

## WORKING DOCUMENT OF TEXTUAL PROPOSALS ON LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL, TEACHING AND RESEARCH INSTITUTIONS AND PERSONS WITH OTHER DISABILITIES

*Compilation prepared by the Secretariat on the basis of comments made by Member State  
delegations*

## GENERAL

### *Proposal from the African Group*

#### 1. Preamble:

The Contracting Parties,

*Recalling* the principles of non-discrimination, equal opportunity and access, proclaimed in the United Nations Convention on the Rights of Persons with Disabilities;

*Acknowledging* the right of all persons to education, as recognized in the International Covenant on Economic, Social and Cultural Rights;

*Noting* that the International Covenant on Civil and Political Rights guarantees the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;

*Considering* that equal access to education, culture, information and communication is a fundamental right that comes under public policy;

*Recognizing* the important role played by the authorities in guaranteeing equal opportunity for all in terms of access to education, culture and information;

*Mindful* of the role played by educational and research institutions, libraries and public archives in popularizing, disseminating, promoting and preserving the cultural and scientific heritage;

*Determined* to contribute to the implementation of the relevant recommendations of the Development Agenda of the World Intellectual Property Organization;

*Mindful* of the challenges to human development and the fulfillment of persons with disabilities with regard to education, research, access to information and communication;

*Mindful* of the challenges to human development and the fulfillment of persons with disabilities with regard to education;

*Aware* that national copyright legislation is territorial in nature, and where activity is undertaken across jurisdictions, uncertainty regarding the legality of that activity undermines the development and use of new technologies and services that can potentially improve the lives of persons with disabilities and all those who do not have the means to access education, culture and information;

*Recognizing* the urgent need to broaden the scope of copyright exceptions and limitations for persons with disabilities, libraries, archives, education, teaching and research;

*Recognizing* the need to introduce new international rules in order to provide adequate solutions to the needs of vulnerable persons and the challenges and opportunities presented by economic, social, cultural and technological developments;

*Recognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly in education, research, teaching and access to information;

Aware that the territorial nature of copyright and related laws can be an obstacle to cross-border exploitation of works, performances, or production and therefore inhibit the normal access, particularly through new technologies, by persons with disabilities, to education, culture, information and knowledge

*Recognizing* that copyright laws must strike a balance between the interests of the public and the interests of authors and other right-holders to fulfill the fundamental purpose of encouraging learning and the dissemination of knowledge;

*Recognizing* the need for a global approach to copyright exceptions and limitations and a minimum level of international harmonization of limitations and exceptions in order to reduce the legal uncertainty to which stakeholders in education and researchers expose themselves in the event of mobility, and the need to ensure the lawfulness of cross-border activities and the global flow of information that posits the use of modern means of communications;

*Noting* that access to knowledge in copyright works is integral to the goals of copyright system;

*Recalling* that the Berne Convention provides for the conclusion of special agreements governing such access that do not contravene its provisions;

*Noting* that consistent with the Berne Convention, States have in their national legislation provided for limitations of or exceptions to the rights of authors of literary and artistic works in special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the work;

*Recognizing* that inadequate use of, or lack of harmonization of the exceptions and limitations adopted under domestic laws have created undesired obstacles to access knowledge and compromises intellectual resources;

*Desiring* to harmonize and enhance national laws on such limitations and exceptions through an international framework consistent with the Berne Convention in order to facilitate access to knowledge in copyrighted works by persons with disabilities, educational and research institutions, libraries, and archives centers.

*Mindful* of the increased economic impact of exceptions and limitations in distance learning using digital technology;

*Noting* that access to knowledge protected by copyright works is integral to the goals of copyright system;

## 2. Article 1: Definitions

For the purposes of this Treaty:

"Accessible format" means an alternative manner or form which gives a person with a disability listed in Article 18 of this Treaty access to the work, as flexibly and comfortably as a person without a disability.

"Database" means a collection of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by electronic or other means, which, by reason of the selection or arrangement of their contents, constitute the author's

own intellectual creation, without prejudice to any rights subsisting in those contents themselves.

"Disability" means visual impairment, or other physical, mental, sensory, or cognitive incapacity, that requires an accessible format of a work.

"Exclusive rights" mean the exclusive rights of authorization granted to the author in terms of the Berne Convention and the WCT.

"Work" means any literary and artistic protected by copyright, and includes any literary and artistic work in which copyright protection has expired.

### 3. Article 4: Beneficiaries

1. Contracting Parties shall provide the exceptions and limitations guaranteed in this Treaty for the benefit of persons with disabilities, educational and research institutions as well as libraries and archives, in this Article referred to as Beneficiaries.

2. Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.

### *Proposal from India*

#### 4. Definitions:

"Original database" means a collection of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by electronic or other means, which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation, without prejudice to any rights subsisting in those contents themselves.

"Libraries" are non-profit publicly funded establishments which are exempted from tax, with a public vocation, and which make available free of charge works dealing with all types of knowledge of nations and peoples, including cultural heritage, with a view to the furtherance of knowledge useful for education, teaching, research and the public interest.

"Work": means any work or any copyrighted work. It includes the literary, artistic cinema graphic and sound recording and other multimedia works, and both analog and digital works.

#### 5. Beneficiaries:

1. Contracting Parties shall provide the exceptions and limitations guaranteed in this Treaty for the benefit of persons with disabilities, public and private educational and non-profit research institutions as well as libraries and archives, in this Article referred to as Beneficiaries.

2. Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.

## **SPECIFIC EDUCATION AND RESEARCH LIMITATIONS AND EXCEPTIONS**

### *Proposal from the African Group*

#### **6. Article 15: Educational and Research Institutions**

1. Educational and research institutions shall be permitted, without the authorization of the right holder and without financial compensation, to make copies of published and unpublished works made legally accessible to the public, regardless of their format, for purposes of education and research.
2. Copies of the work referred to in paragraph (a) shall be for non-profit use or justified by purpose, and shall not unreasonably prejudice the legitimate interests of the right holder.
3. This authorization permitted in paragraph (a) shall include teaching, research and distance learning.

#### **7. Authorized actions**

##### **– Article A: Actions related to reproduction**

The use of works for the purpose of teaching and research authorizes individuals or institutions referred to in this Treaty to:

Reproduce by any means, including on a computer disk, by a researcher, teacher, pupil or student; reproduction remains permissible if it allows researchers, students or pupils to learn about the work at any time and any place individually chosen;  
Make teaching or educational purposes compilations of works extracts limited to the goal to be attained when these are freely available to pupils or students.

##### **– Article B: Actions related to representation**

The use of works for the purpose of teaching authorizes individuals or institutions referred to in this Treaty to:

Represent by any means, including diffusion of fixed works by means of broadcasts or television; representation remains permissible if it allows students or pupils to learn about the work at any time and any place individually chosen.

Insert the work or extracts from the work in educational broadcasts and to fix such broadcasts;

The use of works for research authorizes researchers to represent them by any means, provided that such representation is intended for the scientific community to which belongs the researcher who has initiated the presentation, excluding any other public.

##### **– Article C: Transformation and Translation**

To the extent required for educational purposes or research, the use of works authorizes individuals or institutions referred to in this Treaty to translate, adapt or transform the work, when these translations, adaptations and transformations are carried out for teaching or research and are not made available to the public.

##### **– Article D: Distribution**

The use of works for educational purposes shall authorize individuals or institutions referred to in this Treaty to distribute a copy or copies of all or part of the work, including making available to pupils or students, the original or copies thereof the work, or copies when these are necessary to illustrate the teaching.

The use of works for the purpose of scientific research authorizes any researcher to distribute, a copy or copies of all or part of the work, when such a copy or copies are justified by the aim pursued by the research.

8. Article X: Access to Educational Materials: Limitation on remedies for infringement

(a) In addition to other copyright limitations and exceptions, such as those included in Article 10, 10bis, the Appendix and other Articles in the Berne Convention, and consistent with Article 44.2 of the TRIPS Agreement, Members agree to establish appropriate limitations on the remedies for infringement of works in the following circumstances:

1. To copy articles for purposes of use by students in performing class work,
2. To make copies of books and other works used by students and teachers, when the prices charged for the works are unaffordable by the education institution or by the students.
3. To make a translation of a work, for the purposes of education.
4. To make copies of works no longer available from publishers, and/or for which the owner of the work cannot be found, if a good faith effort fails to identify and locate the owner of the work.

(b) In implementing (1-4), the following limitations on remedies should apply.

(1) So long as the use and distribution of the works is limited to educational purposes, no award for monetary relief (including actual damages, statutory damages, costs, and attorney's fees) may be made other than an order requiring the infringer to pay reasonable and fair compensation to the owner of the exclusive right under the infringed copyright for the use of the infringed work.

(2) The reasonable and fair compensation shall be determined by the Member State where the use of the work takes place. Member States should be free to determine the circumstances under which the payment of such compensation may be organised, including the point in time in which the payment is due. When determining the possible level of reasonable and fair compensation, due account should be taken, inter alia, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public interest missions, such as promoting learning and disseminating culture, and the need to promote access to knowledge for all.

(c) This article shall only apply to Members who are regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations

*Proposal from GRULAC*

9. Merged topic: Use for pedagogical, teaching or educational purposes, including, but not limited to:

- performances;
- reproductions;
- distribution of protected works or fragments of protected works in classrooms;
- translations, adaptations, and other transformations.

### *Proposal from Brazil*

The following shall not constitute violation of copyright:

- The performance, recitation and exhibition of a work, as applicable, for teaching purposes in educational institutions in the context of educational or research activities, to the extent justified by the non-commercial purpose to be achieved, provided that the source, including the author's name is indicated, unless this turns out to be impossible.
- The reproduction, translation and distribution of excerpts of existing works of any kind, or of entire works in the case of works of visual arts or short compositions, as a pedagogical resource for the use by teachers with the purpose of illustration in the context of educational or research activities, to the extent necessary justified by the non-commercial purpose to be achieved, provided that the source, including the author's name is indicated, unless this turns out to be impossible.
- The note taking of lectures, conferences and classes by those to whom they are addressed. The publication of the notes of said lectures, conferences and classes in whole or in part is prohibited without prior written permission of the person who addressed them.
- The quotation in books, newspapers, magazines or in any other medium of excerpts of a work for the purposes of study, criticism or debate, to the extent justified by the purpose and in accordance with fair practice, provided that the source, including the author's name, is indicated, unless this turns out to be impossible.

10. Topic 4: Reproduction of lectures and conferences.

11. Topic 5: Quotations.

### *Proposal from Ecuador*

- 12. Topic 1: Obligations or proposals to update exceptions of a general nature.
- 13. Topic 6: Availability on an interactive basis and communication to the public for educational purposes.
- 14. Topic 9: Distance learning.
- 15. Topic 10: Special education for persons with disabilities.

### *Proposal from Ecuador, Peru and Uruguay*

- 16. Article 1: Obligation to update and expand exceptions for educational purposes, in particular in the digital environment

Contracting Parties shall update, carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention, especially under article 10.1 and 10.2, and devise new exceptions and limitations that are appropriate in the digital network environment to protect educational and research activities.

*Proposal from India*

17. Use for pedagogical and teaching or instructional purposes
18. quotations and citations
19. Reproduction, translation, transformation and adaptations
20. Performance, communication to public, making available, distribution, broadcast and transmission
21. Private and personal use and private study
22. Computer programme, inter- operability and reverse- engineering
23. Research
24. Chrestomathies or anthologies
25. Open Educational Resources
26. Public Funded Research and Open Access

*Proposal from Nigeria*

27. Topic i: Subject-matter ineligible for copyright protection (public domain).
28. Topic iv: Provision dealing with limited liability for Internet Service Providers (ISPs).
  - (1) An internet service provider operating in the territory of a Contracting Party shall not be liable for infringement of copyright or related rights by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the internet service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if
    - (a) the transmission of the material was initiated by or at the direction of an educational institution or individual seeking to enjoy the rights provided by this Treaty;
    - (b) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process;
    - (c) the internet service provider does not select the recipients of the material except as an automatic response to the request of the educational institution or person entitled under this Treaty;
    - (d) no copy of the material made by the internet service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

- (e) the material is transmitted through the system or network without irreversible modification of its content.
- (2) An internet service provider operating in the territory of a Contracting Party shall not be liable for infringement of copyright or related rights, whether directly or indirectly, by reason of the provider's
  - (a) intermediate and temporary storage of material for the purposes of caching, as long as it does not modify the material or provide it in a manner inconsistent with access conditions set by the owner of copyright or related rights;
  - (b) storage at the direction of a user of material that resides on a system or network controlled or operated by or for the internet service provider;
  - (c) referring or linking to an online location containing infringing material or infringing activity, provided that in cases in which the internet service provider has the right and ability to control such activity, this exemption shall apply only if the internet service provider does not receive a financial benefit directly attributable to the infringing activity;
  - (d) caching of electronic documents; and
  - (e) transmitting of a universal resource locator or other electronic pointer, that has the effect of instructing a user's browser to load electronic documents from a third-party server.

29. Topic v: Specific Exceptions for science.

(1) Use for the sole purpose of scientific research is not an infringement of the exclusive rights conferred by copyright and related rights. In interpreting this provision the following shall be recognized as within the scope of this provision:

- (i) Reproduction of any scientific or educational material produced by government entities or government workers in the course of their employment;
- (ii) The reproduction and reuse by search engines, automated knowledge discovery tools, or other digital means now known or later discovered of any lawfully obtained copyrighted work for purposes of not-for-profit scientific research, including storage, archiving, linking, data mining procedures, data manipulation, and virtual scientific experiments subject to attribution of the sources used to the extent reasonably feasible;
- (iii) The use or re-use of any ideas, facts, data, findings, or conclusions found in any scientific work, whether or not copyrightable, including compilations of factual information and data, subject to the attribution of sources used to the extent reasonably feasible.
- (iv) Technical protection measures that seek to override these provisions or otherwise limit access to scientific works shall be considered a misuse of copyright.

(2) Proprietors of works protected by technical protection measures shall be obligated to make them available for research purposes as specified in this Article. Researchers unlawfully denied access and use of such works for purposes solely of scientific research may employ available anti-circumvention measures to obtain access and use of such

works for not-for-profit scientific research purposes.

(3) In the case of for profit scientific purposes, researchers unlawfully denied access and use of scientific works shall be obligated to pay reasonable compensation to proprietors when employing anti-circumvention measures to obtain access to and use of such works.

(4) Contracts attempting to override these provisions shall be null and void as against public policy.

30. Topic vii: Personal use rights for study and research.

31. Topic viii: Use of protected work for public health or public security.

32. Topic xiii: Rights to facilitate Teaching, Scholarship or Research.

(1) Any educational institution or research organization domiciled in the territory of a Contracting Party may, for purposes of teaching, personal study or research

(b) make a translation of a work into any language and publish the translation in printed or analogous forms of reproduction; and

(c) reproduce and publish the translated work;

(d) make the work available in an accessible format to persons with a disability that are members of the institution or organization;

(e) include excerpts of copyrighted material in educational resources created and distributed for educational purposes.

(2) A person domiciled in the territory of a Contracting Party shall be entitled to export lawfully acquired copies of works made pursuant to paragraph (1) of this Article to another Contracting Party classified as a developing or least-developed country by the United Nations.

33. Topic ix: Protection for incidental inclusion of a work or a subject of related rights in educational materials.

34. Topic xi: Reproduction of works, including broadcasts.

35. Topic xii: Uses by Archives, Libraries, Museums and Galleries.

#### *Proposal from Pakistan*

36. Topic 1: Strengthening of existing flexibilities and introduction of new flexibilities in the copyright system to ensure access to textbooks and educational material at affordable prices.

37. Topic 2: Access to publicly funded scientific research.

## SOFTWARE AND DATABASES

### *Proposal from the African Group*

#### 38. Article 16: Computer programs

Contracting Parties shall provide for exceptions and limitations relating to computer programs to allow interoperability and backup.

### *Proposal from Chile*

#### 39. Topic 1: Reverse engineering.

### *Proposal from Nigeria*

#### 40. Topic xiv: Limits to database protection laws.

The provisions of Article ...(Topic V) shall apply *mutatis mutandis* to database protection laws.

## RELATED RIGHTS

### *Proposal from the African Group*

41. Article 17 (now listed as Article E): Limitations and exceptions to related rights
- The acts authorized in this Treaty shall be extended by the national law of each Member State to related rights, mutatis mutandis.

## TECHNICAL PROTECTION MEASURES

### *Proposal from the African Group*

#### 42. Article 18: Technical protection measures

Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in Article 2 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.

### *Proposal from GRULAC*

#### 43. Merged clause: Technological protection measures.

## INFORMATION ON RIGHTS MANAGEMENT

*Proposal from El Salvador*

44. Topic 1: Information on rights management.

## CONTRACTS

### *Proposal from the African Group*

#### 45. Article 19 (now listed as Article F): Relationship with contracts

Any contractual provisions which provide exemptions from an exception provided for in this Treaty shall be null and void.

### *Proposal from Ecuador*

#### 46. Topic 4: Relationship with contracts.

## IMPORTATION AND EXPORTATION

### *Proposal from the African Group*

#### 47. Article 20: Imports and exports of works

Contracting Parties shall ensure that imports and exports of works meet the conditions listed in the provisions of this Treaty, and shall take the necessary steps for this to be permitted without the authorization of the owner of copyright;

- (a) the export to another country of any version of a work or copies of the work that any person or organization in one country is entitled to possess or make under the provisions of this Treaty and
- (b) the import of that version of a work or copies of the work by a person or organization able to act under the provisions of this Treaty into another country.

### *Proposal from Nigeria*

#### 48. Topic ii: Exhaustion of Rights.

(1) Subject to the provisions of paragraphs (2)-(7) of this Article, the owner of a lawfully acquired copy of a work or subject of related rights who is domiciled in the territory of a Contracting Party, or any person authorized by such owner, shall be entitled, without the authority of the owner(s) of copyright or related rights, to sell, export or otherwise dispose of that copy or subject of related rights.

(2) Notwithstanding the provisions of paragraph (1) of this Article, unless authorized by the owner(s) of copyright or related rights in a sound recording, cinematographic work or computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording or a cinematographic work in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a cinematographic work or computer program (including any tape, disk, or other medium embodying such program) may in the territory of a Contracting Party, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or copy of cinematographic work or computer program (including any tape, disk, or other medium embodying such program) by rental, lease or lending, or by any other act or practice in the nature of rental, lease, or lending.

(3) Nothing in paragraph (2) of this Article shall apply to the rental, lease or lending of a phonorecord or a cinematographic work for non-profit purposes by a library or educational institution located in the territory of a Contracting Party.

(4) The transfer of possession of a lawfully made copy of a computer program by a non-profit educational institution located in the territory of a Contracting Party to another non-profit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial advantage under paragraph (2) of this Article.

(5) The owner of a lawfully acquired copy of a work or subject of related rights, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy or subject of related rights publicly in the territory of a Contracting

Party, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

49. Topic iii: Provisions for educational and scientific Institutions for parallel import of educational materials.

## **ORPHAN WORKS**

### *Proposal from the African Group*

#### 50. Article 21: Orphaned works

1. It shall be permitted for the beneficiaries provided for in Article 2 of this Treaty 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.

### *Proposal from Chile*

#### 51. Topic 2: Orphan works.

**WITHDRAWN OR OUT OF PRINT WORKS**

*Proposal from Brazil*

52. Topic 1: Access to works which have been withdrawn, or which are out of print.

## OPEN EDUCATIONAL RESOURCES

*Proposal from Nigeria*

53. Topic vi: Exceptions that support development of open educational resources.

## **PUBLICLY FUNDED RESEARCH**

### *Proposal from Nigeria*

#### 54. Topic x: Access to publicly funded research.

(1) Subject to paragraph (2) of this Article, any work resulting from research financed in whole or in part from the public funds of a Contracting Party shall be made available to the public free of charge within twelve (12) months of its fixation.

(2) The provisions of paragraph (1) of this Article shall not apply to

(a) works whose making available to the public would harm the security or other vital public interest of a Contracting party.

## OTHERS

### *Proposal from Ecuador*

55. Topic 2: Interpretative provisions on the scope of the flexibilities allowed by international law, including the three-step test, Articles 40 and 44 of the TRIPs Agreement and others.
56. Topic 11: Limitations and exceptions allowed only in the case of developing countries.

### *Proposal from Ecuador, Peru and Uruguay*

57. Article 2: Scope of the three-step test

When applying either Article 9.2 Berne, 13 TRIPS, 10 WCT, or similar provision in any other multilateral treaty, nothing prevent contracting parties to interpret the three-step test in a manner that respects the legitimate interests, including of third parties, deriving from educational and research needs, and other human rights and fundamental freedoms; and other public interests, such as the need to achieve scientific progress and cultural, educational, social, or economic development, protection of competition and secondary markets.

## LIMITATIONS AND EXCEPTIONS FOR PERSONS WITH DISABILITIES

### *Proposal from the African Group*

#### 58. Article 5: Limitations and exceptions to exclusive rights

It shall be permitted without the authorization of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to persons with disabilities by any means, including by non-commercial lending or electronic communication by wire or wireless means, without the authorization of the owner of copyright, and undertake any other intermediate steps to achieve these objectives, when all of the following conditions are met:

- (a) the person or organization wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;
- (b) the work is converted to an accessible format, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to persons with disabilities;
- (c) copies of the work are supplied exclusively to be used by persons with disabilities;
- (d) the activity is undertaken on a non-profit basis; and
- (e) the owner of the right is recognized as such.

#### Article 6: Personal use by persons with disabilities

A person with a disability to whom a work is communicated by wire or wireless means as a result of activity under Article 5 of this Treaty shall be permitted without the authorization of the owner of copyright to copy the work exclusively for his or her own personal use. This provision shall be without prejudice to any other limitations and exceptions that the person in question is able to enjoy.

#### Article 7: Application to profit entities

The rights under Article 5 of this Treaty shall also be available to for profit entities and shall be extended to permit commercial rental of copies in an accessible format, if any of the following conditions are met:

- (a) the activity is undertaken on a for-profit basis, but only to the extent that those uses fall within the normal exceptions and limitations to exclusive rights that are permitted without remuneration to the owners of copyright;
- (b) the activity is undertaken by a for-profit entity on a non-profit basis, only to extend access to works to persons with disabilities; or
- (c) the work or copy of the work that is to be made into an accessible format is not reasonably available in an identical or largely equivalent format enabling access for persons with disabilities, and the entity providing this accessible format gives notice to the owner of copyright of such use and adequate remuneration for copyright owners is available.

#### Article 8: Criteria for determining reasonable availability

In determining whether a work is reasonably available under Article 7 (c) of this Treaty, the following criteria shall be considered:

- (a) for developed economies, the work must be accessible and available at a similar or lower price than the price of the work available to persons who are not disabled; and
- (b) for developing countries, the work must be accessible and available at prices that are affordable, taking into account disparities in income levels for persons with disabilities.

#### Article 9: Remuneration for commercial exploitation of works

1. When implementing Article 7(c) of this Treaty, Contracting Parties shall ensure that there is a mechanism for determining the level of adequate remuneration to be paid to the owner of copyright in the absence of voluntary agreement. In determining adequate remuneration under Article 7(c) of this Treaty, the following principles shall be observed;
2. Right owners shall be entitled to remuneration that is reasonable for normal commercial licensing of works, regarding the terms normally associated with the country, population and purposes for which the work is used, subject to the requirements of paragraph (c) below;
3. In developing countries, remuneration should also take into consideration the need to ensure that works are accessible and available at prices that are affordable, taking into account disparities in income levels for the beneficiaries of the exceptions and limitations;
4. It shall be a matter of national law to determine if remuneration under (a) is waived for the works covered by the exception;
5. Persons who distribute works across borders shall have the option of registration for remuneration payments in a single country, if the mechanisms for remuneration meet the requirements of this Treaty and address the legitimate concerns of the copyright owners in terms of transparency, and remuneration is considered reasonable either for a global license for works that are distributed globally, or for a license to use works in specific countries, calibrated for the countries, users and purposes of such use.

## **BEST PRACTICES AND EXPERIENCES**

### **Proposal from El Salvador**

#### **59. Topic 2: Best practices and experiences.**

Comments made during discussions (day one)

*Comments from the European Union and its Member States*

Educational and research institutions play an important role in our society with regard to the dissemination of culture and research, vital to permit the full exercise of fundamental freedoms such as the rights of education. We find it important that the Copyright framework enables these institutions to fulfill these roles both in the analog and digital world. Thus, the European Union and its Member States are ready to debate and have exchange of views on this file and have an exchange of views on the national experience in this area. In the European legislation there is a range of possibilities for the Member States to establish -- for the benefit of education establishments and for teaching purposes or scientific research. The framework for these exceptions and limitations is largely provided by Directive 2001/29/EC and the harmonization of certain aspects of Copyright and Related Rights in the Information Society. The exceptions all have an optional character and allow for a degree of flexibility which is particularly important in view of the different legal systems and traditions of the 27 Member States. Moreover licensing also plays an important role either alongside the application of exception or instead of the application of exceptions. The European Union and its Member States look forward to discussing the systems in which these limitations and exceptions function in Europe and in the rest of the world and how they are used in practice. Education and training are not only essential for the European economy in order to evolve as a knowledge society and compete effectively in the globalized economy, but also permit the full exercise of fundamental freedoms, such as the rights to education which is enshrined in our charter of the fundamental rights for the European Union, in article 14. It's a legal statement in our charter. In the EU, educational policy as such is decided by each member state, but together they establish joint goals and share best practices. Copyright protection is required in order to further the creation of not only educational contents but also works in general which are at the very heart of the functioning of teaching activities. Thus, copyright protection is required so that educational establishment in the EU have access to top quality works, such as teaching material. It is therefore vital that a fair and sustainable balance is achieved between copyright protection on the one hand, and the achievement of public interest objectives on the other. As for many other sectors in the society, the development of new technologies has changed the education sector in the EU and deeply modified teaching methods. The Internet has nowadays become an essential instrument of knowledge transmission, be it via the traditional teaching classroom, distance learning, or in the framework of private study. In all cases, works and other protected subject matter are frequently used by teachers including on-line. It is just as important for the EU and the Member States that the copyright framework enables educational establishments and professionals to fulfill their role in the digital age. The Berne Convention in our view provides for specific exceptions to allow use, users of copyright works for the purpose of quotation and teaching, article 10 of the Berne Convention. The same types of exceptions are permitted under the WIPO Copyright Treaty, and as far as the related rights are concerned, and under the Rome convention as well and the WIPO performances and phonograms treaty. These exceptions are the significant margin of mind over to members of these conventions and treaties in their implementation. For instance, in the case of education, they make no distinction between the level of education or its nature. It is for individual countries to apply the framework provided at international level, to put it into practice via the national legislation and adapt it to the local conditions, while respecting the three step test as provided for in the conventions and treaties. I would like now just to make a very quick overview of the EU copyright framework within the field and such appropriate balance between protection of copyright and relevant rights and teaching objectives. So the EU legislation provide Member States with the possibilities to establish in the legislation exceptions to copyright and relative rights for the benefit of educational establishment and for teaching purposes, including the possibility for Member States to decide on whether to provide for fair compensation for right-holders when applying such exceptions. The EU copyright framework allows the necessary degree of flexibility by permitting Member States to

incorporate exceptions in their legal systems, in accordance with their educational policy, legal traditions and market specificities. This is essential in view of the number of Member States in the EU and the number of different legal and educational systems existing in the EU. The last, our framework also ensures that the application of these exceptions fall within the framework of the three-step test. Our directive establishes the possibility for an exception to the production rights, right of communication to the public and right of making available for the sole purpose of illustration, purpose of illustration for teaching or for scientific research, which is commonly considered at EU level at the main exception for the activities of teaching undertaken by educational establishments. We also have at the EU level implemented in all 27 Member States the quotation exceptions, in different ways, according to the tradition and legal frameworks of each country. And we also have private copying in most of the EU countries, not all but most of them, and reprographic copying as well. For the education, the education purposes, we have an article in our directive which is word by word the Berne Convention article, and which is, which covers all of the exceptions which are implemented at the Member States level. We are ready to discuss again, and further other aspects of our legislation and how we have implemented the Berne Convention in the EU, via our directive for harmonization of copyrights. The three step test under article 13 of TRIPS, article 10 of WCT and article 16 of WPPT anyway applies to all exceptions and limitations. Furthermore, in accordance with all these obligations to respect the three-step test, EU legislation makes all exceptions and limitations under the INF directive 200129EC subject to the three-step test. We cannot go beyond that.

#### Comments made on Draft Compilation (day two)

##### *Comments from Nigeria*

Topics should be grouped in four clusters:

- Cluster I: Institutional beneficiaries to use the limitations and exceptions.
- Cluster II: Kinds of uses that would be allowed.
- Cluster III: Distance education, digital transmission, databases, TPMs, among others.
- Cluster IV: Research

As to specific exceptions for science, this is a proposal to have an out right exception for scientific research, for scientists to be able to access databases for the results of scientific research, whether publicly funded or in journal documents to be easily available within the educational and research context. Related to that, of course, is what is identified as cluster 7, which is personal use rights for study and research. This would include personal use both for researchers and teachers themselves, but also for students within educational institutions. In the process of the educating function, particularly in traditional classrooms, the rights to facilitate teaching, scholarship, or research should not be in any cluster per se. That is, in fact, the purpose of this exercise is to identify a scope of rights to facilitate each of these activities. With regard to cluster number 9, protection for incidental inclusion of a work or a subject of related rights in educational materials, this really goes, of course, to the capacity and ability of both teachers and students in the process of either in class or distance learning preparations when copyrighted works or works subject to related rights are captured, particularly in digital form as part of a teaching research or study exercise. We want to be ensured that those sorts of incidental inclusions are not the subject of a violation. This is particularly important in the context, of course, of countries that do not have the fair use doctrine which would normally excuse such incidental inclusion in any regard. Finally, as to the reproduction of works under cluster 11, as India pointed out, this is really about transmission and the capacity to be able to transmit digital works and content for distance education, but also for in-class use. They are aspects of one of the four or five clusters that I have suggested, but they speak to particular rights that Nigeria would like to see attended to during this discussion.

#### *Comments from the European Union and its Member States*

I willfully concur with the remarks by Nigeria that maybe there is a certain degree of confusion because we are using the term clusters, which is normally things that belong together and that you want to separate from other things that belong together in a very loose manner. Sometimes we have here clusters that overlap or talk about the same from different angles, which is going to complicate somehow our discussions going forward. It is useful to try to regroup together some of the clusters as it has been done, the use of works for pedagogical and teaching purposes is a very large title in any event. The ones referring to distribution of protected works or fragments of protected works in classrooms, performance for educational purposes or reproduction for educational purposes seem all to relate. The first is a very general basket, the others seem to relate to different rights that may be affected by a limitation or exception for the benefit of teaching and maybe research. There is one, however, which originally is on the point number 12, cluster 7, which reads translations, transformations and adaptations. We welcome further guidance from GRULAC. We would also welcome further clarification from Ecuador, in particular as regards to cluster 6 under now point 11 that refers to availability on an interactive basis and communication to the general public for education purposes. Normally when we are talking about limitations to rights for the purposes of teaching or education, one normally tends to try to identify the institution or the particular use of the particular user or beneficiary. This seems to be very large when referring to the general public. It is for us not very clear the purpose of cluster one under the proposal from Ecuador and point 9 that refers to proposals to update exceptions of a general nature.

#### *Comments from Ecuador*

When we propose a specific title or heading for a cluster, we are not saying this is the exception, but rather we are saying this is the heading under which we are going to include exceptions which are specific within this particular heading. As to cluster 7 on translations, transformations and adaptations, we understand that this will be following the analogy of a heading, a rubric where we are going to include specific proposals of exceptions for educational purposes that have to do with a work is being in one language, will be translated into another language in order to facilitate the educational process. The most obvious would be, for example, a work in English which will be translated into Spanish. Under certain conditions which will be clarified by the proposal, by the country which wants to include it in a listing for complete discussion. So this will be a case which we hope will be covered by cluster 7. As to transformations, this would be a situation in which a change will be made to the work in order to make it more understandable or apt for educational purposes. For instance, it would be an extensive work which will be summarized so that it can be used for education for children in basic education. There is a transformation there with certain conditions which we proposed for this specific exception being proposed. As to adaptation, for example, a poem in which the professor in class proposes a small representation of the poem and it changes from a literary genre to an audiovisual work to be used in the classroom. As to cluster 6, which is availability on an interactive basis and communication to the general public for educational purposes, we assume that these are not exceptions. These are the subheadings which are going to include the exceptions and which are going to have their own conditions, obviously each time specified.

#### *Comments from the United States of America*

We concur with the sentiment in the room that the word "clusters" has perhaps led us astray in some of our thinking. Perhaps what we really intended was topics. And because we recognized that some topics may be in groups, somehow the word clusters came upon us. But we think we

can definitely find an appropriate concept to use for what we are really trying to capture here. That is the topics or families of topic that we believe should be addressed in the legal framework on which we are working. The United States would like to address a couple questions based on the comments we have heard from our colleagues. One is to follow up on the European Union's exchange with Ecuador concerning topic number 11, which is cluster 6, the availability on an interactive basis and communication to the general public for education purposes. As we listened to the explanation, we would appreciate a clarification on what the difference is between the Ecuadorian cluster 6 and the concept of distance learning which is cluster 9. We would like to understand the specific difference that they understand to be what would fall under cluster 6 and cluster 9 because the explanation we heard made it sound very similar to the concept of distance learning as the United States would understand it. As to the remarks of India, we do have a question for India in the suggestion of the addition of citations to the Brazilian topic, cluster number 5. That is, we are not sure what the problem is in copyright about citations. Under American copyright law and most of the domestic copyright laws with which we are familiar, there would be no protection of citations from which you would need an exception. So we would appreciate a clarification from the Distinguished Delegate from India. We certainly he has something in mind, but we did not understand exactly what it would be. In addition we would like to ask the Delegate of Pakistan, as we were taking notes we understood that one of the proposals they had mentioned was access to publicly funded scientific research, which is also a topic that occurs as number 38 on page 16 from Nigeria previously. And we would appreciate an explanation if Pakistan and Nigeria have a meeting of minds that that is the same thing. Our impression is just from the title of the topic or cluster that that is not exactly a copyright exception or limitation. The United States has a robust practice of seeking the public dissemination of publicly funded research and is perhaps the world's largest funder of scientific research. We would not normally conceive of that as a copyright exception or limitation but as a government policy regarding funding of scientific research.

#### *Comments from Nigeria*

With regard to the explanation to item 12 on page 6, which is listed as cluster 7, translations, transformations and adaptations. I thought I heard from Ecuador two distinct arguments about this. The first is that there might be a need to translator to make copyrighted content usable in the classroom by a teacher or a student, perhaps in an abbreviated format for educational purposes. But I wondered if this might perhaps be a little bit different from the notion of a teacher or professor or lecturer taking a work and distributing it in the classroom, perhaps just in an excerpted form. The way I understood the comment from Ecuador is that these transformations and adaptations appear to be something done on a wide scale, perhaps encroaching on what is a well-established secondary market for what we would refer to as derivative works. The second point goes to the Delegate of the United States of America on the proposal to enhance the African Group proposal on access to publicly funded research. We have not had any discussions with our colleagues from Pakistan, so I am unable to determine if they mean the same thing as we do. But, the U.S. is in fact is the largest funder of research and certainly scientific research, and access to these works or to the results of these research outputs are often mandated by the granting agency. And that would include the NIH, for example, or other government funders. However, as we are now fully aware, there has been a new requirement by government agencies in the U.S. that the results of government-funded research by the NIH ought to be available, certainly in preprinted final publication form. What the African Group proposal and this enhancement from Nigeria seeks to do is ensure that as a minimum standard of international copyright that access to such research is made available because certainly the traditional justifications for the copyright system do not apply when the incentive to create and to publish and write from the results of this research have been funded by the government, not by private investment. And that is in essence what the Nigeria's enhancement to the African Group proposal seeks to underscore as an important part of facilitating access to copyrighted content. It would be certainly fine to simply have a government use exception in this legal framework

rather than access to publicly funded research. Government use would be much wider in my view and would effectively balance the interests of the professional societies who publish scientific works and the interests much research scientists who want to access those works when they have been funded by the government.

#### *Comments from Senegal*

I think the proposal from Nigeria is very relevant. There is certainly a problem of functionality because in fact the heading does not always reflect the reality of the content. If a heading brings together a group of themes, we could group them together according to their points in common. It supported Indian proposal on research, to have a special cluster on research. It would be a good idea, I think, to particularly concentrate on that area because structurally and economically speaking governments, particularly African governments, tend to look at research in terms of essential research, especially with all the consequences that it will have on the digital sphere. Knowledge will mean real transcription of one language to another. Usually, particularly for the French-speaking countries, research works are usually in English. So the adaptation from one language to another, all of this has to be the subject of several exceptions which would be in the research cluster. So Senegal, finally, still agrees with India on the need to protect content of all the works which are particularly related in all ways to copyright.

#### *Comments from Finland*

Presenting the implementation of the directive of the European Union in Finland as regards educational activities could be useful to note under several clusters presented today, but specifically under the one proposed, for example, by Brazil. That is clusters 3, use for pedagogical and teaching purposes. Our copyright act of 1961 has since its beginning reflected the needs of educational activities as well as libraries and archives needs as well as others. In fact, the exclusive rights given to authors must according to Finnish law be read with the various limitations and exceptions made to them. The exceptions are limited to nonprofit context. As regards education, our provisions build on limiting the public performance right of the authors on one side and the reproduction right on the other. According to Finnish law, a published work may be publicly performed in connection with education. This provision does not concern the dramatic or cinema graphic works except for purposes of research and higher education on cinematography. As regards the reproduction rights, when a work has been made public and performed by a teacher or a student in a classroom, the work may be recorded for temporary use in the classroom. It is also possible to take parts of a literary work or, when the work is not extensive, the whole work, to be incorporated into a test instituting a part of an examination or a corresponding test. The exception to the reproduction right here gives the possibility of discretion as regards the content of an exam. Furthermore, it is possible to make an anthology of literary or artistic works in a compilation of works, consisting of the works of several authors. The use is restricted after five years have passed from the year of publication. The exception allows for printed anthologies only. It is especially indicated that works made for education are not covered by the exception. The authors have the right to remuneration for this type of use. In addition to limitations, the law Finland has also from the beginning of the 1960s developed a specific mechanism called the extended collective licensing system. Based on this system it is possible to negotiate about the use of works for educational activities or for scientific research between the users and the rightholders in a flexible manner. Such uses include uses in the digital context as well.

#### *Comments from Ecuador*

I reply to what has been asked by the Distinguished Delegate from Nigeria with regard to whether cluster 7 refers or not to secondary market. I will go to the core part of the question. The issues of translation, transformation, adaptation can be seen case-by-case by a teacher only for that particular class. If one teacher one day decides to make a poem, to make it an art work that would be a case-by-case. Of course you may have a case where the publisher decides to provide material to be distributed making adaptation of longer work with some special elements that have changed to make it more accessible for young children. In that case we would have a different kind of transformation or adaptation because it will be referred, creating a secondary market of books. So the answer is, cluster 7 is neutral. We may include specific situations for particular classes or situation where it might be a secondary market. The second question put forward by the Distinguished Delegate from the United States was if cluster 6 was the same as distance learning because it seems to be that distance learning applies now for those significances expressed in cluster 6. Well, the answer is that you might have a specific making available for a class that is not sought for distance locations. We have a regular class in a law school where the professor has somebody provide the class access to some specific content for that class. But the class is present. But the work somehow is transmitted from a different place. That would not fall within the concept of distance learning. Distance learning is a situation where all the time the student are in a different place than the institution. So distance learning addresses a specific type of education and that in some cases uses interactive basis and communication, but also there are situations where you have making available a communication that is not in the context of distance learning.

#### *Comments from India*

I would like to reply to the question put to us by the Distinguished Delegate from the U.S on the inclusion of citation along with quotations. Quotations are already covered in many national laws including the conventions like the Bern Convention. We need to put all the items under one umbrella of exceptions and limits of educational institutions. We are covering all the possible things which can be covered here. Number two, the Delegate of Finland rightly mentioned the importance of performance. If we look at the definition of performer, as per Indian law, a person delivering a lecture is also a performer. He actually is performing in the classroom. So the performance is also important. That is already covered under the cluster 5. Then coming to clusters 6, 13 and 21, they are all covering reproduction. So this can be brought under one group as for instance reproduction, translation and adaptation. Referring to one other important point raised by the Delegation of Finland, the idea of anthologies, preparation of anthologies and publication by schools and institutions is also very important. Mr. Daniel Seng has covered this in his study on exceptions on behalf of WIPO, including giving the explanation on Indian limitation and exceptions for educational purposes. Anthologies should be covered under a separate cluster. Coming to importance of the licensing, this treaty should focus on uncompensated exceptions. We should not affect these exceptions and limitations with licenses and compensations or the very purpose of giving support to the growing knowledge society will get defeated and the teachers will be defeated if we chain these with the license.

#### *Comment from the European Union and its Member States*

Within the different elements that we have been discussing and the clusters and sub clusters and groups that we have been trying to put together, the EU and its Member States wanted just to make a general reference to the main issue, which is the possibility of limitations and exceptions for teaching purposes. There is already a general framework that has been established at EU level and that is followed by the 27 Member States of the European Union for

limitations and exceptions and it is a framework that is probably quite interesting to keep in mind; because we are a group of very different countries with very different traditions and ways to approach copyright protection. In fact the framework we have, it is in the same as the Bern Convention, a framework that allows for a catalog of limitations and exceptions to be voluntarily adopted by the Member States of the European Union in its largest majority. It is a framework that provides for a degree of flexibility which is very important if one wants effectively for those limitations and exceptions to be implemented and that flexibility relates to matters such as the possibility or not to provide for fair compensation. There are some cases in which it is compulsory, but there is also flexibility as regards the scope of these exceptions. It is very often the case that exceptions and limitations are supplemented or facilitated or enhanced by systems of licensing such as standard collective licensing that plays an important role in a number of our Member States. That framework of limitations and exceptions is required not only by the Berne Convention but also by the WCT, the WPPT, and the BTAP. It is not a surprise that we are going back and forth as regards different limit limitations and exceptions. If I look at the catalog of limitations and exceptions that it is available at EU level and there has been adapted to different degrees by our Member States, we do have a general exception for teaching. It is an exception for teaching that is referred as for the sole purpose of illustration for teaching. It also applies for scientific research. But of course we have the possibility as well for the purposes of quotation which is relevant in this context; for the purposes of private copy can and reprography which is relevant in this context and specific, very specific limitations and exceptions for instance as regards limitations to the reproduction right for educational establishment. It is often used in libraries and educational establishments for purposes such as preservation. We also have exceptions to the reproduction right and making the right and the communication to the public right for research for private study, in terminals, on the premises of educational establishments. We have the same policy objective on the basis of a number of existing exceptions in our key. It is often completed by the possibility, the facilitation of licenses. If I stay for an minute on what I have referred to as our main or the more general teaching exception, basically what this exception does is to cover the use of works or other subject matters, for instance phone owe grams or broadcasts, for the sole purpose of teaching. There is a clarification in our legal system and as it has been there implemented by Member States that such use can be done on condition that it is for noncommercial purposes. We also require that when Member States provide for a teaching exception to indicate the source and name of the author of the work unless this happens not to be possible for practical reasons or otherwise. The rights that can be affected by such limitation or exception as implemented by Member States are very varied; we are talking about different rights that have been referred to in different instances here. We are talking about the reproduction right. We are talking about general communication to the public right, but also covering making the available right. We are talking about the distribution right. They can be used when properly implemented within the framework of the three-step test. They can be used as regards face-to-face teaching but also distance learning which is a concern that we heard during the discussions. For instance, you could cover within the specific conditions that we have such as uploading, online transmissions and downloads of our work or other subject matter. And it could also be the case that permanent downloads are further covered by the private copying exception. As regards not the rights but the works and subject matter that can be covered or affected by these limitations and exceptions, again our key provides for great flexibility. It is an open-ended exception in the sense that it does not impose any specific limitations as to the nature of the work or other subject matter that can be subject to the limitation or exception. It is for Member States to implement it again taking into account the application of the three-step test. And the same approach applies to the type of beneficiaries. I have mentioned at the start that the use has to be for noncommercial purposes, but beyond that the exceptions and limitations and the framework that is established at the EU level does not limit the category of uses that can benefit, school or university, the nature of such institutions. It can be a public or private institution. So in that respect our main point much reference is the noncommercial purpose to be achieved, not the nature of the institution as such. That type of flexibility we have had to give in order to have an effective system of limitations and exceptions for the purposes of teaching

and research, that adapt equally well to the conditions in Finland as it may be conditions in Portugal, Spain, or Romania. That degree of flexibility and proportionality we have to keep in mind when proceeding with our work.

#### *Comments from Peru*

The EU asked for clarifications regarding the proposals on the table. So taking as my starting point these interesting statements, I would like to make two points. First of all to remind you that cluster number 7, which originally corresponded to an Ecuadorian proposal on which clarifications have been asked was merged into the GRULAC proposal; and has been covered by a general term which is for uses of teaching or educational purposes. And this is important because in the original proposal there was not this special relationship with the purposes of teaching or education and now that it has been merged into the GRULAC proposal it was the intention to make it clearer by doing this. And referring to the interesting statement by the EU Delegate and by the emphasis, and to the emphasis put on the word "flexibility" which we and the Ecuadorian Delegation consider very important. I can use that as a bridge towards mentioning and briefly explaining the joint proposal on page 7 from Ecuador, Peru and Uruguay. Paragraph 16, which is clearly connected with cluster number 1 on page 6. This is aimed at providing this flexibility and it is based on a commitment by the parties to establish either through updating or through extension including in the digital environment or by means of creating new exceptions and limitations that will cover the teaching and research area. This chapter could be a first introduction that is very important and could be supplemented by specific mentions that have been agreed on by consensus or that could be incorporated subsequently by way of example. And which could be an opened or a closed list. So the purpose of this tripartite proposal from Ecuador, Peru and Uruguay was to make clear that there is a commitment by the parties, there is an obligation to update and expand exceptions, in particular for educational purposes. Therefore, we believe it is offering and invitation to carry out this work but incorporates sufficient flexibility to include specific mentions of specific exceptions that have been proposed as clusters at this session and that could be used as an introduction for starting from this initial proposal, which we repeat is flexible.

#### *Comments from Burkina Faso*

I would like to state that our comment is under cluster 7 having to do with translations, transformations and adaptations. We had considered that it was necessary perhaps to have a bit more clarification on the aspects which I just underlined because in most national legislations limitations and exceptions have to do with methods of use and differentiated uses. So in this present case perhaps it might be a good idea for us to know what the real dimension these subheading is; in other words, translations, transformations and adaptations. Perhaps this will lead to the creation of derivative works and derivative works would mean in fact an authorization not by the author who created the derivative work but rather some kind of legal authorization which is not really, does not really come under the definition of derivative works. Now, again, on this cluster 7 we might have the transformation of the work to do with the moral right of the author, the initial author who created the work. Perhaps we should know in the context of the creation of this derivative work what would be the view of the work or the author, since this might be used in another context in another kind of use which does not constitute an exception. In other words, when it would not be used for teaching purposes but rather for sort of archiving. So it does lead to possible problems and perhaps if we could be given further explanations as to the possible consequences of these uses under cluster 7, then we could come back to it later.

### *Comments from Nigeria*

I think it is illustrative that in the EU where there is a laundry list of limitations and exceptions that cover in fact all of the things that we are discussing today there has been disparate adoption of these limitations and exceptions by Member States. So the results that we have is a patch work system in which some Member States have certain limitations and exceptions and others do not. We see this situation in the EU being mirrored across the world. What that means is that for purposes of education and research, those of us who are teachers like myself are never quite sure what we can access, what we cannot access. We have to identify where the source is. We have got to figure out what rights attach; what rights do not attach. These become barriers to knowledge. They become barriers to learning. They become barriers to teaching and barriers to progress. If the system is going to function effectively for the economy, this proposed instrument is designed to establish the order of a sustainable knowledge economy in which the creation and access to knowledge is effectively available for all nations. Not just some over others. There is a reason that some countries have been unable to utilize these limitations and exceptions that exist in the EU. Now, there is, of course, two strong traditions represented in this room with regard to limitations and exceptions. We have the Continental or European tradition that lists very explicitly what uses are permitted and lists very specifically whether those uses are compensated or uncompensated. Then there is, of course, the most common law or Anglo American tradition which combines very short lists with a huge flexible instrument called the fair use doctrine in which particular uses are evaluated against the public or social purpose and the amount and content that is used. This proposed framework that we are discussing today hopefully will find a bridge between these two systems, neither of which are ideal but both of which are functioning for some but not all Member States that are represented here today. So for example, as the European Union Delegate mentioned, the right of making available, which is recognized under the WCT, has been repeatedly declared to not be a part of US copyright law. We have limitations and exceptions that are recognized not normally in the text of the law but sometimes by judicial opinions. It is important to have a harmonized minimum mandatory approach not just because particular sectors need it, but because the entire economy requires some flexibility in order to advance the progress of science and the useful arts as I have mentioned before. What the enhanced proposal by the African Group has suggested is modification slightly of the EU list of exceptions and limitations combined with a provision that I believe may address our Distinguished Delegate from Ecuador who in one of their clusters looked at the possibility of a provision that facilitates an updating of limitations and exceptions for education. This text in essence allows countries to enact new limitations and exceptions consistent with the Berne Convention and established state practice because, as we know from recent decisions from the European court of justice, from the U.K. they just implemented a mandatory access to U.K.-funded research; the decision of the Canadian Supreme Court yesterday which liberally interpreted fair dealing in Canada for educational purposes, this is where most OECD countries are moving. It is important that Members of the African Group, members of GRULAC, the rest of the global south and, as I said before, the developed countries all come to the table to facilitate what is in fact the social goals and ultimate purposes of the international copyright system. The enhanced proposal also includes the possibility African Group includes the fair use doctrine in addition to fair limitations and exceptions to preserve the difference that the Distinguished Delegate from GRULAC mentioned as well as the European Union. WIPO does not have specific limitations and exceptions that address education, science, libraries, archives, and those needs of persons with disabilities, but rather to say that the time has come for harmonized approach which is the very foundation of WIPO mission and, of course, the very foundation of the copyright itself. It is not simply an end in and of itself, but it is a means to be an end. It is here in place, dynamic and hopefully with a possibility of for the first time adopting a system that gives life to the Bern appendix which exists as a legal instrument, but also takes advantage of the recent developments in the EU, Canada, and the United States.

### *Comment from Germany*

Germany, being a member of the European Union, the German copyright law is based on the Directive on the harmonization of certain aspects of copyright and related rights in society. The limitations we have are all subjected to the three-step-test of the Bern Convention, even if it is not mentioned in detail. So I will take the opportunity and tell you the general guidelines, how the engineer man law uses the possibilities of the framework of the European Directive is providing in accordance with the Bern Convention. If you compare the law of Finland that my Finnish colleague told before, you can see the flexibility that not only the general European law but the Bern Convention already do provide. The German law has no special limitation or exceptions for the purpose of education or research. Instead the engineer man copyright law makes a difference between the different possibilities how one can use the copyrighted work. For the purpose of education and research, one may use the following limitations on copying. First, every student at school or at university has the permission to make copies of a work for the purpose of education. The student can do it by himself. It is also permitted that a third person makes the copies on behalf of the student. For example, a library, copy shop or another student. Second, any teacher or professor is permitted to make copies for every pupil or student in his class, but only for part of the work or for a short work. If a longer work is concerned, the permission is for ten to 15 percent of the work. If it is a shorter work, maybe a poem or a picture, the whole book can be copied. As an exception to this limitation, it is not permitted to copy books, especially school books. In both cases, copies made by the student and copies made by the teacher, the rightholder gets remuneration. Everyone who sells a copying machine or something like this has to pay certain amount to the rightholders collecting society. So society will distribute its revenues to its members. It is further permitted to make a work available to the public for the purpose of education or research. For example, by putting it into the Intranet of the school, university or research organization. But universities, schools or research organizations, have to take care that the work can be used only by students or by its members, not by the general public. One is not permitted to use the whole work there, but only a part of the work, about ten to be 15 percent of the work. The owner of the copyright gets remuneration for this kind of use. For this are purpose, there is a contract between the representatives of the schools, universities, and research organizations and the rightholders collecting societies that guarantees the rightholders remuneration. At the moment those limitations will exist until the end of this year, but we are working with the elongation of the limitation. About performance, the expression performance can hold very different meanings. I give you some small examples that may hold the information which is needed. It is permitted to recite a play or a poem in class when there is no auditorium. It is permitted to show a video or a broadcast in class if it is a private video or broadcast brought by the teacher. It is further permitted to communicate or perform a work for school events, for example a school theater and school orchestra. If the auditorium does not pay an entry fee or similar fee, the performance is without responsibility to pay remuneration to the rightholder. The German copyright law gives permission to make quotations. The main part of the permission is the purpose of the quotation. It is not permitted to copy a part of a copyrighted work. Quotations need a purpose. That means, you need to show the artistic approach or quotation of the copyright work. Quotation means use of the small part of the work but in certain rare cases it also can mean the whole work.

### *Comment from the United States of America:*

Our educational system in the United States is supported by a vibrant commercial market for education and research materials as well as a set of exceptions and limitations in our copyright law including the doctrine of fair use and specific provisions for teachers and students. Together, the commercial market through licensing and voluntary agreements and the exception limitations and exceptions in our copyright law, provide the critical access to

information, research, and creative expression needed to enable full participation in our information society. The commercial marketplace in the United States includes both major publishers and nonprofit presses. It serves any number of educational institutions and audience, public and private, from K through 12 to college courses to initiatives for the adult learner. In short, educational success in the United States has in significant part been the result of a sustained educational marketplace. At the same time there is no question that exceptions and limitations are an important part of the copyright balance worldwide and at the national level. In our experience appropriate and balanced exceptions that satisfy the three-step-test require careful study and consideration of all circumstances, but we must recognize that such circumstances may differ from country to country. In the United States, we do have a set of targeted exceptions for education codified in section 110 of the U.S. copyright act. But it is very hard to map these exceptions on to the specific clusters that we have discussed today. At best, they reflect a few of the cluster proposals set forth in the draft compilation document. For example, with respect to cluster number 5, performance for educational purposes, Section 110 allows instructors or students to display or perform copyrighted works as part of classroom activities in a nonprofit educational institution and provided that the work is a lawfully made copy. With respect to cluster number 9, distance learning, also one of the proposals, in the late 1990s, the United States engaged in an extensive process to promote the development and growth of distance education and to help ensure that our copyright law exceptions for education reflected the realities of the digital age. This review involved public debate and discussion which culminated in a formal study issued by the United States copyright office on copyright and digital distance education with recommendations to Congress on legislative changes that might be needed in our law. As a result in 2002, the United States enacted the technology education and copyright harmonization act also known as the teach act which amended our section 110 to allow for the inclusion of performances and displays of copyrighted works in digital distance education under appropriate circumstances and subject to certain limitations. Specifically, the Teach Act expanded the categories of works that were covered by section 110 of the copyright act and removed the concept of the physical classroom as a requirement to qualify under that provision in favor of the concept of mediated instructional activities under the supervision of an instructor. At the same time the teach act acknowledged the risk inherent for copyright owners in the digital environment by incorporating a number of safeguards to protect against the unauthorized distribution and reproduction of copyrighted works. Under the Teach Act, only accredited educational institutions or government bodies may avail themselves of this exception and only students officially enrolled in the course are authorized to receive transmissions of copyrighted works. In addition, educational institutions must apply technological measures that reasonably prevent recipients from retaining the works beyond the class session and from retransmitting them. Under our law educational institutions are generally prohibited from interfering with technological measures taken by copyright owner to pre-vent retention and distribution of the acts used. Under the teach act to provide the markets to create distance learning materials, the exception provided under the law does not extend to use of company righted works developed specifically for online educational uses, textbook materials, or other materials typically acquired by students for their interest use. In the same spirit we believe that as we discuss copyright exceptions and limitations at the international level we must work together to ensure that the needs of educational institutions are balanced by appropriate responsibilities on the part of educational institutions. As Winston Tabb, from IFLA said yesterday, it is important that limitations and exceptions provide a secure environment for the use of copyrighted works. With respect to clusters 27 and 28 which I think now have been combined, technological measures; our law also provides certain flexibilities for education with respect to those measures. Under section 1201 of the U.S. copyright act, nonprofit educational institutions as well as libraries and archives are permitted to circumvent access control measures solely in order to make a good faith determination whether to acquire and authorized copy of a work. Also under section 1201 of our law the U.S. copyright office conducts an administrative proceeding every three years and in consultation with the Department of Commerce develops exemptions to the laws, prohibition on circumvention of technological measures to control access of works for certain types of works. Through this process, the

United States has permitted the circumvention of technological measures in order to permit the incorporation of portions of films into new works for the purposes of criticism and comment by college and university professors engaging in educational uses. Finally under U.S. law, the doctrine of fair use may in specific circumstances allow third-parties to make limited use of copyrighted works, including for purposes of teaching, scholarship or research. This doctrine is codified in our section 107 of the U.S. copyright act and sets forth four nonexclusive factors that courts must determine when determining whether a particular use will be fair under our law. Under this doctrine as applied by our courts socially beneficial uses including educational uses are more likely to be considered fair in circumstances such as where no more of a work is taken than is necessary to achieve the educational or research purpose and where the use does not cause harm to the rights holder. Uses that add something new with a further purpose or different character are also important in the court's analysis of the purpose and character of the use applying the four factors under our fair use provisions. The considerations of these factors, however, often require a complex analysis of the facts and circumstances of each individual case and do not necessarily provide broad guidelines that can be routinely applied to as many cases as board to multiple uses. It should be clear from this brief discussion that the U.S. has experience in limitations and exceptions that fall under some of the cluster headings proposed by our Distinguished Delegates from Brazil, Peru, Ecuador, and Nigeria yesterday. We have clear and detailed experience in cluster topics like distance learning and limitations on reproduction for classroom use. On the other hand, we have little or no national experience in some of the topics proposed or how they might relate to specifically education such as some of the cluster topics such as public health or security, ISP liability, orphan works or computer programs.

*Comment from France:*

The French Delegation is taking the floor now to indicate how France has set up, that is in the context of the Bern Convention as recalled by Germany but also in the context of the 2009 directive which was explained and presented by the representative of the European Union to indicate how this framework enables us to respect French legal tradition which in fact has set up a teaching exception. This pedagogical exception which is L1025 (e) of French Intellectual Property rights. It lists all the exceptions and very specifically it is e which aims at the pedagogical exception. Under this Article it is permitted: Acts authorized are representation. Reproduction of extracts of works with the reservation of works conceived for teaching purposes. Musical partitions and digital, written works aimed for illustration purposes in the context of teaching and research purposes, and excluding all recreational activities as long as the public to which this representation or reproduction is aimed is composed mainly of students, classroom students or teachers or researchers directly are concerned and the use of this representation and this reproduction gives no rise to commercial use and compensated by remuneration negotiated on a lump sum basis. So that is the provision. Now I would like to comment to explain the essential principles and the pillars that condition the French legislative framework on this. Five principles basically. The first is that the exception does not apply at all materials. In France this cannot aim at books used for teaching nor musical partitions nor digital works. When we talk about that we are talking about school books as well as university textbooks which also constitute an exception in many foreign legislative frameworks as you as mentioned by the US Delegate in the presentation which just preceded mine. The exception for digital editions and musical partitions are explained by the fragility of the sector, particularly concerning musical publications. This sector already suffered all kinds of reproduction and we could not possibly aim at it in this exception. Now, there was a protocol agreement negotiated in France with the rights holders for the use of these books and printed music, as well as periodic publications just for teaching purposes. Therefore, license is used parallel to the use. This for those not covered by this particular exception of the so it is important to recognize the model of the license and to look how it can be combined with the exception, the second pillar or second general principle underlying the French exception. This has to do with the aim of the exception. Representation or reproduction of the protected work can only be used to illustrate





