

Standing Committee on Copyright and Related Rights (23rd session)
November 22, 2011

Limitations and Exceptions: Libraries and Archives
List of common topics discussed by delegations

I. Preservation of library and archival material

African Group	Brazil (Background paper)	United States of America	Brazil, Ecuador and Uruguay
Preservation of library and archival materials 1. It shall be permitted to make limited copies of published and unpublished works, regardless of their format, to meet the needs of libraries and archives, without the authorization of the owner of copyright; 2. The copies of the work referred to in paragraph (a) shall be used solely to meet the needs of teaching, research, and preservation of cultural heritage; 3. The copies referred to in paragraph (a) shall be made for non-profit uses, in the general interest of the public and for human development, without conflicting with the normal exploitation of the work or unreasonably prejudicing the legitimate interests of the author; this	Preservation of Library and Archival Materials 1. It shall be permitted for libraries and archives to reproduce works, or materials protected by related rights, for the purposes of preservation or replacement, in accordance with fair practice. 2. Copies that have been reproduced for the purposes of preservation or replacement may be used in place of the original works or material preserved or replaced, in accordance with fair practice. Explanatory Note This provides an exception to the reproduction right for the purpose of preservation of works and materials protected by related rights by libraries and archives. This permits libraries and archives to	Objective: Enable libraries and archives to carry out their public service role of preserving works. Principles: Exceptions and limitations can and should enable libraries and archives to carry out their public service role of preserving works that comprise the cumulative knowledge and heritage of the world's nations and peoples. To that end, exceptions and limitations can and should enable libraries and archives to make copies of published and unpublished works for purposes of preservation and replacement, under appropriate circumstances. The need for such preservation exists	

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activity may be exercised in situ or remotely.	reproduce for preservation purposes as many copies of works or materials in as many formats as are technically needed in accordance with the standards of best professional preservation practice. (Examples of some current preservation standards can be found at http://libguides.wits.ac.za/digitisation_preservation_and_digitalcuration). Sub-paragraph 2 allows libraries and archives to use a preservation copy as the working copy in order to preserve the original work (which may be very old, very fragile, rare or precious or in the digital environment may need to be in a different format to be usable). This provides flexibility to copy, format-shift and migrate copyright works and materials to different platforms and to use these copies in place of the original, so that the original itself is not damaged and is preserved for posterity.	in a variety of media and formats and may include the migration of content from obsolete storage formats.	

II. Right of reproduction and supply of copies

African Group	Brazil (Background paper)	USA	Brazil, Ecuador and Uruguay
Supply of works It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.	Copies by Libraries and Archives 1. It shall be permitted for a library or archive to reproduce and to supply a copy of a copyright work, or of material protected by related rights, to a library user, or to another library or archive, for purposes of: a) education; b) requests by users for research or private use; c) interlibrary document supply; provided that such reproduction and supply is in accordance with fair practice. 2. Libraries and archives shall be permitted to reproduce and supply a copy of a copyright work or material protected related rights, to a user, in any other case where a limitation or exception in national legislation would allow the user to make such copy. Explanatory Note This provides an exception to the reproduction right for the purpose of allowing libraries and archives to reproduce and supply copies of works and materials protected by related rights that are held in their collections to users, or to another library or		Reproduction and Distribution of Copies by Libraries and Archives 1. It shall be permitted for a library or archive to reproduce and to distribute a copy of a copyright work, or of material protected by related rights, to a library user, or to another library or archive, for purposes of: a. education; - b.-requests by users for research or private study; - c.- interlibrary document supply; provided that such reproduction and distribution is in accordance with existing international obligations, among them the Berne Convention. 2. Libraries and archives shall be permitted to reproduce and distribute a copy of a copyright work or material protected related rights, to a user, in any other case where a limitation or exception in national legislation would allow the user to make such copy.

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	archive for the use of a reader there. This would be done under a permitted limitation or exception in accordance with fair practice as determined by national law. Here the limitation of "fair practice" is derived from the use of the term in Article 10 of the Berne Convention. This limitation is needed because it would not normally be regarded as "fair practice" to copy a whole book for instance but in other cases it would be fair practice to copy the whole of smaller works such as a poem, a periodical article, an illustration, a recipe or a knitting pattern, since without the integrity of the whole the copy would be useless. The WIPO guide to the Berne Convention explains that "fair practice" implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if		

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	any, the new work, by competing with the old, cuts in upon its sales, circulation, etc." World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)(Geneva: WIPO, 1978), 58-59. Libraries and archives in many countries make copies under library and archive exceptions on the users' behalf and the service is often called a "document supply" service.		

III. Parallel Importation and purchase of works

African Group – SCCR/22/12	Brazil & Ecuador (IFLA)	USA	Brazil, Ecuador and Uruguay
Purchase of works It shall be permissible for libraries and archives to purchase and import legally published works to be incorporated into their collections in cases where a Contracting Party does not provide for international exhaustion of the importation right after the first sale, or other transfer of ownership of a work.	Parallel Importation In cases where the respective Contracting Party does not provide for international exhaustion of the distribution or importation or exportation rights after the first sale or other transfer of ownership of such work or material, libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works or materials protected by related rights that are legally available in any country. Explanatory Note This provides an exception to the distribution right. Its purpose is to ensure that the principle of international exhaustion (whereby the distribution right is exhausted after first sale anywhere in the world) applies to the acquisition of works and materials protected by related rights by libraries and archives for their collections, whether by purchase or through gift or exchange. This provides that libraries and archives are not restricted by the principle of national exhaustion		

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	(whereby the distribution right is exhausted with the first sale in a territory), with regard to the works and materials they can purchase and import from foreign countries, or in their ability to accept donated or exchanged works and materials originating from outside the territory of their location. This would apply to both online and offline transactions.		

IV. Cross-border uses

African Group	Brazil (Background paper)	USA	Brazil, Ecuador and Uruguay
Cross-border uses of works and materials reproduced under an exception or limitation It shall be permissible for libraries and archives located in the territory of a Contracting Party to send, receive or to exchange a copy of work, or material protected by related rights, legally made in the territory of another Contracting Party including copies of works and materials protected by related rights made in accordance with this Treaty.	Cross-Border Uses To the extent that it is necessary for the exercise of a limitation or exception provided for in this Treaty, cross-border uses shall be permitted. <u>Explanatory Note</u> This provides an exception to the making available, communication, transmission and distribution right for the purpose of allowing libraries and archives to share resources across borders and supply copies made under an exception to other libraries and archives regardless of location and international borders. This ensures that copies of works made under an exception in this Treaty may be sent and received across borders. This is not a carte blanche provision since each exception has a set of conditions and these conditions apply in conjunction with other exceptions.		

V. Library lending and supply of works

African Group	Brazil (Background paper)	USA	Brazil, Ecuador and Uruguay
Supply of works It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.	Library Lending 1. It shall be permitted for a library to lend copyright works, or materials protected by related rights, to a user, or to another library. 2. Any Contracting Party which at the time of ratification or accession expressly provides for libraries a remunerated limitation or exception to a public lending right of authors may keep such provisions, provided that notification is deposited with the Director General of WIPO at the time of ratification or accession to the Treaty. The Contracting Party may withdraw the notification at any time. Explanatory Note This introduces a right for libraries to lend. Its purpose is to provide the right of libraries to lend by any means both analogue and digital works or materials to their users. The right to lend would be upheld in licensing contracts and in the application of technological protection measures.		Library Lending 1. It shall be permitted for a library to lend copyright works, or materials protected by related rights, to a user, or to another library. 2. Notwithstanding the provisions of paragraph (1), any Contracting Party/Member State which expressly provides for a public lending right, may keep such right.

VI. Retracted, withdrawn and orphan works

African Group	Brazil (Background paper)	USA	Brazil, Ecuador and Uruguay
Orphaned works 1. It shall be permitted for the beneficiaries provided for in (specify) to reproduce and use a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry. 2. It shall be a matter for national law to determine whether certain commercial use of a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry would require payment of remuneration.	Access Retracted and Withdrawn Works 1. It shall be permitted for libraries and archives to reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work, or material protected by related rights, which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the author or other rightholder. 2. Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.		

Explanatory Note

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

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	purposes. The Article permits libraries and archives to preserve the public record for posterity in the digital environment (as they have done in the analogue environment), including records and documents relating to any modifications or retractions made to it, in order to make it available to researchers. It would ensure access for researchers through libraries and archives to copyright works and materials protected by related rights in digital formats that are no longer available to the public because they have been withdrawn. Contracting Parties would have the option to limit the application of this exception to certain uses or to not introduce it. Use of Orphan Works and Materials Protected by Related Rights 1. Libraries and archives shall be permitted to reproduce, make available to the public and otherwise use any work, or material protected by related rights, for which the author or other rightsholder cannot be identified or located after reasonable		

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	inquiry. 2. Contracting Parties may provide that, subject to certain conditions, should the author or other rightholder subsequently identify him or herself to the library or archive that used the copyright work or material protected by related rights, he or she shall be entitled to claim equitable remuneration for future use, or require termination of the use. <u>Explanatory Note</u> This provides exceptions to the reproduction, adaptation and communication to the public rights with respect to "orphan works" insofar as they remain orphan. Its purpose is to enable libraries and archives to copy "orphan works" and communicate them to the public. "Orphan works" are copyright works or materials protected by related rights for which their rightholders cannot be identified or located in order to clear the rights. In practice this would enable libraries and archives to digitalize their collections and make them available to the public online.		

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

VII. Legal deposit

African Group	Brazil (Background paper)	USA	Brazil, Ecuador and Uruguay
		Objective: Encourage the adoption of national legal deposit laws and systems. Principles: Legal deposit systems help develop national collections and may help in preservation efforts, particularly if they include many categories of works published in multiple formats. Libraries and archives also serve the public by maintaining essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve, and disseminate government works.	

VIII. Technological measures of protection

African Group	Brazil (Background paper)	USA	Brazil, Ecuador and Uruguay
Circumvention of technical measures Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in (specify) have the means to enjoy the exception where technical protection measures have been applied to a work, including when necessary the right to circumvent the technical protection measure so as to make the work accessible.	Obligations Concerning Technological Protection Measures 1) Where the use of copyright protected works and materials controlled by related rights are controlled by technological protection measures, Contracting Parties shall ensure that libraries and archives have the means to enjoy the limitations and exceptions provided in this Treaty. 2) For this purpose, Contracting Parties shall permit a) the circumvention of technological protection measures for the purpose of making a work, or material protected by related rights, accessible, provided that the beneficiary of the limitation or exception has lawful access to the protected work or material; b) the acquisition of services or tools necessary to carry out such circumvention.		Obligations Concerning Technological Protection Measures 1. Member States /Contracting parties shall ensure that libraries and archives have the means to enjoy the exceptions and limitations provided in this instrument when technological protection measures have been applied to a work or other protected matter. Limitation on Liability for Libraries and Archives A librarian or archivist acting within the scope of his or her duties, shall/shoud be protected from claims for damages, from criminal liability, and from copyright infringement, when the action is performed in good faith: a.- in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is being used as permitted within the scope of a limitation or exception in this instrument, or in a way that is not restricted by copyright; or b.- in the belief, and where there are
	Explanatory Note This provides an exception for libraries and archives to the right to protection from circumvention of		

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	technological protection measures (TPMs) for the purpose of permitting a non-infringing use of a work or of material protected by related rights. The exception allows libraries and archives to circumvent TPMs for non-infringing uses (such as preservation, access to content by disabled people and the users' right to make use of national statutory exceptions to copyright). The exception is limited by the requirement that the library or archive or their user has lawful access to the work or material. It also permits libraries and archives to acquire the tools or services needed for the circumvention. Limitation on Liability for Libraries and Archives 1) A librarian or archivist acting within the scope of his or her duties, shall be protected from claims for damages, from criminal liability, and from copyright infringement, when the action is performed in good faith: a) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is being used as		reasonable grounds for believing, that the work, or material protected by related rights, is in the public domain or under an open content license. When a Contracting Party/Member State provides for secondary liability regimes, libraries and archives shall/should be exempt from liability for the actions of their users.

VIII. Technological measures of protection

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	permitted within the scope of a limitation or exception in this Treaty, or in a way that is not restricted by copyright; or b) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is in the public domain or under an open content license. 2) When a Contracting Party provides for secondary liability regimes, libraries and archives shall be exempt from liability for the actions of their users. Explanatory Note This introduces the protection of limited liability to libraries and archives, their employees and agents for primary copyright infringement that may result inadvertently from their good faith interpretation and application of national copyright law (Sub-paragraph 1). Sub-paragraph 2 also protects libraries and archives from liability for secondary infringement where the user of their services has committed the primary infringement.		