



TLIB

A 'Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives'

Frequently Asked Questions

JUSTIFICATION

1. Why is a Treaty on exceptions and limitations for libraries and archives needed?

Because international copyright law does not properly serve the needs of libraries and archives in the 21st century. The *Berne Convention* (1886) [<http://bit.ly/nGlrDq>], the major governing copyright treaty, is focused on establishing international protection for authors' rights. While it did address certain public interest considerations, confirming that they are a fundamental part of the system, apart from the two mandatory copyright exceptions, Article 2(8) on news reporting and Article 10(1) on quotations, these are optional and not global in nature.

As a result, libraries and archives work under a patchwork of provisions that differ in scope and effect from country to country, and which increasingly fail to address the legal and policy challenges of the global digital environment. At the same time, new treaties protecting rightholders and new ways to control access to content have been adopted. To resolve this structural problem, and to develop a distinct policy space for libraries and archives enabling the robust dissemination of knowledge to people and society, a global treaty for libraries and archives along with a range of complementary measures is a proposed solution that is a natural continuation of longstanding international principles.

2. Under the Berne Convention, countries are already free to have exceptions and limitations in their national law, so why do we need this new international instrument?

Unlike the case in respect of quotations and news reporting, there is no international mandate for countries to have exceptions and limitations for libraries and archives. As mentioned above, this has resulted in a patchwork of provisions for libraries and archives. The *WIPO¹ Copyright Treaty* (WCT) [<http://bit.ly/otDU32>] has a provision for countries to extend exceptions and limitations in national law into the digital environment, and to devise new exceptions and limitations appropriate for the digital environment. However, without an international mandate, this laudable gesture has had limited effect. The result is a copyright system that is not fit for purpose for libraries and archives today.

The two mandatory exceptions that exist in the *Berne Convention* have proven to be crucially important in the international copyright system. They make possible the free communication of information in society, leading to engagement in learning and intellectual activity, the acquisition of knowledge and a thriving economy. Article 10(1) is the foundation for modern scholarship and education practice and the freedom and independence of the news industry rely on both Articles 2(8) and 10(1).

¹ World Intellectual Property Organisation

3. Why do libraries and archives need special exceptions and limitations?

Exceptions and limitations to copyright benefit society by:

- safeguarding fundamental user rights concerning the individual, including freedom of expression;
- reflecting commercial interest, industry practice and competition; and
- promoting the dissemination of knowledge and information and the public interest

Libraries and archives are primary cultural and scientific institutions that provide information as a public good. Serving as gateways for education, research, scholarship, creativity and discovery, libraries and archives have an important role in fulfilling all three functions above.

- They enable intellectual freedom and facilitate democratic exchange by providing access to information, ideas and works of the imagination in any medium to all members of society.
- They enrich the lives of individuals enabling further creativity, support education and teaching, as well as scientific research and development.
- They help to bridge the digital divide through the provision of new technologies to access the internet and other digital resources
- They provide services to people with reading disabilities,.
- They have a unique role to preserve the historical record to enable understanding of the past, efficient management and proper oversight in the present and to inform the future.

In addition, most libraries and archives are funded, wholly or partly, from the public purse or are charitable foundations, and a number have statutory obligations to collect and preserve national heritage, or to promote information, research, education and cultural activity. Governments worldwide recognise the public policy role of libraries and archives as facilitators of knowledge through a variety of means including funding, public policies, the enactment of laws governing cultural institutions, and exceptions and limitations in copyright law for the benefit of libraries and archives and their users.

The world's common information platform is now the Internet, operating across invisible national borders, so to play their full part libraries and archives now need minimum international copyright norms so they can continue to provide full access to information and cultural heritage in the global digital environment. Library and archive users everywhere want digital access to information: for example, photocopying from printed books and journals and from other documents is being supplanted by scanning or downloading and libraries are switching their subscriptions from print to e-journals. The same is likely to happen for most library books: already Amazon sells more e-books than printed books. [*Amazon.com now selling more Kindle books than print books.* Amazon News Release 19/05/2011 <http://bit.ly/kBgwLu>].

The human right of access to information provided by Article 19 of the *UN Declaration of Human Rights* <http://bit.ly/o6ezK>) depends not only on laws that protect freedom of expression but also on laws providing copyright exceptions and limitations that ensure equal public access to and use of information. However, a cataclysmic shift is taking place in how information is distributed to end-users because access to digital information goods such as e-journals, e-

books, film and sound recordings is subject by licence to the monopoly control of the rightholder(s).

In most countries, apart from in Ireland, Belgium and Portugal, these private business-to-business contracts are allowed to undermine the statutory copyright exceptions and limitations in the law of the country where the library or archive is located. In such cases, as illustrated by the British Library's 2009 study of 100 digital licences offered to it which found that more than 90% undermined UK copyright law exceptions [see *Response from the British Library to the Independent Review of Intellectual Property and Growth, 2011*. Para 2.2 pp 6-7 <http://bit.ly/qJ2e9J>], the longstanding public interest function of national copyright exceptions is lost.

The terms of access to digital information goods are solely at the whim or commercial decision of the rightholder, crystallising the digital divide between the information 'haves', and the 'have-nots' who depend on publicly accessible and educational libraries and archives for access. For example, two major publisher bodies with global outreach recently advised their members to include terms in licences that would confine the full delivery of library services to the technological age of the horse and cart: the UK's Publishers Association advises that e-book lending licences should prevent public library users from downloading e-books from their libraries remotely but only allow them to do so in person at the library premises [*Publishers Association (2010): E-book lending in public libraries*. <http://bit.ly/pNsehZ>; *E-book restrictions leave libraries facing virtual lockout*. *Guardian* 26/10/2010 <http://bit.ly/BS3ICa>]; and the International Association of Scientific Technical and Medical Publishers' (STM) proposes that e-journal licences should only allow libraries to provide printed copies, not digital copies, of documents to users [*STM Statement on Document Delivery 08/06/2011* <http://bit.ly/mMPKO9>].

4. How would exceptions and limitations benefit different library and archive user groups?

Libraries and archives are all about the people they serve. Every day throughout the world, libraries and archives help hundreds of millions of people meet their work, study, research and leisure needs - students, scientists, researchers, professionals, and the general public from all walks of life. Through libraries people can learn new skills, find jobs, discover history and culture, understand current affairs, improve their health, connect to other sources of knowledge and generally improve their lives. Archives provide people with a unique resource documenting human activity which is an irreplaceable witness to past events, underpinning democracy, the identity of individuals and communities, and human rights. Exceptions and limitations are designed to support libraries and archives in the services they provide. Some are general provisions that will benefit all user groups, while others are designed for specific activities.

All the proposed exceptions and limitations in the draft Treaty apply to non-commercial uses only, while some are subject to further conditions such as the international standard of fair practice. Here are some examples:

- All user groups, and for publicly funded libraries and archives also the taxpayer, will benefit from the right to parallel importation (Article 4). This ensures that libraries and archives are able to choose and buy books and other materials required by their readers from any country that best meets their needs and budget.

- All users, especially those living in rural areas or served by smaller libraries and regional archives, will benefit from being able to access resources available from larger institutions or from specialist libraries or archives, either at home or abroad (Articles 5 & 7).
- All user groups benefit from being able to borrow a book, music score, e-book, film or sound recording from a library to read, study, watch or listen to in their own time and at their own pace, or to bring it to a friend or relative who cannot travel to the library or access it online themselves (Article 6).
- Historians, scholars and social commentators rely on material preserved by libraries and archives to discover and analyse the past and to provide an insight into the future. Without the freedom to make preservation copies, many works, whether on fragile older media or on impermanent modern media and in digital form, will decay or become unusable (Article 8).
- Allied to this is a provision to preserve the public record for posterity of works originally published in databases or on websites that are retracted, usually by the publisher (Article 12).
- Accessible formats enable people with reading disabilities to exercise their right to read and their fundamental right to education (Article 9).
- Students and scholars will benefit from the right to make copies of works for the purposes of education, research or private study, and libraries and archives will be able to provide tutors with learning materials in virtual learning environments (Article 10).

CONTEXT

5. How would this treaty proposal interface with other proposals on exceptions and limitations offered at the WIPO Standing Committee on Copyright and Related Rights (SCCR) 2009-2011?

There are currently two other proposals relating to exceptions and limitations on the agenda of WIPO SCCR. These are the '*Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*' (later joined by Mexico) [document ref. SCCR/18/5 <http://bit.ly/qaW2w5>], and the '*Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives*' proposed by the African Group, [document ref. SCCR/22/12 <http://bit.ly/oEU3Nb> (SCCR/20/11 revised)].

The international library community fully supports the WBU proposal and the timetable for its endorsement. Our own library and archive treaty proposal, known as 'TLIB' [<http://bit.ly/hOy3KI>], also contains a provision for blind, visually impaired and other reading disabled persons (Article 9), but it will only apply if the permitted uses are not provided for by another treaty administered by WIPO. In other words, it is a fallback provision that will only be used if the WBU proposal is not already adopted.

The African Group proposal includes some provisions for libraries and archives. We appreciate the attention given to libraries and archives in this proposal, and we offer our own treaty proposal (TLIB) to help inform the discussion and to enrich the debate. At the same time, we believe that each issue should progress as it is ready, so as not to delay the adoption of a new instrument that will benefit blind, visually impaired and other people with reading disabilities.

6. Does TLIB comply with existing international obligations?

We believe so. Article 1 sets out the relationship with other agreements, and holds that it is consistent with the five major copyright treaties affecting libraries and archives. It is set out as a special agreement within the meaning of Article 20 of the Berne Convention.

Importantly, the international standard of fair practice is adopted, from Article 10 of the Berne Convention, "as determined in national law", thereby providing countries with the flexibility to set out the appropriate standard in their national law. TLIB provides flexibility for countries to maintain existing national provisions e.g. for remuneration (Article 3), public lending right (Article 6), and fair use/fair dealing (Article 17). Article 17 also allows countries to retain any exceptions and limitations that go beyond TLIB's requirements and, subject to certain conditions, to create new exceptions and limitations.

While we have made every effort to ensure that TLIB does comply with international obligations, we welcome comments and scrutiny in this regard.

CONTENT

7. How are the particular position and needs of libraries and archives addressed by the draft treaty?

The 2008 WIPO *Study on Copyright Exceptions and Limitations for Libraries and Archives* (document ref. SCCR/17/2 <http://bit.ly/hyRHe>) by Professor Kenneth Crews of Columbia University looked at the statutes of 149 of the 184 WIPO Member States and found that the provision of exceptions around the world is as follows:

- no library and archive exceptions at all (21)
- general exception solely for libraries (27)
- copying for research or study (74)
- copying for preservation (72)
- copying for replacement of worn out originals no longer available for purchase (67)
- document supply (17)
- loans between libraries (6)
- legal workarounds for anti-circumvention of technological protection measures (26)

The objective of TLIB is to ensure that, in this environment, national and international networks of library and archive services, critical to the provision of access to quality information, will be able to function properly in today's global information village. As detailed below, TLIB sets out these minimum norms that libraries and archives need in an international instrument to specifically address their position in copyright law and redress the current patchwork of provision exposed by the Crews study.

8. Which exceptions and limitations are mandated by the treaty?

The exceptions and limitations mandated by the treaty are based on a set of principles that were developed in 2009 by librarians, intellectual property specialists, the World Blind Union, and representatives of other civil society NGOs. [See *The Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives* <http://bit.ly/axwvwa>]. TLIB [<http://bit.ly/hOy3KI>] provides for the following:

- Information resource sharing – parallel importation (Article 4);
- Cross-border uses of works and materials reproduced under an exception or limitation (Article 5);
- Library lending (Article 6);
- Document supply (Article 7);
- Preservation and conservation of works (Article 8);
- Use of works under related rights for the benefit of persons with disabilities (Article 9);
- Use of works by library and archive patrons for education, research and private study (Article 10) and for personal and private purposes (Article 11);
- Right of access to retracted and withdrawn works published in databases or on websites (Article 12);
- Use of orphan works (Article 13).

9. Which other obligations are included in the TLIB proposal to protect libraries and archives?

TLIB also provides for:

- An obligation to respect exceptions to copyright and related rights – voiding of terms in contracts and licenses for information goods that impede or remove statutory exceptions and limitations in national laws (Article 14);
- Obligations concerning technological protection measures (TPMs) - permitting workarounds for libraries and archives to circumvent TPMs in specified circumstances (Article 15);
- Limitation on liability for libraries and archives for actions performed in good faith (Article 16);
- Flexibilities for national law (Article 17);
- Implementation and enforcement of copyright exceptions, including provision for the establishment of national tribunals and ‘small claims’ procedures to assist resolution of copyright disputes (Article 18).

10. Is TLIB a one-size-fits-all solution?

No. We recognize that countries are at different stages of economic development, national cultures differ and that countries have a variety of existing provisions. Instead, TLIB suggests a basic foundation for all countries, setting a framework for national copyright laws that is flexible and that we believe is consistent with existing international law. TLIB provides a positive way forward to implement the agreed statement concerning Article 10 of the WIPO Copyright Treaty. These baseline norms are essential because the Internet, and the transmission and sharing of information it makes possible, is a global phenomenon affecting library and archive services in all countries.

While it is mandatory for certain key issues to be addressed in the proposal, in most cases the implementation is flexible, using the international standard of "fair practice" as set out in the Berne Convention. In addition, the grandfathering of current legislation is permitted and there is a possibility for countries to make a reservation on certain provisions. Of course, countries may exceed the standards set in TLIB, and some already do.

11. Why do we not distinguish between print and digital content?

Because in the agreed provisions of the WIPO Copyright Treaty 1996, WIPO Member States recognised that a seamless approach to exceptions and limitations is needed for information content regardless of format. They rejected the claim that "digital is different" by confirming that the Contracting Parties may carry forward and extend existing exceptions and limitations in the digital environment and create new exceptions where appropriate. The approach in TLIB is consistent with that already adopted by WIPO.

12. Does TLIB deal with moral rights?

No. TLIB does not in any way change the foundation for moral rights established in the Berne Convention so the existing provisions of the Convention would continue to apply without change.

13. What if a country already has or wants to implement exceptions and limitations that are broader than TLIB?

No problem. Article 17 establishes that specific library and archive exceptions do not represent the outer limits of permissible activities undertaken by libraries and archives. Countries would be able to retain any existing exceptions and limitations in areas addressed by the treaty in their national laws, including 'fair use' and 'fair dealing', that go beyond the minimum standards required by TLIB, provided they satisfy existing treaty obligations. Article 17 also enables the creation of new exceptions and limitations in areas not addressed by this treaty.

14. How will TLIB affect exceptions and limitations that we already have in our national law?

Countries that ratify the treaty and whose national laws already comply with or exceed the exceptions and limitations as set out in TLIB will see no effect. Countries that ratify the treaty and whose exceptions and limitations do not meet the minimum standard as set out in the treaty will need to amend their laws to meet the minimum standard. Both scenarios are subject to any reservations that countries may make, in accordance with the treaty.

EFFECTS OF THE PROPOSED TREATY

15. What is the exact nature of the instrument? Is it legislation, a recommendation, a rule or a guideline?

TLIB is a treaty proposal that sets an obligation on States to provide exceptions and limitations in their national laws to protect the legitimate activities of libraries and archives. A treaty is an international norm directed at sovereign States, not at individuals. When a country becomes a contracting party to a treaty, its constitution would either oblige it to implement the treaty nationally through passing domestic legislation, or the treaty would be self-executing (i.e. take effect automatically). Only in the latter case, would the treaty terms directly effect individuals.

16. Why do we need a treaty and not a recommendation?

A treaty is the only instrument that would bind States to provide exceptions and limitations in their national laws to protect specific library and archive activities. In addition, in those countries where treaties are self-executing, specific implementing legislation would not be needed thereby more easily achieving the objective to protect the activities of libraries and archives.

By contrast, a “soft norm,” such as a recommendation or a resolution, would not bind countries to adopt the required copyright exceptions and limitations. At best, it would be a “suggestion” for what could be done by a country with regard to exceptions for libraries and archives, and it could not be self-executing.

17. Would every country need to follow the treaty?

Only those countries that sign and ratify (i.e. accept) the treaty, would be bound by it and be required to follow its mandate. At the same time, the treaty would create a standard that could be followed by countries that have chosen not to ratify it.

18. Would libraries and archives in a country need to follow the treaty?

Once ratified by and implemented in a country, or in those countries where such treaties are self-executing, libraries and archives that carry out activities for non-commercial purposes would follow the treaty requirements as set out in their national laws.