



International Federation of
Library Associations and Institutions

Treaty Proposal on Limitations and Exceptions for Libraries and Archives

Version 4.4

6 December 2013



Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives

In November 2010 the WIPO Standing Committee on Copyright and Related Rights (SCCR) agreed on a work program on copyright limitations and exceptions for the two-year period 2011-2012.

As part of the SCCR's focus on libraries and archives, the International Federation of Library Associations and Institutions (IFLA), the International Council on Archives (ICA), Electronic Information for Libraries (EIFL) and Innovarte, a library NGO, are pleased to make available a Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives that sets out the key issues for libraries and archives.

We note with gratitude the inclusion of limitations and exceptions for libraries and archives in the Draft WIPO Treaty on Exceptions and Limitations for Persons with Disabilities, Educational and Research Institutions, Libraries and Archives proposed by the African Group (SCCR/22/12). Our text is intended to complement the African Group proposal, and it has been produced to guide Member States in a discussion of library and archive issues.

Following conclusion of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled (Marrakesh Treaty) in June 2013, several Articles in this Proposal have been updated to reflect language already agreed to in that Treaty. Nothing in this Treaty Proposal is intended to override or depart from the Marrakesh Treaty.

For further information, please contact:

International Federation of Library Associations and Institutions (IFLA)
Stuart Hamilton
Director of Policy and Advocacy
P.O. Box 95312
2509 CH The Hague
Netherlands

+31 70 314 0884

Stuart.hamilton@ifla.org

www.ifla.org/copyright-tlib

TABLE OF CONTENTS

Preamble

I. General Provisions

- Article 1: Definitions
- Article 2: Relationship with Other International Instruments
- Article 3: Beneficiaries and Scope of Protection under this Treaty
- Article 4: Free Uses and Options for Remuneration

II. Mandatory Limitations and Exceptions for Libraries and Archives

- Article 5: Right to Parallel Importation
- Article 6: Right to Acquire Works
- Article 7: Right to Library and Archive Lending and Temporary Access
- Article 8: Right of Reproduction and Supply of Copies by Libraries and Archives
- Article 9: Right of Preservation of Library and Archival Materials
- Article 10: Right to Use of Works and Material Protected by Related Rights for the Benefit of Persons with Disabilities
- Article 11: Right to Access Retracted and Withdrawn Works
- Article 12: Right of Use of Orphan Works and Materials Protected by Related Rights
- Article 13: Right to Cross-Border Uses
- Article 14: Right to Translate Works and Materials Protected by Related Rights

III. Additional Protections

- Article 15: Obligation to Respect Exceptions to Copyright and Related Rights
- Article 16: Obligations Concerning Technological Protection Measures
- Article 17: Limitation on Liability for Libraries and Archives
- Article 18: Legal Deposit
- Article 19: Government Publications

Article 20	Right to Extract and Reuse Facts and Information
Article 21:	Other Limitations and Exceptions Not Mandated by this Treaty
Article 22:	Provisions on Implementation and Enforcement of Limitations and Exceptions

IV. Administrative and Final Clauses

Articles 23-30

Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives

Preamble

The Contracting Parties,

Considering that libraries and archives are distinctive guardians of the public trust, specifically designated worldwide as institutions necessary for serving the global public interest with regard to preserving the diverse forms of expression used by societies over time, for facilitating access to and dissemination of knowledge goods, and to further facilitate intellectual interchange accomplished primarily by means of literary, educational, scientific and cultural materials, analogue, digital or any other format to be known;

Acknowledging the essential role of digital technologies in the preservation, access and use of historical records and that such new technologies require appropriate mechanisms to enable libraries and archives to appropriately respond to the new digital environment in order to ensure the progress of research, scholarship, and culture;

Being aware of WIPO Copyright Treaty's recognition of "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works", including "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention";

Committed to improving the effectiveness of measures at international, regional and national levels to ensure that libraries and archives remain effective in their capacity to serve the interests of countries and their citizens in accessing and disseminating information and knowledge necessary for educational, scientific and development purposes especially across territorial borders in order to fulfil the promise of the digital age;

Aware of the importance of copyright to the production of literary and artistic works, whatever may be the mode or form of their expression;

Mindful of the need to respond appropriately to new technological advancements and their impact on the publication, access, and use of literary and artistic works, and of the need that such response be limited to special cases which do not conflict with a normal exploitation of these works, and do not unreasonably prejudice the legitimate interests of their authors;

Recognising the need for a global approach to copyright limitations and exceptions and a minimum level of international harmonisation, to secure the effective and unhindered flow of information essential for global equality of access to research, ideas, and innovation;

Convinced of the educational, political, social, cultural, and entertainment-related benefits of the international copyright system;

Realising that the free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expression are vitally important both for intellectual progress and the cultural development of all societies;

Emphasising the need to incorporate principles in the international copyright system that support the effective operation of such system both in the protection of authors and the provision of public goods such as education and health, as an integral part of national and international development policies;

Conscious of the need not to impair the role of libraries and archives to collaborate and work together in providing citizens of all countries and regions access to a wide diversity of cultural expressions;

Considering the necessity of mutual assistance to accomplish the objective of promoting creativity and the protection of authors and other owners of copyright and users;

Mindful that intellectual property rights should operate to the mutual advantage of creators and users of knowledge goods, limitations and exceptions in the applicable Conventions must enjoy the same legal status as exclusive rights;

Recognising that copyright limitations and exceptions are user rights that maintain a proper balance between the interests of copyright owners and users of copyrighted works within a fair international copyright system;

Reaffirming obligations under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international agreements.

Hereby agree as follows:

I. General Provisions

Article 1 Definitions

For the purposes of this Treaty:

“**Accessible format**” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;¹.

“**Archive**” means an organisation that systematically collects, preserves, and facilitates access to rare published and unique unpublished records created by individuals and organisations that are retained and preserved for their long-term value for non-commercial purposes. Archives adhere to professional standards that may be subject to review by professional societies. An archive may be formed as a standalone entity consistent with domestic law or common practice, or it may form part of a larger organisation, serving the general interests of the public and the needs of the organisation.

¹ Article 2 – Definitions, WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty).

“**Disability**” means physical, mental, sensory, or cognitive incapacity that requires an accessible format of a work or of materials protected by related rights.

“**Library**” means an organisation that systematically collects, preserves, and facilitates access to published and unpublished information resources for non-commercial purposes. Libraries adhere to professional standards that may be subject to review by professional societies. A library may be formed as a standalone entity consistent with domestic law or common practice, or it may form part of a larger organisation, serving the general interests of the public and the needs of the organisation.

“**Materials Protected by Related Rights**” means any performances, phonograms, broadcasting signals, protected under the Rome Convention, the TRIPS Agreement or the WIPO Performances and Phonograms Treaty or any other material or activity protected under a WIPO treaty or national law as related rights.

“**Work**” means a work protected under the Berne Convention, the TRIPS Agreement or the WIPO Copyright Treaty.

Explanatory Note

This Article establishes definitions for certain terms for the purpose of clarifying their meaning with respect to their use in this Treaty.

Article 2
Relationship with Other International Instruments

- 1) Nothing in this Treaty is understood to derogate from the obligations of Contracting Parties under the following instruments:
 - a) the Berne Convention for the Protection of Literary and Artistic Works, 1886 as amended (Berne Convention);
 - b) the WIPO Copyright Treaty, 1996 (WCT);
 - c) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome

Convention);

- d) the WIPO Performances and Phonograms Treaty, 1996 (WPPT);
 - e) the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement);
 - f) the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty)
- 2) Contracting Parties agree that, to the extent that this Treaty applies in part to literary and artistic works as defined in the Berne Convention, this Treaty is a special agreement within the meaning of Article 20 of that Convention, (as regards Contracting Parties that are Member States of the Union established by that Convention).

Explanatory Note

This Article establishes that this Treaty and its provisions is a special agreement made under Article 20 of the Berne Convention that does not conflict with existing international obligations from the Treaties and Conventions expressively referred.

In particular, since this Treaty concerns exceptions applying to libraries and archives, compliance with the Treaties and Conventions referred to in this Article includes this Treaty's mandated exceptions, compliance with the 'Three-Step-Test' set out in Article 9(2) of the Berne Convention, Article 13 of TRIPS, Article 10 of the WCT and Article 16 of the WPPT, when such test has to be applied considering the specific exception and the Member State implementing it. The Three-Step-Test has established that exceptions made in national laws to the exclusive rights provided in such Treaties, must be 'special cases' that do not 'conflict with a normal exploitation of the work' and do not 'unreasonably prejudice the legitimate interests of the rights holder'. It is important to note that each exception provided in this Treaty is a 'special case' under the Three-Step-Test.

Article 20 of the Berne Convention permits new copyright treaties to be made as long as they are not contrary to the Convention: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements...contain other provisions not contrary to this Convention."

Article 3

Beneficiaries and Scope of Protection under this Treaty

- 1) Contracting Parties shall accord the protection provided under this Treaty to libraries and archives, and their employees and agents, that are located in the territory of any Contracting Party.
- 2) Subject to Article 21 of this Treaty the provisions in this Treaty shall apply to non-commercial uses of copyright works and materials protected by related rights, in any format.

Explanatory Note

This Article establishes the scope and the beneficiaries of this Treaty.

The Article establishes that its scope covers the use by libraries and archives of copyright works and materials protected by related rights in any format, digital or non-digital, for non-commercial purposes. The wording of sub-paragraph 1 is modelled from Article 3(1) of the WPPT. The direct beneficiaries are libraries and archives and the people who work for them. To the extent that they benefit from library and archive services, library and archive ‘users’ or ‘readers’ are also indirect beneficiaries.

Article 4

Free Uses and Options for Remuneration

- 1) Limitations or exceptions to copyright or related rights provided in this Treaty, unless required otherwise, shall not require remuneration to authors or to any other rightholder.
- 2) Contracting Parties that at the time of signature of this Treaty, expressly grant in their national legislation remuneration for any limitation or exception may, in a notification deposited with the Director General of WIPO, declare that such remuneration will be maintained, when ratifying

or acceding to the Treaty.

Explanatory Note

This Article provides that as a general norm, when implementing the limitations and exceptions mandated by this Treaty, Contracting Parties shall not subject libraries and archives to remunerate rightholders of copyright works or materials protected by related rights. However, there is no bar to already existing provisions for remuneration in national laws being maintained. Nor does the Article prevent remuneration for new exceptions for libraries and archives that might be introduced in future, in cases where such exceptions go beyond of what is mandated as a minimum exception under the Treaty. Any remuneration referred to in this Article is not related to library service charges.

II. Mandatory Limitations and Exceptions for Libraries and Archives

Article 5

Right to Parallel Importation

In cases where the respective Contracting Party does not provide for international exhaustion of the distribution or importation or exportation rights after the first sale or other transfer of ownership of such work or material, libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works or materials protected by related rights that are legally available in any country.

Explanatory Note

This Article provides an exception to the distribution right. Its purpose is to ensure that the principle of international exhaustion (whereby the distribution right is exhausted after first sale anywhere in the world) applies to the acquisition of works and materials protected by related rights by libraries and archives for their collections, whether by purchase or through gift or exchange.

The Article provides that libraries and archives are not restricted by the principle of national exhaustion (whereby the distribution right is exhausted with the first sale in a territory), with regard to the works and materials they can purchase and import from foreign countries, or in their ability to accept donated or exchanged works and materials originating from outside the territory of their location. The Article would apply to both online and offline transactions.

Article 6

Right to Acquire Works

- 1) A Contracting Party shall prohibit the vendor of commercially available copyright works from discriminating unjustly against any library or archive by refusing to license it a work, or sell it a copy of a work, on reasonable terms.

Explanatory Note

This Article introduces a right for libraries and archives to purchase or obtain a licence to use copyright works that have been made commercially available. This provision is needed because, increasingly, digital works commercially available for the public to purchase or access by license are being withheld from the library market by rightholders.

Like any customer, libraries and archives must have the freedom to choose what they want from the available titles in publishers' or distributors' listings on the commercial market. Libraries and archives must be able to develop their collections independently by choosing those publications and other media most appropriate for their patrons needs in support of their mandate to provide community access to quality sources of information and knowledge.

The text of this Article reflects Principle 1 of the International Federation of Library Associations & Institutions (IFLA)'s 'Principles for Library eLending' (August 2013).

Article 7

Right to Library and Archive Lending and Temporary Access

- 1) It shall be permitted for a library or archive to lend copyright works incorporated in tangible media, or materials protected by related rights, to a user, or to another library.
- 2) It shall be permitted for a library or archive to provide temporary access to copyright works in digital or other intangible media, to which it has

lawful access, to a user, or to another library, for consumptive use.

- 3) Any Contracting Party which at the time of ratification or accession expressly provides for libraries a remunerated limitation or exception to a public lending right of authors may keep such provisions, provided that notification is deposited with the Director General of WIPO at the time of ratification or accession to the Treaty. The Contracting Party may withdraw the notification at any time.

Explanatory Note

This Article introduces a right for libraries and archives to lend copyright works incorporated in tangible media, and to provide temporary access to intangible digital copyright works, for consumptive use. By temporary access is meant time-limited access as a form of distribution. By consumptive use is meant access that allows viewing, reading, listening, or perceiving in any other manner.

The Article is intended to permit libraries to continue the established service known as lending in the physical world. It enables lending of physical works, as an exception to the lending, or distribution right. It enables “digital lending” as temporary access, as an umbrella concept that accommodates an exception to the distribution right, or communication to the public right, or any such right pertaining to digital transmission, that might be adopted in national legislation and that would affect the ability of libraries to provide, upon request, for a limited time, a copy of a work in a digital or intangible format.

The right to lend and to provide temporary access granted by this Article would be upheld in licensing contracts under Article 14 and in the application of technological protection measures under Article 15 of this Treaty.

Article 8

Right of Reproduction and Supply of Copies by Libraries and Archives

- 1) It shall be permitted for a library or archive to reproduce and to supply a copy of a copyright work, or of material protected by related rights, to a library or archive user, or to another library or archive in connection with a request by a user at that library or archive, for the purpose of education, research, or private use, provided that such reproduction and supply is in accordance with fair practice.
- 2) Libraries and archives shall be permitted to reproduce and supply a copy of a copyright work, or of material protected by related rights, to a library or archive user, in any other case where a limitation or exception in national legislation would allow the user to make such copy.

Explanatory Note

This Article provides an exception to the reproduction right for the purpose of allowing libraries and archives to reproduce and supply copies of works and materials protected by related rights that are held in their collections to users, or to another library or archive for the use of a reader there. This would be done under a permitted limitation or exception in accordance with fair practice as determined by national law.

In this Article the limitation of “fair practice” is derived from the use of the term in Article 10 of the Berne Convention. The WIPO Guide to the Berne Convention explains that “fair practice” implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales, circulation, etc.” World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)(Geneva: WIPO, 1978), 58–59.

Libraries and archives in many countries make copies under library and archive exceptions on the user’s behalf and the service is often called a “document supply” service.

Article 9

Right of Preservation of Library and Archival Materials

- 1) It shall be permitted for libraries and archives to reproduce works, or materials protected by related rights, for the purposes of preservation or replacement, in accordance with fair practice.
- 2) Copies that have been reproduced for the purposes of preservation or replacement may be used in place of the original works or material preserved or replaced, in accordance with fair practice.

Explanatory Note

This Article provides an exception to the reproduction right for the purpose of preservation of works and materials protected by related rights by libraries and archives.

The Article permits libraries and archives to reproduce for preservation purposes as many copies of works or materials in as many formats as are technically needed in accordance with the standards of best professional preservation practice. (Examples of some current preservation standards can be found at http://libguides.wits.ac.za/digitisation_preservation_and_digitalcuration). Sub-paragraph 2 allows libraries and archives to use a preservation copy as the working copy in order to preserve the original work (which may be very old, very fragile, rare or precious or in the digital environment may need to be in a different format to be usable).

The Article provides flexibility to copy, format-shift and migrate copyright works and materials to different platforms and to use these copies in place of the original, so that the original itself is not damaged and is preserved for posterity.

Article 10

Right to Use of Works and Materials Protected by Related Rights for the Benefit of Persons with Disabilities

- 1) It shall be permitted for libraries and archives, as “authorised entities” within Article 2 of the Marrakesh Treaty, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, without the authorization of the copyright rightholder, when all of the following conditions are met:
 - (i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;
 - (ii) (ii) the work is converted to an accessible format copy, 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 the beneficiary person;
 - (iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and
 - (iv) the activity is undertaken on a non-profit basis;
- 2)
- 3) Where a work, or material protected by related rights, has been made in an accessible form under paragraph (1), this shall not prevent further accessible forms of any type from being made for, and supplied to, any other persons with a disability by any means, including digital transmission.

- 4) Any accessible copy of a work, or of material protected by related rights, made under paragraphs (1) and (2), may be transferred or loaned to any other library or archive.

Explanatory Note

This Article provides exceptions to the reproduction, transcription, translation, adaptation, distribution and communication to the public rights for the purposes of serving disabled people. It recognises the roles of libraries and archives as “authorised entities”, within the scope of Article 2, Definitions, Marrakesh Treaty (2013). Nothing in this Article is intended to override or prejudice provisions agreed to in the Marrakesh Treaty.

The Article allows libraries and archives to make and distribute or communicate accessible copies from works or materials for the benefit of a disabled person and to make and distribute further copies from that copy for the use of other disabled people. The provisions apply to both the analogue and digital environment and would allow format shifting and other necessary adaptations such as subtitling and translation into sign language for deaf people or transcription into Braille for visually impaired people. It also allows the transfer or loan of an accessible copy made by one library or archive to another library or archive, including across national borders (see Article 13).

Article 11

Right to Access Retracted and Withdrawn Works

- 1) It shall be permitted for libraries and archives to reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work, or material protected by related rights, which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the author or other rightholder.
- 2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

Explanatory Note

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

The Article permits libraries and archives to preserve the public record for posterity in the digital environment (as they have done in the analogue

environment), including records and documents relating to any modifications or retractions made to it, in order to make it available to researchers. It would ensure access for researchers through libraries and archives to copyright works and materials protected by related rights in digital formats that are no longer available to the public because they have been withdrawn. Contracting Parties would have the option to limit the application of this exception to certain uses or to not introduce it.

Article 12

Right of Use of Orphan Works and Materials Protected by Related Rights

- 1) Libraries and archives shall be permitted to reproduce, make available to the public and otherwise use any work, or material protected by related rights, for which the author or other rightholder cannot be identified or located after reasonable inquiry.
- 2) Contracting Parties may provide that, subject to Article 7 of this Treaty, should the author or other rightholder subsequently identify him or herself to the library or archive that used the copyright work or material protected by related rights, he or she shall be entitled to claim equitable remuneration for future use, or require termination of the use.

Explanatory Note

This Article provides exceptions to the reproduction, adaptation and communication to the public rights with respect to ‘orphan works’ insofar as they remain orphan. Its purpose is to enable libraries and archives to copy ‘orphan works’ and communicate them to the public. ‘Orphan works’ are copyright works or materials protected by related rights for which their rightholders cannot be identified or located in order to clear the rights. In practice this Article would enable libraries and archives to digitise their collections and make them available to the public online.

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

Article 13

Right to Cross-Border Uses

To the extent that it is necessary for the exercise of a limitation or exception provided for in this Treaty, cross-border uses shall be permitted.

Explanatory Note

This Article provides an exception to the making available, communication, transmission and distribution right for the purpose of allowing libraries and archives to share resources across borders and supply copies made under an exception to other libraries and archives regardless of location and international borders.

This Article ensures that copies of works made under an exception in this Treaty may be sent and received across borders.

This is not a carte blanche provision since each exception has a set of conditions and these conditions apply in conjunction with Article 12.

Article 14

Right to Translate Works and Materials Protected by Related Rights

Libraries and archives may, for the purpose of teaching, scholarship or research, translate works lawfully acquired or accessed when those works are not available in a language required by such library or archive's users. Such translations may not be used for other purposes.

Explanatory Note

A significant amount of the world's written output is in major languages such as Chinese, English or Spanish. This places large amounts of reading material out of the reach of other language speakers, and acts as a practical barrier to knowledge and information. Libraries and archives are often the primary source of reading materials as well as sound recordings or film (containing the spoken word or songs, for example speeches, conversations or folk songs, for researchers, scholars and lifelong learners. New opportunities for search and resource discovery through the Internet has enabled greater access to global materials. In many countries, librarians and archivists are increasingly being asked by patrons to facilitate access to foreign language material through the provision of translation services. New technologies and machine translations are enabling such services. This is especially important to facilitate education and learning in indigenous languages to individuals in multi-lingual developing countries. For example, South Africa has 11 official languages, and India records 32 regional languages.

This provision would enable libraries and archives to translate works upon individual request that are not available in the language of the user. The translation may only be used for education and learning or research.

The Stockholm Conference for the revision of the Berne Convention (1967) affirmed an implied exception to the right of reproduction with respect to translation (1). Chile and Japan both have provisions in national law for translation by libraries and archives. In Chile, where a work is not available in Spanish within certain time periods, libraries and archives may translate for the purpose of research or study by their users (Article 71, 2011). In Japan, a library may translate a single copy of a work that is publicly available at the request of a user for the purpose of investigation (Article 31(1)(i) and 43(ii)). In addition, the National Diet Library, the National and Parliamentary library, offers translation services for members of parliament.

III. Additional Protections

Article 15

Obligation to Respect Exceptions to Copyright and Related Rights

Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions in copyright adopted by Contracting Parties according to the provisions of this Treaty, shall be null and void.

Explanatory Note

This Article introduces a new provision for the purpose of safeguarding the exercise of the limitations and exceptions, adopted by Contracting Parties under the provisions of this Treaty, in the digital environment. The Article is modelled on Article 15 of the European Directive on the Legal Protection of Databases (Directive 96/9/EC) and Article 9(1) of the European Directive on the Legal Protection of Computer Programs (Directive 91/250/EEC).

The Article provides that contractual agreements may not undermine the provisions for limitations and exceptions in copyright law, by preventing those licence terms that seek to undermine copyright limitations and exceptions from being enforceable against licensees. These provisions would apply in cases where access to and use of works and materials protected by related rights is subject to contracts and licences.

Article 16

Obligations Concerning Technological Protection Measures

Contracting parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent [libraries and archives] from enjoying the limitations and exceptions provided for in this Treaty.

Explanatory Note

This Article provides an exception for libraries and archives to the right to protection from circumvention of technological protection measures (TPMs) for the purpose of permitting a non-infringing use of a work or of material protected by related rights.

- a) *The exception allows libraries and archives to circumvent TPMs for non-infringing uses (such as preservation, access to content by disabled people and the user's right to make use of national statutory exceptions to copyright). The exception is limited by the requirement that the library or archive or their user has lawful access to the work or material. It also permits libraries and archives to acquire the tools or services needed for the circumvention. The text of this Article is replicated from Article 7 – Obligations Concerning Technological Measures, WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty)*

Article 17

Limitation on Liability for Libraries and Archives

- 1) A librarian or archivist acting within the scope of his or her duties, shall be protected from claims for damages, from criminal liability, and from copyright infringement, when the action is performed in good faith:
 - a) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is being used as permitted within the scope of a limitation or exception in this Treaty, or in a way that is not restricted by copyright; or

- b) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is in the public domain or under an open content license.
- 2) When a Contracting Party provides for secondary liability regimes, libraries and archives shall be exempt from liability for the actions of their users.

Explanatory Note

This Article introduces the protection of limited liability to libraries and archives, their employees and agents for primary copyright infringement that may result inadvertently from their good faith interpretation and application of national copyright law (Sub-paragraph 1). Sub-paragraph 2 also protects libraries and archives from liability for secondary infringement where the user of their services has committed the primary infringement.

Article 18
Legal Deposit

- 1) Contracting parties shall ensure that a system of national deposit is in place such that at least one copy of every work published in the country is given to at least one designated repository, to be permanently retained.
- 2) In compliance with national Legal Deposit Regulations:
- a) It shall be permitted for the designated legal deposit repository or repositories to demand the deposit of copies of published copyright works, or copies of published material protected by related rights.
 - b) It shall be permitted for the designated legal deposit repository or repositories to reproduce publicly available content and demand the deposit of reproductions of copyright works, or material protected by related rights, which has been communicated to the public or been made available to the public.

Explanatory Note

The objective of this provision is to encourage the adoption of national legal deposit laws and systems in order to preserve a nation's cultural and scientific heritage for perpetuity. Legal deposit systems help develop national collections and may help in preservation efforts, particularly if they include many categories of works published in multiple formats. Included in Legal Deposit may be

- *works and material protected by related rights published on media as tangible objects;*
- *works and material protected by related rights and publicly available content made available to the public via electronic networks;*
- *radio or television programmes which have been communicated to the public;*
- *cinematographic works which have been produced for public performance.*

Legal deposit regulations only apply to copyright works and material protected by related rights or publicly online available content which has been produced in the national territory, or by nationals of, or by persons with permanent residence in the contracting party which has issued the legal deposit regulation. Material deposited in legal deposit repositories in compliance with the legal deposit regulations of a contracting party may be used or made available to the public according to the copyright legislation of the contracting party.

Article 19 Government Publications

- 1) It shall be permitted for libraries and archives to request and disseminate to the public official publications issued by government ministries, departments and agencies.
- 2) Contracting Parties that, at the time of signature of this Treaty, provide copyright protection to official publications issued by government agencies may, in a notification deposited with the Director General of WIPO, declare that such protection will be maintained, when ratifying or acceding to the Treaty.

Explanatory Note

Libraries and archives also serve the public by maintaining and disseminating essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve, and disseminate to the public official publications published by national, provincial, or local government ministries, departments and agencies.

Typical examples of official publications are: treaties, laws, regulations, reports of public inquiries, judicial decisions and other decisions with equivalent effect, parliamentary debates and official publications that set out official policy or that explain the law.

Article 20

Right to Extract and Reuse Facts and Information

- 1) The adaption and reproduction of a work, or material protected by related rights, that is accessible through a library or archive shall be permitted where it is in order to isolate, extract or otherwise facilitate the use of facts or independent units of information contained therein.

Explanatory Note

This Article provides for a process known as text and data mining, or non-consumptive use, of works and other subject matter owned or legally accessed through libraries and archives.

Libraries and archives play an important role in the provision of knowledge, particularly scientific knowledge. Technology has developed to such an extent that there is too much data to be read by researchers but computers are now able to read, look for trends or patterns in information and automatically extract important units of knowledge for further research. TDM has been recognised to support innovation and speeds up scientific and medical discoveries for the benefit of mankind

It is an accepted principle of international copyright law in copyright and droit d'auteur jurisdictions that copyright only protects the expression or form of a work and not the underlying contents, ideas or facts.

BERNE CONVENTION Art. 2

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

TRIPS Art. 9

(2) Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Although such a process often involves the extraction of expressions of facts (that are by definition themselves not subject to copyright law) from a copyright work, the process often also involves the private law of contract and laws that regulate databases.

Article 21

Other Limitations and Exceptions Not Mandated by this Treaty

Contracting Parties shall be permitted to provide more extensive limitations and exceptions than those granted by this Treaty, in so far as such limitations and exceptions are not contrary to this Treaty. The provisions of existing agreements which satisfy these conditions shall remain applicable.

Explanatory Note

The purpose of this Article is to establish that the specific library and archival exceptions in this Treaty need not represent the outer limits of permissible activities affecting copyright that can be undertaken by libraries and archives under the national laws of the Contracting Parties.

The Article enables a Contracting Party to retain, or introduce in its national laws limitations and exceptions in the areas addressed by this Treaty that may exceed its minimum requirements, provided that they comply with existing treaty obligations.

The need for this provision is to provide flexibility for countries to continue to introduce limitations and exceptions into national laws. This would allow Contracting Parties to introduce a general free use provision consistent with the concept of 'fair practice' (see the Explanatory Note to Article 7 above).

Article 22

Provisions on Implementation and Enforcement of Limitations and Exceptions

- 1) Contracting Parties shall adopt, in accordance with their legal systems, appropriate measures to implement the provisions of the Treaty.
- 2) Contracting Parties shall apply the Treaty transparently, taking into account the priorities and special needs of developing countries as well as the different levels of development of the Contracting Parties.

- 3) Contracting Parties shall ensure that implementation of this Treaty allows for the timely and effective exercise of the limitations and exceptions it mandates, including expeditious procedures that are fair and equitable.

Explanatory Note

The purpose of this Article is to ensure the proper, transparent and timely implementation of this Treaty in the national laws of Contracting Parties that takes into account the needs of developing countries.

IV. Administrative and Final Clauses

**Article 23
Assembly**

- 1) a) The Contracting Parties shall have an Assembly.
 - b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
 - c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
- 2) a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
 - b) The Assembly shall perform the function allocated to it under Article xx in respect of the admission of certain intergovernmental organisations to become party to this Treaty.
 - c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions

to the Director General of WIPO for the preparation of such diplomatic conference.

- 3) a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

b) Any Contracting Party that is an intergovernmental organisation may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organisation shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.
- 4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.
- 5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 24 **International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty. These shall include the commissioning of regular studies on the implementation of the Treaty and the organisation of technical assistance to developing and transition nations to enable them to fully implement the provisions of this Treaty.

Article 25 **Eligibility for Becoming Party to the Treaty**

- 1) Any Member State of WIPO may become party to this Treaty.
- 2) The Assembly may decide to admit any intergovernmental organisation to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorised, in

accordance with its internal procedures, to become party to this Treaty.

- 3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 26 **Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 27 **Signature of the Treaty**

This Treaty shall be open for signature until December _____, by any Member State of WIPO and by the European Community.

Article 28 **Entry into Force of the Treaty**

This Treaty shall enter into force three months after 20 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 29 **Effective Date of Becoming Party to the Treaty**

This Treaty shall bind:

- a) the 20 States referred to in, Article 25 from the date on which this Treaty has entered into force;

- b) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- c) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 25, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- d) any other intergovernmental organisation that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 30 **Denunciation of the Treaty**

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 31 **Languages of the Treaty**

- 1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
- 2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organisation that may become party to this Treaty, if one of its official languages is involved.

Article 32
Depositary

The Director General of WIPO is the depositary of this Treaty.