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draft law on copyright

INCLUDING MODEL
EXCEPTIONS & LIMITATIONS
FOR LIBRARIES AND THEIR USERS

Based on WIPO Draft Law on Copyright
and Related Rights (VERSION 2005)

Recommendations by EIFL (2016)

WORK IN PROGRESS

EIFL works in collaboration with libraries
in 55 developing and transition countries

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ABOUT EIFL

EIFL (Electronic Information for Libraries) is a not-for-profit organization that works with libraries to enable access to knowledge in developing and transition economy countries in Africa, Asia Pacific, Europe and Latin America. In a highly networked digital world our activities help people access and use information for education, learning, research and sustainable community development. We build capacity, advocate for access to knowledge nationally and internationally, encourage knowledge sharing, and initiate pilot projects for innovative library services through programmes on Licensing, Copyright and Libraries, Open Access and Public Library Innovation.

ABOUT COPYRIGHT AND LIBRARIES (EIFL-IP)

The goal of the Copyright and Libraries programme (EIFL-IP) is to protect and promote the interests of libraries in copyright issues in EIFL partner countries. Our vision is that librarians are advocates for a fair copyright system and leaders in promoting access to knowledge in the digital age. We have established a network of copyright librarians in partner countries, we advocate for national and international copyright law reform, and we develop useful resources on copyright issues.

www.eifl.net

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Comments and feedback are always welcome. Please email info@eifl.net.

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Foreword

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled enters into force on 30 September 2016, following its ratification by 20 member states of the World Intellectual Property Organization (WIPO).

Consequently many countries are amending their copyright laws to enable the creation and cross-border transfer of accessible format copies. Therefore we decided to simplify Article 17 on persons with disabilities to facilitate its easy implementation into national law. The provision complies with the Marrakesh Treaty, and includes in addition persons with other disabilities, such as deaf people.

We hope that the EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and their Users is a useful resource for librarians and policymakers. We welcome all comments and feedback.

Teresa Hackett and Jonathan Band J.D.
July 2016

After five years, it is time to update the EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and their Users in the light of legislative developments and new library services enabled by technology. Important international developments include the adoption by member states of the World Intellectual Property Organization (WIPO) of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013), and the Beijing Treaty on Audiovisual Performances (2012).

The improvement of copyright laws globally for the benefit of libraries and archives is also being discussed at WIPO where EIFL, together with the international library and archive community, is advocating for a binding international instrument. To establish what is needed and to guide member states in their discussions, EIFL jointly produced a Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives (known as TLIB) that covers core exceptions and limitations for libraries and archives.¹ In 2012, WIPO member states adopted a working document with eleven topics including preservation, library lending and inter-library document supply that forms the basis for future discussion on library and archive issues.² At the same time, the European Commission is reviewing EU copyright rules,³ and national copyright laws are being modernized to allow greater freedoms for users of digital content. For example, in 2014 the UK enabled the digital preservation of sound and film recordings and protected copyright exceptions in contracts for e-resources, among other changes to the law.⁴ In addition, scholars are making the case for flexible norms in copyright law.⁵

1. Jointly produced by EIFL IFLA, ICA and Innovarte www.eifl.net/resources/treaty-proposal-copyright-limitations-and-exceptions-libraries-and-archives-ifla-eifl-ica.

2. Working Document Containing Comments on and Textual Suggestions Towards an Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitations for Libraries and Archives, www.wipo.int/meetings/en/doc_details.jsp?doc_id=242388.

3. Public Consultation on the review of the EU copyright rules http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.ht.

4. <https://www.gov.uk/government/news/changes-to-copyright-exceptions>.

5. P.B. Hugenholtz and Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities', 2011, <http://papers>.

In this context, we have reviewed the EIFL Draft Law (2009). Consequently, provisions for inter-library document supply (Art. 11A) and public documents (Art. 17A) have been amended. New provisions have been added for libraries and archives to purchase and lend materials, to provide access to withdrawn works, and to limit the liability of librarians and archivists in certain circumstances (Article 12). A new provision on text and data mining (Art. 17B) and a general, flexible exception (Art. 17C) have been introduced. We have also refreshed the layout and design of the document.

We hope it will continue to be a useful resource for librarians and policymakers alike. We welcome all comments and feedback.

Teresa Hackett and Jonathan Band J.D.
October 2014

Copyright law governs the ownership, control and distribution of knowledge. The role of libraries is to provide people with access to knowledge and knowledge goods. This means that copyright law is a core concern for librarians and for organizations representing libraries.

This document provides a coherent set of definitions and exceptions and limitations to exclusive rights for libraries and consumers. The World Intellectual Property Organization (WIPO) Draft Law on Copyright and Related Rights (version 2005), previously available online, was used as the basis for this document. The amendments and additions to that text reflect the basic needs of libraries and consumers in relation to the use of information in an electronic environment. We have put a lot of thought into our recommendations and have drawn on a range of national copyright laws. Copyright experts from the international library and archive communities, as well as other specialists have contributed to the text. The result reflects contributions from many people including Ahmed Abdel Latif, Toby Bainton, Robin Gross, Michael Heaney, Gwen Hinze, Eddan Katz, Dick Kawooya, David Mann, Katherine McDonald, Wilma Mossink, Miriam Nesbit, Ruth Okediji, Charles Oppenheim, Tim Padfield, Achal Prabhala, and Julia Sonnavend. Special thanks to Denise R. Nicholson for contributing to the explanatory notes. EIFL would also like to thank Vera Franz of the Open Society Foundations for her ongoing support.

We hope that this document will be a practical guide to assist librarians, as well as their legal advisors and policy makers when national laws are being updated. It highlights the basic, minimum requirements that we believe are necessary for libraries serving the public interest, especially in developing and transition countries, in the digital age. They may be adapted for national situations, amended as appropriate or used simply as a checklist. We welcome all comments and feedback.

Teresa Hackett and Emanuella Giavarra LL.M.
April 2009

ssrn.com/sol3/papers.cfm?abstract_id=1959554.

Introduction

Many countries are in the process of changing their copyright laws for a variety of reasons; to update the law for the digital environment, to implement new international treaty obligations or copyright provisions in bilateral trade agreements. Whatever the reason, it is important that amendments to the law support access to knowledge and the wider interests of libraries and consumers.

International treaties already contain certain flexibilities for governments to implement provisions in support of access to knowledge. Yet evidence shows that these flexibilities are often not adequately transposed into national law for the benefit of the public. Two WIPO commissioned studies, *Copyright Limitations and Exceptions for Libraries and Archives* (Crews, 2008)⁶ and *Copyright Limitations and Exceptions for the Visually Impaired* (Sullivan, 2007), confirmed this trend particularly in relation to developing countries. For example, twenty of the twenty-one countries with no exceptions for libraries in their national legislation are developing countries. An earlier study by Consumers International⁷ 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.

The World Intellectual Property Organization (WIPO) provides support to all countries in using the intellectual property system. Assistance offered to developing countries, least developed countries (LDCs) and countries in transition includes advice in the preparation of laws, comments on draft national laws, and advisory missions to discuss IP-related legislative issues with policymakers.⁸ Legislative advice, which is confidential and bilateral, takes several forms in accordance with specific requests. One modality is the provision of a draft law.⁹ The structure of this document is adopted from the WIPO Draft Law On Copyright And Related Rights Version 1 that was available online in 2005¹⁰ as later versions are not publicly available.

However, the WIPO Draft Law on Copyright and Related Rights (2005) did not address the needs of libraries and library users in developing countries adequately. It also included additional obligations for which there is no corresponding international treaty e.g. a public lending right. Consequently, this document sets out to amend and complement the WIPO Draft Law On Copyright And Related Rights (2005) in line with the Recommendations adopted in 2007 under the WIPO Development Agenda.¹¹ In particular, it addresses Recommendations in Cluster A: Technical Assistance and Capacity Building and Cluster B: Norm-setting, flexibilities, public policy and public domain. These include that

- WIPO's legislative assistance shall be development-oriented, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States (Recommendation 13);

6. The WIPO study on copyright limitations and exceptions for libraries and archives study was updated in 2014.

7. *Copyright and Access to Knowledge*, Consumers International Asia Pacific Office, 2006, <http://azknetwork.org/sites/default/files/azk-report.pdf> (accessed 10 October 2014).

8. www.wipo.int/ip-development/en/legislative_assistance.

9. www.wipo.int/ip-development/en/legislative_assistance/modalities.html.

www.wipo.int/ip-development/en/legislative_assistance.

10. www.wipo.int/cfdiplaw/en/trips/pdf/copyright_v1.pdf, last found on 29 November 2005.

11. www.wipo.int/ip-development/en/agenda/recommendations.html.

- WIPO shall make available advice, including norm-setting, that takes into account the flexibilities contained in the TRIPS Agreement and other international intellectual property agreements, especially those flexibilities that are of interest to developing countries and LDCs (Recommendations 14 and 17);
- the WIPO Secretariat should address in its working documents for norm-setting activities issues such as potential flexibilities, exceptions and limitations for Member States and the possibility of additional special provisions for developing countries and LDCs (Recommendation 22);
- discussions should be initiated on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO (Recommendation 19).

This document has three chapters. Chapter 1 contains the proposed provisions on copyright. We have preceded this by some prefatory notes to the document, and introduced headings on interpretation, works protected, economic and moral rights, free uses permitted by law and general provisions, in order to orient the reader.

Chapter 2 sets out objectives and rationale for the free use provisions.

Chapter 3 provides an introduction to the work of libraries and the role of copyright and licensing in the electronic environment.

The provisions in this document are not idealistic. They represent reasonable and common sense provisions for today's libraries and consumers. The focus is on free uses only – i.e. exceptions and limitations that do not require permission from the rightsholder and are free of charge. Compensated exceptions can be added as appropriate, according to national needs and resources. We have sought to explain the objective and rationale of the exceptions and limitations, the effect of each provision and have listed some examples of its application. We hope that this document will work towards an enhanced understanding of the importance of exceptions and limitations for libraries in their role supporting access to knowledge, teaching, and research and the development of open societies.

Important notes before starting

- The structure of this document is adopted from the WIPO Draft Law on Copyright and Related Rights (“WIPO Draft Law”) Version 1 that was available online in 2005.¹² The text of the WIPO Draft Law was used as the basis for the model exceptions and limitations for libraries and consumers drafted by EIFL.
- The definitions used can either be found in international treaties and/or national laws. The remaining definitions were part of the WIPO Draft Law.
- Great effort has been made to make the proposed provisions compliant with international treaties.
- The text focuses on copyright only and does not cover related rights or enforcement.
- The provisions apply fully to the digital environment.
- The provisions for libraries and archives apply only to activities carried out for non-commercial purposes.
- The draft exceptions and limitations cover free uses permitted by law of literary and artistic works i.e. free of charge and without the need to ask for permission from the rights holder. They do not cover compensated uses that could consequently be broader in scope.
- Compensated exceptions can be added as appropriate, according to national needs and resources.
- The proposed provisions are for basic, minimum provisions only, and are not comprehensive or all-encompassing.
- There are important provisions for digital preservation, inter-library document supply, and activities in the electronic learning environment.
- There is a flexible exception to “future-proof” the law for technological developments and new activities that cannot be foreseen even five or ten years from now.
- Each exception and limitation is accompanied by a short explanatory note in Chapter two. The Objective and Rationale describes the policy goal of the provision. The Effect of the Provision describes how it might be applied in practice with examples. The examples serve merely as practical scenarios for how an exception might be used. They are not in any way to be considered as limited to these examples alone.
- There is a provision to safeguard the exceptions and limitations for libraries provided by law, safeguarding library uses in licences for electronic resources.
- For contracting parties to the WIPO Copyright Treaty (WCT), a general provision on the circumvention of technological protection measures is included. To provide guidance for countries implementing the WCT/WPPT, EIFL offers best practice considerations and options for the implementation of technological protection measures (TPMs) in a separate document available on request from EIFL.
- The three step test is not included in the text as the three step test is a mere drafting tool for the legislator and, once applied, should not be included in national law.

12. www.wipo.int/cfdiplaw/en/trips/pdf/copyright_v1.pdf, last found on 29 November 2005.

Draft law on copyright

TITLE PAGE

[Name of Country]

The Copyright Act, [date]

INTERPRETATION

1 Introduction

(a) Short title

(b) Commencement

2 Interpretation

PART I COPYRIGHT

3 Works protected

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5 Subject matter not protected

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**PART II PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS
AND BROADCASTING ORGANIZATIONS**

[This section from the WIPO Draft Law is not included in this document]

PART III ENFORCEMENT OF RIGHTS

[This section from the WIPO Draft Law is not included in this document]

PART IV FINAL PROVISIONS

[This section from the WIPO Draft Law is not included in this document]

Interpretation

I Introduction

- (a) This Law¹³ may be cited as the Copyright Act of [date].
- (b) This Law¹⁴ shall come into effect on [.....]* The provisions of this Law shall apply also to works, performances, phonograms and broadcasts dating back to before the date of the coming into effect of this Law, provided that the term of protection had not expired under the former legislation or under the legislation of the country of origin of such works, performances, phonograms or broadcasts that are to be protected under an international treaty to which (name of country) is party.

2 Interpretation

For the purpose of this Law,¹⁵ the following terms have the following meaning:

- (i) an “audiovisual work” is a work that consists of a sequential series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds, susceptible of being made audible;
- (ii) “author” is the natural person who has created the work;
- (iii) “broadcasting” is the communication of a work, a performance or a phonogram to the public by wireless transmission, including transmission by satellite;
- (iv) a “collective work” is a work in which a number of contributions constituting separate and independent works in themselves as assembled into a collective whole, such as a newspaper;
- (v) “communication to the public”¹⁶ is any communication to the public of a work, sound recording, film or broadcast, by wire or wireless means, including the making available to the public of the work, sound recording, films or broadcasts in such a way that members of the public may access the work, sound recording, film or broadcast from a place and at a time individually chosen by them;
- (vi) a “computer” is an electronic or similar device having information-processing capabilities; and a “computer program” is a set of instructions expressed in words, codes, schemes or in

13. This draft Law is based on the WIPO Draft Law On Copyright and Related Rights draft law prepared by the Secretariat of the World Intellectual Property Organization (WIPO) previously available online, and is compatible with the provisions of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) (the ‘Berne Convention’), the Agreement on Trade-Related Aspects of Intellectual Property Rights (the ‘TRIPS Agreement’), the WIPO Copyright Treaty (the ‘WCT’) and the WIPO Performances and Phonograms Treaty (the ‘WPPT’). The text focuses on copyright only and does not cover related rights or enforcement.

The provisions in this draft Law should be viewed as to their substance (as distinct from their wording or drafting structure). This draft Law may need to be adapted to the legal and drafting traditions of the country concerned. The draft law only covers the free uses of literary and artistic works. Any remunerative uses can be added to the draft law preferably after consultation with the library and education sector in the country.

14. Article 18 of the Berne Convention provides for a retroactive protection of literary and artistic works.

15. This Section includes definitions for certain key terms which can be found in various provisions of the draft Law. The interpretations reflect international norms as well as recent technological advances which have influenced the treatment and exploitation of protected works. Some of these definitions have also been expressly incorporated in international treaties on copyright and related rights.

16. A definition for communication to the public is only necessary for countries implementing the WIPO Copyright Treaty (WCT) and/or the WIPO Performances and Phonograms Treaty (WPPT). Other countries need not provide a definition.

any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result;

- (vii) a “copy” is a reproduction of a work in either print or digital form;
- (viii) a “database” is a compilation of data or other material, in any form, which by reason of the selection or arrangement of the contents of the database constitutes the authors own intellectual creation;
- (ix) “distribution” refers to the distribution of fixed copies that can be put into circulation as tangible objects;
- (x) “economic rights” are the rights mentioned in Part I – Section 6;
- (xi)¹⁷ definitions of expressions of folklore have been deleted;
- (xii)¹⁸ “fixation” means the embodiment of sounds, images or both or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
- (xiii) “infringement” is any act that violates any rights protected under this Law;
- (xiv) “moral rights” are the rights mentioned in Part I – Section 7;
- (xv) “owner of copyright” is:
 - where the economic rights are vested in the author, the author,
 - where the economic rights are originally vested in a natural person other than the author or in a legal entity, that person or entity,
 - where the ownership of the economic rights has been transferred to a natural person or legal entity, that person or entity;
- (xvi) “performers”¹⁹ are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary and artistic works or expressions of folklore;
- (xvii)²⁰ “phonogram” is the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (xviii) “a photographic work” is a recording of light or other radiation on any medium on which an image is produced or from which an image may be produced, irrespective of the technique (chemical, electronic or other) by which such recording is made; a still picture extracted from an audiovisual work shall not be considered a “photographic work” but a part of the audiovisual work concerned;
- (xix) the “producer” of an audiovisual work or a phonogram is the natural person or legal entity that undertakes the initiative and responsibility for the making of the audiovisual work or phonogram;
- (xx) “public display” is the showing of the original or a copy of the work:

17. The definition of expressions of folklore have been deleted because international debates in this area are ongoing.

18. This definition is compliant with that provided under Article 2(c) of the WPPT.

19. This definition is similar to that provided under Article 2(a) of the WPPT. It is broader than the definition provided under Article 3(a) of the Rome Convention as it specifically includes those who perform expressions of folklore.

20. This definition corresponds to that provided under Article 2(b) of the WPPT.

- directly,
 - by means of a film, slide, television image or otherwise on screen,
 - by means of any other device or process, or,
 - in the case of an audiovisual work, the showing of individual images non-sequentially
 - at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time or at different places and/or times, and where the work can be displayed without communication to the public within the meaning of (v) above;
- (xxi) “public performance” is:
- (a) in the case of a work other than an audiovisual work, the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process;
 - (b) in the case of an audiovisual work, the showing of images in sequence and the making of accompanying sounds audible, either separately or in combination; and
 - (c) in the case of a phonogram, making the recorded sounds audible, in each case at a place or at places where persons outside the normal circle of the family and its closest acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time, or at different places and/or times, and where the performance can be perceived without the need for communication to the public within the meaning of item (v) above;
- (xxii) “published work”²¹ refers to tangible copies of a work or a phonogram which have been made available to the public in a reasonable quantity for sale, for rent or other transfer of ownership or the possession of copies, provided that, in the case of a literary or artistic work, the making available to the public took place with the consent of the author or other owner of copyright, and in the case of a phonogram, with the consent of the producer of the phonogram or his successor in title;
- (xxiii) “rental” is the transfer of the possession of the original or a copy of a work or phonogram for a limited period of time for profit-making purposes;
- (xxiv) “reproduction”²² is the making of one or more copies of a work or phonogram in any manner or form, including any permanent or temporary storage of the work or phonogram in electronic form;
- (xxv) the definition of ‘rights management information’²³ in the WIPO Draft Law has been deleted from this document;
- (xxvii) a “work” is any literary or artistic work under Part I – Sections 3(1) and 4(1);
- (xxviii) a “work of applied art” is an artistic creation with utilitarian functions or incorporated in a useful article, whether made by hand or produced on an industrial scale;

21. This definition is consistent with that provided under Article 3(3) of the Berne Convention in relation to works, as well as Article 3(d) of the Rome Convention and Article 2(e) of the WPPT in relation to phonograms.

22. This definition conforms with the manner in which the notion of “reproduction” has, over the years, been understood under the Berne Convention (see Article 9(1)), as well as with the Agreed Statements concerning Article 1(4) of the WCT and Articles 7 and 11 of the WPPT. It has been accepted, already for a long time, that the storage of works in an electronic medium is an act of reproduction, and the definition covers this aspect.

23. A definition for rights management information in the WIPO Draft Law has been deleted because Part III on Enforcement of Rights has not been included in this document.

- (xxix) a “work of joint authorship” is a work created by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors; provided that the work does not qualify as a “collective work” under item (iv) above.

Works protected

PART I COPYRIGHT²⁴

3 Works protected

- (1) The person creating an original literary or artistic work²⁵ shall have copyright therein, be it expressed in writing or in speech as a fictional or a descriptive representation, or whether it be a musical or dramatic work, cinematographic or photographic work, or a work of fine art, architecture, applied art, or expressed in some other manner (hereinafter referred to as “works”).
- (2) Works shall be protected by the sole fact of their creation and irrespective of their mode or form of expression, as well as of their content, quality and purpose.
- (3) Within the limitations specified in this Law, copyright is a property right and implies the exclusive right to control the work in accordance with Section 6 and 7.

4 Derivative works

- (1) The following shall also be protected as works:
 - (a) original translations, adaptations, arrangements and other transformations or modifications of works;²⁶ and
- (2) The protection of any work referred to in subsection (1) shall be without prejudice to any protection of a pre-existing work or expression of folklore incorporated in or utilized for the making of such a work.

24. This Section relates to copyright which deals with the protection of literary and artistic works by granting to their authors certain exclusive rights regarding the utilization of their works.

25. Section 3(1) This shall include the main categories of works protected under copyright such as:

- (a) books, pamphlets, articles, computer programs (databases) and other writings;
- (b) speeches, lectures, addresses, sermons and other oral works;
- (c) dramatic, dramatico-musical works, pantomimes, choreographic works and other works created for stage productions;
- (d) musical works, with or without accompanying words;
- (e) audiovisual works;
- (f) works of architecture;
- (g) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;
- (h) photographic works;
- (i) works of applied art;
- (j) illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.
- (k) collections of works, compilations of mere data, whether in machine readable or other form, and collections of expressions of folklore, provided that such collections are original by reason of the selection or arrangement of their contents constitute intellectual creations.

This list is not intended to limit the modes or forms of expression which are protected by copyright law and as such, is not exhaustive. The list is derived from the illustrative list set out in Article 2(1) of the Berne Convention. Protection for computer programs is expressly provided for under Article 10(1) of the TRIPS Agreement and Article 4 of the WCT.

26. These works are required to be protected under Article 2(3) of the Berne Convention.

5 Subject matter not protected²⁷

Notwithstanding the provisions of Sections 3 and 4, no protection shall extend under this Law to any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work.

Economic and moral rights

6 Economic rights²⁸

- (1) Subject to the provisions of Sections 8 to 17C, the author or other owner of copyright shall have the exclusive right to carry out or to authorize the following acts in relation to the work:
- (a) reproduction of the work;
 - (b) translation of the work;
 - (c) adaptation, arrangement or other transformation of the work;
 - (d) the distribution²⁹ to the public by sale, rental³⁰ or otherwise of the original or a copy of the work that has not already been subject to a sale or other transfer of ownership authorized by the owner of copyright;
 - (e) rental³¹ of the original or a copy of an audiovisual work, a work embodied in a phonogram, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned;
 - (f) public performance of the work;
 - (g) broadcasting of the work;
 - (h) communication³² to the public of the work.

27. Section 5 lists subject matter that is excluded from copyright protection. The exclusions under paragraph (a) are related to the fundamental principle that copyright protection extends only to works and, as such, does not include ideas, etc. Similar provisions can be found in Article 9(2) of the TRIPS Agreement and Article 2 of the WCT.

28. Any country regarded as a developing country, in accordance with established practice of the General Assembly of the United Nations, and who considers itself unable to make provisions for the protection of all the rights as provided by this Act, may avail itself of provisions in the Berne Appendix and will substitute the exclusive right(s) of translation and/or reproduction by a system of non-exclusive and non-transferable licenses granted by a competent authority. The licenses are granted in accordance with the conditions of the Berne Convention Appendix Special Provisions Regarding Developing Countries. www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

29. An exclusive right of distribution in respect of all works is provided for in Article 6(1) of the WCT. Under the Berne Convention, it is only in respect of cinematographic works that such a right is expressly granted, although some consider that such a right follows from the right of reproduction. The WCT does not contain any obligations concerning the exhaustion of the right of distribution after the first sale or other transfer of ownership of the original or a copy of the work. Countries are not obliged to select any particular form of exhaustion, (i.e. national, regional or international exhaustion) or to deal with the issue of exhaustion at all. The TRIPS Agreement does not provide for a right of distribution and, in the Article 6, leaves the issue of exhaustion open.

In most modern copyright legislation, as far as sale of copies is concerned, the right of distribution is limited to the first sale. Subsequent sales are not covered, as this would pose unreasonable restrictions on the owners of such copies and make such activities as second hand book selling subject to permission from right owners. This is the reason why the general right of distribution is limited in the draft Law to the first distribution of the copies of the work.

30. Public lending right has been deleted here as there is no international treaty that qualifies public lending as an economic right.

31. The right of rental for the categories of works described in this paragraph is provided for under Article 11 of the TRIPS Agreement and Article 7 of the WCT.

32. The notion "communication to the public", as defined in Section 2, corresponds to the right of communication to the public granted under Article 8 of the WCT, which has extended this right to all categories

- (2) The right of rental under item (e) of subparagraph (1) does not apply to rental of computer programs where the program itself is not the essential object of the rental.

7 Moral rights³³

- (1) Independently of his economic rights, and even where he is no longer the owner of the said rights, the author of a work shall have the right:
- (a) to be identified by name as the author on copies of his work and in connection with any public use of his work, as far as practicable;
 - (b) not have his name indicated on the copies and in connection with any public use of his work, and the right to use a pseudonym;
 - (c) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work which would be prejudicial to his honour or reputation.
- (2) None of the rights mentioned in subsection (1) shall be transmissible during the life of the author, but the right to exercise any of those rights shall be transmissible by testamentary disposition or by operation of law following the death of the author.
- (3) The author may waive any of the moral rights mentioned in subsection (1), provided that such a waiver is in writing and clearly specifies the right or rights waived and the circumstances in which the waiver applies and provided further, that any waiver of the right under item (c) of subsection (1) specifies the nature and extent of the modification or other action in respect of which the right is waived. Following the death of the author, the natural person or legal entity upon whom or which the moral rights have devolved shall have the right to waive the said rights.

of works. Under the Berne Convention (Article 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1)), this right is only recognized in respect of those categories of works which used to be traditionally communicated to the public.

33. The protection of moral rights must be granted by virtue of Article 6bis of the Berne Convention. Article 9(1) of the TRIPS Agreement excludes moral rights from the scope of that Agreement, but protection of moral rights is also provided for under the WCT Article 1(4) which incorporates, by reference, all the substantive provisions of the Berne Convention.

Free uses permitted by law

8 Reproduction for private purposes and research

- (1) It shall not be a violation of this Law to reproduce a work for private non-commercial purposes³⁴ or for the purposes of research.
- (2) The fair practice³⁵ under subsection (1) shall not include the reproduction of the whole or of a substantial part of a book or of a musical work in the form of notation without fair compensation to the owner of copyright.

9 Temporary reproduction³⁶

- (1) Anyone is permitted to make temporary copies of a work:
 - (1) which are transient or incidental;
 - (2) which are an integral and essential part of a technical process;
 - (3) the sole purpose of which is to enable a transmission of a work in a network between third parties by an intermediary, or a lawful use of a work; and
 - (4) which have no independent economic significance.

10 Quotation

It shall be permitted to make quotations of a work, which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose. The quotation shall be accompanied by an indication of source and the name of the author, if his name appears in the work from which the quotation is taken.³⁷

II Reproduction for educational activities

- (1) For the purpose of educational activities copies may be made of works, recordings of works, broadcast in radio and television provided the copying is done by a person giving or receiving instruction and does not exceed the extent justified by the purpose;
- (2) Educational establishments may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in the course of instruction and/or in virtual learning environments, managed learning environments, virtual research environments and library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies;

³⁴. Private non-commercial purposes means reproductions by or for the individual user, immediate circle of family of the user and acquaintances.

³⁵. "Fair practice", derived from Article 10 of the Berne Convention, means certain permitted uncompensated uses of a work. Fair practice implies an objective appreciation of what is normally considered admissible, to be determined by national courts. WIPO Guide to the Berne Convention (1978).

³⁶. The definition of "reproduction" proposed in Section 2 (xxiv) of the draft Law includes, as an act of reproduction, the storage of works in an electronic medium. However, certain incidental and temporary storages in electronic form should be covered by an exception. A text for an appropriate exception is proposed in Section 9.

³⁷. See Article 10(1) of the Berne Convention.

- (3) Persons receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, theses and in dissertations for personal use and library deposit;
- (4) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies made under subsection (1) to (3);

The permission under subsection (1) shall not extend to reproductions for commercial purposes and shall include the reproduction of a whole textbooks where the textbook is either out of print, the owner of the right cannot be found, authorized copies of the same edition of the text book are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.

IIA Inter-library document supply

- (1) A library may supply to another library a copy of a work whether by post, fax or email. A copy may be supplied by the receiving library to a user of such library for their research and or private use.

IIB Translations

- (1) A library or a person giving or receiving instruction may translate works provided this is not done for commercial purposes. Such translations may be used for private educational, teaching and research purposes only;
- (2) A person or a public body may translate works from or into minority languages and communicate to the public such translations for non-commercial public information purposes.

IIC Communication to the public for educational and research purposes³⁸

- (1) An educational establishment may communicate to persons affiliated as persons receiving instruction at or from such educational establishment the reproductions and the translations permitted by this Law solely for private, educational and research purposes provided this is done via a secure network.

12 Libraries and archives

- (1) Libraries and archives may use and distribute copies of works as part of their activities in accordance with subsections (2) – (12) provided this is not done for commercial purposes.
- (2) Such institutions may make copies of works in their collection for the purpose of back-up and preservation. Such institutions may also make copies of publicly accessible websites for the purposes of preservation.
- (3) If a work or a copy of such work, in such an institution's collection, is incomplete, such an institution may make or procure a copy of the missing parts from another institution.

³⁸. A provision for communication to the public is only necessary for countries that have created an equivalent exclusive right i.e. countries implementing the WIPO Copyright Treaty (WCT) and/or the WIPO Performances and Phonograms Treaty (WPPT).

- (4) Such institutions may make copies of works that are or should be available in their collections in their chosen format, if they cannot reasonably be acquired in such format through general trade or from the publisher.
- (5) This Law does not prevent the making of copies in accordance with the provisions of the Act [on legal deposit of published works].
- (6) Such institutions may make copies of works where the permission of the author or other owner of copyright cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.
- (7) Copies in whatever format made in accordance with subsections 3-6 or acquired pursuant to the Act [on legal deposit of published works] may be used by users for personal use or study on the premises of the establishment with or without the means of technical equipment and can be lent to users. The same applies in special cases to copies made in accordance with subsection (2).
- (8) Notwithstanding any other section, libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works that are legally available in any country.
- (9) Notwithstanding subsection 6(d), a library or archive may lend copyright works incorporated in tangible media to a user, or to another library.
- (10) Notwithstanding subsection 6(e), a library or archive may provide temporary access to copyright works in digital or other intangible media, to which it has lawful access, to a user, or to another library, for consumptive use.
- (11) Libraries and archives may reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work which has been retracted or withdrawn from public access,³⁹ but which has previously been communicated to the public or made available to the public by the author or other rightsholder.
- (12) 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:
 - In the belief, and where there are reasonable grounds for believing, that the work is being used as permitted within the scope of an exception in this Act, or in a way that is not restricted by copyright; or
 - 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.Librarians and archivists shall be exempt from liability for the actions of their users.

13 Reproduction, broadcasting and communication to the public for informatory purposes

The following acts shall be permitted in respect of a work without the authorization of the author or other owner of copyright, subject to the obligation to indicate the source and the name of the author as far as practicable:

³⁹. Subject to national law or court decisions.

- (a) the reproduction by the press, the broadcasting or communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;⁴⁰
- (b) for the purpose of reporting current events, the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of such events, to the extent justified by the purpose;
- (c) the reproduction in a newspaper or periodical, the broadcasting or communication to the public of a political speech, a lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information.

14 Caricature, parody and pastiche

- (1) Notwithstanding the provisions of section 7 of this Law, use may be made of works and phonograms for the purpose of caricature, parody or pastiche.

15 Reproduction and adaptation of computer programs

- (1) The reproduction, in a single copy, or the adaptation of a computer program by the lawful owner of a copy of that computer program shall be permitted without the authorization of the author or other owner of copyright, provided that the copy or adaptation is necessary:
 - (a) for use of the computer program with a computer for the purpose and extent for which the computer program has been obtained;
 - (b) for archival purposes and for the replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, destroyed or rendered unusable;
 - (c) to observe, study, or test the functioning of the computer program in order to determine the ideas and principles which underlie any element of the program, including the information necessary to achieve the interoperability of an independently created computer program with other programs.
- (2) No copy or adaptation of a computer program shall be used for any purpose other than those specified in subsection (1), and any such copy or adaptation shall be destroyed in the event that continued possession of the copy of the computer program ceases to be lawful.

16 Display of works

- (1) The public display of originals or copies of a work (in parts and in whole) shall be permitted without the authorization of the author for the purpose of promotion of the work, testing of the work or for the training of users of the work;
- (2) It shall be permitted to publicly display or publicly perform parts of a work as part of a presentation at a conference, seminar or workshop or other such similar activity without authorization of the author.

⁴⁰. See Article 10bis of the Berne Convention.

17 Persons with disabilities⁴¹

- (1) An accessible format copy of a work may be created and distributed, including by import or export, for persons who are blind, visually impaired or otherwise disabled, without authorization of its author or copyright owner.⁴²

17A Public documents

- (1) Official texts of a legislative, administrative and legal nature, and official translations of such text are not subject to copyright.⁴³
- (2) Libraries and archives may request and disseminate to the public official publications issued by government ministries, departments and agencies.

17B Reproduction for computational analysis⁴⁴

- (1) A person who has lawful access to a work does not infringe copyright in the work by making copies of the work, or by making derivative works of that work, provided that the copies or derivative works are made in order that the person may carry out a computational analysis of anything recorded in the work.
- (2) The person in paragraph (1) may make available quotations from the work.

17C Fair dealing

- (1) In addition to the uses specifically authorized by section 8 through 17B, fair dealing with a copyright work, including such use by reproduction in copies or phonorecords for purposes such as research, private study, scholarship, teaching, criticism, comment, parody, review, or the reporting of news or current events, does not infringe copyright in the work.
- (2) For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including—
 - (a) the nature of the work in question;
 - (b) the amount and substantiality of that part of the work affected by the act in relation to the whole of the work;
 - (c) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; and
 - (d) the effect of the act upon the potential market for, or the commercial value of, the work.

41. This provision complies with the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013). It is hoped that the treaty will enter into force in 2016 when it is ratified by 20 members (17 countries have ratified thus far).

42. The provision includes persons with other disabilities, such as deaf people. Persons with other disabilities is a topic on the agenda of WIPO's Standing Committee on Copyright and Related Rights.

43. See Article 2(4) of the Berne Convention (1971).

44. Based on Section 29A, The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, UK. www.legislation.gov.uk/ukdsi/2014/978011112755.

General provisions

18 Duration of copyright⁴⁵

- (1) Subject to the provisions of subsections (2) to (5), the economic rights shall be protected during the life of the author and for fifty years after his death.
- (2) In the case of a work of joint authorship, the economic rights shall be protected during the life of the last surviving author and for fifty years after his death.
- (3) In the case of a collective work, other than a work of applied art, and in the case of an audiovisual work, the economic rights shall be protected for fifty years from the date on which the work was either made, first made available to the public, or first published, whichever date is the latest.
- (4) In the case of a work published anonymously or under a pseudonym, the economic rights shall be protected for fifty years from the date on which the work was either made, first made available to the public or first published, whichever date is the latest, provided that where the author's identity is revealed or is no longer in doubt before the expiration of the said period, the provisions of subsection (1) or subsection (2) shall apply, as the case may be.
- (5) In the case of a work of applied art, the economic shall be protected for twenty-five years from the making of the work.
- (6) Every period provided for under the preceding subsections shall run to the end of the calendar year in which it would otherwise expire.

18A Duration of moral rights

The rights conferred by section 7 continue to subsist so long as copyright subsists in the work provided the right(s) were not waived during the life of the author or after his death.

19 Original ownership of economic rights⁴⁶

- (1) Subject to the provisions of subsections (2) to (5), the original owner of economic rights is the author who has created the work.
- (2) In respect of a work of joint authorship,⁴⁷ the co-authors shall be the original owners of the economic rights. If, however, a work of joint authorship consists of parts that can be

⁴⁵. This provision respects the international standard term of protection for a literary work as set out in the Berne Convention and the TRIPS agreement i.e. life of the author plus 50 years after death. In Europe, the US and some other countries, the term of protection has been extended to life of the author plus 70 years after death. For developing and transition countries, where the issue of accessing knowledge is a key determinant to development, term extensions mean that information remains under private ownership for longer, benefiting the estates of rightsholders at the expense of libraries, education and consumers of information.

Paragraph (1) sets out the general rule for calculating the duration of copyright protection.

With the exception of protection for photographic works, the terms of protection set out in this Section are the minimum requirements under Article 7 of the Berne Convention and Article 12 of the TRIPS Agreement. Under Article 7(6) of the Berne Convention, countries are free to provide for longer terms of protection.

Article 9 of the WCT extends the term of protection for photographic works to the general 50-year term by obliging Contracting Parties not to apply Article 7(4) of the Berne Convention which prescribes a shorter (25-year) term of protection for photographic works and works of applied art.

⁴⁶. The owner of copyright in a work is generally the author of the work, at least in the first instance. There are however, in most common law countries, exceptions to this underlying principle which can be found in Section 19.

⁴⁷. This provision can be found in most national copyright laws.

used separately and the author of each part can be identified, the author of each part shall be the original owner of the economic rights in the part that he has created.

- (3) In respect of a collective work, the natural person or legal entity at the initiative and under the direction of whom or which the work has been created shall be the original owner of the economic rights.
- (4) In respect of an audiovisual work,⁴⁸ once a performer has consented to fixation of his or her performance in an audiovisual fixation,⁴⁹ the owner of the economic rights shall be the producer, unless provided otherwise in a contract. The co-authors of the audiovisual work and the authors of the pre-existing works included in or adapted for the making of the audiovisual work shall, however, maintain their economic rights in their contributions or pre-existing works, respectively, to the extent that those contributions or pre-existing works can be subject of acts covered by their economic rights separately from the audiovisual work.

20 Presumption of authorship and of representation of the author⁵⁰

- (1) The natural person whose name is indicated as the author on a work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the author of the work. This provision shall be applicable even if the name is a pseudonym, where the pseudonym leaves no doubt as to the identity of the author.
- (2) In the case of an anonymous or pseudonymous work, subject to the provision in the second sentence of paragraph (1), the publisher whose name appears on the work shall, in the absence of proof to the contrary, be presumed to represent the author and, in this capacity, shall be entitled to exercise and enforce the moral and economic rights of the author. This presumption shall cease to apply when the author reveals his identity.

21 Assignment and license of authors' rights⁵¹

- (1) Copyright is transmissible by assignment in whole or in part, by testamentary disposition or by operation of law, as personal or movable property.
- (2) Any assignment of an economic right, and any license to do an act subject to authorization by the author or other owner of copyright, shall be in writing signed by the assignor and the assignee, or by the licensor and the licensee.
- (3) An assignment in whole or in part of any economic right, or a license to do an act subject to authorization by the author or other owner of copyright, shall not include or be deemed to include the assignment or license of any other rights not explicitly referred to therein.
- (4) Any contractual provisions contrary to Sections 8 through to 17c shall be null and void.

⁴⁸. Article 14bis of the Berne Convention provides countries with the flexibility to determine the initial ownership of rights in cinematographic works. In most Common Law countries, the producer of an audiovisual work is the first owner of copyright in the work.

⁴⁹. This clause is consistent with Article 12 of the Beijing Treaty on Audiovisual Performances, www.eifl.net/beijing-treaty-audiovisual-performances-eifl-brief.

⁵⁰. These provisions are derived from Articles 15(1) and (3) of the Berne Convention.

⁵¹. The relevant international instruments do not, in general, regulate the transfer of economic rights (the only reference to such matters is in Article 40 of the TRIPS Agreement, which seeks to control anti-competitive practices in contractual licenses). The extent to which detailed regulation is needed depends, to a large degree, on the legal traditions in the country concerned.

22 Circumvention of technological protection measures⁵²

Any beneficiary of an exception or limitation under Sections 8 through to 17C shall have the means of benefiting from that exception or limitation where technological protection measures have been applied to a work, including where necessary the right to circumvent the technological protection measure so as to render the work accessible.

52. This provision only applies to countries that have applied legal protection to technological protection measures, for example, as part of the implementation of the WCT/WPPT. To provide guidance for countries implementing the WCT/WPPT, EIFL offers best practice considerations and options for the implementation of technological protection measures (TPMs). This is in a separate document available on request from EIFL.

Objectives and rationale of free uses

This chapter describes the objective and rationale of each proposed free use provision, as set out in Chapter 1, Articles 8–17C, of this document.

8 Reproduction for private purposes and research

OBJECTIVE AND RATIONALE

This is one of the most universally accepted limitations and exceptions to the right of reproduction in national copyright laws. The need for a person to make copies for a variety of non-commercial purposes in their everyday lives is widely recognized. It would be impractical and onerous if permission had to be obtained for each and every copy, and it would serve to hamper the free flow of information in society.

EFFECT OF THE PROVISION

This provision allows any natural person, in any capacity, to access and reproduce of a work, whether analogue or digital, for personal, recreational, entertainment, educational or any other non-commercial purpose. It also permits reproduction of a portion of a work for the purposes of doing research, being involved in research or collaborating in research related activities.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- learning a new skill e.g. a language, hobby;
- researching a topic of special interest e.g. the family tree;
- time-shifting e.g. recording a TV programme for viewing at another time.

- 8(1) It shall not be a violation of this Law to reproduce a work for private non-commercial purposes or for the purposes of research.
- (2) The fair practice under subsection (1) shall not include the reproduction of the whole or of a substantial part of a book or of a musical work in the form of notation without fair compensation to the owner of copyright.



9 Temporary reproduction

OBJECTIVE AND RATIONALE

Computers have a temporary storage area for data that is likely to be used again, and which can be quickly fetched for rapid access. Known as cache, this is an integral part of the technical process. As data is transferred across networks, over the internet for example, cache copies are made and they are frequently used by web browsers, as well as web servers. These temporary, transient copies have no independent economic significance. They are essential to the functioning of computers. It is impossible to view digital material without a temporary or transient copy being created.

EFFECT OF THE PROVISION

This provision allows anyone using a computer to make temporary reproductions or on-screen copies to access information and/or for the mere transfer of data within or across networks. Such reproductions should be of a temporary or incidental nature. Without this provision, permission would have to be obtained every time copyrighted material was viewed on a computer. This would greatly hamper the use of digital resources, and would impose extra costs on computer users and network providers, including universities and libraries.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- Copies automatically generated by a computer to ensure efficient data access, search and retrieval.

10 Quotation

OBJECTIVE AND RATIONALE

The right to make a quotation of a work is essential for education, research, criticism, parody and review, and other socially important purposes. For example, the ability to reproduce quotations adds authority and provides evidence for research and study. Authors and creators may build upon quotations to create new works. The ‘quotation right’ stems from Article 10(1) of the Berne Convention that is a mandatory exception.

EFFECT OF THE PROVISION

This provision provides users with a rich array of words and expressions other than their own, for the purposes of enhancing their own creations, or for personal use, research, teaching, learning, entertainment, satirical expression, evidence, and for many other reasons. The source, including the author’s must be indicated, if

9(1) Anyone is permitted to make temporary copies of a work:

(1) which are transient or incidental;

(2) which are an integral and essential part of a technical process;

(3) the sole purpose of which is to enable a transmission of a work in a network between third parties by an intermediary, or a lawful use of a work; and

(4) which have no independent economic significance.

10 It shall be permitted to make quotations of a work, which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose. The quotation shall be accompanied by an indication of source and the name of the author, if his name appears in the work from which the quotation is taken.

available. The quotation must be in accordance with fair practice and within the scope that is required by the specific purpose.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- Quoting an expert's opinion on a particular topic;
- Use of a quotation in an examination paper;
- Use of a quotation by a journalist for a newspaper article;
- Quoting expressions or conclusions from research papers.

II Reproduction for educational activities

OBJECTIVE AND RATIONALE

Education is acknowledged the world over as key to economic and social development. Countries with high literacy rates and high standards of educational attainment also score best in quality of life indicators, such as the human development index. Exceptions and limitations for educational purposes promote the dissemination of knowledge and information. They facilitate day-to-day educational activities in teaching and learning institutions, and maximize the use of learning resources. Educational advancement would be impossible if teachers, instructors or learners had to request permission for each and every copy made for classroom preparation, teaching, or other training activities. Costs would be prohibitive if fees had to be negotiated for every single transaction.

The practice of teaching and learning has changed greatly over the last decade. New technologies have enabled the creation of secure virtual learning environments and exciting new ways to teach, learn and interact. Copyright law must keep pace so that students and teachers can access and use copyrighted content regardless of format.

EFFECT OF THE PROVISION

This provision allows teachers, instructors and learners within a secure network to use knowledge resources from a broad spectrum of works to support education. This provision applies to educational activities using a variety of new media, as long as it does not exceed the extent justified by the purpose. It encompasses educational instruction on a one-to-one basis, in a classroom, via broadcast, multimedia, distance/open learning or Web-based facilities.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A copy may be made by or for a teacher, at his/her request, for research, teaching, assessment and/or preparation for teaching;

- 11(1) For the purpose of educational activities copies may be made of works, recordings of works, broadcast in radio and television provided the copying is done by a person giving or receiving instruction and does not exceed the extent justified by the purpose;
- (2) Educational establishments may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in the course of instruction and/or in virtual learning environments, managed learning environments, virtual research environments and library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies;
- (3) Persons receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, theses and in dissertations for personal use and library deposit;
- (4) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies made under subsection (1) to (3);
The permission under subsection (1) shall not extend to reproductions for commercial purposes

- A copy may be made of parts of the work by a learner for criticism or review and/or for inclusion in an assignment, project, report, etc.
- A teacher/instructor/examiner may make a copy to include in a worksheet, assignment, test, examination or similar document for assessment and/or evaluation;
- A teacher/instructor/librarian may place a copy of a work on an access-controlled digital platform, e.g. electronic reserves, WebCT, Intranet, etc., for access by registered staff and learners of a particular institution for educational purposes.

and shall include the reproduction of a whole textbooks where the textbook is either out of print, the owner of the right cannot be found, authorized copies of the same edition of the text book are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.

IIA Inter-library document supply

OBJECTIVE AND RATIONALE

A library cannot own every book or subscribe to every electronic journal, no matter how well resourced the institution. A library's collection development policy reflects the needs of its community of users. Some libraries, such as public libraries, may have general collections. Others, such as academic libraries, may concentrate on certain subjects, such as medicine or music. They may also have material that is unique, rare or out of print. In these circumstances, it is customary practice for a library to provide a copy of an individual item, on a non-commercial basis, to another library in response to a specific request from a user. The collaborative system of resource sharing is known as "inter-library document supply".

EFFECT OF THIS PROVISION

This provision would enable end users to access specific resources that they require that are not be available in their home institution. Usually the library first checks whether the material is available locally, then broadens its search to national or international libraries. Without this provision, users would be limited to the materials available in libraries which they could personally visit or for which they have individual membership. Inter-library document supply also enables libraries to replace missing or damaged parts of works.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A librarian may receive a copy of a book chapter or journal article from another library within its country at the request of a student undertaking academic research;
- A librarian may obtain a copy of a work to replace a missing or damaged work that is out of print and not available in his/her country.

11A(1) A library may supply to another library a copy of a work whether by post, fax or email. A copy may be supplied by the receiving library to a user of such library for their research and or private use.

IIB Translations

OBJECTIVE AND RATIONALE

The ability to read content in one's own language is recognized globally as essential for social and economic inclusion. Studies show that children learn better in their mother tongue.⁵³ The World Summit on the Information Society (2003) affirmed that the creation, dissemination and preservation of content in diverse languages and must be accorded high priority in building an inclusive Information Society.⁵⁴ Yet a significant amount of the world's written output is in major languages such as Chinese, English or Spanish that places large amounts of reading material out of the reach of other language speakers. Libraries and archives are often the primary source of reading materials as well as sound recordings or film (containing the spoken word such as speeches) for researchers, scholars and lifelong learners. New opportunities for online search and resource discovery has enabled greater access to knowledge. As a result, librarians are asked by patrons to facilitate access to foreign language material through the provision of technology-led translation services, such as machine translations. This can be especially helpful to support education and learning in indigenous languages to individuals in multilingual developing countries, such as for example South Africa that has 11 official languages, and India that records 32 regional languages.

The Stockholm Conference for the revision of the Berne Convention (1967) affirmed an implied exception to the right of reproduction with respect to translation (1). Chile and Japan provide for translation by libraries and archives their national laws.

EFFECT OF THIS PROVISION

This provision enables works to be translated by a library or by a person giving or receiving instruction for private educational, teaching and research purposes. It also allows an individual or public entity to translate works from or into indigenous or official national languages and communicate such translations to the public for non-commercial public information purposes. In this way, minority language groups can be fully included in public discourse.

- 11B(1) A library or a person giving or receiving instruction may translate works provided this is not done for commercial purposes. Such translations may be used for private educational, teaching and research purposes only;
- (2) A person or a public body may translate works from or into minority languages and communicate to the public such translations for non-commercial public information purposes.



⁵³. <https://www.globalpartnership.org/blog/children-learn-better-their-mother-tongue>.

⁵⁴. www.itu.int/wsis/docs/geneva/official/dop.html.

SOME EXAMPLES:

- A teacher/instructor translating an extract of a work for discussion with learners in print or in digital format;
- A researcher/academic translating a scientific journal article into his/her mother tongue for self-learning;
- A librarian translating, or organizing a translation, of an out-of-print book into an indigenous or official national language for educational, teaching or research purposes.

IIC Communication to the public for educational and research purposes

OBJECTIVE AND RATIONALE

The WIPO Copyright Treaty (1996) introduced a new right of communication to the public to cover new communication technologies “by wire or wireless means”. This provision provides an exception to the communication to the public right for educational purposes under certain conditions.

EFFECT OF THE PROVISION

The provision facilitates the development of modern ways of teaching and learning. It permits a closed user group such as teachers and learners who registered at an educational institution to access copies of material made under an exception for educational and research purposes via a secure network. Access can be from terminals on-site or off-site in a secure network.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A teacher may make reproductions of copyrighted works accessible to registered students via the institution’s Intranet;
- A teacher may reproduce, show or communicate to registered users of the institution a portion of a film, or play a sound recording for the purposes of criticism or review to students on a media studies course.

11C(1) An educational establishment may communicate to persons affiliated as persons receiving instruction at or from such educational establishment the reproductions and the translations permitted by this Law solely for private, educational and research purposes provided this is done via a secure network.

12 Libraries and archives

OBJECTIVE AND RATIONALE

Every day, libraries and archives in all parts of the world help people to meet their work, study, research and leisure needs. By collecting and providing access to knowledge, libraries and archives are a gateway for education, research, scholarship, creativity and discovery. Their services enrich people's lives and support important public policy goals such as literacy, education, scientific advancement, employability and well-being. They foster the sharing of ideas that encourages further creativity and development.

Libraries and archives require a legal framework that enables activities in support of these public policy objectives. Limitations and exceptions are a key component of a copyright system to permit the acquisition, preservation and dissemination of materials. Copyright laws must keep pace with digital technologies that have changed how people access and use information.

The WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives (Crews, 2008) found that while most countries surveyed have at least one statutory library exception, libraries operate under a patchwork of provisions that differ widely in scope and effect from country to country. In the digital environment, libraries need exceptions that recognize the role of libraries, and their end users, in the global knowledge society. These draft provisions enable libraries to continue to fulfil their public policy goals in the digital environment. They also enable material that has been acquired under deposit schemes to be copied and used on the premises for personal use or study.

EFFECT OF THIS PROVISION

This provision enables memory institutions to reproduce copyrighted works as part of their institutional responsibility in collecting and preserving their collections so that they are permanently accessible. It allows libraries to buy and lend books and other materials – in any format. It allows material to be archived in any format, and seeks to maintain the integrity of the public record for online resources, the medium of today, that disappear for different reasons everyday. It permits libraries to use works in their collections that may be of high historical, social and educational value, but where the rightsholder cannot be found. And it enables librarians and archivists to do their jobs in good faith without the fear of being sued.

- 12(1) Archives, public libraries, other libraries, museums and galleries may use and distribute copies of works as part of their activities in accordance with subsections (2) – (12) provided this is not done for commercial purposes.
- (2) Such institutions may make copies of works in their collection for the purpose of back-up and preservation. Such institutions may also make copies of publicly accessible websites for the purposes of preservation.
- (3) If a work or a copy of such work, in such an institution's collection, is incomplete, such an institution may make or procure a copy of the missing parts from another institution.
- (4) Such institutions may make copies of works that are or should be available in their collections in their chosen format, if they cannot reasonably be acquired in such format through general trade or from the publisher.
- (5) This Law does not prevent the making of copies in accordance with the provisions of the Act [on legal deposit of published works].
- (6) Such institutions may make copies of works where the permission of the author or other owner of copyright cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.
- (7) Copies in whatever format made in accordance with subsections 3-6 or acquired pursuant to the Act [on legal deposit of published works] may be used by users for personal use or study on the premises of the establishment with or without the means of technical equipment and can be lent to users. The same applies in special cases to copies made in accordance with subsection (2).

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

Personnel in the said institutions may:

- Make a backup copy of a work to safeguard against lost, damage or theft;
 - Replace missing parts in a collection, provided they are not available for purchase;
 - Format-shift to a format appropriate for the institution;
 - Enable copies to be made of out-of-print works or where the rightsholder cannot be traced;
 - Permit a library to buy a book that is legally available in another country, and to acquire e-books for their collection.
- (8) Notwithstanding any other section, libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works that are legally available in any country.
 - (9) Notwithstanding subsection 6(d), a library or archive may lend copyright works incorporated in tangible media to a user, or to another library.
 - (10) Notwithstanding subsection 6(e), a library or archive may provide temporary access to copyright works in digital or other intangible media, to which it has lawful access, to a user, or to another library, for consumptive use.
 - (11) Libraries and archives may reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work 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 rightsholder.
 - (12) 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:
 - In the belief, and where there are reasonable grounds for believing, that the work is being used as permitted within the scope of an exception in this Act, or in a way that is not restricted by copyright; or
 - 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.Librarians and archivists shall be exempt from liability for the actions of their users.

13 Reproduction, broadcasting and communication to the public for inforamatory purposes

OBJECTIVE AND RATIONALE

This provision helps to safeguard freedom of expression, a fundamental human right guaranteed by the Universal Declaration of Human Rights,⁵⁵ that encourages open, democratic societies and that helps to shape public debate.

EFFECT OF THIS PROVISION

The provision enables reproduction by the media to the public for a range of informational purposes, such as the reporting of current events, political speeches, public lectures, etc. It facilitates a vibrant news media sector that can inform and enlighten the general public, increase transparency and accountability, and enhance democracy.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A newspaper to reproduce an important political speech made during the course of an election;
- The use of a work as reference material for a current affairs programme.

- 13 The following acts shall be permitted in respect of a work without the authorization of the author or other owner of copyright, subject to the obligation to indicate the source and the name of the author as far as practicable:

(a) the reproduction by the press, the broadcasting or communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;

(b) for the purpose of reporting current events, the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of such events, to the extent justified by the purpose;

(c) the reproduction in a newspaper or periodical, the broadcasting or communication to the public of a political speech, a lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information.

55. Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.



14 Caricature, parody and pastiche

OBJECTIVE AND RATIONALE

Caricature, parody and pastiche are literary or artistic genres that imitate literary, musical or artistic works often using humour. Pastiche follows in a long tradition, from operas by George Frideric Handel to the George Lucas *Star Wars* films from the 1970s. Parodies and caricatures tend to be satirical. Whatever their purpose, caricature, parody and pastiche are considered an important part of popular culture and are used for entertainment, creative works and political expression.

EFFECT OF THE PROVISION

This provision facilitates the development of a healthy environment that encourages freedom of thought and expression through imitation, flattery, ridicule, satirical mimicry or humour.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A cartoonist making a caricature of a politician or other public figure to highlight a particular political or social issue;
- An author writing a parody of a best-selling novel – e.g. *Barry Trotter* is a parody of J.K. Rowling's *Harry Potter*;
- A musician creating a pastiche of songs from a variety of sources.

14(1) Notwithstanding the provisions of section 7 of this Law, use may be made of works and phonograms for the purpose of caricature, parody or pastiche.

15 Reproduction and adaptation of computer programs

OBJECTIVE AND RATIONALE

Interoperability is the ability of different computer systems to work together. To promote innovation and competition, different computer programs need to be interoperable. Software developers and others must be able to copy a program to examine the code and to produce compatible software. The development of new applications would be impeded if permission had to be obtained each time, discouraging innovation and competition for the benefit of consumers. This provision also provides for the making of a backup copy of a computer program to safeguard against its loss.

EFFECT OF THIS PROVISION

This provision reflects the category of exceptions that involve industry practice, competition and commercial interest. It enables the reproduction and adaptation of a computer program to enable it to work with other computer programs. In this way, software vendors can develop competing or complementary products, such as word processing software that works with multiple operating systems or add-on software with new features. It also enables the making of a backup copy should the program become corrupted or unusable in some other way.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- Backing up an expensive application when upgrading your home computer operating system;
- Adapting a computer programme so that it works with your language character set;
- A computer specialist may reproduce or adapt a program to access the information contained in the program or generated from the program for the purposes of migrating to an upgraded system;
- A computer specialist may reverse-engineer to learn about a computer program or to make software work more effectively or to interlink data between different operating systems or databases.

15(1) The reproduction, in a single copy, or the adaptation of a computer program by the lawful owner of a copy of that computer program shall be permitted without the authorization of the author or other owner of copyright, provided that the copy or adaptation is necessary:

(a) for use of the computer program with a computer for the purpose and extent for which the computer program has been obtained;

(b) for archival purposes and for the replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, destroyed or rendered unusable.

(c) to observe, study, or test the functioning of the computer program in order to determine the ideas and principles which underlie any element of the program, including the information necessary to achieve the interoperability of an independently created computer program with other programs.

(2) No copy or adaptation of a computer program shall be used for any purpose other than those specified in subsection (1), and any such copy or adaptation shall be destroyed in the event that continued possession of the copy of the computer program ceases to be lawful.



16 Display of works

OBJECTIVE AND RATIONALE

Institutions that are open to the public, such as libraries and archives may wish to display items in their collection to promote their services or a particular collection.

EFFECT OF THIS PROVISION

This provision would enable an institution to promote copyrighted works within their collection and for professors and students to use images and parts of works in their presentations at conferences and workshops.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- Demonstrating electronic resources in an academic library to new students at the start of term;
- A library exhibition to promote an event, such as an author's reading in the library.

- 16(1) The public display of originals or copies of a work (in parts and in whole) shall be permitted without the authorization of the author for the purpose of promotion of the work, testing of the work or for the training of users of the work;
- (2) It shall be permitted to publicly display or publicly perform parts of a work as part of a presentation at a conference, seminar or workshop or other such similar activity without authorization of the author.

17 Persons with disabilities⁵⁶

OBJECTIVE AND RATIONALE

The right of people with disabilities to take part in cultural life on an equal basis with other people is enshrined in Article 30 of the UN Convention on the Rights of Persons with Disabilities.⁵⁷ This Convention specifically refers to the right to enjoy access to cultural material in accessible formats and the duty on Member States to ensure that laws on intellectual property rights do not constitute an unreasonable or discriminatory barrier to access to cultural materials by persons with disabilities.

According to the World Health Organization (WHO), more than 90% of blind and visually impaired persons live in developing countries. The World Blind Union estimates that even in the wealthiest markets, less than five per cent of published books are accessible to persons who are blind and that far fewer works are available in developing countries. The author of the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired (Sullivan, 2007) found that copyright exceptions for the benefit of blind and visually impaired people are found in

- 17(1) An accessible format copy of a work may be created and distributed, including by import or export, for persons who are blind, visually impaired or otherwise disabled, without authorization of its author or copyright owner.

⁵⁶. These provisions are based on the Proposal by Brazil, Ecuador and Paraguay Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (2009) that, following negotiations, was adopted as the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013). As the Treaty is ratified by countries and implemented into national law, these provisions are subject to change.

⁵⁷. www.un.org/disabilities/default.asp?id=259.

fewer than half of WIPO Member States and seem to be less common in developing countries.⁵⁸

International action was needed to solve the problem of the “book famine”. For this reason, WIPO member states adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled in 2013.⁵⁹ The Marrakesh Treaty seeks to remove barriers created by copyright law to accessing works by requiring countries which ratify the Treaty to have an exception in domestic copyright law for the benefit of print disabled people, and by making it legal to export and import accessible versions of books and other printed works from one country to another.

These provisions apply to persons with all disabilities who need alternative formats in order to access information. As the Marrakesh Treaty for persons with print disabilities is ratified by countries and implemented into national law, they are subject to revision. Countries should ratify the Marrakesh Treaty as soon as possible so that it comes into force at the earliest time, fulfilling the Treaty’s objective to end the book famine.⁶⁰

EFFECT OF THIS PROVISION

New technologies make it possible for people with disabilities to have access to works for study, leisure, work and to participate in hobbies in a format that enables them to access the work the same way as other people. This provision permits accessible format copies of works to be made for the benefit of people with disabilities. Further, the provision allows for the cross-border transfer of accessible copies. It is subject to indicating the name of the author and the source of the work where practical, and the activity must be undertaken on a non-profit basis.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A teacher or instructor may copy a work to enable a dyslexic learner to access the content via text-to-speech software;
- A librarian may convert a copyrighted work to large-text print or Braille for a visually impaired library user;
- A volunteer may record an article onto audiotape for a blind or visually impaired learner;

58. www.wipo.int/meetings/en/doc_details.jsp?doc_id=111453.

59. www.wipo.int/treaties/en/ip/marrakesh.

60. See also the EIFL Guide to the Marrakesh Treaty (2014) www.eifl.net/resource/topic/Copyright.

- A teacher/instructor/volunteer may convert an audiotape to text for a deaf student.
- A library may send an accessible format copy to a library or a blind person in another country.

17A Public documents

OBJECTIVE AND RATIONALE

The Berne Convention leaves it up to Member States to determine the protection granted to official documents, such as texts of a legislative, administrative and legal nature and their official translations. Citizens need access to official documents in order to contribute to the social, economic, cultural and political development of a nation. Such documents may include statistics and other data, legislation and court reports. Information generated by the public sector is also regarded as a valuable source of raw material for new information services and products.⁶¹ Re-use of information resources by public sector bodies is mandated, for example, through legislation in the European Union.⁶²

EFFECT OF THIS PROVISION

This provision places a range of public documents in the public domain so that citizens and other taxpayers, can access, re-use and add value to create new products and services. It ensures that official texts, such as legislation, are freely available, avoiding the scenario of national legislation only being available to its citizens under licence from a commercial entity. It facilitates e-government because document portals can be easily built without the complications of having to obtain authorization or the cost of paying licence fees.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- Government legislation may be placed online for access by citizens and others around the world;
- Legal texts can be published by commercial publishers and individuals with added-value commentaries;
- A journalist may reproduce an official document for the purposes of a news broadcast or webcast.

17A(1) Official texts of a legislative, administrative and legal nature, and official translations of such text are not subject to copyright.

(2) Libraries and archives may request and disseminate to the public official publications issued by government ministries, departments and agencies.

61. http://ec.europa.eu/information_society/policy/psi/index_en.htm.

62. Directive on the re-use of public sector information http://ec.europa.eu/information_society/policy/psi/actions_eu/policy_actions/index_en.htm.

17B Reproduction for computational analysis

OBJECTIVE AND RATIONALE

This provision is based on a 2014 amendment to UK copyright law (see footnote 51) and Article 47 of the Japanese copyright law. It provides for a process known as text and data mining (TDM), or non-consumptive use, of works and other subject matter owned or legally accessed through libraries and archives. Libraries and archives play an important role in the provision of knowledge, particularly scientific knowledge. Technology has developed to such an extent that there is too much data to be read by researchers but computers are now able to read, look for trends or patterns in information and automatically extract important units of knowledge for further research. TDM has been recognized to support innovation and speeds up scientific and medical discoveries for the benefit of mankind. TDM often requires material such as databases or texts to be copied into computer memory. That act of copying could trigger copyright liability. The 2014 TDM amendment in the UK provides an exception from liability when a copy is made to carry out computational analysis. In the US, courts have permitted this copying under the fair use doctrine.

EFFECT OF THIS PROVISION

This provision provides a narrow exception for making copies or works in the memory of computers needed to carry out computational analysis for the sole purpose of research. Additionally, the provision allows the text and data miner to make available quotations from the work.

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A scientist copies scientific databases into computer memory to perform analysis of that data.
- A library copies books into a database to enable analysis of trends regarding the use of certain terms e.g. digital humanities.

17B(1) A person who has lawful access to a work does not infringe copyright in the work by making copies of the work, or by making derivative works of that work, provided that the copies or derivative works are made in order that the person may carry out a computational analysis of anything recorded in the work.

(2) The person in paragraph (1) may make available quotations from the work.



17c Fair dealing

OBJECTIVE AND RATIONALE

More than 40 countries with over one-third of the world's population have a general, flexible exception in their copyright law. This flexible exception typically exists side-by-side a set of specific exceptions.⁶³ The flexible exception allows a court to permit an otherwise infringing activity to the extent that the court considers the use to be “fair” and to meet other statutory criteria. The virtue of a flexible exception is that it allows courts to accommodate new uses in a time of rapid technological change. Delaying the deployment of a new technology until a legislature enacts a specific exception impedes innovation and thus harms consumers.

There are two prevailing approaches to flexible exceptions: fair dealing and fair use. Fair dealing was first developed by courts in England in the eighteenth century, and was codified in 1911. In the UK legislation, an exception to infringement was provided for fair dealing with a work for the purposes of “private study, research, criticism, review, or newspaper summary.” Fair dealing also became incorporated into copyright laws of the former British Imperial territories, now referred to as the Commonwealth countries. Over the past century, however, the fair dealing statutes have evolved in many of the Commonwealth countries. While in some countries fair dealing remains, as in the UK, restricted to the original purposes of the 1911 Act, in other countries these purposes have become a non-exclusive list of examples (see, e.g., Bahamas). In still other countries, legislatures have added factors a court must consider in determining fair dealing (see, e.g., Australia). Moreover, some countries have replaced the term “fair dealing” with “fair use” (see, e.g., Bangladesh). Thus, the fair dealing statutes in many countries have over time increasingly resembled the fair use statute in the United States. (Additionally, judicial interpretations of fair dealing in countries such as Canada are now similar to judicial interpretations of fair use in the United States.)

Fair use in the United States is attributed to Justice Story's 1841 decision in *Folsom v. Marsh*, which was based on the English fair dealing case law. Congress codified fair use in the Copyright Act of 1976. Section 107 provides that fair use for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship and research is not an infringement of copyright.

63. See J. Band and J. Gerafi, *The Fair Use/Fair Dealing Handbook*, <http://infojustice.org/archives/29136>, for a compilation of fair use and fair dealing provisions around the world.

17c(1) In addition to the uses specifically authorized by section 8 through 17B, fair dealing with a copyright work, including such use by reproduction in copies or phonorecords for purposes such as research, private study, scholarship, teaching, criticism, comment, parody, review, or the reporting of news or current events, does not infringe copyright in the work.

- (2) For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including—
- (a) the nature of the work in question;
 - (b) the amount and substantiality of that part of the work affected by the act in relation to the whole of the work;
 - (c) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; and
 - (d) the effect of the act upon the potential market for, or the commercial value of, the work.

It lists four factors that are to be included in the determination of whether the use made of a work in any particular case is a fair use. In other words, Section 107 sets forth non-exclusive purposes and non-exclusive factors for fair use. Although fair use is generally considered to be more flexible and open-ended than fair dealing, this, as discussed above, is no longer the case in many Commonwealth countries.

The countries with flexible exceptions are in all regions of the world and at all levels of development. Although many of the countries with fair use or fair dealing provisions are common law countries, not all are (e.g., Taiwan and Korea). Moreover, civil law judges routinely apply relatively abstract standards to the facts before them, determining whether a party engaged in unfair competition or acted negligently. Even in the copyright space, civil law judges determine whether the alleged defendant copied protectable expression or unprotectable ideas. Fair dealing is no more abstract than the idea/expression dichotomy. The broad diffusion of fair use and fair dealing indicates that there is no basis for preventing the more widespread adoption of these doctrines, with the benefits their flexibility brings to authors, publishers, consumers, technology companies, libraries, museums, educational institutions and governments.

This provision is based on the fair dealing provisions of the Bahamas, Malaysia, and Singapore. These provisions, in turn, reflect a combination of the permitted purposes for fair dealing in UK law and the fair use factors in US law.

EFFECT OF THIS PROVISION

The non-exclusive list of permitted purposes and the four factors provide a framework within which copyright owners, users, and courts can evaluate whether a particular use is a fair dealing. Additionally, courts can look for guidance to the large body of fair use and fair dealing precedent in the United States and Commonwealth jurisdictions, much of which is available online.⁶⁴

SOME EXAMPLES, INCLUDING BUT NOT LIMITED TO

- A library digitizing and providing access to archives including records and photographs relating to the 1939 World Fair in New York City.
- A consortium of libraries copying books from their collections into a database to provide search functionality and full text access to the print disabled.
- A technology company copying millions of student papers to develop plagiarism detection software.

⁶⁴. See J. Band and D. Goldman, *Global Fair Use and Fair Dealing Decisions Available Online*, <http://infojustice.org/archives/30057>.





“Information is the
currency of democracy.”

THOMAS JEFFERSON
(1743–1826)

Libraries and copyright

About libraries

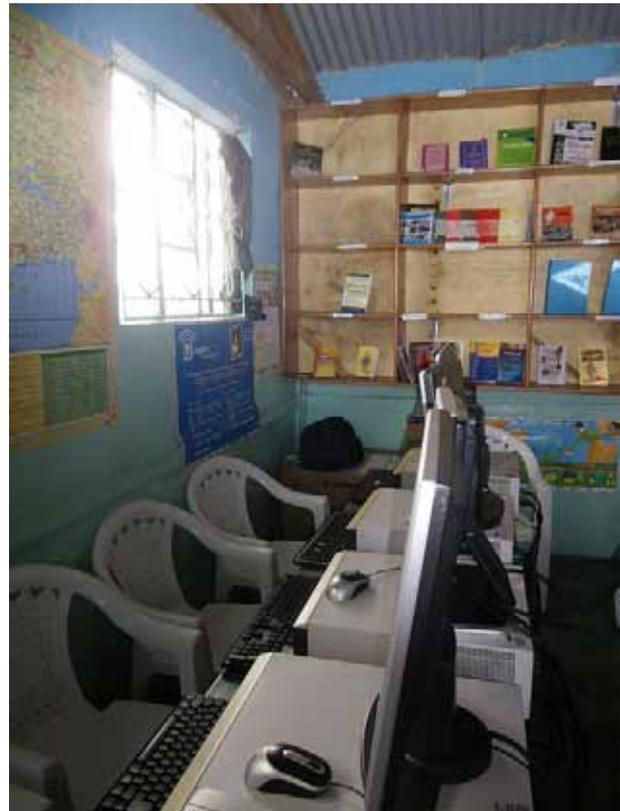
The mission of libraries is to collect, organize, preserve and make available the world's cultural and scientific heritage for current and future generations. Libraries operate for the public benefit supporting education and training, access to knowledge, information and culture. Libraries are independent, neutral spaces committed to providing services on the basis of equality and access for all.

Libraries exist in almost every country in the world. Different types of libraries serve different user groups. The **National Library** usually collects the national publishing output of the country and often has sophisticated preservation and conservation programmes. Many countries also have a network of **public libraries** offering community-based services to the general public including lending books, programmes for literacy and lifelong learning, as well as information on local services. Public libraries range in size from large central libraries to small village centres and mobile libraries serving rural communities. They may also provide services directed to specific groups, such as children, linguistic minorities, people with disabilities, people in hospitals or prisons.

Academic and research libraries

play a central role in supporting teaching, learning and research in universities, schools and other places of learning. **Special and workplace** libraries provide vital information services to people in support of their work, such as government policy makers, doctors and clinicians, as well as the private and corporate sectors, including accountancy and law firms, pharmaceutical companies and media organizations.

The richness of the content in libraries is reflected in the diversity of the media. Packaged in many different ways, it comes in all shapes, sizes and formats: print based materials including newspapers, maps, pamphlets, illustrations, puzzles and games, Braille, as well as books and journals; all forms of sound and visual recording e.g. records and tapes, talking books, CDs, videos, DVDs; online and offline electronic formats e.g. CD-ROM, e-books and journals, databases accessed over the internet. Nowadays, the library is no longer confined to a physical space. Access to library resources, such as electronic journals, is usually available directly on the desktop or mobile device of the user.



Libraries serving the public interest

The delivery of high-quality library and information services helps guarantee universal and equitable access to information, ideas and works of the imagination that people, communities and organizations need for their social, educational, cultural, democratic and economic well-being.⁶⁵

Libraries are not just shelves of books or collections of databases. Resources are carefully selected and organized by trained professionals. The unique role of libraries is that they provide personalized information, responding to the particular questions and individual needs of citizens. This complements the general transmission of knowledge by the media, and makes libraries vital to the creation of a democratic and open information society. Libraries are essential for a well-informed citizenry and transparent governance, as well as for the take-up of e-government.⁶⁶

Everyday libraries in all parts of the world provide information services to people for their work, study, research and leisure needs. Librarians are professionally committed to freedom of access to information with a special obligation to ensure the free flow of information and ideas to present and future generations.⁶⁷ Librarians providing services in the public, educational and cultural sectors among others serve the public interest.

The scope and nature of exceptions and limitations

Recognizing that the purpose of copyright is to encourage creativity and learning, exceptions and limitations have existed in copyright laws from early times. The Berne Convention for the Protection of Literary and Artistic Works mandates free uses, such as quotation, illustration for teaching and the reporting of current events, and permits limitations on protection for political speeches and speeches delivered in the course of legal proceedings. The WTO Trade-Related Aspects of Intellectual Property (TRIPS) Agreement carried forward public interest principles in its Objective.⁶⁸

The 1996 WIPO Copyright Treaty (WCT), carried forward in the Beijing Treaty for Audiovisual Performance (2012),⁶⁹ re-states the principle of balance between rightsholders and users recognizing the need to “maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.”⁷⁰ In addition, the Agreed Statement concerning Article 10 (Limitations and Exceptions) permits members to extend existing limitations and exceptions for the digital environment, and to devise new ones that are appropriate for the digital network age.

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013)⁷¹ represents a significant

65. IFLA Core Values, www.ifla.org/III/intro00.htm#CoreValues.

66. *Alexandria Manifesto on Libraries*, www.ifla.org/III/wsis/AlexandriaManifesto.html.

67. For example: Code of Ethics of the American Library Association, www.ala.org/ala/oif/statementspols/codeofethics/codeethics.cfm.

68. Article 7 www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm.

69. www.wipo.int/treaties/en/text.jsp?file_id=295837.

70. www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#preamble.

71. www.wipo.int/dc2013/en.

development in international copyright law because it is the first treaty to deal specifically with copyright limitations and exceptions. The objective of the Treaty is to help end the book famine – the fact that only about 7 per cent of published works are available globally in accessible formats. In developing countries, where the majority of blind and visually impaired people live, the figure is less than 1 per cent. The Marrakesh Treaty illustrates the importance of limitations and exceptions in the copyright system in order to protect access and to correct market failures.

The type and number of exceptions and limitations are a matter of national sovereignty and differ from country to country.⁷² Determining factors include legal and cultural traditions, socio-economic factors, national

IP strategy and policies. A country may adopt exceptions as are deemed necessary and appropriate, provided they are in line with their international obligations. In practice, robust exceptions can be hard to achieve due to a variety of reasons including pressures from bilateral trade negotiations, strong rightsholder lobbies, and capacity. This is why EIFL is advocating at WIPO for an international instrument for the benefit of libraries and archives.⁷³ Exceptions and limitations can be expressed either as a list of specific uses, a general provision such as the US doctrine of “fair use” or the UK concept of “fair dealing”, or a combination of both.

Exceptions and limitations can be grouped into three broad categories. The first category safeguards fundamental user rights concerning the individual, including freedom of expression and the right to privacy. The second reflects commercial interest, industry practice, and competition, such as reverse engineering of computer programs for interoperability. The third category, that hues most closely to library activities, promotes the dissemination of knowledge and information, and concerns society and the public interest at large.

Exceptions and limitations for libraries

Exceptions and limitations are the cornerstone of access to copyrighted content for libraries and their users. Without exceptions and limitations, 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 who use libraries, could only view or read



copyrighted materials. All other uses would require permission. While this is impractical both for libraries and consumers, it would threaten the core functioning of libraries, and would interfere with the free flow of information in society, and the public interest considerations intended by the copyright system.

In international copyright treaties,⁷⁴ including the Berne Convention, the rights of the rightsholder are specifically identified whereas the exceptions are general and ambiguous. Crucially, rightsholder rights are guaranteed while the exceptions are discretionary. This means that rightsholder rights are international and guaranteed, and exceptions are national and optional. Over the years, the term



of protection has increased in many countries. New treaties have introduced new exclusive rights for rightsholders, new subject matter, and new modes of exploitation. Exceptions and limitations in most countries have not evolved at the same pace, and have not kept up with changes in digital technology. This lack of balance threatens the proper functioning of the copyright system and places libraries at risk of mission failure. This is why libraries and archives are advocating at WIPO to establish basic international standards for exceptions to ensure that libraries have the legal certainty to undertake their activities in the global, digital age.

The important role of exceptions and limitations has been under scrutiny for more than a decade at national level. “Copyright reform is in the air” is the opening statement in a report prepared by the Copyright Review Committee aimed at identifying barriers for innovation in the digital environment in Ireland.⁷⁵ The common theme in several other countries that are also reviewing their national laws is to make copyright fit for purpose in the digital environment. For example, Australia is undertaking an investigation on copyright and the digital economy,⁷⁶ Estonia is harmonizing its intellectual property (IP) law for today’s needs,⁷⁷ and Poland is making reforms essential for the growth of a robust digital society.⁷⁸ In a process that started in 2006,⁷⁹ the UK government introduced changes in 2014 to copyright exceptions for libraries, education, research, disabled people

74. with the exception of the Marrakesh Treaty www.wipo.int/treaties/en/text.jsp?file_id=301016

75. *Modernising Copyright. A Report prepared by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation, Ireland* (October 2013), www.enterprise.gov.ie/en/Publications/CRC-Report.pdf

76. www.alrc.gov.au/inquiries/copyright-and-digital-economy

77. Libraries in Estonia take to the national airwaves with copyright, www.eifl.net/case-study-copyright-debate-estonia

78. Copyright reform in Poland: the need to address the issue of balanced limitations and exceptions, www.eifl.net/case-study-copyright-reform-poland

79. Gowers Review of Intellectual Property www.hm-treasury.gov.uk/gowers_review_index.htm

and personal use⁸⁰ to implement recommendations that the UK has an IP framework best suited to “supporting innovation and promoting economic growth in the digital age”.⁸¹ In 2013 the US Department of Commerce held public consultations on updating copyright policies for the Internet age.⁸²

In December 2013, the European Commission launched a public consultation as part of its on-going efforts to review and modernize EU copyright rules, that includes limitations and exceptions to copyright in the digital age.⁸³ The EIFL response included a seven point plan for EU copyright reform that will help libraries to do their work effectively in the digital environment⁸⁴

The need for an international instrument on exceptions and limitations was the conclusion of a study published in 2008 by Professors P. Bernt Hugenholtz and Ruth L. Okediji.⁸⁵ To improve copyright laws globally for the benefit of libraries, EIFL is advocating at WIPO to establish basic international copyright standards to protect universal access to information, and to support equality in the global, digital world. To achieve this, we are seeking a binding international instrument on copyright exceptions and limitations for libraries. To establish what is needed and to guide Member States in their discussions at WIPO, EIFL, IFLA, ICA and Innovarte presented a Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives (known as TLIB) in 2011 that covers core issues such as digital preservation, library lending, and inter-library document supply. The proposals are format neutral because the public policy principles enshrined in limitations and exceptions should apply regardless of the format. In addition, TLIB has safeguards so that library provisions cannot be taken away by contract or technological protection measures. In the internet age, cross-border uses are protected. In 2012, WIPO member states adopted a Working Document with eleven key topics that are contained in our proposal that form the basis of ongoing discussion.⁸⁶

Libraries and digital technologies

Digital technologies have transformed how content is created, disseminated and used, as well as how libraries acquire, preserve and make digital content available. Movements such as open access, and commercially licensed e-resources,⁸⁷ create opportunities for everyone to have access to top quality information resources, even those living in the remotest regions or the poorest countries.

The fast pace of technological change, such as mobile devices, cloud computing and e-books presents libraries with opportunities to develop innovative services and new

80. <https://www.gov.uk/government/news/changes-to-copyright-exceptions>

81. Implementing the Hargreaves review, www.ipo.gov.uk/types/hargreaves.htm

82. U.S. Department of Commerce Produces Comprehensive Analysis Addressing Copyright Policy, Creativity and Innovation in the Digital Economy, www.commerce.gov/news/press-releases/2013/07/31/us-department-commerce-produces-comprehensive-analysis-addressing-cop

83. Copyright Commission launches public consultation, http://europa.eu/rapid/press-release_IP-13-1213_en.htm

84. See www.eifl.net/resource Response by Electronic Information for Libraries (EIFL) to the European Commission Public Consultation on the review of the EU copyright rules

85. *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, P. Bernt Hugenholtz and Ruth L. Okediji, 2008, www.ivir.nl/publications/hughholtz/limitations_exceptions_copyright.pdf

86. *Working Document Containing Comments on and Textual Suggestions Towards an Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitations for Libraries and Archives*, www.wipo.int/meetings/en/doc_details.jsp?doc_id=242388

87. such as licensed resources available to EIFL partner library consortia through EIFL.

ways to serve library users more effectively. As new opportunities for search and resource discovery are enabled by the internet and collaboration between researchers, students and citizens is increasingly international, there is a growing demand for access to materials across borders. Digitization projects can be national or international.

At the same time, the digital environment raises new legal issues that can disrupt important library activities.

Libraries, copyright and licensing

Most electronic material purchased by libraries is subject to a licence. Off-the-shelf electronic products, such as a dictionary or encyclopaedia on CD-ROM, may be subject to a “shrink-wrap” licence, which is accepted by the library when the product is opened. The majority of a library’s electronic resources are usually large collections of databases, electronic journals, books and newspapers, etc. purchased through commercial vendors. All are usually subject to a licence agreement with the copyright holder (usually the publisher).

The introduction of licences for electronic products introduced a host of new issues for libraries. A licence, mostly regulated by contract law, is a formal authority to do something that would otherwise be unlawful. Contract law often takes precedence over copyright law, so anything that the library agrees to in a licence is usually binding regardless of what the law on copyright says. Therefore libraries should ensure that licence terms for electronic resources don’t take away exceptions in national law.

In addition, exceptions should not be undermined by the legal protection of technological protection measures (TPMs). Anti-circumvention laws should not prevent libraries from availing of lawful exceptions under national copyright laws or otherwise limit the exception.

Libraries uphold the public policy goals enshrined in the principle of exceptions and limitations, and insist on their continued applicability in the digital age. Librarians seek to ensure that existing exceptions and limitations are extended to the digital environment and that new exceptions appropriate to the new technologies are crafted.

The digital environment has transformed how we access and use knowledge for education and research, and to foster creativity and innovation. Copyright law must continue to support these goals in the digital age.



“The need for more openness
in copyright law is almost self-evident
in this information society of
highly dynamic and unpredictable change”

P.B. HUGENHOLTZ
& MARTIN SENFTLEBEN,
2011

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