



Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives

Frequently Asked Questions

IFLA is working with Member States of the World Intellectual Property Organization (WIPO) to gain support for a binding international instrument on copyright limitations and exceptions to enable libraries to preserve their collections, support education and research, and lend materials. To demonstrate what is needed, IFLA has produced a Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives (short ‘TLIB’) to guide WIPO’s Member States in updating limitations and exceptions for libraries and archives worldwide. TLIB is intended as a constructive proposal to feed into the discussions at WIPO, and to maximise the opportunities that have been created.

JUSTIFICATION

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

International copyright law does not properly serve the needs of libraries and archives in the 21st century. The *Berne Convention* (1886), the major governing copyright treaty, is focused on establishing international protection for authors' rights. It addresses certain public interest considerations as fundamental parts of the system, including two mandatory copyright exceptions, on news reporting (Article 2(8)) and on quotations (Article 10(1)). All other limitations and exceptions 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. The framework increasingly fails to address the legal and policy challenges of the global digital environment.

The two mandatory exceptions 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.

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.

2. Is a scientific study on limitations and exceptions for libraries and archives available? What are the results?

The WIPO *Study on Copyright Exceptions and Limitations for Libraries and Archives* from 2008 by Kenneth Crews of Columbia University looked at the statutes of 149 of the 184 WIPO Member States and found that the provision of exceptions varies around the world:

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

3. What are the major issues that need to be addressed by an international norm setting?

- The absence in many countries of exceptions to copyright for core activities, like lending, preservation, and inter-library document supply, means that documentary heritage will disappear and may not be available to future generations.
- Exceptions to copyright which enabled libraries and archives to preserve and make available works in the print era have not been updated to the digital age, particularly with respect to digital archiving and virtual learning environments.
- Licences imposed by rightholders on libraries for access to electronic resources often override limitations and exceptions to copyright designed to support education, learning and creativity.
- Prohibitions to circumvent Technological Protection Measures (TPM) to preserve, and enable permitted use of lawfully acquired digital content, are hampering research, and leading to an incomplete cultural, scientific and historical record.
- The Internet offers new opportunities for information and communication. Established practices of resource-sharing among libraries to advance knowledge are increasingly cross-border and multi-jurisdictional. Unless this is reflected in copyright laws, education will be impaired, especially harmful for developing countries and for those living in rural or remote areas.

4. What is the role of libraries? Why do they need special limitations and exceptions?

Libraries are primary cultural and scientific institutions that provide information as a public good. Serving as gateways for education, research, scholarship, creativity and innovation, libraries benefit society.

- 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 and innovation, 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.

5. Why are limitations and exceptions for libraries so important in the digital age?

The world's common information platform is now the Internet, operating across invisible national borders. To fulfil their mission, libraries need minimum international copyright norms to provide full access to information and cultural heritage also in the global digital environment. Library 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.

6. Who are beneficiaries of a treaty on limitations and exceptions?

The beneficiaries of limitations and exceptions are libraries and archives, their users and society at large. Over one billion registered library users turn regularly to their library to borrow books, music and films, participate in events, or learn new skills. In many developing countries, the library is the only source of information for those engaged in educational or training programmes. Limitations and exceptions benefit society as they safeguard fundamental individual user rights, including freedom of access to information and freedom of expression as required in the UN Declaration on Human Rights. Limitations and exceptions also foster commerce, competition, creativity and innovation by promoting the dissemination of knowledge.

7. How do limitations and exceptions support the freedom of access to information as declared in the *UN Declaration of Human Rights*?

The human right of access to information provided by Article 19 of the *UN Declaration of Human Rights* depends not only on laws that protect freedom of expression but also on laws providing copyright limitations and exceptions that ensure equal public access to and use of information.

8. Why should governments support limitations and exceptions for libraries?

Most libraries are funded, wholly or partly, from the public purse. They have a number of 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 as facilitators of knowledge through a variety of means including funding, public policies, the enactment of laws governing cultural institutions, and limitations and exceptions in copyright law for the benefit of libraries and their users.

CONTEXT

9. What is the context?

Since 2008, WIPO Member States have been discussing limitations and exceptions with work focused on three groups of beneficiaries: blind and visually impaired people (VIPs), libraries and archives, and education. In November 2011, a special 3-day session at WIPO dedicated to libraries and archives takes place in Geneva. This is a unique opportunity to present library issues at the highest international level, to engage with Member States on the substantive issues and in the political process, and to advocate for the best possible results.

10. Are there other treaty proposals on limitations and exceptions offered at WIPO?

There are currently two other proposals relating to limitations and exceptions. These are the '*Proposal on an international instrument on limitations and exceptions for persons with print disabilities*', 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.

11. How would TLIB interface with the other proposals offered at WIPO?

The international library community fully supports the proposal on an international instrument on limitations and exceptions for persons with print disabilities and the timetable for its endorsement. Our own library and archive Treaty proposal also contains a provision for library and archive services to blind, visually impaired and other reading disabled persons.

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 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.

12. Does TLIB comply with existing international obligations?

Article 2 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 4) and for library lending (Article 6). Countries may also retain limitations and exceptions that go beyond (i.e. are more generous) than TLIB’s requirements and, subject to certain conditions, create new ones.

CONTENT

13. How are the particular position and needs of libraries addressed by the Treaty proposal?

The objective of TLIB is to ensure that national and international networks of library services, critical to the provision of access to quality information, will be able to function properly in today’s global information village. TLIB sets out these minimum norms that libraries need in an international instrument to specifically address their position in copyright law and redress the current patchwork of provision.

14. What is the basis the limitations and exceptions mandated by the Treaty proposal have been developed?

The limitations and exceptions mandated by the Treaty proposal 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. The *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives* identifies 12 principles:

- Preservation
- General free use exceptions applicable to libraries
- Legal deposit
- Interlibrary loan and document supply
- Education and classroom teaching
- Reproduction for research or private proposes
- Provisions for persons with disabilities
- Orphan works

- Copyright term
- Technological protection measures that prevent lawful uses
- Contracts and statutory exceptions
- Limitation on liability

15. Which limitations and exceptions are mandated by the Treaty proposal?

The Treaty proposal provides for the following:

- Information resource sharing – parallel importation (Article 5);
- Library lending (Article 6);
- Reproduction and Supply of Copies (Article 7);
- Preservation of library and archival materials (Article 8);
- Use of works under related rights for the benefit of persons with disabilities (Article 9);
- Right of access to retracted and withdrawn works (Article 10);
- Use of orphan works (Article 11);
- Cross-border uses (Article 12).

16. Which other obligations are included in TLIB to protect libraries?

TLIB also provides for:

- An obligation to respect exceptions to copyright and related rights – by voiding terms in contracts and licenses for information goods that impede or remove statutory limitations and exceptions in national laws (Article 13);
- Obligations concerning Technological Protection Measures (TPMs) – permitting workarounds for libraries and archives to circumvent TPMs in specified circumstances (Article 14);
- Limitation on liability for copyright infringement by libraries and archives for actions performed in good faith (Article 15);
- Flexibilities for national law (Article 16);
- Implementation of the Treaty by Contracting Parties in their national laws. (Article 17).

17. Which activities are protected in the Treaty proposal?

- The preservation of materials for posterity, with the flexibility to access cultural works in copy-protected formats.

- The support of education, research, and private study.
- The making or receiving of copies of works by a library or archive for personal and private purposes, in accordance with fair practice.
- The supply of copies of works in response to requests from individual users.
- The provision or lending of content on a not-for-profit basis.
- The support of people with disabilities in the exercise of their right to access content.
- The circumvention of TPM for the purpose of permitting a non-infringing use of a work.
- The limiting of the risk of liability to libraries and archives with respect to orphan works, in order to facilitate mass digitisation projects.

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

No. TLIB recognises 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 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 digital transmission and sharing of information are 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.

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

In the agreed provisions of the WIPO Copyright Treaty 1996, WIPO Member States recognise that a seamless approach to limitations and exceptions 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 limitations and exceptions in the digital environment and create new exceptions where appropriate. The approach in TLIB is consistent with that already adopted by WIPO.

20. Does TLIB affects 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.

21. What if a country already has or wants to implement limitations and exceptions 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 limitations and exceptions in areas addressed by the Treaty proposal in their national laws, including, for instance, ‘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 limitations and exceptions in areas not addressed by this treaty.

22. How will TLIB affect limitations and exceptions that already exist in national law?

Countries that ratify the treaty and whose national laws already comply with or exceed the limitations and exceptions as set out in TLIB will see no effect. Countries that ratify the treaty and whose limitations and exceptions 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

23. How would the limitations and exceptions in the Treaty Proposal benefit library users?

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 users, and for publicly funded libraries and archives also the taxpayer, will benefit from the right to parallel importation. 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.
- 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.
- 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.

- 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.
- Accessible formats enable people with reading disabilities to exercise their right to read and their fundamental right to education.
- 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.

24. 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 limitations and exceptions 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).

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

A treaty is the only instrument that would bind States to provide limitations and exceptions 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 limitations and exceptions. At best, it would be a “suggestion” for what could be done by a country with regard to exceptions for libraries, and it could not be self-executing.

26. Would every country need to follow the treaty?

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.

27. Would libraries in a country need to follow the treaty?

Once ratified by and implemented in a country, libraries that carry out activities for non-commercial purposes would follow the treaty requirements as set out in their national laws.