

COPYRIGHT EXCEPTIONS AND LIMITATIONS

What are copyright exceptions and limitations?

The original purpose of copyright law is to encourage creativity and innovation. It aims to do this in two ways. On the one hand, it grants legal protection so that authors and creators can exploit their works, for example, get financial reward for their work. On the other hand, it provides reasonable access to society to encourage innovation, research and further creativity. So from the beginning, copyright law was meant to balance the need to protect creators with the user's need to access information and knowledge goods.

The legal protection granted to the creator is in the form of an exclusive right to control production and use of the work by others, for example, copying, distribution, translation, public performance and broadcasting. This is a powerful, monopoly right. In order to provide reasonable access to society, the exclusive rights are limited in two main ways.

- The right is granted for a limited amount of time only, known as the term of protection. The international standard term of protection for a literary work is the life of the author plus 50 years after death. (See also eIFL Handbook chapter Copyright, the Duration of Protection and the Public Domain).
- The rights granted are subject to certain exceptions and limitations to enable access to copyrighted works.

Exceptions and limitations can be considered in three broad categories. The first category safeguards fundamental user rights concerning the individual. Examples include public speeches, the right to make quotations, the reporting of current events, the right to parody, and reproductions for private non-commercial use. The second category reflects commercial interest, industry practice and competition. This includes press reviews, and de-compilation/ reverse engineering of computer programs for interoperability. The third category concerns society at large and promotes the dissemination of knowledge and information. It includes provisions for libraries, educators for teaching and research, people with disabilities, and reporting of parliamentary and judicial proceedings.

Exceptions and limitations can be either compensated or uncompensated. Compensated exceptions mean that the copyright owner is usually entitled to a payment when the exception is used. In other words, the user does not need to ask for permission, but the rightowner is remunerated for the use (so it is a bit like compulsory licence). Uncompensated exceptions mean that the copyright owner is not compensated when the exception is exercised. Compensated and non-compensated uses are discussed in **Kenneth Crews, WIPO study on copyright limitations and exceptions for libraries and archives, p.38.**

In addition, some countries have an "all-purpose" general provision. In the US, this is known as the doctrine of "fair use". Codified in US copyright law, it is subject to four criteria and has evolved through court decisions over the years. The UK has a related concept known as "fair dealing", which takes a narrow, specific approach and

covers mainly research and private study, criticism and review, and news reporting. The precise definition and interpretation of fair dealing is ultimately determined by the courts. Countries that inherited British copyright law are likely to have the fair dealing provision.

Copyright exceptions and the international legal framework

The international copyright system has from the earliest days recognised exceptions and limitations to copyright, which are considered an essential part of a well-functioning copyright system. Accordingly, the Berne Convention for the Protection of Literary and Artistic Works (1886) contains several exceptions and permits signatories to devise further limitations in accordance with national legislation. This includes a mandatory, uncompensated exception for the quotation of copyrighted works compatible with “fair practice” (Article 10(1)), and gives discretion to member states to create uncompensated exceptions and limitations for a range of uses such as news reporting, illustration and recording musical works, subject to certain conditions.

The Berne Appendix (1971) also contains special provisions for developing countries and places limitations on the right of translation and the right of reproduction, subject to strict conditions. (Due to the complex procedures and limited scope, the Berne Appendix has turned out to be of limited benefit to developing countries).

The Berne Convention further allows the creation of additional uncompensated exceptions to the right of reproduction provided they meet the controversial three-step test (Article 9(2)) that was carried forward and extended in TRIPS (Article 13). The scope and application of the three-step test is subject to debate by legal scholars and law-makers. In any case, the three-step test is a mere drafting tool for the legislator and, once applied, should not be included in national law.

Exceptions and limitations for digital content

The 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, known collectively as the “Internet treaties”, updated international copyright law for the digital environment. Both treaties contain important statements regarding exceptions and limitations in the digital environment. In the Preambles, the need to maintain a balance between the rights of rightholders and the larger public interest, particularly education, research and access to information, is recognised.

An agreed statement reaffirms that signatories can carry forward and extend into the digital environment exceptions and limitations in their national laws, and that they may devise new exceptions and limitations that are appropriate in the digital network environment (WCT Agreed Statement to Article 10, WPPT Agreed Statement to Article 16).

Practice

Except for Article 10(1) of the Berne Convention (see above), exceptions and limitations are discretionary and are left for national governments to decide. This provides countries with flexibility to create access regimes that meet national

educational cultural and development needs. However, evidence shows that these flexibilities are often not transposed into national law for the benefit of the public and has led to a patchwork of national exceptions that often do not meet the needs of the global digital environment. Two WIPO commissioned studies, *Copyright Limitations and Exceptions for Libraries and Archives* (Crews, 2008) and *Copyright Limitations and Exceptions for the Visually Impaired* (Sullivan, 2007), confirm this trend particularly in relation to developing countries. A study by Consumers International (2006) found that none of the eleven developing countries surveyed in the Asia Pacific region had implemented all the flexibilities available to them under international treaties.

In addition, new treaties over the years have introduced new exclusive rights, new subject matter and new modes of exploitation. Exceptions and limitations have not evolved at the same pace as the development of authors' and other rightsholders' rights, seriously upsetting the copyright balance. Private licensing of electronic materials in libraries frequently undermine the exceptions and limitations, and the application of technological protections measures can prevent their use. (See also eIFL Handbook chapters *The Relationship between Copyright and Contract Law and Technological Protection Measures*).

Policy issues for libraries

Exceptions and limitations are the cornerstone of access to copyrighted content. Without them, copyright owners would have a complete monopoly over use of copyrighted materials. Works in copyright could only be sold and lent. Libraries, and the people using them, could only view or read copyrighted materials. All other uses would require permission. This would threaten the functioning of libraries and interfere with the free flow of information. Thus, libraries cherish the public policy goals enshrined in the principle of exceptions and limitations, and insist on their continued applicability in the digital age.

The agreed statement to Article 10 of the WIPO Copyright Treaty (see above) was an attempt to provide a remedy for such future issues. More than a decade on, the issues are too complex to be addressed solely by this general statement expressing an intention. This is why libraries, other user groups and some legal academics have been calling for a minimum set of exceptions and limitations, for example, as part of an international treaty on Access to Knowledge. The WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives concluded that there is a demand amongst librarians for more supportive legislation and clearer laws that would apply to the services they deliver.

Since 2004, eIFL.net, IFLA and latterly the US Library Copyright Alliance (LCA) have been raising these issues at WIPO and supporting the position of member states including Chile, Brazil, Nicaragua and Uruguay. In November 2008, the WIPO Standing Committee on Copyright and Related Rights (SCCR) began discussing exceptions and limitations for blind, visually impaired and other reading disabled people, as well as libraries and education.

In May 2009, eIFL.net, IFLA and LCA published a joint *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives* which sets out minimum, core library copyright exceptions for the 21st century. This document is the basis for future discussion and action by the international library community. The principles are:

- **Preservation:** A library should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats.
- **Legal deposit:** Legal deposit laws and systems should be broadened to include works published in all formats and to allow for preservation of those works.
- **Interlibrary loan and document supply:** Libraries should be able to supply documents to the user directly or through the intermediary library irrespective of the format and the means of communication.
- **Education and classroom teaching:** It should be permissible for works that have been lawfully acquired by a library or other educational institution to be made available in support of classroom teaching or distance education in a manner that does not unreasonably prejudice the rights holder. A library or educational institution should be permitted to make copies of a work in support of classroom teaching.
- **Reproduction for research or private purposes:** Copying individual items for or by individual users should be permitted for research and study and for other private purposes.
- **Provision for persons with disabilities:** A library should be permitted to convert material from one format to another to make it accessible to persons with disabilities. The exception should apply to all formats to accommodate user needs and technological advances. To avoid costly duplication of alternative format production, cross-border transfer should be permitted.
- **General free use exceptions applicable to libraries:** A general free use exception consistent with fair practice helps ensure the effective delivery of library services.
- **Orphan works:** An exception is needed to resolve the problem of orphan works, where the rights holder cannot be identified or located.
- **Copyright term:** Consistent with the Berne Convention, the term of copyright for literary works should not exceed the life of the author plus 50 years.
- **Technological protection measures that prevent lawful uses:** It should be permissible for libraries and their users to circumvent a technological protection measure for the purpose of making a non-infringing use of a work. Implementation of anti-circumvention legislation in many nations exceeds the

requirements of Article 11 of the WIPO Copyright Treaty, effectively eliminating existing exceptions in copyright law.

- **Contracts and statutory exceptions:** Contracts should not be permitted to override exceptions and limitations. The goals and policies providing for exceptions are important statements of national and international principle and should not be varied by contract.
- **Limitation on liability:** There should be a limitation on liability for libraries and library staff who act in good faith, believing or having reasonable grounds to believe, that they have acted in accordance with copyright law.

Library position statements

eIFL-IP Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and Consumers. Recommendations by eIFL.net
http://www.eifl.net/cps/sections/docs/ip_docs/draft-law

IFLA Copyright and other Legal Matters Committee (CLM) <http://www.ifla.org/en/clm>
(look in Statements or Publications)

Statement of principles on copyright exceptions and limitations for libraries and archives. eIFL.net, IFLA, and the Library Copyright Alliance, May 2009
http://www.eifl.net/cps/sections/docs/ip_docs/statement-principles

World Book and Copyright Day, 23 April 2009. Statement by eIFL-net on the importance of users' rights for libraries, education and development
http://www.eifl.net/cps/sections/docs/ip_docs/world-book-copyright-day

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WIPO Copyright Treaty (WCT) 1996. <http://www.wipo.int/treaties/en/ip/wct/>

WIPO Performances and Phonograms Treaty (WPPT) 1996.
http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html

WTO TRIPS Agreement. http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1

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Okediji, Ruth L. The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries. UNCTAD - ICTSD Project on IPRs and Sustainable Development (2006)
www.unctad.org/en/docs/iteipc200610_en.pdf.

Sullivan, Judith. WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired (2007)

http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696

Users' rights: making copyright work for libraries. Proceedings from Copyright and other Legal Matters session at IFLA World Library and Information Congress, Quebec (2008)

<http://archive.ifla.org/IV/ifla74/Programme2008.htm#14August>

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