



International Federation of
Library Associations and Institutions

Treaty Proposal on Limitations and Exceptions for Libraries and Archives

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

20 January 2012



Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives

In November 2010 the WIPO Standing Committee on Copyright and Related Rights (SCCR) agreed on a work program on copyright limitations and exceptions for the two-year period 2011-2012. This work program stated that at the 23rd session of SCCR three additional working days dedicated to limitations and exceptions for libraries and archives would be added to the regular session.

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

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

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

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TOPIC 1: PRESERVATION

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

Right of Preservation of Library and Archival Materials

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

Explanatory Note

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

The Article permits libraries and archives to reproduce for preservation purposes as many copies of works or materials in as many formats as are technically needed in accordance with the standards of best professional preservation practice. (Examples of some current preservation standards can be found at http://libguides.wits.ac.za/digitisation_preservation_and_digitalcuration). Sub-paragraph 2 allows libraries and archives to use a preservation copy as the working copy in order to preserve the original work (which may be very old, very fragile, rare or precious or in the digital environment may need to be in a different format to be usable).

The Article provides flexibility to copy, format-shift and migrate copyright works and materials to different platforms and to use these copies in place of the original, so that the original itself is not damaged and is preserved for posterity.

TOPIC 2: RIGHT OF REPRODUCTION AND SAFEGUARDING COPIES

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

Right to Reproduction and Supply of Copies by Libraries and Archives

- 1) It shall be permitted for a library or archive to reproduce and to supply a copy of a copyright work, or of material protected by related rights, to a library user, or to another library or archive, for purposes of:
 - a) education;
 - b) requests by users for research or private use;
 - c) interlibrary document supply;provided that such reproduction and supply is in accordance with fair practice.
- 2) Libraries and archives shall be permitted to reproduce and supply a copy of a copyright work or 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.

Explanatory Note

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

In this Article the limitation of 'fair practice' is derived from the use of the term in Article 10 of the Berne Convention. This limitation is needed because it would not normally be regarded as 'fair practice' to copy a whole book for instance but in other cases it would be fair practice to copy the whole of smaller works such as a poem, a periodical article, an illustration, a recipe or a knitting pattern, since without the integrity of the

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

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

TOPIC 3: LEGAL DEPOSIT

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

The Treaty Proposal does not cover Legal Deposit.

TOPIC 4: LIBRARY LENDING

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

Right to 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) Any Contracting Party which at the time of ratification or accession expressly provides for libraries a remunerated limitation or exception to a public lending right of authors may keep such provisions, provided that notification is deposited with the Director General of WIPO at the time of ratification or accession to the Treaty. The Contracting Party may withdraw the notification at any time.

Explanatory Note

This Article introduces a right for libraries to lend. Its purpose is to provide the right of libraries to lend by any means both analogue and digital works or materials to their users.

The right to lend granted by this Article would be upheld in licensing contracts under Article 13 and in the application of technological protection measures under Article 14 of this Treaty.

TOPIC 5: PARALLEL IMPORTATION

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

Right to Parallel Importation

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

Explanatory Note

This Article provides an exception to the distribution right. Its purpose is to ensure that the principle of international exhaustion (whereby the distribution right is exhausted after first sale anywhere in the world) applies to the acquisition of works and materials protected by related rights by libraries and archives for their collections, whether by purchase or through gift or exchange.

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

TOPIC 6: CROSS-BORDER USES

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

Right to Cross-Border Uses

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

Explanatory Note

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

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

This is not a carte blanche provision since each exception has a set of conditions and these conditions apply in conjunction with Article 12.

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

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

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

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

Explanatory Note

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

This Article provides an exception for libraries and archives to use ‘orphan works’ when unable to identify or locate the rightholder after reasonable inquiry. It also allows equitable remuneration for the rightholder, should he or she come forward, and allows the rightholder to require cessation of use of the work or material.

Right to Access Retracted and Withdrawn Works

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

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

Explanatory Note

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

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

TOPIC 8: LIABILITY OF LIBRARIES AND ARCHIVES

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

Limitation on Liability for Libraries and Archives

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

Explanatory Note

This Article introduces the protection of limited liability to libraries and archives, their employees and agents for primary copyright infringement that may result inadvertently from their good faith interpretation and application of national copyright law (Sub-paragraph 1). Sub-paragraph 2 also protects libraries and archives from liability for secondary infringement where the user of their services has committed the primary infringement.

TOPIC 9: TECHNOLOGICAL MEASURES OF PROTECTION

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

Obligations Concerning Technological Protection Measures

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

Explanatory Note

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

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

TOPIC 10: CONTRACTS

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

Obligation to Respect Exceptions to Copyright and Related Rights

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

Explanatory Note

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

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

TOPIC 11: RIGHT TO TRANSLATE WORKS

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

The Treaty Proposal does not cover the Right to Translate Works.