

STATEMENT OF PRINCIPLES
ON
COPYRIGHT EXCEPTIONS AND LIMITATIONS
FOR LIBRARIES AND ARCHIVES

BY

ELECTRONIC INFORMATION FOR LIBRARIES,
INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND
INSTITUTIONS,

AND
LIBRARY COPYRIGHT ALLIANCE

WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS
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The international library community believes that there is an immediate need for a new understanding of the role of copyright exceptions and limitations in the 21st century and for corresponding action on the part of Member States to include provisions in their national laws to address the realities of access to digital information.

Recognizing the urgent global need to increase the scope of copyright exceptions and limitations for library services and access to information in all parts of the world;¹

Acknowledging the role that libraries² have played throughout history as repositories of works that comprise the cumulated knowledge, cultural heritage and collective memory of nations and peoples;

Acknowledging that libraries have a public mission, often governed by statute, to enable the advancement of knowledge essential to teaching, research, and the public interest;

Acknowledging that libraries must now fulfill their public mandate in the global digital environment;

Acknowledging the role that copyright law has long held in supporting the essential functions of libraries through statutes that, as a matter of common practice, permit functions such as preservation, library lending to users, interlibrary lending, and copying for research and private purposes;

Emphasizing that exceptions and limitations embody long-standing public policy goals and principles that remain applicable irrespective of the format of the material;

Emphasizing that copyright laws in many nations have enabled library activity in the print environment, but they have not been updated sufficiently on an international scale to allow for adequate uses of digital information;

Emphasizing that the private licensing of information often prevents lawful uses of copyrighted works, undermining the services of libraries, and hindering intellectual and creative activity;

Emphasizing that the absence of effective provisions addressing use of digital information and the use of technological protection measures constrains libraries from performing functions that copyright law has long intended to support;

Aware that as a result, entire bodies of works are in fact lost, researchers are unable to obtain necessary information to accomplish their work and a vast amount of digital information currently being created is not being systematically collected or preserved and faces extinction;

Emphasizing that humanity faces a digital blackout in the historical record and in the progress of research, scholarship and culture if measures are not taken to reinforce copyright exceptions and limitations governing library activity globally;

Emphasizing that developing and transition nations do not always benefit from flexibilities, including copyright exceptions and limitations, that may be available to them within the intellectual property system;

Emphasizing that the development of a global approach to exceptions and limitations is one of the central challenges facing the international copyright regime today;

Stating that the challenge extends to the structure of the Berne Convention, which secures the rights of copyright owners clearly and explicitly, but by contrast, does not adequately ensure that the public interest will be served through the creation of exceptions and limitations;

Stating that because the rights of copyright holders in international and domestic law are drafted broadly, they have expanded over time with newly developed technology, and that by contrast, copyright exceptions and limitations are written and interpreted narrowly, and often in rigorous detail, and have not been allowed to adjust and adapt to new technologies and new realities;

Emphasizing that the rights of owners continue to expand and adapt while exceptions and limitations remain fixed, and are at steady risk of becoming obsolete with successive changes in information technology;

Emphasizing that at a time of dramatic and continued technological change, the role of copyright exceptions and limitations has become unacceptably unbalanced;

The library community asserts that exceptions and limitations maintaining the longstanding function of copyright law in society should be viewed as public rights balancing the private rights to information also granted in copyright laws. They should be seen as integral to the proper function of copyright as a means of supporting innovation, creativity and economic growth in all parts of the world.

The WIPO Standing Committee on Copyright and Related Rights (SCCR/18) continues its discussions on exceptions and limitations, which have evolved in the context of proposals submitted to WIPO from the government of Chile in 2004 (SCCR/12/3) and 2005 (SCCR/13/5) and from the governments of Brazil, Chile, Nicaragua, and Uruguay in 2008 (SCCR/16/2). In its proposal of November 2005, Chile reiterated the importance of prioritizing the work of the SCCR “to strengthen international understanding of the need to have adequate limitations, learning from existing models and moving towards agreement on exceptions and limitations for public interest purposes, which, like minimum standards, were to be envisaged in all legislation for the benefit of the international community” (SCCR/13/5).

Chile identified three areas of work to be undertaken by the SCCR:

1. Identification, from the national intellectual property systems of Member States, of national models and practices concerning exceptions and limitations.
2. Analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming therefrom.
3. Establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community, especially to give access to the most vulnerable or socially prioritized sectors.

We acknowledge the recent work done by the SCCR to study exceptions and limitations in the digital environment, for the visually impaired, for libraries and archives, and for educational activities, illustrating national models and practices concerning exceptions and limitations. It is our hope that these studies will provide a framework to strengthen international understanding of the need for adequate exceptions and limitations and to restore the balance necessary to maintain a durable and sustainable global information society.

We urge WIPO to continue work on the areas identified in the proposal by Chile. In connection with the second area of analysis, we propose an evidence-based study directed at determining those exceptions and limitations for libraries needed to promote creation and innovation and the dissemination of developments stemming therefrom. This study should be aimed toward the goal of reaching agreement on core exceptions and limitations for the public interest to serve as a minimum in all national legislations.

We ask that WIPO consider concrete proposals for instruments that will guide IP administrations, that are explicitly aimed at expanding the array of available copyright exceptions and limitations globally, and in particular for developing countries. Where copyright exceptions and limitations do not exist at the national level,³ we ask that WIPO assist nations in developing them, in connection with technical assistance and thematic work programs being proposed within the WIPO Development Agenda.

We ask WIPO Member States to take action to address the gaps in copyright provisions for libraries and archives in their national laws. In doing so, Member States will promote the intellectual and creative life of their nations into the future.

We respectfully ask that Member States adopt the following principles to guide the formulation of copyright exceptions and limitations for libraries and archives in national copyright laws:

Preservation

A library should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats.

Seventy-two countries currently have a statute allowing copies for library preservation. Sixty-seven countries allow libraries to reproduce works for replacement purposes, and fifty-three of those exceptions clearly allow the library to make copies for deposit in another library.⁴ However, many such provisions do not apply to certain categories of copyrighted works, such as audiovisual materials and sound recordings, and they do not have clear language applying to digital materials. Libraries in more than half of the world's countries lack legal certainty in their ability to perform activity that is essential to their missions, and many more lack certainty in handling digital information at all.

The preservation exceptions should apply equally to all categories of copyrighted works, and to materials in all media and formats. Libraries should be allowed to preserve proactively materials at risk of deterioration, damage, or loss.

Legal deposit

Legal deposit laws and systems should be broadened to include works published in all formats and to allow for preservation of those works.

A legal deposit system requires organizations and individuals producing documentation in multiple copies to deposit one or more copies with a recognized national institution or institutions. It is an essential means for ensuring the comprehensiveness of national library collections and for ensuring that the published heritage of a nation is acquired and preserved for all time.

Legal deposit legislation often excludes certain categories of works and non-textual formats, such as sound recordings and audiovisual works. Legal deposit legislation in

many nations has not expanded to include electronic publications. To address the fragile nature of digital works, legal deposit legislation should include a derogation clause permitting preservation of works regardless of format and notwithstanding the provisions of a copyright act that does not permit it.

Interlibrary loan and document supply

Libraries should be able to supply documents to the user directly or through the intermediary library irrespective of the format and the means of communication.

Seventeen countries currently have specific exceptions on document supply, while six countries permit copying for interlibrary loan for the purpose of delivering the copy to an individual user.⁵ Some national laws allow for interlibrary document supply services under a general library provision, while others contain no provision at all. Sharing of materials is vital for the advancement of knowledge, particularly in developing countries.

No library within a country can own every book, journal or published work. It is customary practice for libraries to supply one another other with material on a non-commercial basis, in response to requests from their users, in order to provide the widest access to knowledge and the best service to their patrons. The collaborative system of resource sharing is commonly known as interlibrary loan for print material and interlibrary document supply for digital material. Interlibrary arrangements are an essential means for ensuring richness and diversity in collections and for maintaining robust library services that allow for resource sharing while protecting the legitimate interests of rights holders.

Education and classroom teaching

It should be permissible for works that have been lawfully acquired by a library or other educational institution to be made available in support of classroom teaching or distance education in a manner that does not unreasonably prejudice the rights holder. A library or educational institution should be permitted to make copies of a work in support of classroom teaching.

Educational advancement would be impossible if teachers, instructors or learners had to request permission every time they needed to reproduce material for teaching preparation, teaching, learning, instructing or other training activities. The administrative infrastructure needed to secure permissions for every single educational or teaching need would be unreasonable.

New technologies enable the creation of secure virtual learning environments and exciting new ways to teach, learn and interact. Exceptions must keep pace so that the students of tomorrow benefit in the same way as their counterparts in the paper age. Education is the key to economic and social development, acknowledged the world over.

Reproduction for research or private purposes

Copying individual items for or by individual users should be permitted for research and study and for other private purposes.

This is one of the most widely accepted exceptions and limitations 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 recognized by librarians who encounter the real needs of individuals and organizations making use of copyrighted material for creative, educational, and informative purposes. It would be impractical if permission had to be obtained for each and every copy, and it would hamper the free flow of information in society. Libraries should be able to provide users with the means for making these reproductions, regardless of the format of the material.

Provision for persons with disabilities

A library should be permitted to convert material from one format to another to make it accessible to persons with disabilities. The exception should apply to all formats to accommodate user needs and technological advances. To avoid costly duplication of alternative format production, cross-border transfer should be permitted.

Human rights are denied when persons with disabilities are denied access to information. All people have a right to read and learn, and experience enriched lives. The needs of disabled persons in developing societies require particular attention from the international community. Cross-border transfer currently leads to legal uncertainties that undermine the use of new technologies and services that can improve the lives of disabled persons. Action must be taken to expand library provisions for the benefit of disabled persons, by enabling the use of information by persons with disabilities through any media and regardless of national borders.

General free use exceptions applicable to libraries

A general free use exception consistent with fair practice helps ensure the effective delivery of library services.

General exceptions such as fair use and fair dealing should extend to library activities as a complement to specific library exceptions. In some nations, general free use exceptions are limited to purposes such as research and study, criticism or review, news reporting, parody or satire, and judicial proceedings. In other countries, notably the U.S., it is accepted that fair use extends to certain library activities. Specific library and archival exceptions should not represent the outer limits of permissible activities undertaken by libraries and archives. Fair use and fair dealing serve the further purpose of permitting libraries to adapt services to emerging needs before specific exceptions may be amended.

Orphan works

An exception is needed to resolve the problem of orphan works, where the rights holder cannot be identified or located.

Many good-faith users of protected works are unable to identify or locate rights holders when they seek to use a work. For libraries and other stewards of cultural heritage, the inability to identify or locate rights holders often leads to gaps in access to important local and unique collections. Fearing liability, libraries forgo the use of these “orphan” works, even when the use is for non-profit purposes, such as preservation. A mechanism to reduce the risk of liability for libraries with respect to orphan works would help to expand access to millions of works. An orphan work limitation would help to preserve works in addition to exposing works which would otherwise be ignored.

Copyright term

Consistent with the Berne Convention, the general term of copyright should be the life of the author plus 50 years.

The international standard term of protection for a literary work as set out in the Berne Convention and the TRIPS Agreement is life of the author plus 50 years. In many countries, the general term of protection has been extended to life of the author plus 70 years. Term extensions mean that information remains under private ownership for longer, benefiting the estates of rights holders at the expense of libraries, education, and individuals. Copyright terms should not be further extended in national laws. A robust public domain provides new opportunities for creativity, research, and scholarship.

Technological protection measures that prevent lawful uses

It should be permissible for libraries and their users to circumvent a technological protection measure for the purpose of making a non-infringing use of a work. Implementation of anti-circumvention legislation in many nations exceeds the requirements of Article 11 of the WIPO Copyright Treaty, effectively eliminating existing exceptions in copyright law.

The WIPO Copyright Treaty permits exceptions, but few countries have enacted exceptions to the anticircumvention law for the benefit of libraries and library users. Exceptions and limitations are policy-based legal principles, with nuances and complexities that reflect national public policy. The use of technological protection measures reduces information policy to zeroes and ones, either on or off, and with the toggle of an electronic switch, abolishes important national policies that were created for public benefit. Moreover, most of the statutory exceptions to anticircumvention have been heavily criticized as unworkable. WIPO should support investigation of an entirely new approach to these issues and to identify innovative means for meeting the objectives of the law.

Contracts and statutory exceptions

Contracts should not be permitted to override exceptions and limitations. The goals and policies providing for exceptions are important statements of national and international principle and should not be varied by contract.

Most digital products acquired by libraries are accompanied by licenses that override statutory exceptions and limitations supporting library activities. The private law of contract can thereby override the public law of copyright. Accordingly, license terms that seek to undermine copyright exceptions and limitations should not be enforceable against libraries. In addition to licenses for individual works, we see the emergence of broad license agreements that encompass a vast amount of materials and set tight restrictions. These agreements have the potential to redefine the rules of copyright for large portions of the intellectual heritage of a country. Licensing agreements should not redefine the rules of copyright.

Limitation on liability

There should be a limitation on liability for libraries and library staff who act in good faith, believing or having reasonable grounds to believe, that they have acted in accordance with copyright law.

Libraries are critical intermediaries in fostering public access to information resources. Libraries and library staff strive to adhere to the law, and they respect the legitimate interests of rights holders. In fulfilling their public mandate, libraries throughout the world handle vast amounts of information daily, inevitably facing questions of interpretation and application of the law. Librarians, who are ordinarily not professionally trained in the law, commonly need to answer their own questions about copyright without the benefit of specialised legal advice. Member States should offer the protection of limited liability for libraries and library staff who act in good faith in applying copyright law. By acting in good faith, the library is taking steps to understand and apply the law in a manner that respects all interests.

1. We wish to acknowledge Kenneth Crews for providing the first comprehensive overview of statutory provisions in national copyright laws of WIPO Member States for the benefit of libraries and archives. His Study on Copyright Exceptions and limitations for Libraries and Archives (2008), commissioned by WIPO, provides a foundation for further analysis, and underlines the need for broadening the scope of copyright exceptions and limitations for libraries and archives worldwide. The study is available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf.

2. In this document the term “library” is generally used to refer to both libraries and archives, and is used for the sake of efficiency.

3. Twenty-one countries lack a library exception in their copyright law. Kenneth Crews, WIPO Study on Copyright Exceptions and limitations for Libraries and Archives (2008), 29.

4. Crews, 3.

5. Crews, 68.