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ANALYTICAL DOCUMENT ON LIMITATIONS AND EXCEPTIONS

prepared by the Secretariat

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I INTRODUCTION

1. The Eighteenth Session of the Standing Committee on Copyright and Related Rights (SCCR) which took place in Geneva from May 25 to 29, 2009, decided to request the WIPO Secretariat to "prepare analytical documents, identifying the most important features of limitations and exceptions in the various domains based on all the studies carried out, as well as addressing the international dimension and possibly categorizing the main legislative solutions." The present document is prepared in response to that request and attempts to synthesize the following studies which have been commissioned by the WIPO Secretariat and presented to the SCCR:

- WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by Mr. Sam Ricketson, Professor of Law, University of Melbourne, and Barrister, Victoria, Australia (document SCCR/9/7) (the Ricketson Study);
- Automated Rights Management Systems and Copyright Limitations and Exceptions, prepared by Nic Garnett, Principal Consultant, Interight.com (document SCCR/14/5) (the Garnett Study);
- Study on Copyright Limitations and Exceptions for the Visually Impaired, prepared by Judith Sullivan, Consultant, Copyright and Government Affairs (document SCCR/15/7) (the Sullivan Study); and
- Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews, Director, Copyright Advisory Office, Columbia University (document SCCR/17/2) (the Crews Study).

It has not been possible to include the commissioned studies regarding limitations and exceptions for educational activities, as those studies were still under preparation when the present document was completed.

2. The document attempts to summarize and complement the various studies in a cross-cutting way, by putting together: first, the various activities that are permitted by the different provisions in national law (Chapter II); second, the various legislative models used in that respect, such as provisions on free use, compulsory licenses, legal licenses, among others (Chapter III); third, the provisions, either general or specifically related to the discussed limitations and exceptions, dealing with the importation of copies made under limitations and exceptions abroad, with particular focus on exceptions for the visually impaired (Chapter IV); and, fourth, the provisions of international treaties and conventions that may permit or restrict the flexibility of national legislators (Chapter V).

II ANALYSIS OF THE EXISTING LIMITATIONS AND EXCEPTIONS

(a) Distance learning

3. Certain issues relating to limitations and exceptions for distance learning are dealt with in the Garnett Study. The main focus of the study is the interaction between digital rights management (DRM) and limitations and exceptions, as illustrated in two specific areas, accessibility to works for persons with visual impairments and distance learning. Also in the latter respect, the study does not contain a global review of national law, but it presents the provisions in some selected countries, namely Australia, the Republic of Korea, Spain, the United Kingdom and the United States of America.

4. Some of the examined statutes present examples of provisions permitting the reproduction and dissemination of protected literary and artistic works in the context of distance learning over the Internet. Thus, the provisions in Parts VA and VB in the Australian Copyright Act contain two schemes permitting certain use of print resources and digitized resources, respectively. While print resources can be scanned from paper and re-keyed and stored in digital medium, materials already in digital form may be reproduced electronically and in that form also be communicated to the staff and students of educational institutions. The institutions and the Copyright Agency Limited (CAL, a collective management body) must agree on matters and processes constituting an electronic use system, such as payment and the system of records to be kept for recording usage. The provisions contain a number of limitations to their use which are mitigated by voluntary licenses offered by CAL to the educational institutions[1].

5. In the United States of America, the 2002 Technology, Education, and Copyright Harmonization Act (TEACH Act) permits, under a carefully crafted systems of conditions and safeguards, that works be digitized, or works in digital formats be reproduced by government bodies and non-profit educational institutions and performed and displayed through transmission at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of systematic mediated instructional activity. The provision also covers asynchronous use by students where a "class session" is a period in which the student is logged onto the server and may thus vary according to the student's needs or the nature of the course. Reception must, to the extent technologically feasible, be limited to students officially enrolled in the course or government employees as part of their official duties or appointment[2].

6. In the Republic of Korea the statutory provisions are more "traditional" covering use of excerpts of works in textbooks, and broadcasting and reproduction of works to the extent deemed necessary for the purposes of education. These provisions, however, are supplemented by DRM enabled licensing systems, for example, used by a large commercial distance education vendor[3].

7. While the information in the Study regarding Spain is no longer up-to-date, the United Kingdom Copyright, Designs and Patents Act 1988 contains provisions which permit reproduction in the course of instruction, or of preparation for instruction, the making of anthologies for educational use, the performing, playing or showing of works in the course of the activities of an educational establishment and the recording of broadcasts by educational establishments. The Open University (OU) is a very important distance learning institution in the United Kingdom and it has students from many different countries enrolled, which means that its rights clearance activities are extensive and complex, even though they are simplified as much as possible through the use of standardized terms and processes for rights clearance[4].

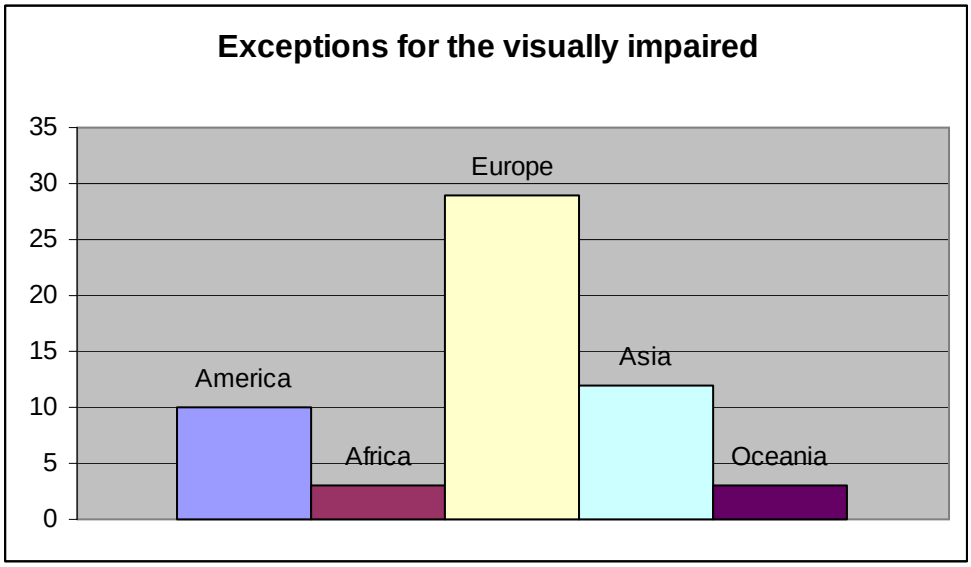
[1] Document SCCR/14/5, page 55f
[2] *Idem*, page 68ff
[3] *Idem*, page 60f
[4] *Idem*, page 63ff

(b) Visually impaired persons

8. Two studies address the issue of limitations and exceptions for the visually impaired, namely the aforementioned Garnett Study as well as the Sullivan Study. As noted above for the issue of distance education, the former does not contain a global review of national law in the examined areas, but presents the provisions in five selected countries, namely Australia, the Republic of Korea, Spain, the United Kingdom and the United States of America.

9. The Sullivan Study looks at national exceptions in a more comprehensive way. It identifies provisions in national copyright statutes relating to the needs of visually impaired persons and finds that significantly fewer than half of WIPO Member States have such provisions.

10. Among the specific exceptions found in only 57 national statutes, the Study identifies important variations in terms of a number of factors such as (i) end beneficiaries, (ii) type of works that can be copied, (iii) commercial nature of the acts, (iv) permitted acts, (v) persons or bodies that may undertake the acts, (vi) type of accessible copies that can be made, (vii) particular conditions, and (viii) overridability of exceptions by contracts[5].



Source: WIPO, 2009

11. As to the *end beneficiary*, the majority of exceptions are specifically directed at people who are unable to access works, or who have difficulty doing so. Some countries attempt to clearly define the terms used, whether in a medical or functional way, so as to encompass a wide range of visual impairments. A number of exceptions apply to disabled people generally, or people with either a physical or mental handicap[6].

12. As to the *works that may be used*, the main differences among provisions regarding what works can be made accessible to visually impaired people concern whether the work has already been published or otherwise disclosed or disseminated to the public. About a third of the exceptions do not appear to require any such condition whereas the majority do, often also

[5] Document SCCR/15/7, page 28f
[6] *Idem*, page 29ff

making it clear that publication or disclosure must have been lawful. Also, many exceptions include a requirement that the work to be used has not been published already in a special format for visually impaired people. Several statutes exclude certain kinds of works, such as computer programs, databases or dramatic or cinematographic works, from the provision permitting accessible copies to be made[7].

13. As to a *condition whether the using organization or body is profit making or not*, in at least two-thirds of the exceptions profit-making or commercial activity is ruled out of the scope of the exceptions by specifically requiring that the activity be not for profit, non-commercial, not for gainful intent or similar[8].

14. As to the *permitted acts*, nearly half of the exceptions only specify the reproduction of a work. Only few statutes provide clearly the possibility of distributing the accessible copies produced and their communication to the public, which are in general the subsequent activities needed to supply accessible copies to visually impaired people. Only four countries have exceptions which permit a performance in public of a work[9].

15. As to *who may undertake the acts*, in about half of the countries with exceptions, there does not appear to be any limitation as to who may undertake the permitted activity under the exceptions. However, for some countries, there is a restriction as to who may make some types of accessible formats, usually formats other than Braille. These differences have presumably been devised to better control the making of the more sensitive types of accessible formats. Several countries appear to limit all activity under their exceptions to bodies that have been officially designated or authorized in some way. In some exceptions, bodies that are specifically and often primarily assisting people with a print disability are specified as those that can undertake the activity permitted under the exceptions, but there does not appear to be any process through which they must be officially authorized[10].

16. As to the *kind of accessible formats* that may be produced under the exception, the Study highlights the fact that whereas some people learn to read specialized formats using relief characters such as Braille, many more do not. This may depend on the degree of their disability, the age at which they were no longer able to read commercially available publications comfortably or otherwise, but it does mean that producing accessible formats in Braille only is most unlikely to provide a complete solution to the problem of access to the works by visually impaired persons. Suitable accessible formats for visually impaired persons could therefore include large print publications, audio recordings and photographic enlargements, and also technology-based formats, such as electronic Braille and digital copies that are compatible with screen-reading software that reads aloud text messages appearing on a computer monitor, or with software that magnifies the size of text displayed on monitors. The increased technological solutions possible in the digital world has also given rise to development of the digital talking book, such as in the DAISY[11] standard specifically catering for the needs of visually impaired people but also utilizable by other people without a disability.

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[7] *Idem*, page 31ff
[8] *Idem*, page 32ff
[9] *Idem*, page 33ff
[10] *Idem*, page 35ff
[11] Digital Accessible Information System (DAISY) <*www.daisy.org*>

17. Six exceptions appear to be limited only to the production of Braille copies, while 21 countries appear to provide exceptions that are not limited, or appear not to be limited, to the making of specialized formats. Of the remaining countries with specific exceptions to copyright for the benefit of visually impaired people, 19 appear to be limited to the production of Braille or other specialized formats that give accessibility to visually impaired people. It is not clear whether the making of copies in other formats not exclusively made for the visually impaired, such as large print copies that could be read by anyone or sound recordings on media that can be played in standard audio equipment, are excluded from these exceptions. Eleven countries have exceptions specifying other types of provision on accessible formats[12].

18. As to other *particular conditions of the exceptions*, in slightly fewer than half the analyzed exceptions, there is a requirement to acknowledge in some way the origin of a work. Those countries generally define the minimum form this should take. Most common is to require the name of the author and the source to be acknowledged. Other items that are specifically required sometimes include the title of the work, the name of the publisher, the performer (for talking books), where or when the work was first made public and the name of the rightholder which might not be the same as the name of the author[13].

19. In about a fifth of the countries with specific exceptions for the benefit of visually impaired people no other conditions other than those of the type already discussed under the paragraphs above have been found. One of the most common additional conditions is one that often overrides all the exceptions provided in the copyright law of the country, namely an additional test, identical or similar to one or more steps of the three-step test found in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and other treaties (discussed in Chapter V, below). A total of twenty-seven countries include an exception with the same or similar steps as the three-step test of the Berne Convention which seems to apply in addition to other requirements in those countries' exceptions for the benefit of visually impaired people[14].

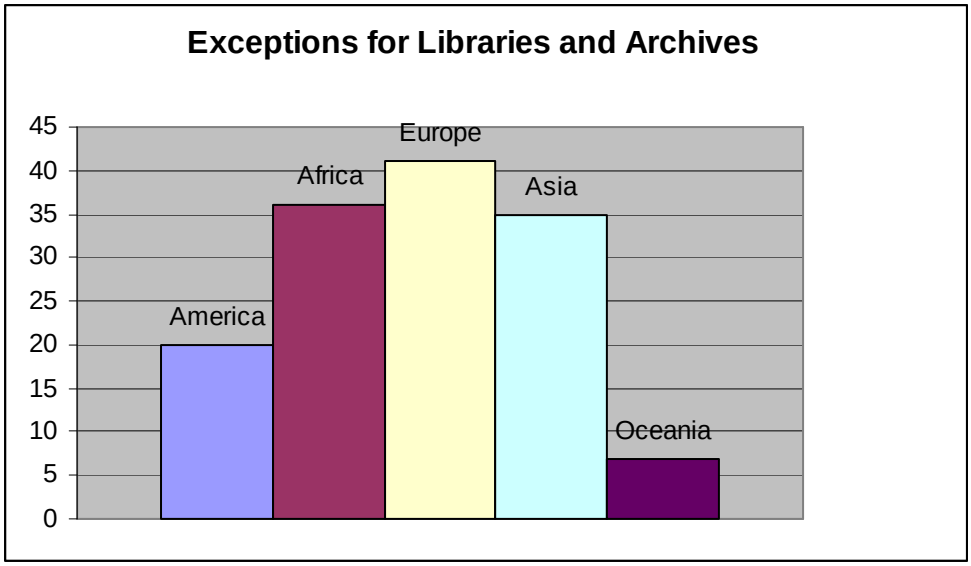
20. Finally, the Sullivan Study investigates to what extent it might be possible to *override by contract* the specific exceptions to copyright for the benefit of visually impaired persons which have been found in national statutes. It finds that two national statutes appear to stipulate that contracts are void if they would have the effect of overriding exceptions to copyright. By contrast, one national statute clearly indicates that the exceptions to copyright do not affect any other right or obligation restricting the doing of any of the specified acts. Other rights or obligations could, presumably, encompass a contract preventing enjoyment of the exceptions provided for the benefit of visually impaired people.[15]

(d) Libraries and archives

21. The Crews Study on limitations and exceptions for libraries and archives is based on an examination of copyright statutes from 149 countries of which the Study found that a large majority had one or more limitations and exceptions specifically relating to libraries or archives ("library exceptions"), only 21 of the examined statutes did not contain such

[12] *Idem*, page 36ff
[13] *Idem*, page 40ff
[14] *Idem*, page 41ff
[15] *Idem*, page 44ff

provisions.[16] Of the 128 countries in which library limitations or exceptions were identified, 27 have a provision permitting the library to make copies of works for users without explicitly limiting the purpose of the copy to research, preservation, or any other particular use and unaccompanied by any other more specific library exception for research, preservation or other activities. A few other countries have such a general library exception, plus provisions on specific library activities. Two countries combine a broad provision with an authorization for a government agency to make more detailed regulations circumscribing the conditions for the copying, and one country permits the library and other organizations to make "use" of any type of work, without stated limits on quantity, so long as the copying is in the "public interest[17]."



Source: WIPO, 2009

22. Statutory provisions addressing the right of a library to make limited copies for private research or study by a library user were identified in 74 countries, sometimes with more than one single provision addressing this particular issue. The statutory provisions fall in three main categories: (1) exceptions permitting libraries to make reproduction of works without explicit limitation to research, study, or similar purpose (found in 14 statutes); (2) exceptions permitting reproduction of all or nearly all types of works for purposes such as research (four concrete examples are mentioned in the Study); and (3) exceptions permitting reproduction of specified types of works (for example, journal articles) for purposes such as research (found in most of the examined statutes). A common distinction between types of works is between published and unpublished works where, if reproduction of the latter is permitted, it is normally combined with specific safeguarding clauses. The statutes include significant variations with respect to other requirements, such as non-commercial uses, use of only parts of works, making only single copies of works, or use permitted only for materials where no licensing alternative is available. Also the requirements of proof, for example of the research purpose, vary from no specific requirements to submission of a written declaration of purpose by the user[18].

[16] Document SCCR/17/2, page 29
[17] *Idem*, page 41f
[18] *Idem*, page 42ff

23. Exceptions that permit a library to make a work available for research or study appear in the copyright statutes of 11 countries of the European Union and in addition in four statutes of other countries[19].

24. Seventy-two of the examined statutes permit preservation copying by libraries (understood as the making of a copy of a work before it has been lost for any reason, in order to ensure its continued availability). Sixty-seven statutes permit replacement copying (i.e. the making of a copy specifically to replace an item that already has been lost from the library collection or for other reasons is no longer suited for general use). Further, 53 countries have statutes that explicitly permit libraries to make copies for adding to the collection of another library.[20] The preservation and replacement statutes are diverse in their detailed conditions. Among the common conditions are: single copies only; copy of works currently in the library collection; the copy becomes a permanent part of the collection; the copying is for nonprofit purposes. A few countries impose only few restrictions in that regard. The most critical provisions seem to relate to the availability of the work for purchase on the market, and the exact condition of the specimen that is copied, including whether it is deteriorating or in an obsolete format[21].

25. The Study identifies six countries that have provisions allowing reproduction for "document delivery" or "inter-library loans", that is, reproductions of works which are made by one library, in possession of the work, and sent to the user's library which will give the copy to the user to keep for private study. Related to this are the 17 statutes identified which contain provisions allowing the "supplying" of copies from one library to another for purposes of retaining the copy in the collections of the receiving institution, or otherwise generally for use by the receiving library[22]. A few countries also have statutory provisions on the issue of liability for infringements committed by library users who make use of photocopiers, etc., supplied by or on the premises of the library[23], and some few countries have more or less general provisions sheltering libraries by limiting the legal exposure they might face in the event of copyright infringement[24].

26. The Study concludes, *inter alia*, that there is a remarkable variety in the ways in which some of the various issues have been dealt with in detail, and it is an area in transition where new legislation is regularly passed, based on the prevailing circumstances in different countries, although some harmonizing effects can also be traced to sources such as the 1976 UNESCO and WIPO Tunis Model Law and European Directives[25].

[19] *Idem*, page 49ff
[20] *Idem*, page 52ff
[21] *Idem*, page 54ff
[22] *Idem*, page 57ff
[23] *Idem*, page 63f
[24] *Idem*, page 64
[25] *Idem*, page 68ff

III THE DIFFERENT LEGISLATIVE MODELS

(a) General

27. Limitations and exceptions have existed in national copyright law since the earliest legislation, and over time a number of different models have been elaborated which will be described in general terms in the following. These are: provisions allowing free use; non-voluntary licenses; and provisions regulating the management of rights.

28. Apart from these models which influence how the permission to use the work is given and how a possible remuneration is to be paid, there is also an overall distinction between, on the one side, provisions addressing specific utilizations described in the statute and, on the other side, provisions establishing general criteria for the permitted utilizations to be determined, as the last resort, by the courts of law. The former solution is in very widespread use, probably in all or practically all statutes, whereas the latter solution, or rather additional provision, is most commonly found in countries, following the common law tradition, where it is referred to as provisions on fair use or fair dealing.

29. The provisions on fair use originated in the United States of America as a codification of many years of jurisprudence. In brief, the provision allows the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

30. The rules on fair dealing originated in the copyright statute of the United Kingdom and originally provided that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary shall not constitute an infringement of copyright.[26] In subsequent revisions various forms of that basic provision have emerged in the various countries where it originally applied.

(b) Provisions allowing free use

31. Many limitations and exceptions, whether established as targeted specific provisions or more general provisions of the fair use or fair dealing type, allow for *free use*, that is, a provision permitting the user to undertake the acts restricted under copyright or related rights protection to the extent permitted in the limitation or exception, and without having to contact the rightholder before or after to obtain permission or inform of the use and without having to pay any kind of remuneration.

32. As compared to the other legislative models, discussed below, provisions allowing free use present the solution most advantageous to the users and most disadvantageous to the rightholders. It has been found, however, in many cases that such provisions are the most

[26] United Kingdom 1911 Copyright Act, §2

adequate way of obtaining a balanced solution. The reasons might be that the use is of such a relatively small impact on the rightholders' interests that other solutions would not be justified, or the burden to contact the rightholders and settle the remuneration and other conditions might be more than what can reasonably be required for uses that are limited, perhaps frequent, and supported by solid public policy concerns. Furthermore, provisions permitting free use also ensure that users can choose the most appropriate works without having to consider, for example, whether the rightholders can be reached (orphan works).

33. Where limitations and exceptions are permitted under the international conventions, it is normally also permitted to establish them as provisions on free use. Exceptions are the specific provisions regarding non-voluntary licenses which are referred to, below. There is, however, a general provision which might be seen as limiting the possible resort to provisions on free use, namely the last step of the three-step test in Article 9(2) of the Berne Convention, Article 10 of the WIPO Copyright Treaty (WCT) and Article 16(2) of the WIPO Performances and Phonograms Treaty (WPPT). According to that step, limitations and exceptions may not "unreasonably prejudice the legitimate interests" of the rightholder. This provision is normally understood as implying that a non-voluntary license may be required for a limitation or exception to be compatible with the test, if its economic impact exceeds a certain level.

34. The Sullivan Study finds that a very large majority of the 57 analyzed national exceptions do not appear to require any payment of remuneration to rightholders. Indeed, in 20 countries, the exceptions are drafted in such a way that they specifically rule out the payment of remuneration. However, this can only really be fully assessed by considering in each case what other limitations are imposed by the exception, such as permitting only very specific types of accessible formats to be made, only certain very limited types of, or limited numbers of, bodies being able to act under the exceptions, and conditions ruling out profit-making activity and activity that could compete with accessible formats that are commercially available[27].

35. In addition to the 20 countries with exceptions that specifically preclude any remuneration, 32 other countries appear to make provision in the form of a non-remunerated exception. In the case of eight of these countries, the non-remunerated acts only apply in some circumstances though; in other circumstances there must be, or may be, the possibility of remuneration.

36. The Crews Study points out that most of the statutes examined permit libraries to make specified uses of copyrighted works without compensation to rightholders. There are also some countries which have provisions allowing free use which are only operative under the condition that there is not a collectively managed license available covering that use[28].

[27] Document SCCR/15/7, page 39ff

[28] Document SCCR/17/2, page 38

(c) Non-voluntary licenses

37. Non-voluntary licenses are explicitly permitted in Articles 11*bis*(2) and 13 of the Berne Convention, covering broadcasting, simultaneous rebroadcasting, cable transmission and other public communication of broadcasts, and recording of musical works and lyrics which have previously been recorded with the author's authorization, respectively. These provisions are still in use, but in a limited number of countries. During the preparation of the WCT it was proposed that parties to that treaty should undertake not to apply those provisions, but it was rejected. Similar provisions are Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) and Article 15 of the WPPT which (optionally) grant performers and producers of phonograms a right to equitable remuneration for the broadcasting and communication to the public of their commercially published phonograms. In principle, however, these provisions do not belong to the non-voluntary licenses discussed here, because they are established as rights as such, not as limitations or exceptions to exclusive or other, more wide-ranging, rights.

38. As the provisions of the international conventions, discussed in this document, are minimum requirements, countries are considered free to establish non-voluntary licenses in cases where free use is otherwise permitted, as the former is considered a higher level of protection.

39. Non-voluntary licenses enable the use in question to take place without the rightholders being able to prevent it, but entitling them to obtain equitable remuneration. In this way such licenses may be considered more to the advantage of the rightholders, and accordingly more to the disadvantage of the users, than provisions regarding free use. The rightholders will obtain some remuneration for the use, and the payment and management thereof will represent an additional burden for the users.

40. In this respect, much depends on the way in which the non-voluntary license has been established. Normally a distinction is drawn between *legal licenses* and *compulsory licenses*. This distinction refers to where the permission for the use is granted. If the use is permitted by the statute *per se* it is considered a legal license, whereas a compulsory license is a system in which the statute obliges the rightholders to grant the permission when this is requested by the users. In any case, if the rightholders and the users cannot agree on the amount of the equitable remuneration or if, under a compulsory license, the rightholders refuse to grant the license to the users, national law will establish an appropriate authority to make the necessary decisions, for example, a designated court of law or a copyright tribunal.

41. A compulsory license can be said to represent a more limited deviation from exclusive rights than a legal license, because it relieves, in principle, the rightholders from the burden of monitoring the possible use and claiming the remuneration. On the other hand, where broadly representative organizations do not exist, such licenses do not enable the use of orphan works in the same way as legal licenses do.

42. The Sullivan Study indicates that only three countries appear to provide an exception that is in effect a compulsory license with compensation for the rightholders in respect of all the acts permitted under their exceptions for the benefit of visually impaired people. In

addition, seven countries provide an exception that is a compulsory license for at least some of the permitted acts[29].

43. There are various ways in which the split between pure exception and compulsory license has been made, such as compulsory license only applying to the making of sound recordings of works, recordings of broadcasts or large print copies, or when more than a single copy of a work is made.

44. Only three countries have provisions for at least some of the acts permitted under exceptions that are not strictly speaking non-voluntary licenses because there is only the possibility of remuneration being paid to rightholders. In only few countries, rightholders may request payment of equitable remuneration. This constitutes a half-way house where a non-remunerated exception can in effect be overridden by a licensing scheme that a rightholder choose to set up covering the same act as that permitted under the relevant exception. Thus, a rightholder is then free to seek payment under the licensing scheme if he wishes so. This seems to correspond to the solutions identified in the Crews Study and referred to under (b), above.

45. The Crews Study points out that typically an exception that requires compensation relies on the mechanism of collective management, because transaction costs would otherwise be too high if individual licensing had to be relied on. Furthermore, collective management also offers additional advantages for both users and rightholders. The requirement of licenses or payment of remuneration may also have advantages for the users, because lawmakers with such safeguards may be willing to accept more generous limitations and exceptions while, at the same time, the costs may or may not be a burden to an individual library as they might be spread widely to all eligible libraries or just form part of the library's operating budget, covered by public funding. Nevertheless, the license remains a precondition to some library services, and the license can be used to effectively limit the scope of a statutory exception to only certain works[30].

(d) Provisions regulating the management of rights

46. Some legislators have tried to avoid the use of limitations and exceptions through provisions that are based on exclusive rights, but regulate the exercise of such rights, namely through obligatory collective management of right or, possibly, through extended collective management (the latter might also be seen as containing a certain element of limitation or exception). Both models presuppose the existence of collective management organizations which are authorized by their members to negotiate with the users the use of their works.

47. In the case of *obligatory collective management* the statute curtails the rightholders' individual possibility of enforcing their rights against the users by providing that the rights in question can only be claimed through a collective management organization, possibly with certain additional conditions, for example that the organization has been approved by the government and fulfills certain basic requirements regarding its operations, etc. Obligatory collective management has the advantage of shielding the users against claims from others when they have entered into an agreement with the approved organization, and such

[29] Document SCCR/15/7, page 39f
[30] Document SCCR/17/2, page 38f

agreements normally include also a clause in which the organization undertakes to hold the users harmless from claims from rightholders who are not members, thereby in practice solving also the problems that might emerge regarding orphan works.

48. *Extended collective management* presupposes not only the existence of a collective management organization but also that the organization represents a significant part, or the majority, of the rightholders. The provision in the statute will only come into effect if an agreement regarding the use in question is reached between the users and the representative organization, but if that happens the statute extends the effect of that agreement to cover also rightholders who are not represented by the organization, typically provided that they have not specifically prohibited the use in question. One might still argue that such provisions contain a certain limitation of the exclusive rights for the non-represented rightholders, but commonly they are considered more a regulation of the exercise of rights than a limitation or exception. The advantage of such provisions can be said to be that they offer a solution to the licensing of orphan works, and they ensure that the conditions for the use have been negotiated. On the other hand, they leave the underlying issues unsolved if the users and the representative organization cannot reach an agreement, in which case exclusive rights will apply, and they are only viable in cases where such organizations actually exist.

(e) Relation to automated rights management systems

49. The interplay between automated rights management systems and limitations and exceptions is the main focus of the Garnett Study[31]. It describes the basic functions of digital rights managements systems (DRMs) and confronts it with the characteristics of some typical limitations and exceptions.

50. In accordance with views already expressed in previous literature about the subject, the Study concludes that while there are examples of copyright considerations influencing the architecture and workings of DRMs, such as the Single Copy Management System (SCMS) that allows only one generation of subsequent copies and the DVD regional coding, the situation is fundamentally different when it comes to limitations and exceptions. They often require that various factual circumstances are taken into consideration which the computer-based systems are not capable of assessing. They also frequently rely on a legal interpretation of a term or a factual situation which requires human intervention. Furthermore, such systems are developed by the rightholders who cannot be expected to invest the very significant resources that would be needed to establish such systems, as they would not be called for as far as their commercial interests are concerned, and such systems mandated by law would be very difficult to formulate and they would be likely to become obsolete very quickly[32].

51. Instead, the Study points to the solution of establishing Trusted Third Parties (TTP), that is, public or private institutions which fulfill a number of specific requirements that will enable both contents providers and users to rely on them and to entrust them with the detailed management of the limitations and exceptions, established by law[33]. The Sullivan Study indicates that the exchange of electronic files between publishers and those making accessible

[31] Document SCCR/14/5
[32] *Idem*, page 79ff
[33] *Idem*, page 88ff

copies may always work best where there is trust between the publishers and the organizations acting under an exception[34].

52. A related issue is the extent to which national legislation establishes exemptions from a ban on circumvention of technological measures of protection (TPMs) for the purpose of benefitting from limitations and exceptions under the law.

53. The Sullivan Study found that, while only 17 national statutes include specific provisions in this regard, the majority of countries do not appear to have addressed this issue. However, a number of them have also not as yet provided any protection for rightholders against devices and services used to circumvent TPMs or the act of circumvention as such. Until that type of provision exists in national law there is, of course, not an issue with regard to whether or not it must still be possible to enjoy exceptions where protective technology has been applied. Anyone in those countries wishing to undertake the acts by an exception is not acting contrary to any law by circumventing any TPM in order to do so[35].

54. In the Crews Study, 79 countries were identified as having provisions in their statutes regarding the circumvention of technological protection measures, out of which 26 have enacted exceptions, applicable to libraries, either specifically dealing with libraries or in a more general form, also applicable to other users or institutions[36].

(f) Extra-legislative solutions

55. A number of options presenting alternatives to exceptions have been described in both the Crews and Sullivan Studies so as to respond to the needs of libraries and the visually impaired community in relation to copyright protection.

56. As to alternatives to exceptions to facilitate non-profit accessible format production, the Sullivan Study highlights two main solutions, one regarding the promotion of licensing and the other on the role of trusted intermediaries, including libraries.

57. Licensing, or licensing in combination with exceptions, may well be capable of delivering more useful assistance to visually impaired people than exceptions alone can deliver. Collective licensing in particular is clearly a helpful way to resolve many of the difficulties with reaching agreement on licensing. Collective licensing therefore benefits, and is trusted by, publishers as well as users of copyright material.

58. One of the keys to any licensing arrangement is the development of trust. Rightholders need to be reassured that those making alternative formats control their circulation responsibly and protect copyright appropriately. Certain libraries, for instance, are major producers of accessible material as well as having more usual library functions in giving visually impaired people access to this material. They may be very well placed to create a trusted environment for controlled circulation and protection of protected material for the visually impaired patrons[37].

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[34] Document SCCR/15/7, page 10f
[35] *Idem*, page 45ff
[36] Document SCCR/14/5, page 64ff
[37] Document SCCR/15/7, page 125

59. Other solutions not necessarily linked to the production of non-profit accessible copies as such, but rather to the use of new technological tools, are "built-in" accessibility, extension of print on demand and the sharing and deposit of e-files. The Study also highlights the importance of DRMs, cost reduction policies for accessible copies and awareness raising activities[38].

IV PROVISIONS RELATED TO THE RIGHT OF DISTRIBUTION OF COPIES

(a) Specific provisions

60. Not all the commissioned studies address the issue of international distribution of copies, produced under the various limitations and exceptions which are identified in national law. It is, however, addressed at some length in the Sullivan Study[39].

61. The Sullivan Study analyzes eight types of activities related to the distribution of copies, namely:

62. The *distribution to individuals* or the distribution of accessible copies legally made by an organization permitted to act under a specific exception to assist visually impaired people within the jurisdiction, the Study identifies seven statutes that provide the most comprehensive possibilities for distribution of accessible copies in this respect.

63. The *distribution to organizations* or the distribution of accessible copies legally made by an organization permitted to act under a specific exception within the jurisdiction to another organization within the same jurisdiction which assists visually impaired people; the Study identifies only three statutes which appear to extensively facilitate this type of distribution.

64. The *exportation to individuals,* or the exportation of a legally made accessible copy by an organization entitled to make it under a specific exception to an individual visually impaired person in another country, the Study finds that at least 14 statutes that broadly permit this activity.

65. The *exportation to national organizations,* or the exportation of legally made accessible copies by an organization entitled to make them under a specific exception to an organization assisting visually impaired people which operates in the other country, the Study finds no statute which makes specific provision for this activity.

66. The *exportation to international organizations,* or the exportation of legally made accessible copies by an organization entitled to make them under a specific exception to organizations assisting visually impaired people which operate internationally, the Study finds no statute that addresses this activity.

67. The *importation to individuals*, or the importation of an accessible copy legally made in another country under a specific exception direct to a visually impaired person, the Study shows that 51 statutes seem to allow this act, in some cases with some restrictions.

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[38] *Idem,* page 129

[39] *Idem,* notably pages 47 to 64, 89 to 96 and 119 to 123

68. The *importation to organizations*, or the importation of accessible copies legally made in another country under a specific exception to an organization assisting visually impaired people, the Study shows that this is the category that reflects the most nuances in national legislation. However, it shows that nine statutes allow this activity within certain restrictions.

69. Finally, as to the *exportation or importation of intermediate copies*, or the exportation of legally made intermediate copies (that is copies necessarily created during the process of making accessible copies of a copyright work) to organizations in other countries which will use them to make accessible copies for visually impaired people and/or import of legally made intermediate copies from another country by an organization which will use them to make accessible copies for visually impaired people; the Study finds that only three national statutes facilitate these activities[40].

(b) Exhaustion of rights

70. For countries where a provision was found, the Sullivan Study indicates that there is the expected range from international exhaustion after the first sale or transfer of ownership of a copy by or with the consent of the copyright owner anywhere in the world, through regional exhaustion for countries in the European Union and/or party to the European Economic Area Agreement, to national exhaustion where rights are only exhausted after the first sale or transfer of ownership of a copy by or with the consent of the copyright owner in that country.

71. In some countries rules on exhaustion vary for different types of work. Many countries make it clear, however, that rental (and in some cases lending) rights are not exhausted and a few countries specifically make it clear that the distribution right in tangible copies is not exhausted for copies made with the rightholder's consent by recipients of an electronic communication of the work to the public[41].

V THE INTERNATIONAL CONVENTIONS

(a) General provisions, the three-step test

72. The provisions in the international conventions on copyright and related rights regarding limitations and exceptions are the subject of the Ricketson Study[42]. The Study presents the limitations and exceptions permitted under the Berne Convention, the Rome Convention, the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement), the WCT and the WPPT, respectively, and it discusses in particular the adoption of the three-step test as a general provision applying to limitations and exceptions, the various types of limitations and exceptions permitted under the text, compulsory licenses, the application of the three-step test to specific areas of concern and specific issues relating to technological protection measures.

[40] *Idem*, page 55ff
[41] *Idem*, page 63ff

[42] Document SCCR/9/7

73. Certain limitations and exceptions under the international conventions can be applied "across the board" by national legislation. Among those, the three-step test has come to center stage[43]. It was first formulated during the 1967 Stockholm Conference in connection with the discussions on the introduction of an explicit provision granting the exclusive right of reproduction. The Conference decided, instead of including a catalogue of more or less specific possible limitations and exceptions to that right, to adopt a general clause in Article 9(2) of the Stockholm Act (later repeated unchanged in the 1971 Paris Act) which permits limitations and exceptions to the right of reproduction if they are enacted (i) in certain special cases, (ii) provided that such reproduction does not conflict with a normal exploitation of the work and (iii) does not unreasonably prejudice the legitimate interests of the author[44].

74. As regards crosscutting limitations and exceptions to other rights, notably rights of performance, communication to the public, etc., the Conference did not adopt any explicit provisions, but it confirmed in the General Report of Main Committee I a statement from the General Report of the preceding 1947 Brussels Conference concerning the so-called "minor reservations". These reservations are permitted in respect of religious ceremonies, performances by military bands and the requirements of education and popularization[45]. The doctrine of minor reservations was included under the wording of the three-step test in the 1994 TRIPS Agreement in Article 11 of which the test in substance was repeated, but without being limited to the right of reproduction.

75. The WCT contains in its Article 10 two provisions based on the three-step test, of which the first in paragraph (1) relates to the limitations and exceptions to the rights of the WCT itself. Paragraph (2) relates to the implementation of the Berne Convention and makes the three-step test generally applicable to the rights under that Convention, as well, thereby extending the scope of the test from covering only the right of reproduction to covering all economic rights, granted under the Berne Convention. In addition, an Agreed Statement to the WCT clarifies the understanding that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention[46].

76. There are also some provisions of a general character specifically for related rights. This is the case as regards Article 15(2) in the Rome Convention which states that any Contracting State may in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with the Rome Convention. The latter reservation notably means that the compulsory licenses in Articles 11*bis*(2) and 13 of the Berne Convention cannot be applied *mutatis mutandis* to the

[43] *Idem*, page 65
[44] *Idem*, page 20ff
[45] Records of the Intellectual Property Conference of Stockholm (1987), WIPO Geneva 1971, page 1166. See also document SCCR/9/7, page 34ff
[46] *Idem*, page 56ff

rights covered by the Rome Convention outside the areas where the latter permits compulsory licenses[47]. Article 16 of the WPPT only contains a general provision permitting the same limitations and exceptions as those provided for in the national legislation on copyright in literary and artistic works and supplemented with the same Agreed Statement[48].

(b) Specific provisions

77. Apart from these general provisions, the Berne and Rome Conventions contain a number of provisions permitting specific limitations and exceptions, whereas the TRIPS Agreement, the WCT and the WPPT, other than their general reference to the Berne Convention (except the WPPT) only contains the general rule of the three-step test. The provisions in the Berne Convention are Article 2(4) on official texts; Article 2(8) on news of the day and press information; Article 2*bis*(1) on political speeches and speeches delivered in the course of legal proceedings; Article 10(1) on quotation; Article 10(2) on utilization for teaching purposes; Article 10(3) supplementing the two preceding provisions in respect of attribution of source and authorship; Article 10*bis*(1) on use of articles in newspapers and periodicals; Article 10*bis*(2) on use of works in the reporting of current events; Article 2*bis*(2) on reporting of lectures, addresses and other similar works; Article 11*bis*(2) on non-voluntary license for broadcasting, etc.; Article 11*bis*(3) on ephemeral recordings (time-shifting recordings made for broadcasting purposes); and Article 13(1) on non-voluntary license for recording of already recorded musical works. Furthermore, the Appendix to the Berne Convention contains a series of compulsory licenses concerning the translation and reproduction of works for educational and developmental purposes in developing countries[49].

78. The specific provisions of the Rome Convention are shorter and more general in nature than those of the Berne Convention. They are placed in Article 15(1), which allows Contracting States to provide for exceptions as regards: private use; use of short excerpts in connection with the reporting of current events; ephemeral fixations; and use solely for the purposes of teaching or scientific research[50].

(c) Territorial application, exhaustion of distribution rights of physical copies, importation of unauthorized copies

79. Throughout the abovementioned international treaties and conventions governing the framework for national copyright laws, the underlying premise is that copyright legislation is territorial in nature. This means that each national law can generally only make provision for the rights that exist in that territory, and any limitation and exception to those rights only determine what acts can be undertaken in that territory without infringing copyright.

80. Where acts are undertaken across jurisdictions, it is usually extremely difficult to determine with certainty what parts of those acts are lawful and what parts are not. The

[47] *Idem*, page 45
[48] *Idem*, page 64
[49] The limitations and exceptions under the Berne Convention, and certain implied exceptions, are discussed in *Idem*, pages 10 to 43.
[50] *Idem*, page 44f

guidance provided by private international law appears to be very complex and there is likely to be a considerable divergence of opinion amongst legal experts about the correct interpretation of copyright laws.

81. A right to control the distribution of physical copies is only clearly provided in the WCT and the WPPT. The Agreed Statements in these Treaties clearly indicate that the right of distribution provided by Article 6(1) of the WCT for authors of literary and artistic works and by Articles 8(1) and 12(1) of the WPPT for performers and producers of phonograms respectively is concerned with only the distribution of physical copies.

82. This right is not specifically provided in the Berne Convention, other than distribution right in Article 14(1) for literary and artistic works adapted and reproduced as cinematographic works, and no right in this respect is clearly required by the TRIPS Agreement.

83. Also of note is the fact that, the WCT and WPPT leave to national legislation to decide on how and when the right of distribution is exhausted after the first sale or other transfer of ownership of the original or a copy of the work, fixed performance or phonogram where the transfer has been authorized by the author, performer or producer of the phonogram respectively.

84. Provisions on exhaustion of distribution rights are, though, not really relevant to deciding whether or not accessible copies made in one country under a specific exception to copyright can be imported into another country. This is because the concept of international exhaustion in the WCT and WPPT is clearly limited to the exhaustion of the distribution right in a copy that has been made with *the authorization of the author or other rightholder*. Therefore, copies made under exceptions are not so made as the author or other rightholder has not given permission for them to be made at all[51].

85. In contrast, provisions on exhaustion become relevant for those interested in cross border movements of accessible copies when they are made under agreements with rightholders.

86. No provision in international treaties or convention explicitly dictates how to treat a copy that comes into a person’s possession through the above acts, if they take place across borders, that is to say, where the copy is exported from one country and imported into another, and when that copy is made under authorization granted by the author or other rightholder, or when a copy is made under a permitted exception to copyright in the country in which it is made (legally made copies).

87. However, when a copy is made in any country by infringing copyright (illegally made copies) and that copy is exported from one country and imported into another, Article 16 of the Berne Convention imposes an obligation on Members of the Berne Union to make infringing copies liable to seizure, including where copies of the work are made in countries which do not, or no longer, provide copyright protection for the work. The TRIPS Agreement provides for certain specific rules in its Part III to guarantee efficient application of seizures.

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[51] Document SCCR/15/7, page 49ff