

PROVISIONAL WORKING DOCUMENT CONTAINING COMMENTS ON AND TEXTUAL  
SUGGESTIONS TOWARDS AN APPROPRIATE INTERNATIONAL LEGAL INSTRUMENT (IN  
WHATEVER FORM) ON LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL, TEACHING  
AND RESEARCH INSTITUTIONS AND PERSONS WITH OTHER DISABILITIES

Note: It is understood that if text is included under a particular heading that text may also apply to other sections of this document.

## **PREAMBLE**

### *Proposal from the African Group*

The Contracting Parties,

Recalling that the promotion of education, science and the useful arts for public welfare is a principal objective of the copyright system;

Convinced that the encouragement of learning and the pursuit of scientific research and innovation are indispensable to sustainable human and economic development;

Mindful of the vital role of educational institutions, libraries and archives in the dissemination and preservation of all forms of knowledge, and in providing public access to the scientific and cultural heritage of nations;

Moved by the realization that persons with impairments face special access needs to works protected by copyright and related rights, and that they constitute a community whose right to participate in the knowledge economy must be effectively assured;

Recognizing the role of copyright in encouraging the creation, protection and dissemination of knowledge goods to secure a more sustainable balance between the public interest and rights of owners of copyright and related rights;

Acknowledging that new digital platforms and innovation in information communication technologies have had a profound impact on the public's ability to access, read, use, re-use and enjoy creative content, while also introducing new challenges for traditional copyright business models;

Understanding that the education of citizens, the advancement of scientific research, the encouragement of innovation and the defense of culture and democratic discourse is a significant responsibility of States, attainable most meaningfully through educated citizens;

Desiring to ensure that the public interest in dissemination and use of works protected by copyright and related rights are equally affirmed in the international copyright system as protection of those works traditionally have been;

Purposeful in the intention to secure an international copyright system appropriate to all nations and directed at achieving the benefits of accessible products of culture, sciences, and the arts

Hereby Agree as Follows:

## DEFINITIONS

### *Proposal from the African Group*

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.
- “Archives” means non-profit establishments with a public vocation, which serve as depositories for 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.
- “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 under the Berne Convention and the WCT.
- “Libraries” mean establishments with a public vocation, which make available 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 literary and artistic protected by copyright, and includes any literary and artistic work in which copyright protection has expired.

## GENERALLY APPLICABLE CONSIDERATIONS

### *Proposal from the European Union*

1. Copyright protection is required in order to foster 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 establishments 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.

### *Proposal from the European Union*

2. Like the EU, we would like to emphasize that 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 exceptions and limitations in our copyright law (through, for example, 17 USC 110 and 107) 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 non-profit presses. It serves any number of educational institutions and audiences, both public and private, from k-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 education 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.

## **A. Flexibilities**

### *Proposal from Pakistan*

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

### *Proposal from Ecuador*

4. 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.

### *Proposal from the European Union*

5. The Berne Convention provides for specific exceptions to allow uses of copyrighted works for the purpose of quotation and teaching. The same types of exceptions are permitted under the WIPO Copyright Treaty and, as far as related rights are concerned, under the

Rome Convention and the WIPO Performances and Phonograms Treaty. These exceptions leave a significant margin of manoeuvre 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 their national legislation and adapt it to their local conditions while respecting the three-step test as provided for in the Conventions and Treaties.

## **B. Three-step test**

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

#### 6. Interpretation of the three-step test.

When applying either Article 9.2 Berne, 13 TRIPS, 10 WCT, or similar provisions in any other multilateral treaty, nothing prevents 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, and protection of competition and secondary markets.

#### 7. Scope of the three-step test.

## **C. Obligations/Proposals to update exceptions**

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

#### 8. 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 Pakistan*

#### 9. Strengthening of existing flexibilities and introduction of new flexibilities in the copyright system to ensure access to textbooks and educational material at affordable prices.

## **D. Ongoing WIPO work plan/best practices and experiences**

### *Proposal from El Salvador*

#### 10. Contracting Parties agree to share on a periodic basis best practices and experiences on the effective implementation of the provisions of this Instrument.

## TOPIC 1: USES

### A. Educational, Teaching and Research Institutions

#### *Proposal from the African Group*

11. Beneficiaries.

This Treaty applies to persons with disabilities, educational institutions and research organizations, students, libraries and archives.

#### *Proposal from India*

12. Beneficiaries.

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 and teaching institutions, in this Article referred to as beneficiaries.

#### *Proposal from Pakistan*

13. Beneficiaries.

Contracting parties shall provide the exceptions and limitations guaranteed in this treaty for the benefit of persons with disabilities, public and private educational, teaching and non profit research institutions, in this article referred to as beneficiaries.

#### *Proposal from the African Group*

14. 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—

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

(b) reproduce and publish the translated work;

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

(d) 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.

15. Imports and exports of works – Exhaustion.

(1) Consistent with the Berne Appendix, an educational institution, library, research organization or student that is 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, shall be entitled, without the authority of the owner(s) of copyright or related rights, to sell, import, 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, educational institution or research organization located in the territory of a Contracting Party.

(4) The transfer of possession of a lawfully made copy of a computer program by an educational institution or research organization located in the territory of a Contracting Party to another 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 is entitled, without the authority of the copyright owner, to display that copy or subject of related rights publicly in an educational institution or research organization 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.

16. Uses by archives, libraries, museums and galleries.

(1) Any archive, library, museum or gallery operating in a Contracting Party [in conjunction with an educational or research organization] shall be entitled to—

(a) make copies of a work or a subject of related rights in its collection for the purpose of back-up and preservation;

(b) if a copy of a work or a subject of related rights in such an institution's collection is incomplete, make or procure a copy of the missing parts from another institution;

(c) make copies of a work or a subject of related rights that is or should be available in its collections in its chosen format, if it cannot reasonably be acquired in such format through general trade or from the publisher; and

(d) make copies of a work or a subject of related rights where the permission of



the author or other owner of copyright or related rights cannot after be obtained after reasonable endeavor.

(e) make a work available for lending in an accessible format to a person with a disability or an institution dedicated to the education of persons that are disabled.

(2) The rights conferred by paragraph (1) of this Article shall be applicable only to uses done for non-commercial purposes.

(3) Copies in whatever format made in accordance with paragraph (1) of this Article may be used for personal use or study and may be lent to users.

(4) Libraries shall be entitled to supply to each other, whether by post, fax or secure electronic transmission, provided that the electronic file is deleted immediately after printing a paper copy of an electronic copy of a work, unless such electronic copy is saved for archival purposes.

#### 17. National Repositories.

1. Contracting Parties may determine that specific libraries and archives or any other institution shall serve as designated repositories in which at least one copy of every work published in the country are to be deposited and permanently retained.

2. A designated repository or repositories is entitled to demand the deposit of copies of published copyright works, or copies of published material protected by copyright or related rights.

3. A repository or repositories may reproduce for purposes of retention, at least one record of publicly available content and demand the deposit of reproductions of copyright works or works protected by related rights, which have been communicated to the public or have been made available to the public.

#### 18. Limitation on Liability for Libraries and Archives.

A librarian or archivist acting within the scope of his or her duties, and performing any act subject to an exception or limitation under this Treaty shall not be liable for copyright infringement, whether direct or indirect.

#### *Proposal from Brazil*

#### 19. 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.

#### *Proposal from India*

20. Anthologies and Chrestomathies.

#### *Proposal from Finland*

21. 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.

#### *Proposal from the European Union*

22. The EU copyright framework within this field aims at striking an appropriate balance between the protection of copyright and related rights and teaching objectives, notably by:
- a) Providing Member States with the possibility to establish in their legislation exceptions to copyright and related rights for the benefit of educational establishments and for teaching purposes, including the possibility for Member States to decide on whether to provide for fair compensation for rightholders when applying such exceptions;
  - b) Allowing 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 Union;
  - c) Ensuring that the application of these exceptions falls within the framework of the three-step test.

In the EU the exceptions for the benefit of educational establishments and for teaching purposes are set out in Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the "Infosoc Directive"). This Directive establishes the possibility for an exception to the reproduction right, right of communication to the public and right of making available for the sole purpose of illustration for teaching or scientific research which is commonly considered at EU level as the main exception for the activities of teaching undertaken by educational establishments. This teaching exception as implemented in the EU Member States varies in terms of scope, nature of works used, type of beneficiaries and compensation.

Moreover, the exception is, in a number of cases, linked to or supplemented by licensing by rightholders.

The exception covers the use of a work or other protected subject matter for the sole purpose of illustration for teaching on condition that this is done for non-commercial purposes.

EU law requires Member States to provide in any teaching exception a requirement to indicate the source and name of the author of the work (in full respect of the moral right), unless this is impossible.

The exception covers the rights of reproduction, communication to the public (which includes the “making available to the public”) and distribution and applies to face-to-face teaching and distance learning. The acts of uploading, online transmission and download of a work or other subject matter are covered by the teaching exception of Article 5.3(a), provided other conditions are fulfilled, notably the application of the three-step test. Permanent downloads of the protected work that could be made by students in the context of a learning process, may be covered by the teaching exception or by the private copying exception of Article 5.2(b).

As regards the works or other subject matter covered, the teaching exception in the Infococ Directive is open-ended and does not impose a limitation as to the nature of the works or other subject matter that can be used or the extent of the use (obviously, when determining this, Member States need to comply with the three-step test). The same approach applies as regards the type of beneficiaries; the exception does not limit the category (school, university, etc.) or nature (public or private) of the eligible educational establishment. The exception however refers to the particular purpose of the educational activity (the “non-commercial purpose to be achieved”) and Recital 42 provides guidance in this respect. It is also worth noting that the exception remains silent as to the persons (institution, teachers or students) that might benefit from it.

Different systems exist in the EU in order to organise the use of works and other protected subject matter for teaching purposes. Licensing also plays an important role, either alongside the application of an exception (for instance to allow for uses that go beyond the scope of the exception) or instead of the application of exceptions.

Educational establishments may compensate the rightholders or clear the various rights according to different methods:

- Extended collective licensing agreements are used in some countries to facilitate the licensing of the use of works and other subject matter for teaching purposes.
- Voluntary collective licensing plays a role in Member States where uses for teaching purposes are not allowed by law via an exception or where the exception only applies if the relevant licensing schemes do not exist.
- Voluntary individual licensing also plays a role in cases where collective rights management organisations have no mandate to manage and clear the rights necessary for teaching purposes, mainly for digital reproduction and making available online but also, in some cases, for reprographic rights. In these cases, the rights are directly licensed by rightholders.

The Directive also establishes the possibility for an exception for quotation purposes, a reprographic copying exception and private copying exception. All these may play a role in teaching activities, on both fronts: when the teacher uses the work for analysis,

comment or review in an educational context and when copies are made by the institution or the student in the educational establishment.

In parallel to the teaching exception, the exceptions provided in the Infosoc Directive for purposes of quotations, reprographic and private copying may also exempt some of the acts that take place during teaching activities.

Quotations normally refer to extracts, passages or parts of literary works used word for word or to similar units of other works (e.g. painting, scenes from a movie etc.) which are accompanied by comment or criticism. The reproduction of an extract of a work must normally be considered as a quotation covered by the exception only if the extract is short regarding both the quoted work and the quoting work. The quotation must not be longer than necessary. This assessment is delicate and its criteria are defined by the jurisprudence in the Member States.

It is to be noted that in some Member States quotation of certain artistic works does not fall within the scope of a general quotation exception. The quotation exception covers both the rights of reproduction and communication to the public (including the making available to the public), and may be used in many different activities similar to, but not limited to, "criticism or review". The quotation exception may also be implemented in the framework of teaching activities.

Some of the EU Member States grant a general quotation exception without limiting it to any specific purposes, while others refer to specific purposes such as teaching.

Quoting a passage or a phrase from a work or other subject matter is often essential for commenting on, analysing, or criticizing pre-existing works used in a teaching activity. The use of extracts for the purpose of quotation is restricted to use that is in accordance with fair practice and to the extent required by the specific purpose. This means that usually only a small part of the work may be used without the authorization of the rightholders. It is also possible to justify in some cases the "quotation" of an entire work (e.g. cartoons, pictures or poems). In contrast, the teaching exception goes necessarily beyond a mere quotation. In this respect, the quotation exception in some EU Member States can be limited to "short quotations"; "short extracts of lawfully published works"; "passages from a work"; "use of brief quotations"; "fragments of written, sound or audio-visual character and isolated works of three-dimensional, photographic or art character". The quotation exception is of particular importance in systems with a narrow teaching exception.

The Infosoc Directive provides that the source, including the author's name, is indicated if possible. In this respect, national laws explicitly require the source and the author's name to be mentioned, the title of the work, or even the publisher and translator, other Member States refer to "proper usage" and "sufficient acknowledgement".

As regards the reprographic and private copying exception and in accordance with the Infosoc Directive, EU Member States are required to ensure that rightholders receive fair compensation for harm caused by reprographic or private copying. In many Member States, fair compensation is provided via levies (reprography and private copying levies) applicable on certain equipment and/or media that are used to make copies.

Finally, there are two other possible exceptions relevant in this context: (i) exception to the reproduction right for the benefit of educational establishments, and (ii) exception to the reproduction right, right of communication to the public and right of making available, for the purpose of research or private study at dedicated terminals on the premises of educational establishments. These exceptions are mainly used to make copies for preservation purposes and for the communication of a certain number of copies for private

study by individuals on the premises of the establishments. These exceptions are mainly used for the benefit of libraries (including libraries in educational establishments) and are different from exception for teaching purposes (i.e. exceptions for educational establishments to use works or other protected subject matter in the process of teaching). Most EU Member States establish a clear separation between the teaching exception and the library exceptions.

### *Proposal from France*

23. In the context of the Berne Convention and within the framework of the 2001/29/EC Directive which allows the respect of the French legal tradition, France has set up a pedagogical exception contained in article L 122-5 e) of the intellectual property code. This article authorises the reproduction or the representation of extracts of works with the exclusion of works conceived for teaching purposes, musical partitions and written works in digital form. This provision aims for illustration purposes in the context of teaching and research purposes, and excludes all recreational activities as long as the public to which this communication or reproduction is aimed is composed mainly of students, classroom students or teachers or researchers, directly concerned. The use of this communication and reproduction gives no rise to commercial use and is compensated by remuneration negotiated on a lump-sum basis.

Five essential principles or pillars underlie this French legislative framework.

The first is that the exception does not include all materials. In France, the exception cannot include books used for teaching, musical partitions, and digital works. School books as well as university textbooks are outside the scope of the exception, like in many foreign legislative frameworks. The exception within the exception for digital edition and musical partitions is explained by the fragility of the sectors, particularly concerning musical partitions. This last sector already suffered all kinds of reproduction and therefore we could not aim at it in this exception.

In France, a protocol was negotiated with the rightholders for the pedagogical use of these books and printed music, as well periodic publications. Licensing schemes are used in parallel to exceptions to authorise the uses of copyrighted materials for those not covered by the exception. Therefore we need to consider licensing in combination with exceptions.

The second general principle underlying the French exception deals with its aim. Communication to the public or reproduction of the protected work can only be used to illustrate the teaching course or the work of the researcher. This teaching aim includes all primary schools and university education, public or private, and distance learning. There is no distinction made in France between regular teaching and distance learning. In regards to research, the exception covers all research in public institutions, but the criteria of absence of commercial use excludes those carried out in private companies. The third pillar of the French legislative framework is the very special targeted public under its exception. The French pedagogical exception aims at a particular public which is made up of pupils, students, teachers and researchers, directly concerned. There is a primary condition as to the persons concerned and a second concerning the existence of a link between the persons and the subject being dealt with in the teaching framework.

The fourth element is the absence of commercial purpose. This came out of the non commercial purpose included in the Directive 2001/29/EC of 22 may 2001. This is essentially justified by the objective of exceptions to meet the general public interest.

The last pillar, which is also very important, is the remuneration. The exception in France

can only be used as a counterpart to remuneration negotiated on a lump-sum basis.

*Proposal from the United States of America*

24. In the United States, we do have a set of targeted exceptions for education, codified in Section 110 of the U.S. Copyright Act. Section 110 allows limited use of copyrighted materials under certain circumstances (and subject to certain requirements) for both face-to-face teaching and distance education. Where appropriate, we have later described specific aspects of Section 110 of our law and how it reflects some of the individual topics to be discussed such as in-class learning and distance education. More generally, 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 Section 107 of the U.S. Copyright Act and sets forth four non-exclusive factors that courts must consider when determining whether a particular use will be “fair” under our law. Under this doctrine, as applied by our courts, socially beneficially 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 market 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 in applying the four factors. The consideration of these factors, however, often requires a complex analysis of the facts and circumstances of each individual case and does not necessarily provide broad guidelines that can routinely be applied across the board to multiple uses.

**B. In-classroom**

*Proposal from the African Group*

25. 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 organized, 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 Brazil*

26. 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.

#### *Proposal from GRULAC*

27. 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 India*

28. Anthologies and Chrestomathies.

*Proposal from Ecuador*

29. Availability on an interactive basis and communication to the public for educational purposes.

*Proposal from China*

30. In-classroom Teaching: Translation and reproduction in a small quantity of copies of a published work may be allowed for school in-classroom teaching or scientific research purposes, and such translations and reproductions may be incorporated into classroom teaching materials in order to be distributed, exhibited or performed for teaching illustration and classroom discussions. No consent may be required for such acts from copyright holders, nor remunerations paid to them, provided that the name of the author, and the title and source of the work are indicated.

*Proposal from the United States of America*

31. Section 110(1) of the United States Copyright Act is designed to address exceptions for use of copyrighted works for traditional in-classroom teaching. The provision allows instructors or students to display or perform copyrighted works, provided they do so as part of face-to-face teaching activities in a nonprofit educational institution and provided the work is a lawfully made copy.

*Proposal from Finland*

32. 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 cinematic 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.
33. 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.

## **C. Outside classroom**

### *Proposal from the African Group*

#### 34. Educational Institutions and Research Organisations.

(1) The Contracting Parties agree that the following uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes shall be permitted without the authorization of the owner(s) of copyright or related rights:

- (a) temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:
  - (i) a transmission in a network between third parties by an intermediary;
- (b) reproductions effected by the use of any kind of photographic technique or by some other process having similar effects;
- (c) reproductions on any medium made for private use and for ends that are neither directly nor indirectly commercial related to the pursuit of educational learning or research;
- (d) ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts, provided that the preservation of such recordings in educational or research institution or official archives shall, on the grounds of their exceptional documentary character, be permitted;
- (e) reproductions of broadcasts for pursuing non-commercial purposes in informal learning settings such as hospitals or prisons;
- (f) uses for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (g) reverse engineering or decompilation of a computer program done for the purpose of achieving inter-operability, research or study;
- (h) uses for the benefit of people with a disability, which are directly related to the disability and to the extent required by the specific disability in an educational or research institution;
- (i) reproductions by the press, communication to the public or making available works that are the result of research or study on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the purpose

of the educational institution or research organization, and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(j) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, and provided that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that the use is in accordance with fair practice, and to the extent required by the specific purpose;

(k) uses for the purposes of public health or public security;

(l) uses for the purposes of ensuring the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(m) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(n) use for the purpose of caricature, parody or pastiche;

(o) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(p) incidental inclusion of a work or a subject of related rights in other material;

(q) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(r) use in connection with the demonstration or repair of equipment; and

(s) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums and archives, of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

(2) Notwithstanding the specific exceptions above, Contracting Parties shall be permitted to enact new exceptions and limitations consistent with the Berne Convention and established state-practice to ensure access to education, including educational, and the benefits of scientific research.

(3) Contracting Parties may adopt the fair use doctrine in addition to the specific exceptions listed in this Article.

### 35. 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 organized, 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*

36. 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*

37. 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.

*Proposal from Ecuador*

38. Availability on an interactive basis and communication to the public for educational purposes.

*Proposal from India*

39. Anthologies and Chrestomathies.

**D. Distance Learning**

*Proposal from the African Group*

40. Distance education.

(1) The following uses of works or subjects of related rights in distance learning courses conducted by educational institutions or research organizations located in the territory of a Contracting Party shall be lawful—

- (a) performances of any work, including dramatic works and audiovisual works, if limited for the purposes of instruction; and
- (b) displays of any work in an amount reasonably necessary to accomplish an educational objective

(2) The provisions of paragraph (1) of this Article shall not apply to works and subjects of related rights marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks and not part of an established curriculum or reasonably identifiable research program.

(3) An educational institution located in the territory of a Contracting Party shall be entitled to record and retain copies of any distance education transmission, whether or not it includes content protected by copyright or related rights, for the following purposes—

- (a) retention of the content for student access for a period of time that is necessary to achieve the learning objectives; and
- (b) copying and storage that is incidental or necessary to the technical aspects of digital transmission, including transient or temporary storage of material, provided that the copyrighted content on a system or network is not available for a longer period than is reasonably necessary to facilitate the transmissions for which it was made, and to the extent technologically feasible.

(4) The provisions in this Article shall not apply to performances or displays given by means of copies not lawfully made or acquired, if the educational institution or research organization, knew or had reason to believe that they were not lawfully made or acquired.

#### 41. Educational Institutions and Research Organisations.

(1) The Contracting Parties agree that the following uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes shall be permitted without the authorization of the owner(s) of copyright or related rights —

- (a) temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable—
  - (i) a transmission in a network between third parties by an intermediary;
- (b) reproductions effected by the use of any kind of photographic technique or by some other process having similar effects;
- (c) reproductions on any medium made for private use and for ends that are neither directly nor indirectly commercial related to the pursuit of educational learning or research;
- (d) ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts, provided that the preservation of such recordings in educational or research institution or official archives shall, on the grounds of their exceptional documentary character, be permitted;
- (e) reproductions of broadcasts for pursuing non-commercial purposes in informal learning settings such as hospitals or prisons;
- (f) uses for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (g) reverse engineering or decompilation of a computer program done for the purpose of achieving inter-operability, research or study;
- (h) uses for the benefit of people with a disability, which are directly related to the disability and to the extent required by the specific disability in an educational or research institution;
- (i) reproductions by the press, communication to the public or making available works that are the result of research or study on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the purpose of the educational institution or research organization, and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (j) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, and provided that, unless this turns out to be impossible, the source, including the author's

name, is indicated, and that the use is in accordance with fair practice, and to the extent required by the specific purpose;

(k) uses for the purposes of public health or public security;

(l) uses for the purposes of ensuring the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(m) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(n) use for the purpose of caricature, parody or pastiche;

(o) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(p) incidental inclusion of a work or a subject of related rights in other material;

(q) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(r) use in connection with the demonstration or repair of equipment; and

(s) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums and archives, of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

(2) Notwithstanding the specific exceptions above, Contracting Parties shall be permitted to enact new exceptions and limitations consistent with the Berne Convention and established state-practice to ensure access to education, including educational, and the benefits of scientific research.

(3) Contracting Parties may adopt the fair use doctrine in addition to the specific exceptions listed in this Article.

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

42. 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 Section 110 of our copyright law 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 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 risks 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 redistributing them. And under our law, educational institutions are generally prohibited from interfering with technological measures taken by copyright owners to prevent retention and distribution of the works used. Finally, to preserve the market for and incentives to create distance education materials, the exception provided under the Teach Act does not extend to use of copyrighted works developed specifically for online educational uses, textbook materials or other materials typically acquired by students for their independent 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 the International Federation of Library Associations said, it is important that exceptions and limitations provide a secure environment for the use of copyrighted works.

## **E. Research**

### *Proposal from the African Group*

#### 43. 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—

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

#### 44. 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—

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

(b) reproduce and publish the translated work;

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

(d) 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.

#### 45. Educational Institutions and Research Organisations.

(1) The Contracting Parties agree that the following uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes shall be permitted without the authorization of the owner(s) of copyright or related rights —

(a) temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable—

(i) a transmission in a network between third parties by an intermediary;

(b) reproductions effected by the use of any kind of photographic technique or by some other process having similar effects;

(c) reproductions on any medium made for private use and for ends that are neither directly nor indirectly commercial related to the pursuit of educational learning or research;

(d) ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts, provided that the preservation of such recordings in educational or research institution or official archives shall, on the grounds of their exceptional documentary character, be permitted;

(e) reproductions of broadcasts for pursuing non-commercial purposes in informal learning settings such as hospitals or prisons;

(f) uses for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(g) reverse engineering or decompilation of a computer program done for the purpose of achieving inter-operability, research or study;

(h) uses for the benefit of people with a disability, which are directly related to the disability and to the extent required by the specific disability in an educational or research institution;

(i) reproductions by the press, communication to the public or making available works that are the result of research or study on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the purpose of the educational institution or



research organization, and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(j) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, and provided that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that the use is in accordance with fair practice, and to the extent required by the specific purpose;

(k) uses for the purposes of public health or public security;

(l) uses for the purposes of ensuring the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(m) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(n) use for the purpose of caricature, parody or pastiche;

(o) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(p) incidental inclusion of a work or a subject of related rights in other material;

(q) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(r) use in connection with the demonstration or repair of equipment; and

(s) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums and archives, of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

(2) Notwithstanding the specific exceptions above, Contracting Parties shall be permitted to enact new exceptions and limitations consistent with the Berne Convention and established state-practice to ensure access to education, including educational, and the benefits of scientific research.

(3) Contracting Parties may adopt the fair use doctrine in addition to the specific exceptions listed in this Article.

#### 46. 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.

#### *Proposal from the African Group*

##### 47. Computer programs.

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 (3) of this Article.

#### *Proposal from Chile and India*

##### 48. Reverse engineering.

#### *Proposal from the European Union*

49. The framework for exceptions to copyright and related rights for research purposes is set out in Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (the "Infosoc Directive").

This Directive establishes the following optional exceptions (subject, as in all other cases, to the application of the three-step test) to the reproduction right, right of communication to the public and right of making available:

1. an exception for the sole purpose of scientific research
2. an exception for quotation purposes
3. an exception for the purpose of research or private study at dedicated terminals on the premises of certain establishments

The Infosoc Directive sets out in Article 5 (3) (a) and corresponding Recital 42 the framework in which Member States may provide that works or other subject matter may be used for the purpose of scientific research. Within that framework, protected works may be copied, communicated to the public or made available and distributed, as long as the source (if possible), including the author's name, is indicated. Indeed, in the research area, works are rarely ex nihilo creations. Then, the indication of the source, if possible, including the author's name, as an element of the moral right, is of a great importance in the use of works for research purposes.

Only non-commercial research activities benefit from this facultative exception even if there might be cases where the distinction between commercial and non-commercial activities is difficult to make.

The exceptions regarding the scientific use of works or other subject matter differ greatly among the different Member States' copyright laws: Some provisions are very specific, others are quite global, or stress the illustrative nature of the uses of the work or other subject matter, or mix both illustration and quotation.

The implementation in Member States of the exception for the sole purpose of illustration for scientific research comes often close to a quotation exception.

An important practice in scientific research is to consider the existing results of other research and of works previously published. It is often necessary in research to quote preexisting works. Under certain conditions, copying parts of preexisting works literally in a new piece of work can be done without authorization of the rightholders.

In EU, the "quotation" exception must obey certain requirements as provided by Article 5 (3) (d), namely:

- the quotation is for a legitimate purpose such as criticism or review,
- the quotation relates to a work or other subject matter which has already been made lawfully available to the public,
- the source, including the author's name, is indicated if possible,
- their use is in accordance with fair practice,
- their use is limited to the extent necessary for the specific purpose.

Quotation normally refers to extracts, passages or parts of literary works used word for word or to similar units of other works (e.g. painting, scenes from a movie, etc.) which are accompanied by comment or criticism. The reproduction of an extract of a work must be considered normally as a quotation covered by the exception only if the extract is short regarding both the quoted work and the quoting work. The quotation must not be longer than necessary. This assessment is delicate and its criteria are defined by the jurisprudence in the Member States.

The Infosoc Directive provides that the source, including the author's name, is indicated if possible. In this respect, national laws explicitly require the source and the author's name to be mentioned, or the title of the work or even the publisher and translator based in

some countries on "proper usage" or "sufficient acknowledgement".

Besides the exception for the sole purpose of illustration for scientific research, the Infosoc Directive also contains an exception for the benefit of libraries and archives for certain acts of communication or making available of works and other protected subject matter on their premises for research.

Research institutions are not normally publicly accessible and therefore are not among the beneficiaries of this exception. The exception rather applies for the benefit of researchers using publicly accessible libraries, educational establishments, museums, or archives to consult works or other subject matter for research purpose on dedicated computers in these institutions.

*Proposal from China*

50. The Delegation of China supports the inclusion, in the topics for discussions, of the issue on limitation and exception with respect to reverse engineering of a computer program.

*Proposal from United Kingdom:*

51. Yesterday the UK released a new policy to open up access to publicly funded research. The UK Government believes making it possible to access publicly funded research will have real economic and social benefits. This announcement is the product of the work between publishers and research organizations. It recognizes that opening access has broad benefits, but also that good quality publishing also brings benefits and has costs for publishers. It puts forward new approaches on how those costs will be met. It is important to note that this announcement does not involve any change to the UK copyright framework.

## TOPIC 2: PERSONS WITH OTHER DISABILITIES

### *Proposal from India*

#### 52. Beneficiaries.

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, in this Article referred to as Beneficiaries.

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 the African Group*

#### 53. Limitations and exceptions for Persons with Disabilities.

Notwithstanding anything in this Treaty, persons with disabilities shall be entitled to exercise all exceptions and limitations necessary to enable and facilitate access to works in accessible formats even when not done in conjunction with education or research activities. In addition, persons with disabilities shall be entitled to the following:

(1) 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, 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) the owner of the right is recognized as such in a visible place on the work.

(2) Personal use by persons with disabilities

A person with a disability to whom a work is communicated by wire or wireless means may, without the authorization of the owner of the copyright or related right, copy the work by any means now known or later developed exclusively for his or her own personal use. This provision shall be without prejudice to any other exceptions and limitations that the person in question is able to enjoy.

#### 54. Remuneration for commercial exploitation of works.

1. When implementing 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 , 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.

## GENERAL COMMENTS ON TOPICS 1 AND 2

### Comments made during discussions (Day one – July 16, 2012)

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

55. 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 during discussions (Day two – July 17, 2012)**

### *Comments from Nigeria*

56. 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*

57. 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*

58. 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*

59. 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 certain 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*

60. 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 excepted 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*

61. 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 Ecuador*

62. 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*

63. 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*

64. 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*

65. 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*

66. 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*

67. 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 purchases 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*

68. 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:*

69. Like the EU, we would like to emphasize that 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 exceptions and limitations 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 non-profit presses. It serves any number of educational institutions and audiences, both public and private, from k-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 education 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. The distinguished delegate of South Africa mentioned the importance of discussing national experiences and the distinguished delegate from Nigeria alluded to aspects of U.S. law, so we would like to briefly discuss our law – and how it influences our views of how to work at the international 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 onto the specific “topic” proposed by various delegations. Where appropriate, we have described Section 110 of our law and how it reflects some of the individual topics to be discussed such as in-class learning and distance education. More generally, 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 Section 107 of the U.S. Copyright Act and sets forth four non-exclusive factors that courts must consider when determining whether a particular use will be “fair” under our law. Under this doctrine, as applied by our courts, socially beneficially 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 market 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 in applying the four factors. The consideration of these factors, however, often requires a complex analysis of the facts and circumstances of each individual case and does not necessarily provide broad guidelines that can routinely be applied across the board to multiple uses.

It should be clear from the brief discussion of our law that the U.S. has direct experience in exceptions and limitations that fall under some of the topic headings proposed by Brazil, Ecuador, Peru and Nigeria yesterday. For example, we have clear and detailed experience in topics like distance learning and limited reproduction for classroom use. On the other hand, we have little or no national experience in some of the topics proposed or how any educational implications could be considered in a vacuum, such as public health and security, ISP liability, orphan works or computer programs. We believe that those general topics are not appropriate for a discussion of educational exceptions and are not within the mandate of this SCCR on this issue.

*Comment from Chile:*

70. Our topic on reverse engineering. First of all, I would like to say that our idea in proposing this theme was that today we are discussing or talking about exceptions and limitations for education and also research. Therefore, without prejudice to the fact that in this document we are looking at today our proposal is under 23. It comes under the heading of software and databases. For us as we see it, reverse engineering is directly connected with research. In this field what we are seeking for, of course, is a discussion of the various opinions that Delegations may have on this. We believe that reverse engineering, since it is an activity that makes it possible to improve the working of computer programs, is in this case directly connected with research. Just by way of an example and very briefly, in Chile we have legislation on exceptions on this, which enable reverse engineering to be carried out on computer programs as much as the computer program has been obtained legally in a legitimate way and this reverse engineering process has to

be carried out for the purposes of research or development. In addition, the information obtained during the process of reverse engineering of a computer program cannot, of course, be used to produce or commercialize a computer program that is similar or that infringes rights, Intellectual Property rights that are protected by law.

*Comment from India:*

71. Reverse engineering. It is important to research. India recognizes this important aspect as one of the exceptions provided under the Indian copyright act. It explains the doing of any act necessary to obtain information essential for operation and functioning of the computer program. So reverse engineering is one of the important aspects. You rightly pointed out under the discussion of the clusters; we got distracted explaining our national laws. The WIPO Secretariat has done a great work in sponsoring five important studies of the different agents of the country. The selected top international copyright experts which covered 157 national laws and again to facilitate the ready hand material, again the Secretariat has come out with the analytical document which has pointed out several clusters. For example, number 1, specific exceptions directly related to teaching and instructional purposes. This is the many countries use not only for the teaching but also for the instructional purposes. The reason why the word "instruction" is important, it may not be normal teaching method, but instruction is important for the people especially the skill development. And the government of India is focusing for the past few years on skill development. Skill development is meant for even the slightly educated people. They may not be literate but they want to improve their skills. Here instruction is more important than teaching. So the instruction should also be included in the cluster. Third cluster, exception for fair use and fair dealing. This we already covered and the Secretariat analytical document again discusses the scope of educational exceptions very well. It covers reproduction. Performance, communication to public, making available and translations. These are the important clusters it covers. Then works. What kind of works? It covers that many countries are covered any work, all kind of works. So it should be the important focus we should discuss. Finally in the clusters, elements to be included in the clusters. And then what kind of rights are covered for educational exceptions? The analytical document we studied in the five studies says all educational exceptions are given to all exclusive rights. What kind of purpose the exception should, educational exception should cover. It talks about the teaching instructions, examinations also. This study or any other conditions, several other conditions as covered under the different national laws. These are the areas we need to focus and move forward. We are already know that these five studies have brought all the different and various kinds of exceptions forward by different, 157 domestic laws. Here while finalizing the exceptions while making the clusters, whatever exceptions we are allowing for the use of educational content, it should help to create the ways of teaching in the university schools and other educational institutions. So this is very, very important and we have to move forward leaving the conservative practices in implementing exceptions as explained by the Distinguished Delegate of Nigeria. I give you would be example recently from my friend, Distinguished Delegate looking at me. It is of the Hargreaves review. They have moved forward in looking at exceptions in education. It is eye opening. When I read it, I loved it. The Price Waterhouse Coopers has done a very good study engaged by the copyright clearing agency. The studies are available in the public domain. How the U.K. study has been suggested important things. It is relevant for not only the developed countries but also for the developing countries.

### TOPIC 3: BROADER TOPICS WITH IMPLICATIONS FOR EDUCATION

#### A. Technology

##### *Proposal from the African Group*

#### 72. 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.

#### 73. Limits to database protection laws.

The provisions of the Article on Science shall apply *mutatis mutandis* to database protection laws.

74. Computer programs.

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 (3) of this Article.

75. Technical Protection measures.

Notwithstanding the provisions of any international agreement, it shall be lawful for any educational institution, research organization, or student domiciled in the territory of a Contracting Party to circumvent any effective technological protection measures and access the content protected by such technological protection measures for the purposes of—

- (a) private non-commercial use;
- (b) private study or research;
- (c) translation, teaching, testing, class room study or scientific research, as long as the source is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (d) reverse engineering or decompilation of a computer program done solely for the purpose of achieving inter-operability;
- (e) use for the benefit of persons with a disability, where such use is directly related to the disability and of a non-commercial nature; or
- (f) use to enhance public health and public security.

76. Limits to database protection laws.

The provisions of the Article on Science shall apply *mutatis mutandis* to database protection laws.

77. Digital rights management.

The provisions of the Article on technical protection measures shall apply *mutatis mutandis* to the circumvention of digital rights management.

*Proposal from El Salvador*

78. Rights management information.

Educational and research institutions that apply the provisions of this instrument in good faith and without commercial purposes, shall not be subject to legal remedies relating to rights management information.

*Proposal from the United States of America*

79. **[The United States' comment under this topic is limited to technological protection measures in relation to educational and research uses; we do not agree that all the materials under the present heading constitute appropriate subject matter for the mandate of this working document.]**

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 an 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, to develop exemptions to the law's prohibitions on acts of circumvention of technological measures that control access to works for persons who are users of particular categories of works. For example, 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 purpose of criticism and comment by college and university professors engaging in educational uses.

Under Section 1204 of the U.S. Copyright Act, nonprofit educational institutions (as well as libraries and archives) are exempted from criminal liability for violation of the Copyright Act's anti-circumvention provisions. Educational institutions, however, may be subject to civil liability for violation of the anti-circumvention provisions, and unless a specific exemption applies, must otherwise comply with the Act's technological protection and rights management obligations. For such civil violations, Section 1203 does include certain provisions addressing violations by nonprofit educational institutions that may be considered "innocent." Under this provision courts are directed to remit damages for any civil violations if the educational institution proves that it was not aware and had no reason to believe that its acts constituted a violation.

**B. Orphan works and withdrawn or out of print works**

*Proposal from the African Group*

80. Orphan works.

1. It shall be permitted for educational institutions, research organizations, libraries and archives 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.

81. Retracted, Withdrawn or Inaccessible Works.

Except as otherwise provided by national law, 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 copyright or related rights, which has become inaccessible, but which has previously been communicated to the public or made available to the public by the author or other rightholder.

## **C. Public domain**

## **D. Contracts**

### *Proposal from the African Group*

#### 82. Relationship with contracts.

Contracts attempting to override the legitimate exercise of the provisions in Articles 2-5 shall be null and void as against the public policy justifying copyright and shall be deemed inconsistent with the goals and objectives of the international copyright system.

## **F. ISP Liability**

### *Proposal from the African Group*

#### 83. Limitation on liability of internet service providers for beneficiaries.

(1) An internet service provider operating in the territory of a Contracting Party whose activities are directed to facilitating access to educational materials and use of exceptions and limitations in this Treaty shall not be liable for infringement of copyright or related rights by reason of the provider's transmitting, routing, or providing connections for, educational 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.

## **G. Importation and Exportation**

### *Proposal from the African Group*

#### 84. Imports and exports of works – Exhaustion.

(1) Consistent with the Berne Appendix, an educational institution, library, research organization or student that is 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, shall be entitled, without the authority of the owner(s) of copyright or related rights, to sell, import, 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, educational institution or research organization located in the territory of a Contracting Party.

(4) The transfer of possession of a lawfully made copy of a computer program by an educational institution or research organization located in the territory of a Contracting Party to another 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 is entitled, without the authority of the copyright owner, to display that copy or subject of related rights publicly in an educational institution or research organization 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.

**H. Public health or security**

[End of document]