



HOW DOES THE ARIPO MODEL LAW MEASURE UP TO EIFL'S CORE LIBRARY EXCEPTIONS CHECKLIST?

BACKGROUND

In October 2019, the African Regional Intellectual Property Organization (ARIPO) released a new Model Law on Copyright and Related Rights. The model is intended for ARIPO member states to consider when updating their national laws. It is geared towards harmonization of copyright laws in Africa, and the effective management and development of copyright systems on the continent.

EIFL reviewed the ARIPO Model Law against [EIFL's 'Core Library Exceptions Checklist'](#) that sets out provisions that every copyright law should have to support modern library activities and services. The model law scores a modest 61% in the review. On the positive side, the model recognizes the digital environment – the exceptions are format neutral and they support the delivery of online education. Libraries may undertake preservation, including web archiving. But it is surprisingly weak on ensuring that these exceptions hold up properly in the digital environment. For example, the relegation to secondary legislation of the circumvention of technological protection measures, in order to avail of an exception, is very unsatisfactory and there is no mention at all of protecting the exceptions from override by contracts (increasingly included in copyright reforms in other parts of the world). It is disappointing that the exception for persons with print disabilities has been made subject to a commercial availability test, and that there are no exceptions for people with disabilities other than print disabilities, such as deafness.

In other words, some of the exceptions are more rigid than those of many developed countries, hampering the ability of libraries in ARIPO member states to fulfill their mission of providing the public with access to information. Additionally many ambiguous provisions, that could cast doubt on the lawfulness of certain library activities, reduced the EIFL score.

Further, the ARIPO model differs from international law in two important ways. The first difference concerns fair practice. Article 21 Quotation and Article 22 Reproduction for Educational Purposes are modeled on Articles 10(1) and 10(2) respectively of the Berne Convention. In Berne, these exceptions are conditioned on being compatible with 'fair practice', while the ARIPO model law takes 'fair dealing' as its standard. Fair practice is a broad concept defined as "an objective appreciation of what is normally considered admissible"¹ whereas fair dealing, as set out in the model law, applies to a set of more convoluted criteria i.e. a closed list

¹ The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from

of limited purposes (scientific research, private use, criticism or review, reporting of current events), subject to four factors (which match the four fair use factors in the U.S. Copyright Act), and that apply only in situations that meet the three-step test. In other words, the quotation right and illustration for teaching in the ARIPO model law is a lot more restrictive than the Berne Convention.

The second difference concerns the three-step test. In Berne, the three-step test applies to reproduction for general purposes only. It does not apply to reproduction under a specific Berne exception, such as quotation or illustration for teaching. Section 18(2) of the ARIPO model law applies the three-step test to all the exceptions (Sections 18-30), including quotation and illustration. Further, two exceptions are additionally subject to the test - Section 19 on private copying, and Section 27 on the distribution of accessible format copies by authorized entities.

EIFL is of the view that since the three-step test is intended as a drafting tool for the legislator, once applied, the test should not be included in national law. Otherwise, the application of the exceptions may be unduly constrained², and this multi-layered ‘Russian doll’ approach to the application of the test creates uncertainty and confusion among beneficiaries over what activities are permitted, or not under the exception.

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which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales, circulation, etc.” The WIPO *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*

² Towards a balanced Interpretation Of The "Three-Step Test" In Copyright Law, Christophe Geiger, Reto Hilty, Jonathan Griffiths Opinion: [2008] E.I.P.R. 489

REVIEW

Collection Development

May a library buy lawfully produced books and other materials from another country for inclusion in its collection?

The Model Law leaves it up to each country to decide.

The economic rights granted in section 7 include the distribution of the original or a copy of the work to the public (7(1)(c)); and the importation of the work (7(1)(j)).

Section 7(2) provides for exhaustion of the distribution right, but leaves it to the country whether the exhaustion applies to the sale of a copy in “any country” (international exhaustion) or in the “national territory” (national exhaustion). Section 7(2) does not directly apply to the importation right.

However, the definition of “distribution” in Section 2 Interpretation includes “importing for the purpose of putting into circulation and public offering for sale and other transfer of ownership.” Thus, the elective exhaustion provision in section 7(2) would appear to extend to importation.

It should be noted, however, that a person infringes under Section 40(1)(a) if he or she “imports, or cause to be imported, a work which the person knows to be an infringing copy.” This suggests that the importation right is infringed only if a person imports an infringing copy. But Section 41(1)(a) provides that a person is a secondary infringer when he or she “imports or causes or causes to be imported or distributed for commercial purposes” any work without the consent of the copyright holder.

In short, the exact scope of the importation right is far from clear, but the ARIPO Model Law provides for national or international exhaustion. From a library perspective, international exhaustion encourages competition and increases choice when buying books. The mandating of international exhaustion in the Model Law would have encouraged regional harmonization for book distribution, rather than increased divergence.

May a library lend a physical book/CD/DVD to a library user, or to another library?

Yes, but the lending might be conditioned on the payment of a fee.

Section 7(2) provides for the exhaustion of the distribution right in a copy that has been subject to a sale or transfer authorized by the copyright owner. But Section 7(1)(k) grants the copyright owner an exclusive right in “public lending.” The Model Law does not further discuss this public lending right (PLR). Thus, a library could lend a copy to a user or to another library, but the lending might be conditioned on the payment of a fee.

It should be noted that there is no exclusive right for public lending in any international copyright treaty. EIFL believes that public lending should be freely available to all. We do not favour situations where scarce resources would be diverted from activities and services supporting literacy, a reading culture and education, for example.

May a library by law lend an e-book to a library user?

There is no specific provision that allows a library to lend an e-book to a user.

Support For Education and Research

May a library supply a copy of a work such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library?

Yes. Section 23(2)(a) provides that a library can make a copy of an article or a short extract of a work to satisfy the request of a natural person, provided that: (i) the library is satisfied that the copy will be used solely for the purposes of study, scholarship or private research, (ii) the reproduction of any particular work is an isolated act occurring, if repeated, only on separate and unrelated occasions, (iii) there is no collective license available from a reproduction rights management organization under which such copies can be made; and (iv) the author is acknowledged. The section does not restrict the format of the copy, so presumably a library can make a digital copy. Presumably providing a single copy does not constitute a distribution or communication to the public.

May a library send and receive such copies across borders?

There is no specific provision in the Model Law that would allow such cross-border use. As noted above, the scope of the importation right in section 7(1)(j) is unclear. The exhaustion provision in section 7(2) does not apply to copies made without the copyright owner's authorization.

May a library create databases of collection material, including e-resources managed by the library, to facilitate text and data mining by researchers?

Section 23(1) provides that a library may make a single copy of a work it has lawfully acquired. This single copy arguably could be used to populate a database of collection material. Further, Section 21 permits making quotations from a work, provided that their making is "compatible with fair dealing, and their extent does not exceed that justified by the purpose." A library could argue that the creation of a database to facilitate text and data mining—that is, to facilitate quotation—falls within the scope of the quotation exception.

On the other hand, the relationship between Section 23(1) and the other library exceptions—Sections 23(2) and 23(3) is unclear. Are the copies permitted in Section 23(2) and (3) in addition to the copy under Section 23(1)? Or do Section 23(2) and (3) limit the availability of Section 23(1)?

May a library provide copies of collection material for use in virtual learning environments to facilitate distance learning?

A library that is part of an educational institution likely would be permitted to provide copies for use in virtual learning environments.

Section 22 permits the use of a work by way of illustration, including “the making available of such works in digital networks, provided that access to the works is only available to enrolled pupils of students and their teachers.” A library that is part of the educational institution likely would be permitted to perform (or enable) such making available.

May a library digitize orphan works in its collection, and make them available online?

Section 23(1) might allow a library to digitize the orphan works in its collection. However, it probably would not permit the library to make these orphan works available online.

Preservation and Replacement

May a library make copies of works in its collection in any form for preservation or back-up, and provide access to these copies?

Section 23(3) allows a library to “make a copy of a work made in order to preserve and, if necessary, replace a copy, which has been lost, destroyed or rendered unusable,” provided that (i) it is impossible to obtain such a copy under reasonable conditions, and (ii) the reproduction of any particular work is an isolated act occurring on separate and unrelated occasions. A library might be able to provide access to the preserved copy in a manner consistent with the public lending right, as appropriate, established in that country (Section 7(1)(k)).

What I meant was that the library could lend the preserved copy in a manner consistent to the public lending right established in that country.

May a library procure from another library the missing parts of any work in its collection?

Section 23(3) could be read as permitting a library to make a copy of a missing part of a work in its collection, from another library’s copy of that work.

May a library web archive, i.e. preserve publicly accessible websites?

Section 23(1) allows a library to make a single copy of a work it lawfully acquired. It is unclear whether works on a publicly accessible website could be considered lawfully acquired under section 23(1). If not, the preservation exception in Section 23(3) is not limited to works in a library's collection. Thus, a library could argue that web archiving is permissible.

Persons with Disabilities

May a library make an accessible format copy of a work and provide it to a person with a disability?

Partly – if the person has a print disability, the answer is yes. If the person has another disability, for example, deafness, it is not permitted.

Sections 26 and 27 contain an exception implementing the Marrakesh Treaty for persons who are blind, visually impaired or otherwise print disabled. An authorized entity (such as a library) is permitted to make and distribute an accessible format copy to people with print disabilities. The relationship between Sections 26 and 27 is unclear however; their provisions appear duplicative, but they impose different limits. Section 26(1) permits the making and distribution of an accessible format copy only if the work is not reasonably available in the necessary accessible format. Section 27(d) allows the distribution and making available of accessible format copies only in compliance with the three-step test.

The Marrakesh Treaty permits countries to retain and expand exceptions benefiting people with disabilities, other than print disabilities mandated by the treaty. The ARIPO Model Law could have availed of this flexibility. Therefore, countries that already have exceptions for other types of disabilities, for example, deafness, retain these exceptions.

May a library send and receive accessible format copies to and from other countries?

Yes, for people with print disabilities. Section 26(2) permits the distribution of an accessible format copy made outside the country. Section 27(1)(c) permits an authorized entity to export an accessible format copy to an authorized entity or a person with a print disability in a country party to the Marrakesh Treaty. Section 27(1)(d) permits an authorized entity, or a person with a print disability (or someone acting on his or her behalf), to import an accessible format copy.

Format Neutral

May a library make copies in any format, including digital copies?

Yes. The exceptions for libraries are format neutral, and appear to allow the making of digital copies.

Safeguarding Exceptions in the Digital Environment

Are the exceptions granted to libraries in copyright law safeguarded from override by license terms?

No. Nothing in the law safeguards copyright exceptions from being overridden by licence terms.

Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?

The Model Law leaves this question to secondary legislation. Section 45(3) provides that the Minister responsible for copyright matters may promulgate regulations providing exceptions to the legal protections for TPMs under Section 45(1). Such exceptions are permitted only to the extent that they don't impair the adequacy or effectiveness of legal protection for TPMs. A footnote states that the three-step test should be considered as guidance to the regulations.

Limitation on Liability

Does the law protect librarians from being sued in the course of their duties?

No. The Model Law does not limit the liability of librarians for any copyright infringement they commit in the course of performing their duties.

A Flexible Exception

In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?

Yes. Section 18 contains a fair dealing exception for purposes of scientific research, private use, criticism or review, or the reporting of current events. The fair dealing provision applies only to this closed list of purposes. In determining whether any particular use is a fair dealing, four factors are to be considered, which match the four fair use factors in the U.S. Copyright Act. Additionally, all the exceptions in the Model Law, including fair dealing, apply only in situations that meet the three-step test. Libraries may rely on the flexibility of Section 18 for activities not specifically permitted by another exception.



Rate my copyright law

How does your copyright law support activities and services in your library? This scorecard is a handy way to rate your national law for core library provisions. Check how the law performs, and compare with other countries. Identify any gaps, or see where it's doing well. The questions on the scorecard should be read together with the *EIFL Core Library Exceptions Checklist*. Tip: Library activities and services may be permitted through specific exceptions, a flexible exception such as fair use/fair dealing, case law, or related law. If in doubt, seek legal advice.

	YES 2	PARTLY 1	NO 0
COLLECTION DEVELOPMENT			
May a library buy lawfully produced books and other materials from another country for inclusion in its collection?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library lend a physical book/CD/DVD to a library user, or to another library?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library by law lend an e-book to a library user?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SUPPORT FOR EDUCATION AND RESEARCH			
May a library supply a copy of a work, such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library send and receive such copies across borders?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library create databases of collection materials, including e-resources managed by the library, to facilitate text and data mining by researchers?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library provide copies of collection materials for use in virtual learning environments to facilitate distance learning?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library digitize orphan works in its collection, and make them available online?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PRESERVATION AND REPLACEMENT			
May a library make copies of works in its collection in any format for preservation purposes or back-up, and provide access to these copies?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	YES	PARTLY	NO
	<input type="text" value="2"/>	<input type="text" value="1"/>	<input type="text" value="0"/>
May a library procure from another library the missing parts of any works in its collection?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library web archive, i.e. preserve publicly accessible websites?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PERSONS WITH DISABILITIES			
May a library make an accessible format copy of a work and provide it to a person with a disability?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library send and receive accessible format copies to and from other countries?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
FORMAT NEUTRAL			
May a library make copies in any format, including digital copies?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SAFEGUARDING EXCEPTIONS IN THE DIGITAL ENVIRONMENT			
Are the exceptions granted to libraries in copyright law safeguarded from override by licence terms?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
LIMITATION ON LIABILITY			
Does the law protect librarians from being sued in the course of their duties?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
A FLEXIBLE EXCEPTION			
In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Does your law measure up?

TOTAL SCORE	<input type="text"/>	TYPE OF LIBRARY	<input type="text"/>	LAW*	<input type="text"/>
COUNTRY	<input type="text"/>	DATE	<input type="text"/>	* VERSION/DATE	