takes account of those publications which are only produced electronically, as well as the vast wealth of cultural and social information which is now found on websites and no where else and how these websites can be preserved for future heritage.

70. Jamaica

On the subject of legal deposits, Jamaica does have a National Legal Deposits Act from 2002, which as recently as last month was the subject of a national campaign to draw awareness to this due to the experience particularly in cultural preservation matters. Importantly Section 6 allows for the copying including downloading to reformat or refresh for preservation. The Legal Deposits Act is subject to our Copyright Act.

71. Germany

The earliest regulation we have to offer was one established in 1663, which provided for a rule on a deposit in the Royal Bavarian Library. The regulations on legal deposit in Germany can be found in our law on the National German Library. The law spells out what has to be deposited in the format of legal deposit, i.e., which materials. And with the last amendment of the law, Germany has opened up the scope of application to borne digital materials, and like in the United Kingdom, it covers a range of materials. The National Library Law also spells out who is under the obligation to comply with the obligation to a legal deposit and it spells out, as well, the procedure that applies. The German National Library does not contain any provisions, which allow for a use of a work, which would be relevant in the sense of the Copyright Code. Every kind of usage, which is a form of making use of copyright protected material, is being dealt exclusively within our Copyright Code. And the National Library Act regulates only the obligations of the library, its function, and as I tried to explain also, the legal deposit, which is not being considered a form of use in the sense of Copyright.

72. Austria

Legal Deposit is governed by the Austrian Media Act. It concerns mainly works of literature. However, in the framework of the recently produced legal deposit of digitally-borne works, there is some rather limited connection with copyright. Depending on the way particular works are delivered, acts of reproduction are necessary and have to be permitted. As the receiving institution, which is the Austrian national library itself makes, may make a copy of the delivered work. The distribution right does not exhaust with regard to this kind of copies and the clarification in this regard seemed necessary to us. Furthermore, we created a legal basis for what is commonly referred to under the term "web harvesting".

73. France

In France, the legal deposit has no connection with copyright. However, where it might have a connection with copyright and possible exceptions, is in the context of institutions that deposit material in the context of legal deposit. These institutions can, to some extent, like libraries and archives, reproduce and/or make available to the public this material that has come from the legal deposit. Those institutions in charge of legal deposit do benefit from exceptions, namely the National Library of the National Cinema Centre, the National Audiovisual Centre, and the service in charge of legal deposit, which is part of the Ministry of Interior. These exceptions do not make part of the Intellectual Property Code, and they are to be found in the codes on national heritage. These exceptions under the national heritage law respect the same principles as the exceptions regarding preservation. Consultation within those institutions is permitted.

74. Switzerland

Swiss Copyright Act does not require legal deposit. The reason for this lies in the rationale for copyright, as it is not so much considered an incentive for creation and instrument for access but rather seen as a natural consequence of the act of creation.

75. Chile

In Chile the deposit of works is considered in the framework of the process of registration, which in our case is voluntary. And since the registration of the work is voluntary, there isn't as such any legal deposit.

76. Greece

Greece also has a legal deposit system not linked to copyright. This system aims at creating a national collection of works, including audiovisual works and various sorts of electronic and digital works and aims at preserving the culture, heritage of Greece. It does not form a requirement for Copyright protection.

77. United States

In the United States works that are deposited in the National Library are available to users at that National Library and then under a variety of circumstances through various lending arrangements. Works that are deposited under the Federal Depository Act, the Government's works, are available to users in many libraries across the United States. For the legal deposit requirement to deposit works in the National Library of Congress the United States has a system of fines and penalties if the rightsholders, copyright owners or publishers, do not meet a demand for deposit of works if those works have not been deposited in compliance with the law.

78. Kenya

It seems like the whole issue of the legal depositors stems from the fact that the U.S. has a registration system for copyright and related works, which does not pertain to a number of countries. Legal deposit system is outside copyright law for most of the country including

Kenya, which is done under the Books and Newspapers Act. So I'm wondering where is the place of the legal deposit would be in relation to the exceptions and limitations that we're discussing regarding the libraries. Whether we actually do have room for that or whether this is something that is very specific to jurisdictions that have provisions for registration of copyright, and that is something which is historical.

79. United States of America

Legal deposit involves two aspects, one is the required legal deposit of private publishers and authors when they publish a work in the United States. The second part is a legal deposit system that seeks dissemination of government works. The second one definitely does involve copyright issues because the United States does not claim copyright in works generated by our government in the belief that a robust democracy requires the people to have full and unfettered access to government materials subject to issues of security and non-copyright issues. There are however, many jurisdictions that claim copyright over government works. When they claim copyright over government works, we believe there nonetheless should be a deposit system and that libraries should have special arrangements, including, if necessary, copyright exceptions and limitations, to disseminate those government works to the be people on behalf of robust democratic discourse.

80. Argentina

Works destined for the national library and the Library of Congress are available to the public wishing to consult them.

## TOPIC 4: LIBRARY LENDING

### Proposed Texts

81. African Group's Proposal:

Supply of works

It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.

82. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

83. Principles and objectives on the subject proposed by the United States of America

Library Lending

1. It shall be permitted for a library to lend copyright works, or materials protected by related rights, to a user, or to another library.

2. Notwithstanding the provisions of paragraph (1), any Contracting Party/Member State which expressly provides for a public lending right, may keep such right.

### Comments made to the Proposed Texts (November 22, 2011)

84. Kenya

The main focus of having this particular provision is to ensure that libraries can interchange works, lending the works or supplying the works to other libraries for the users within the acceptable limits of the law.

85. European Union

We do have since 1992 an exclusive right as far as the lending of the works of authors and the other subject matter protected by neighboring rights. There is a degree of flexibility allowed for in the community framework; if there are exclusions from the exclusivity of the right, there should be at least be the possibility for a remuneration, which is required, at least for authors. The flexibility for Member States allows to consider that in certain cases, say, films or phonograms, there is an exclusive right and in other cases, say, in the instance of books, there is a possibility to establish a remuneration right. The community framework is to be interpreted in a narrow manner. Member States can exempt certain categories of establishment including libraries from having to obtain the authorization for the public lending right, but you should be aware of the fact that the European Court of Justice has been very strict and has reminded on a couple occasions to Member States that they cannot just provide for a general possibility for libraries to lend works and other

subject matter without prior authorization or remuneration. The implementation is diverse and I'm sure some of them will intervene to explain those specific systems, but we have a system that works well, that allows public libraries to fulfill their mission and allow public libraries to be used by happy users but a balance has also been achieved in terms of a respect of the rights of right holders, in particular when an exception from the public lending right will be detrimental to the exploitation of the works and also ensuring remuneration. Inter-library loans is not regulated in the rental and lending directive, it is left for Member States to deal with obviously within the respect of their international and community obligations.

86. Italy

In Italy when it comes to library lending, we apply the relevant Community Directive in this area, that is the one just referred to by the European commission, speaking on behalf of the EU. We make it possible for libraries to lend works in a particular way. These provisions relate to print works, phonograms and videograms. When it comes to phonograms and videograms, they have to be works that were distributed at least 18 months prior to the first instance of lending, in order to ensure that the works during that 18 month period have been used in such way as to allow rightsholders to enjoy their benefits, and then they can be lent.

87. Senegal

The African Group position on this issue is fairly balanced. If we look at the content of the proposal, focusing on the last part of the last sentence, reference is made to fair practices determined in national law. That means the right of library lending is a right which can be regulated on the basis of the provisions of any future instrument that will come into being but also a right that can be implemented in accordance with national law and this really is a guarantee of the fact that we are trying to strike a proper balance among the interests of all right-holders in this area.

88. Egypt

As far as the library lending is concerned, there is no doubt that expanding this as an absolute right for the author will create destabilization of the balance between the authors and the public. Perhaps the library or the archive cannot lend unless it has the agreement of the author and that this would lead to certain delays in teaching and research; that therefore it should be said directly and not within another item that there should be an item which stipulates the libraries' right to lend without having the agreement of the author.

89. India

In the Indian Copyright Act of 1957, there is no express provision for library lending but it is an implied exception. Universities have granted commission to the Government of India, and under the Department of Higher Education of the Ministry of Human Resources Development, an Information Library Network Center has been created. This center is vital in the creation of the infrastructure for sharing information resources among all the universities and institutions in India which are members of the center. Private sector has setup a Development Library Network, which covers interlibrary loan in about 500 universities in India. Due to the paucity of funding some libraries are not able to buy certain books and when researchers request them, they have to lend them other library. In

that sense, providing an exception is very important for the interlibrary loan, as there is an urgent need to introduce this in the international level so that the member countries can adopt this system. The IFLA document which has been presented in the former background paper by Brazil, takes care of the traditional lending right, which exists in most of the European countries and some others. However most of the WIPO Member States do not include this right in their national legislations. With respect to such system, they have provided in paragraph two of the Lending Right Article: "Any contracting party which at the time of ratification or access expressly provides libraries limitation or exception to a public lending right of authors". They keep such provision and establish that notification is deposited within WIPO's Director General at the time of ratification of the treaty, for which the contracting party may withdraw the notification at any time, what I think it is a perfect alternative provided.

90. Czech Republic

In brief our legislation concerning public lending, as far as public lending of books and other printed materials and as far as libraries are concerned, it has been generally accepted. Only in 1990 an explicit exception to the exclusive right of public lending was enacted. According to it, libraries and also archives, galleries, museums and schools, have been allowed to lend physical copies of published works. In 2006, there was an amendment to the Copyright Act, which adopted a remuneration for authors with regards to public lending of works by libraries and other institutions before mentioned. This remuneration is paid from the State's budget to the collecting societies representing relevant national and foreign authors, through their reciprocal agreements. Libraries and other organizations are obliged at the request of collecting societies to submit information on the number of loans as well as all the information they may need to be able to allocate this remuneration. Authors are not entitled to remuneration if the published works are lent on the spot and also in the case of lending by schools and by some sorts of libraries listed in the Copyright Act. According to this exception, libraries can also lend on the spot phonograms and audio visual recordings. Libraries and other institutions usually provide as well special facilities with the necessary technical equipment.

91. Austria

The Austrian Copyright Act provides for lending rights, remuneration rights in line with the EU legislation that the representative of the European Union described before. This right is specifically formulated with regards to the non-commercial lending activities of libraries, for which we do not see a space for limitations and exceptions here. In our view, the fee in question can only be if the state decides to have such a right or not. However, I do not believe that we intend to discuss about a new lending right in this framework.

92. France

In 2003 we adopted legislation in this area, and there are four main aims that this legislation seems to achieve. Firstly, to ensure that copyright guarantees authors' legitimate remuneration when their works are subject to library lending in accordance with the EU directive which has been described by my colleague from the EU. The second objective is the consolidating access for libraries and access for the general public to works by ensuring that the user does not have to pay lending rights and also ensuring that it is not possible for an author to be paid several times over for the same thing. Thirdly, we try to ensure we are striking the right balance within the whole supply chain for books here and we're thinking particularly about the financial situation of authors, that is to say,

remuneration for lending and bearing in mind also the economic situation of libraries. Fourthly, we are trying to upgrade partnerships between libraries and bookshops. The purpose here is to ensure that we have a range of works as diverse as possible, in order to enrich cultural life at local and regional level. The legislation in specific terms makes it possible for remuneration to be paid when a work is lent and also allows lending to take place through licensing, not through an exception. Now, if you have a license granted, you have to ensure that there is a payment made and this payment involves double financing or double funding. Firstly, there is a first annual fixed sum paid by the state and, secondly, there is a second part of payment which is determined in accordance with a percentage of the public price for works to be purchased by a library that will then lend those works. This remuneration system is managed by the French Society for Authors and this is the body that collects remuneration and then divides it among authors and other appropriate right-holders. There is another important point; when this remuneration is paid, some of the funding is used to pay into a kind of additional or complementary pension or welfare fund for authors.

93. United States of America

Like India, the United States does not have an express provision of our law addressing lending by libraries. The capacity of our libraries to lend materials is implicit in our right of distribution and the description of what we call the First Sale Doctrine in Section 109. There are, however, in our law, as in other countries' laws and limitations on the capacity of third parties to lend software and sound recordings. In the United States we have some very carefully crafted exceptions to that right of software owners and sound recording owners so that nonprofit libraries can engage in proper circumstances under the lending of those materials. Regarding the submission made by Brazil, Uruguay and Ecuador in their library lending proposal, we do not have a public lending right and as we understand it the public lending right only exists as to a loan between a library and an end-user although we are certainly ready to be corrected on that. We think that the Brazilian, Uruguayan and Ecuadorian submission is in the right direction as to describing the lending capacity of libraries and archives in a neutral way.

94. Germany

Library lending in Germany is a very important part of our cultural life and it is long-established on the basis of our Copyright Code. It was established even before the corresponding European Directive came out. Very much in line with the Directive also in Germany we do not have a limitation or exception on library lending but a section in our law defines the authors' rights which spell out the condition under which lending by libraries are admissible. It is our Section 27 of the Copyright Code which states that lending is admissible in the sense that there is a remuneration that has to be paid for it. An adequate remuneration can only be made through or by a collecting society which in this case is the collecting society that is representing the authors' rights.

95. Ecuador

The aim of this proposal is to ensure that libraries can comply with an essential function, which is to lend the works to users through any means, for which we believe that it is essential that countries recognize and acknowledge the right of lending to users, and there must be an exception that protects libraries when they carry out that particular function. The Delegation regarding library lending would like to underscore the following: Given the fact that the Berne Convention and other Treaties do not provide such a right to any right

holder, this is a case where multinational law does not impose the application of the three-step; because exceptions to the lending right are based on national legislations. Furthermore, our Delegation is aware that there are countries that grant a right of remuneration or compensation to rights-holders to lend their works. We feel, alongside with Brazil and Uruguay, that this right can be maintained, as it provides sufficient flexibility to all parties.

96. Mexico

With respect to the issue of library lending, what we note here is a limitation to the right of distribution on copies of works that have already been set out in other types of support. Here we are talking about material support and I think this is an issue that will need to be analyzed and examined. In Mexico, we have not defined a system on public lending. Nonetheless, when we discuss provision for material support for consultation purposes, we understand that a copy cannot be obtained and what we consider to be important in the regulation of library lending is to establish whether we have monitoring means and whether we can actually recognize the source of the library that is providing the loan, in order to oversee the whole chain.

## TOPIC 5: PARALLEL IMPORTATIONS

### Proposed Texts

97. African Group's Proposal:

Purchase of works

It shall be permissible for libraries and archives to purchase and import legally published works to be incorporated into their collections in cases where a Contracting Party does not provide for international exhaustion of the importation right after the first sale, or other transfer of ownership of a work.

98. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

Right to Parallel Importation

Even 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.

99. Principles and objectives on the subject proposed by the United States of America

### Comments made to the Proposed Texts (November 22, 2011)

100. Kenya (Africa Group)

The main purpose of this particular article was, taking into account the various laws that ordinarily do not allow for parallel importation of copyright works, to ensure that libraries and archives are able to buy or get the books, within the provisions of the law, without breaking the law. It applies to works that are not available within the country and when there is the need to incorporate them in their collections.

101. European Union

It is indeed not very clear the link between parallel imports and distribution rights and the specific necessities for limitations for the benefits of libraries and archives and it would seem rather difficult to provide for specific types distribution rights and limited to specific beneficiaries. We should also remember that in international treaties the issue remains within the freedom of the contracting parties and the dangers associated with these type of proposals in terms of creating some sort of a parallel different market are to be carefully considered. There is not such a provision that is permitted under the legislation of the European Union, although we do have regional distribution rights.

102. India

According to the TRIPS is for developing countries to tell whether they want international exhaustion in their domestic laws. Same basis has been taken in the IFLA document as it is almost similar to the Article 6 of the WIPO Copyright Treaty, which respects the TRIPS flexibility. It is for countries to decide whether they want international exhaustion or national exhaustion. If the books are provided because of the advantages of parallel imports, if the same work is provided at a cheaper rates, libraries can do their public service function of making works available for the education and research in a better way.

103. Egypt

Article 6 of TRIPS states that the member countries or the contracting parties will determine the type of exhaustion of rights, whether it will be international, national or regional. This right has been mentioned in several other treaties, therefore, I find that this subject must be maintained with all its aspects. We must strongly adhere to it and maintain it in the forthcoming treaty considering its vital importance to libraries, especially in many developing countries.

104. Austria

In accordance with the EU legislation, Austria applies to principles of regional exhaustion of the distribution right within the European Union. We do not apply for any exception to this principle. Furthermore we do not really understand the suggestion that the library which buys a work does not distribute the work anyway. It would be the seller who infringes to the distribution.

105. Mexico

When we talk about acquiring and legally importing works, what type of works are we referring to? Are they published? Are they unedited? Are they disseminated? Can we establish the characteristics or features of these works?

106. Ecuador

Uruguay, Ecuador and Brazil have not put forward a joint proposal on this issue, but we support the African Group proposal in that libraries should not be hampered by the right to import and export in order to acquire in any part of the world legally the works they require for their elections. This is fully compatible with the TRIPS standards and WIPO.

107. Senegal

The African proposal is not intended to allow libraries or archives to start doing the work of booksellers or book distributors. The proposal does make the context quite clear, it is only within certain conditions that it would be possible and permissible, under certain parameters for libraries and archives to receive and exchange works. If you are talking about importation of works, it is because domestically it is not possible to lawfully obtain the work from those who have the responsibility of making it available. Parallel importation is not just an open license to say you can do whatever you like. We are saying that we can go abroad to get works only under certain conditions.

108. Mexico

I think it would also be very important to define how many works can be acquired for import and export.

109. Italy

Like the European Union, in Italy we have a number of difficulties with this provision. In our minds this is not an exception to copyright for bookshops or libraries; it has to be seen as something rather different, something that is a supplementary vision to the rules on the exhaustion of rights which are decided upon by each and every Member State. In other words, this goes well beyond copyright as such, but it implies the general system that has been selected by a given country to apply.

110. Germany

As Austria, also in Germany the regional exhaustion applies, very much in line with the legal situation in all European Member States, as there is no corresponding exception or limitation in German copyright law on parallel importations. What confuses me regarding the content of the proposal of the African Group is that it states that it shall be permissible for libraries and archives to purchase and import legally published works to be incorporated into their collections. The international copyright law to assign among others the right of distribution to the author and holders of related rights. We are not looking at the right of distribution but if you want, quite the opposite, the right of acquisition; and so far the very act of acquiring a work has never been the subject of copyright and certainly not the right of limitation, I would be very grateful if you could clarify this riddle a little bit.

111. Ecuador

We wish to make two comments with respect to the African Group proposal which deals with the possibility and the right for libraries to purchase and import legally published acquired abroad. This makes significant legal sense because we may find ourselves in the situation whereby the standards of the distribution and exhaustion of distribution of acquisition in a country, may imply that it is prohibited to export these works to the author. This would mean we would be able to import without the actual agreement of the author. So looking at the African Group proposal, then, regardless of the exhaustion, the libraries will have the freedom to be able to purchase and import works for their collections. It is not that the library would become a bookshop that will be selling books, but it will purchase and import for their use in their collections. On the other hand, we see there is no limit established or number of works that may be acquired. We don't think it would be appropriate to put a limit on the number of works or books to be acquired because this may not be compatible with national legislations.

112. Kenya

Following up on the intervention by the distinguished Delegation of Ecuador, and in an attempt to answer the question posed by the distinguished Delegation of Germany, I don't think this particular article is talking about the right of acquisition because there is no such right. We are looking at the issue of importation because most libraries and archives

especially in the developing countries, basically lack a lot on books, for which they get their materials from outside their countries. Most of them are not allowed to parallel importation of copyrighted works. This is just a way to allow to allow them to bring books without necessarily infringing copyright. To answer the Delegation of Mexico we cannot quite say the limits of the importation. For instance, if it's the Kenyan National Libraries which has let's say 36 branches in Kenya and they want a couple of books within their collection so they would have the permission to be able to bring those books specifically for their collections to be used within the library, not for them to start selling in any commercial activities.

113. Mexico

We understand that parallel importation is because within the country that is going to import there is a specific market, and what libraries will be trying to do is acquire specific works for their collections. We just have a concern: It is valid for a library to take part in public auctions outside of their country, for instance on a manuscript? If we are not dealing with published works, they would not then fall into this category of parallel importation?

## TOPIC 6: CROSS-BORDER USES

### Proposed Texts

114. African Group's Proposal:

Cross-border uses of works and materials reproduced under an exception or limitation

It shall be permissible for libraries and archives located in the territory of a Contracting Party to send, receive or to exchange a copy of work, or material protected by related rights, legally made in the territory of another Contracting Party including copies of works and materials protected by related rights made in accordance with this Treaty.

115. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

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.

116. Principles and objectives on the subject proposed by the United States of America

### Comments made to the Proposed Texts (November 22, 2011)

117. Kenya

On the issue of cross-border uses, the main reason for drafting this particular provision was to allow for interlibrary exchange across the borders, and this particular provision just says: "It shall be permissible for libraries located in a territory of a contracting party to send, receive or exchange a copy of a work or material protected by related works legally made in a territory of another contracting party, including copies of works and materials protected by related rights made in accordance with this treaty".

118. Austria

We would only add two sentences to the issue of cross-border uses. In our view, this issue is already covered by the cluster of reproduction and distribution of copies to the clients of libraries and archives as well, and the restrictions in national copyright law to production and distribution activities of said institutions apply to the addressed cross-border uses as well.

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

### Proposed Texts

#### 119. African Group's Proposal:

##### Orphaned works

1. It shall be permitted for the beneficiaries provided for in (specify) to reproduce and use a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry.
2. It shall be a matter for national law to determine whether certain commercial use of a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry would require payment of remuneration.

#### 120. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

##### 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,, 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.

##### 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.

#### 121. Principles and objectives on the subject proposed by the United States of America

## Comments made to the Proposed Texts (November 23, 2011)

### 122. Kenya

This is quite a controversial issue and we take cognizance of that particular fact, as the whole issue of orphan works is still developing within the copyright field but it has become more and more important with the development of the Internet. The main reason for having this is just to provide a progressive provision. Our proposal reads: "It shall be permitted for the beneficiaries provided for to reproduce and use a work and materials protected by related rights for which the author or rights-holder cannot be identified or located after reasonable inquiry". The whole issue of reasonable inquiry or due diligence, is something that is quite subjective, probably to be set up by national laws, which would need to decide how far they will go in terms of this. "It shall be a matter of national law to determine whether certain commercial use and works protected by which the author cannot be identified or located after reasonable inquiry would require payment or remuneration." Also this is subject to modification because here we are only talking about the use by libraries and archives. Probably the second paragraph is not something that is applicable for purposes of libraries and archives, for which we will just concentrate on the first paragraph.

### 123. Argentina

Argentina proposes to add a reference to exhausted works, that are no longer available on the market, works that for instance have not been republished. This is actually something we are looking at domestically, as we are studying limitations and exceptions for copying works under those circumstances. Following discussion on this issue, we may consider that limitations or exceptions for preservation already cover this issue. We have also seen there are certain provisions on exhausted works in the legislations of Finland, Austria, Mexico and others, and all of them refer to the preservation section. We would like to request the inclusion of exhausted works under 7. We are still thinking about the best possible legislative framework but right now we would like to keep that reference under cluster 7.

### 124. Senegal

We are very much aware of the fact that these works are very delicate in nature. After all if you are going to declare a work as being an orphan work it is very important that you respect a proper procedure before you do so and you must not be hasty in declaring that a work is orphan. It was important to think about cases where a rightholder might appear at some future stage after a work has been declared an orphan work. The right-holder may reappear at some future stage. And simply because a work has been declared to be an orphan work, should the right-holder be forced to suffer from that? I think we have to think about the legal consequences of that and think about that possible scenario and how we would deal with it. Further, we'd like to raise a question to Argentina. The concept of exhausted works is something rather different. If you talk about exhaustion of rights in terms of protection, that means protection has expired, the original copyright period or post-mortem period, and the work would be in the public domain. However, we also understand that Argentina was talking about something different, a work no longer available on the market, but we would like to be absolutely clear on what exactly they mean by "exhausted works". Do they mean a work that is simply out of print, not available

on the market? Or a work for which the rights are already exhausted, where copyright has already run out?

125. Argentina

Senegal was asking on the interpretation given by Argentina to the term "exhausted works". It seems to exist some confusion about what this means in legal terms. We were talking about works no longer available on the market, or that were out of print, simply because publishing houses decided no longer to print or to produce them. We were not talking about exhaustion of rights when we talked about exhausted works. We were simply saying that the works were no longer available, that the work itself had run out in terms of stocks available on the market.

126. India

Orphan works are copyrighted works for which the rights-owner is not available, rights-owner may be the publisher or author. In this case, Indian copyright answers by the way of compulsory licenses. There is an authorized entity called the Copyright Board. Any publisher who would like to publish such works again, has to go and file an application, seek a compulsory license, then they have to create a kind of due diligence process for that he has to publish an advertisement in the national daily English and Hindi newspaper. If it is a regional language work, he has to publish an advertisement in the regional language newspaper giving some time limit. Within that time limit if no right-owner emerges then he has the right to seek a compulsory license from the Copyright Board and after examination of the case, it awards the compulsory license. The person seeking the compulsory license need to deposit the remuneration fixed by the board because tomorrow the legal heir of the rights-owner emerges and seeks that injustice has been done to them. That is the depositor in the government account and then if he emerges the money will be given, otherwise it is used for the development purpose of the government. But in this case, it is difficult for the library use to go and seek a compulsory license; so exception could be given. The distinguished Delegate of Argentina also mentioned a very important and relevant issue of when rights-holders are available but the book is out of print thus not profitable to them. But there are clients, students and researchers using that book, there is a demand for the book in the library and in such situations, there is exception to be given to the library to make that work available to the client.

127. United States of America

The problem of orphan works is one that is very important to the copyright system and many of our jurisdictions have been working on this problem. Canada and Japan have a robust system for dealing with orphaned works, a system which crosses far beyond just the needs of libraries and archives. The United States has considered and will consider further legislation in this area and we know our colleagues in the European Union are working on. The question is how the question of orphan works is especially needed in the area of libraries and archives. Article 21 of the Africa Group proposal says: "It shall be a matter for national law to determine whether certain commercial use of a work for which the author cannot be identified after reasonable inquiry would require payment or remuneration." From the United States' perspective, the commercial use of a work is not something that a library or archive would engage in. We believe that properly constructed exceptions for libraries and archives covering preservation, covering distribution, reasonably necessary for research and for private uses and the other forms of properly crafted library and archive exceptions will apply equally to copyrighted works, whether they

are orphaned, whether their parents return or not, whether their parents are well-known, whether they have been abandoned. The exceptions would apply to the copyrighted works regardless. So for the United States in our discussion, there is a general question why the orphan works issue is different, why the orphan works do not actually fall within each of the other categories so that as long as that exception is properly constructed, it applies to all the copyrighted works, whether the work has an easily located owner or has an owner that cannot be located.

128. Kenya

I would like to apologize we moved to Topic seven instead of dealing with the cross-border, but I think we have proceeded pretty well with orphaned works and then secondly I just wanted to respond to the distinguished Delegate of the United States on the issue of orphan works. The second paragraph when I made my presentation I made it clear that that was based on the holistic approach the African Group; so the paragraph that was relevant in terms of orphan works for libraries was paragraph 1 only. We take cognizance of his comments with regard to the orphaned works and also I mentioned earlier this is an area still developing so we are still open. This is not something that is cast in stone and many jurisdictions are still trying to figure out how to deal with the issue of orphaned works.

129. Brazil

Just to say we agree with the Delegation of Argentina that we should also look at the issue of out of print work. Noting the intervention made by the distinguished Indian Delegation in the sense that commercial viability or viability of the exploration of works should not prevent library users to have access to it. We agree with the discussion of this topic under this work we are making here.

130. Ecuador

We wanted to state the interest that our Delegation has vis-à-vis the presentation on orphan works, as we feel that there are many cases in which traditional exceptions are not exercisable for libraries and they need to comply with their function. This means that if there is no rights-holder requesting a license, the library should have a provision that protects it to properly use an orphan work. We would also like to state that our Delegation considers it is very important to follow the discussion on retracted and withdrawn works.

131. European Union

We concur with the remarks made by the Delegates of Kenya and Senegal as regards this issue being an issue which is developing, and at best it is unclear, and at worst is very controversial. There is a tendency which is that on the label "orphan works", whenever we start talking about something that seems very reasonable, which is how can we ensure that when there is no right-holder that can be identified or located after a diligent search, the work can be used and very quickly, this type of discussion turns into a discussions on mass digitization, use of works out of commerce, use of works that have never been published and where maybe the author of the work never wanted the communication of such works. These are all very different matters and they are extremely delicate. The limited legislation in place follows different approaches and the same applies for texts that have been discussed in the past or are being discussed. There are proposals based on a

license granted by a government. We are having discussions in the European Union as to whether other forms of licenses could be used. The United States at a time was considering a limitation on liability of more traditional forms of limits and exceptions. We are at the stage where there is very little precedent, where the link to limitations and exceptions for libraries and archives is not necessarily established, and where we think that caution needs to be exercised. The Delegate from India approached me to ask what was the situation in the moment in the context of the European Union and referred to a Memorandum of Understanding that had been developed in 2008, which was very specific on a very crucial issue in order to in good faith declare a work an orphan, as to what steps are needed to be taken before you can declare a work an orphan? What is the diligent search you need to undertake? Which may be very different if it is a potential or suspected orphan book, or if it is a newspaper or an audio visual work or another type of work. In some cases we have had lengthy discussions as regards to photography where the problems are extremely serious and the risk of mistakenly orphanizing works are very high. The European Commission has put on the table a proposal of a Directive on permitted use of orphan works, which is currently under discussions with Member States, in the earliest stages of negotiations obviously with the European Parliament and in parallel we have been discussing solutions for out-of-commerce books based on voluntary agreement of right-holders, voluntary mandates to collecting societies and licenses granted by collecting societies. It is very important not to put together a number of different issues. We need to look for mechanisms that help facilitation of making available of works that otherwise may be forgotten in libraries and archives but that is not necessarily passed by a limitation to the right of others.

132. Senegal

After all, before you can talk about a work, you have to start off with something written by an author and then edited by an editor and then it's going to be published by a publisher. That is a work in physical terms. When we talk about something out of stock we must bear in mind we are talking about booksellers and even publishers running the risk of their livelihood coming to an end if they have nothing to sell. There is an obligation that should be borne by publishers when a book is out of stock to proceed to republish that book and such clause is frequently included within publishing contracts. It may happen that sometimes an author can turn around and say, look, you have allowed my work to be sold out so it is no longer lawfully available on the market. You have not fulfilled your contractual obligation to republish the book so I believe you have actually not been in the situation where you have properly abided by the contract and I will now withdraw and say the contract is null and void and I, the author, will go do what I like to ensure they publish enough books to make it available on the market. I think we have to be very careful.

133. India

We would like to draw attention to the comments made by the Delegate of the United States, as he has pointed out perfectly the right things about the commercial and non-commercial purposes of the use of orphans works. The due diligence follows strictly the due diligence clauses when books are republished, and often works are published with commercial purposes. In this case the work of libraries is for non-profit or non-commercial purposes, as they lend these books either for education, research, or entertainment. I would like to draw your attention to a recently published work by Neil Netanel, "Copyright's Paradox" published by Oxford University Press. He mentions two reasons for the significant increase in copyrighted works that are often published: one is the recent increase in the extension of the protection term of copyrighted works, and the second reason is the lack of formalities for registration of copyrighted works. He says there is a

lack of incentive for publishers or right owners to republish these books again. Because of this, even though there is demand in libraries, and libraries are suffering because of this, as they are not able to satisfy their clients. In light of this, there is a need for an exception for non-profit libraries

134. Egypt

There is no doubt that orphan works is one of the main issues dealt with by libraries because the libraries have to know how to deal with them. The problem rises when these works are no longer orphaned; so the preparation should take this into account and provide for certain steps before declaring a work to be orphan. The African proposal referred to the fact that is stated after carrying out what is called reasonable inquiry, but the question remains on what are the criteria for the fact that this is reasonable inquiry? How can you say it is a reasonable or not reasonable inquiry? Therefore, it is left to the national law criteria.

135. Kenya

We just needed to clarify that second paragraph is not applicable in relation to libraries and archives.

136. Italy

We fully agree with everything that was stated by the European Union. We have great number of doubts vis-à-vis the possibility of regulating orphan works and leaving the concept of diligent search to be regulated by national legislations. For example: perhaps in a specific country, there is a work which is foreign in nature, and it has a foreign editor, and that was published for the first time in another country. Now, where does the research needs to be conducted so as to state whether the work is orphaned or not? It is certainly not in the country where the library will use that work as an orphan work. We would need to go to the country where the work was published for the first time or indeed where the author lives, his place of residence or where the editor published the work. So this is something extremely complicated. We cannot have a criterion which varies from country to country. We cannot say I'll conduct research where the work was published for the first time or it's enough for me to carry out research in my own country or it's enough for me to carry out research in the country where the rights-holder lives. We need a criterion which is across the board for all countries so there is a need to set out several principles in an international instrument. The issue of orphan works is extremely complex. We cannot settle it in a very straightforward simple fashion. We cannot state that orphan works can be used by libraries. There again we have a problem of competition. Now, what is the reason for works to be used by libraries if they are orphaned works? And why can't they be used by editors? For instance, that is a question we need to look at, so they can be used economically. There are a many great problems that suggest we need to proceed with a great deal of caution here.

## TOPIC 8: LIABILITY OF LIBRARIES AND ARCHIVES

### Proposed Texts

137. African Group's Proposal:

138. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

#### Limitation on Liability for Libraries and Archives

A librarian or archivist acting within the scope of his or her duties, shall/should 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 instrument, 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.

When a Contracting Party/Member State provides for secondary liability regimes, libraries and archives shall/should be exempt from liability for the actions of their users.

139. Principles and objectives on the subject proposed by the United States of America

### Comments made to the Proposed Texts (November 23, 2011)

140. Ecuador

Taking into account the huge number of works to be dealt with by libraries for their function, for the benefit of the community, and given the increasing expansion in civil and criminal rights for non-authorized uses of works, as well as the evolutions in copyright, we feel that we should set limitations for liability which can threaten the work of libraries when acting on the basis of good faith, believing their use is not infringing. There is a need for libraries not to be subject to sanctions because of the behavior of their users. In this regard, Ecuador's proposal by both Brazil and Uruguay seek to protect the functions of these institutions.

141. United States of America

Under the Other General Principles section of our Principles and Objectives document, we expressed our concern in the following principle: "National copyright laws may recognize limitations on the liability of certain types of damages applicable to libraries and archives and their employees and agents that act in good faith, believing or having reasonable grounds to believe that they have acted in accordance with copyright laws". We further provided as a principle: "Existing national systems of exceptions and limitations for Libraries and Archives should be examined to determine whether they require updating in the digital era to enable libraries and archives to continue to carry out their public service mission." United States law embodies the concept of limitation of liabilities in a number of ways. As suggested in our Principles and Objective documents, libraries and archives and their employees should not be liable when they act in good faith, believing or having reasonable grounds to believe that they were acting in accordance with our copyright law. We are concerned about the breadth of the language of the proposal coming from Brazil, Ecuador and Uruguay because it seems to exempt the librarian or archivist from any copyright liability at all because it says: "Shall be protected from claims for damages from criminal liability, and for copyright infringement". We believe that the world of professional librarians behave in a extremely respectful manner toward copyright, but we are not sure it would be appropriate to totally exempt librarians acting in their capacities as professionals from all copyright infringement. We do believe where a country has a system of statutory damages, that librarians acting in their professional capacity in the appropriate circumstances should be shielded from those statutory damages.

142. Brazil

This provision aims at,excluding the liability of employees of libraries and archives when doing and performing their daily duties in good faith there is any infringement that occurs without their consent and without their participation. Our national libraries also are demanding this from the Brazilian authorities, as they would like to have some legal certainty on the tasks they perform, while they contribute to the dissemination of culture and knowledge. This is increasingly relevant now that we are approaching a new digital era and many of the materials are not in the traditional print format.

## TOPIC 9: TECHNOLOGICAL MEASURES OF PROTECTION

### Proposed Texts

143. African Group's Proposal:

Circumvention of technical measures

Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in (specify) have the means to enjoy the exception where technical protection measures have been applied to a work, including when necessary the right to circumvent the technical protection measure so as to make the work accessible.

144. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

Obligations Concerning Technological Protection Measures

1. Member States /Contracting parties shall ensure that libraries and archives have the means to enjoy the exceptions and limitations provided in this instrument when technological protection measures have been applied to a work or other protected matter.

145. Principles and objectives on the subject proposed by the United States of America

### Comments made to the Proposed Texts (November 23, 2011).

146. Kenya

On the technical circumvention of technological protection measures, there are a number of provisions in copyright laws that make circumvention of technological protections illegal so we crafted this to take into account there are certain users that ordinarily would fall under exceptions and limitations so this particular provision would allow those who would otherwise be entitled to the exceptions and limitation to be able to access the works in the digital environment. Basically to access works, which ordinarily would be accessible, but in the digital environment there are added measures that stop that particular access.

147. India

We draw the attention on the agreed statements of the Article 10 of the WCT and Article 16 of the WPPT, which clearly explain or declare in fact that limitation and exceptions are similarly extended to the digital environment. It means when we are extending limitation exceptions given to the Libraries, there is a need for giving or allowing them to circumvent the technological protection measures but the care should be taken that it should not lead to piracy.

148. Brazil

We consider that a provision regarding technological protection measures in this new context of digital works is meaningful and this is our first approach to a language. We understand that we may view it on this and try to capture some situations that may arise when we discuss this among the different Delegations that may have their different contributions and experience on that.

149. Ecuador

The obligation to protect technological measures of protection which stem from Article 11 of WIPO Treaty on Copyright, expressly flags that due protection operates when we are dealing with a measure which protects against a non-authorized use by the right-holder or a use which is not permitted by the law. Very clearly the WIPO treaty is allowing or providing flexibility to countries so that through their legislation they can establish limitations to technological measures of protection. The joint proposal is there to flag that given a specific situation, that is the exceptions by libraries, when carrying out their function, it means that they are in a position to circumvent those measures to exercise the measures provided for under law.

150. United States of America

The United States does not have any specific provisions in our law addressing technological protection measures and the circumvention of technological protection measures for libraries except for one small provision addressing occasions when libraries may circumvent a technological protection measure for access in order to determine if they wish to purchase a copy of a work for the library's collection, but we do have what is probably the world's most robust system for providing exceptions for technological protection measures through an administrative proceeding that is conducted by the Librarian of Congress in coordination with part of the Department of Commerce. The Librarian of Congress and her colleagues undertake a proceeding every three years to determine exemptions for persons who are users of a particular class of works if such persons are or likely to be in the succeeding three-year period adversely affected by virtue of such prohibition in their ability to make non-infringing uses of that particular class of works. We have used this for example, to permit the use of films in university film school classes and we have used this for certain cases of technologically obsolete materials or materials that are in technologically obsolete formats protected by technological protection measures. This is one place where the question of limiting the liability of librarians is very important because U.S. law also contains a provision limiting the liability of our librarians and archivists when they are not aware or have no reason to know that they were violating technological protection measures, for which United States law exempt them from any possibility of criminal liability.

151. Italy

Thinking about technical measures, we wonder about the application of these measures to libraries. We know that there's a basic principle that applies and the basic principle is that libraries are supposed to obtain works lawfully, legally. So if works are obtained legally, then this whole question of technological protection measures does not apply. We don't see why we would need technical protection measures to be applied to libraries. It would

seem that technical protection measures would not apply if the work is acquired legally and lawfully as it should be.

152. Ecuador

We would like to give an example which may help to clarify the question which has just been raised, that is, what sense or meaning is there behind having a technological measures of protection allowing for circumvention by archives or libraries if these have been legally acquired or not. An archive or library may have acquired a digital collection of music, for instance, and they need to have a preservation or replacement copy. In that case, they will need to circumvent the technological measure for making the copy so that the exception can be used of the preservation or replacement copy. So that is really where the exception would come into play.

153. Egypt

The danger of TPMs is in certain cases when they apply to works that have fallen in the public domain or others which are subject to exceptions in the field of education and scientific research. Here we should restrict or, rather, we should ban TPMs if it is a matter of a work that is not protected. If the work is subject to TPM, though it has fallen in the public domain, then in fact it does not need the TPMs.

## TOPIC 10: CONTRACTS

### Proposed Texts

154. African Group's Proposal:

Relationship with contracts

Any contractual provisions which provide exemptions from the application of the limitations and exceptions listed in Article 2 shall be null and void.

155. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal

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.

156. Principles and objectives on the subject proposed by the United States of America

### Comments made to the Proposed Texts (November 23, 2011)

157. India

Many librarians have problems with contracts, and how these contracts are overriding the legitimate limitations and exceptions provided by domestic laws, so there is a need to put an end to this kind of contracts, or to put in an exception for them. As an example, when a library buys a physical book, there is no limit on the number of times it is lent to the clientele. Unfortunately, in the digital environment, contracts on digital copies allow them to lend a copy only for 20 times. The reasons given by the person who imposes the contract is that there is a wear and tear of the physical book, and you go back to the shop and buy that book again. In a digital copy there is no such thing that happens, so then there is a need for limiting the number of times a library lends it so that it will come back again, to make that same copy available to the client. There is a need for an exception to be provided, allowing the libraries to continue with the exceptions and limitations, and their functioning should be made out of this kind of problem.

158. Ecuador

As another example that may clarify this issue, it is a license which prevents from having a preservation copy. In that case the contract needs to be abided by the treaty. We feel that it is important for this issue to be duly taken into account and considered.

159. United States of America

We must address this area cautiously because we do not want to limit the freedom of libraries to enter into contractual arrangements with suppliers of materials. It would be better to determine what kind of arrangements librarians are best able to enter into and the experience in the United States is that our libraries are quite effective in dealing with publishers, in demanding improved arrangements and we would be very hesitant to adopt or to thinking about any type of norm which could limit the capacity of libraries to negotiate the best deal possible for the most materials of their collections.

160. Australia

While in Australia we have actually concerns raised by our libraries about their ability to negotiate arrangements with publishers, we still don't think that having an international norm in this area is really the appropriate way to approach this issue and as with some other challenging issues we are facing at the moment, we do think this one may be best addressed by the publishing industry, and the libraries coming together to negotiate a practical solution to this particular problem.

## **TOPIC 11: RIGHT TO TRANSLATE WORKS**

### **Proposed Texts**

161. African Group's Proposal:
162. Proposal from Brazil, Ecuador and Uruguay to the African Group's proposal
163. Principles and objectives on the subject proposed by the United States of America

### **Comments made to the Proposed Texts**

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