

Standing Committee on Copyright and Related Rights

Thirty-Eighth Session
Geneva, April 1 to 5, 2019

**COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR LIBRARIES: TYPOLOGY
ANALYSIS**

prepared by Kenneth D. Crews, JD., PhD.

LIBRARY COPYRIGHT EXCEPTIONS: **TYOLOGY ANALYSIS**

I. Introduction

This analysis of copyright exceptions for libraries is intended to provide an in-depth examination of the possible elements of copyright statutes. The project isolates those elements that have been included in relevant copyright statutes, and in so doing the analysis can assist WIPO delegates as they consider the terms of any guidance or instrument on these copyright exceptions. Further, this project can be of assistance to lawmakers in individual member states as they consider drafting new or revised statutes.

II. Structure of the Typology

This typology analysis is presented as a series of tables, with each table generally representing one topic, concept, or activity that is included in the construct of the law. For example, the first table examines the law on library preservation services and activities. The final table offers an examination of general conditions or requirements that often apply to multiple statutory copyright exceptions.

Each table is divided into four columns. Reading the columns from left to right, they present a systematic means for conceiving and beginning to comprehend the possible structure and detailed elements of a statute. Beginning with the first table on library preservation, the first column highlights the nature of the subject, with a brief description of the affected library services. The second column tells the reader which rights of the copyright owner may be affected. The third and fourth columns isolate and organize the detailed elements that appear in some statutes and related resources, and that a lawmaker may want to consider including in new legal instruments or need an on-going consideration.

The four columns may be described more fully as follows:

- Column 1: Category of Library Activity.
 - General topic or description of the relevant statute or legal provision.
 - Relevant library functions or services or other activities affected by the provision.
 - “Library functions” are daily activities of libraries in order to achieve the core missions.
 - “Library services” refer to activities provided by libraries to and for the benefit of the users.

- Column 2: Owner's Rights Implicated.
 - Rights of owners that are affected by the exercise of the exception.
 - Rights that are most directly affected are distinguished from those that are secondarily or less likely to be affected.

- Column 3: Elements of Statutory Exceptions.
 - Identifies detailed elements that may appear in relevant statutes, with the following characteristics:
 - Each element in Column 3 defines the scope or conditions of the statute and its application.
 - Most elements in Column 3 appear in many of the relevant statutes.
 - Regardless of how frequently each of these elements may appear in the statutes, they generally are included in a consistent manner. For example, all of the countries that include the concept of "fragile" in their preservation statute use it as a condition under which a library may make the preservation copy.
 - Based on the evidence from statutes in the member states, a country may choose to include the elements from Column 3 in their law, but interested parties are not likely to dispute how the terms will be included.
 - No one country is ever likely or expected to enact a statute that includes all of the elements from Column 3.

- Column 4: Elements for Ongoing Consideration.
 - Identifies detailed elements that may appear in relevant statutes, and that have the following characteristics:
 - Each element in Column 4 defines the scope or conditions of the statute and its application.
 - Most elements in Column 4 appear infrequently in the relevant statutes from any member state.
 - Regardless of how often any of these elements may appear in a statute, they seldom appear in the law in a consistent manner. For example, different countries may have an exception on the same topic, but they differ significantly on whether the library may make a single copy or multiple copies. Similarly, copyright exceptions in many countries allow libraries to make copies for private study, but one country may require no proof of the purpose, while the next country requires signed documents and elaborate record-keeping by the library.
 - Because of the different view on some of these issues, these elements are identified as needing ongoing discussion and further consideration of their meaning and application. That consideration may be undertaken by WIPO delegates as they develop legal instruments, or that consideration may be undertaken by lawmakers drafting a statute for one country.

III. Context, Purpose, and Scope

Legal context of the typologies:

- Analysis of copyright statutes applicable to libraries and archives was presented in earlier SCCR meetings.
- Member States have enacted a wide range of relevant copyright statutes, addressing many activities and services that are important to libraries and to members of the public that depend on libraries and their services.
- The statutes, even on the same general issues, are highly diverse in their details.
- These statutes are in general guided only by the general concepts that constitute the Three-Step Test set forth in the Berne Convention and other international instruments.
- The European Union has included some library concepts in its directives.

Purposes of the typologies:

- To identify many of the leading topics and library services that are addressed in statutes of the Member States.
- To articulate the fundamental rights of the copyright owner affected by the individual copyright exceptions.
- To isolate the nuances and specific differences among the statutes and therefore the possibilities for drafting statutes or international instruments.
- To set forth major issues that remain unclear or generally unresolved and that may be the subject of future analysis or negotiation.

Scope of these typologies:

- This study focuses only on libraries. While many of the issues presented here may be relevant to archives and other institutions, WIPO will be preparing and sharing with the member states additional studies that give specialized attention to the needs and circumstances of archives, museums, and educational institutions.
- This study is based on existing statutes that are explicitly applicable to libraries. As a result, it does not encompass issues and proposals that do not actually appear in the laws of member states.

IV. Topics of the Library Typologies

The typologies on library exceptions include tables on the following topics:

- Preservation of Works.
- Replacement of Works.
- Copies for Study & Research.
- Making Available on Terminals.
- Lending of Physical Works.
- Lending of Digital Works.
- General Library Exception.
- Additional Conditions to Specific Exceptions.

TOPIC: Preservation of Works			
Definition: Copyright exception authorizing libraries to make reproductions and other uses of copyrighted works for the primary purpose of preserving the works.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Preservation of Works.</p> <p><i>Library Functions:</i></p> <ul style="list-style-type: none"> • Copies to prevent loss. • Copies in response to loss or damage. • Copies for deposit in other libraries for security or safekeeping. 	<p><i>Primary:</i></p> <p>Reproduction.</p> <p><i>Secondary:</i></p> <p>Distribution (if the copies may be loaned by the library). Circumvention (if the original is secured by TPM).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> • Published or unpublished works. • Printed works. • Music & sound recordings. • Audiovisual works. • Works protected by neighboring rights. <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> • At risk of loss. • Damaged, deteriorating, lost, stolen. • Fragile. • Rendered unusable. • Obsolete format or technology. • Rare works. • Culturally important works. • Replacement not available on the market (if copying entire work). • Work must be in the collections of the library. <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> • Preservation. • Add to collections. • Add to collections of another library or archive. 	<ul style="list-style-type: none"> • Application of digital technology. • Implications of license or agreement for acquisition of the work. • Implications of extended collective licensing. • Number of copies allowed to be made. • Permitted uses of the copies by the library or by users. • Simultaneous availability of the original and the copy. • Authority for cross-border transfers. • Making copies of works before lending or exporting originals. • Extent of proof or documentation of compliance with statute.

TOPIC: Replacement of Works			
Definition: Copyright exception authorizing libraries to make reproductions and other uses of copyrighted works for the primary purpose of replacing a work (or a part of a work) that is missing from the library collection as a result of specified causes.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Replacement of Works.</p> <p><i>Library Functions:</i></p> <ul style="list-style-type: none"> • Copies to replace works in the collection that have been damaged, etc. • Copies to replace works that are at risk of loss, etc. • Copies to replace works that are in an obsolete format or technology. • Copies for completion of a work or other item in the collection. 	<p><i>Primary:</i></p> <p>Reproduction.</p> <p><i>Secondary:</i></p> <p>Distribution (if the copies may be loaned by the library). Circumvention (if the original is secured by TPM).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> • See notes at preservation. <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> • Damaged. • Deteriorating. • Lost. • Stolen. • Replacement not available on the market (if copying entire work). <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> • Replacement. • Add to collections. • Add to collections of another library or archive. 	<ul style="list-style-type: none"> • See notes at preservation. • Permitting copies in anticipation of loss, etc. • Clarify that a library may obtain an original from another library for making the copy. • Clarify that a library may make and deliver a copy to another library whose copy is lost or damaged, etc.

TOPIC: Copies for Study & Research			
Definition: Copyright exception authorizing libraries to make reproductions and other uses of copyrighted works for the purpose of accessing or providing copies of the works for study and other activities by library users.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Copies to Give to Users for Study & Research.</p> <p><i>Library Services:</i></p> <ul style="list-style-type: none"> • Fulfilling user requests for individual copies of specific works. • Copies for individual private study. • Copies made for users with a view to publication (the library may supply a copy, but the requesting user must clear rights for the publication). 	<p><i>Primary:</i></p> <p>Reproduction. Distribution. Making available.</p> <p><i>Secondary:</i></p> <p>Circumvention (if the original is secured by TPM).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> • Published or unpublished works. • Textual works. • Photographs and images. • Images accompanying textual work. • Music. • Sound recordings. <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> • Private study. • Private research. • Personal use. • View to publication. <p><i>Amount of the Work:</i></p> <ul style="list-style-type: none"> • Short works, articles, book chapters. • Entire works or long works (if replacement not available on the market). <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> • Work must be in the collections. • Search the market to confirm whether available (before copying whole works). 	<ul style="list-style-type: none"> • Application of digital technologies. • Implications of license or agreement for acquisition of the work. • Implications of extended collective licensing. • Delivery of copies to users outside the library. • Relationship to interlibrary lending or document delivery. • Authority for cross-border transfers. • Liability for subsequent activity by user. • Multiple requests for the same work. • Photographs and other ancillary or embedded works. • Retaining a copy in the library's digital archive.

TOPIC: Making Available on Terminals			
Definition: Copyright exception authorizing libraries to use copyrighted works in digital formats for the primary purpose of making the works available for viewing and other uses on terminals at the library.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Viewing on Computer Terminals.</p> <p><i>Library Services:</i></p> <ul style="list-style-type: none"> • Making and allowing access to digital copies via terminals at the library. • Viewing digital copies on terminals on the premises of the library. • Fulfilling user requests for access to specific works. 	<p><i>Primary:</i></p> <p>Making available.</p> <p><i>Secondary:</i></p> <p>Reproduction (to digitize the work). Circumvention (if the original is secured by TPM). Public display or performance (but not applicable if access is individual and not public).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> • Any work. <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> • Implication of licenses applicable to the work. • Restrictions on ability of users to make copies. • Limit on the number of simultaneously accessible copies. • Work must be in the collections. 	<ul style="list-style-type: none"> • Application to all types of works. • Application to entire works. • Application to any legal deposit work. • Clarification of whether license needs only be available or must be in effect. • Implications of license or agreement for acquisition of the work. • Implications of extended collective licensing. • Concept of library premises; whether access may be allowed on closed network. • Whether purpose is limited to personal study. • Whether users should be able to make copies consistent with other copyright exceptions.

TOPIC: Lending of Physical Works			
Definition: Copyright exception authorizing libraries to make uses of copyrighted works in non-digital formats for purpose of lending those works to library users.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Concept: Exhaustion of rights of distribution upon first sale of a copy of a work.</p> <ul style="list-style-type: none"> • Accepted as a customary practice in many countries. • Enacted as a statutory provision in some countries. <p><i>Library Services:</i></p> <p>Enables circulation of books and other works in the library collections.</p>	<p><i>Primary:</i></p> <p>Distribution.</p> <p><i>Secondary:</i></p> <p>Public display. Public performance.</p>	<p><i>Scope of the Works:</i></p> <ul style="list-style-type: none"> • Generally applies to any type of work. • Right to lend a particular copy is sometimes allowed only to the owner of the copy; if so, a library may exercise this provision only with respect to works in the collections. 	<ul style="list-style-type: none"> • Application to works in the library collections by loan or license, but not legally owned by the library. • Variations for certain works, such as software and music. • Extension of the provision to permit public displays of copies, and perhaps performances. • Whether to have an explicit statute or to rely on a long-standing doctrine of exhaustion.

TOPIC: Lending of Digital Works			
Definition: Copyright exception authorizing libraries to make uses of copyrighted works in digital formats for purposes of lending those works to library users.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Concept: Exhaustion of rights of distribution upon first sale of a copy of a work.</p> <ul style="list-style-type: none"> • Accepted as a customary practice in many countries. • Enacted as a statutory provision in some countries. <p><i>Library Services:</i></p> <p>Enables circulation of books and other works in the library collections.</p>	<p><i>Primary:</i></p> <p>Distribution. Reproduction. Making available.</p> <p><i>Secondary:</i></p> <p>Public display. Public performance. Circumvention (if the original is secured by TPM).</p>	<p><i>Scope of the Works:</i></p> <ul style="list-style-type: none"> • Generally applies to any type of work, existing in a digital format. • Works stored on portable media (e.g., DVDs and Blu-ray) may generally be loaned in a manner similar to an analog work. • Right to lend a particular copy is sometimes allowed only to the owner of the copy; if so, a library may exercise this provision only with respect to works in the collections. 	<ul style="list-style-type: none"> • Application to works in the library collections by loan or license, but not legally owned by the library. • Variations for certain works, such as software and music. • Extension of the provision to permit public displays of copies, and perhaps performances. • Whether to have an explicit statute or to rely on a long-standing doctrine of exhaustion. • Whether the copies made as part of the automated process of digital lending are permissible.

TOPIC: General Library Exception			
Definition: Copyright exception authorizing libraries to make uses of copyrighted works, but with no specific purposes explicitly stated in the statute.			
Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Allows uses of works for the purposes of the library, without limitation to any specific purpose or activities.</p> <p><i>Library Functions and Services:</i></p> <p>Because no specific purpose or library-related activity is included, the general exception can allow any or all library services.</p>	<p><i>Primary:</i></p> <p>Reproduction. Distribution. Making available. Public display. Public performance.</p> <p><i>Secondary:</i></p> <p>Derivative works Moral rights Anticircumvention Translation rights.</p>	<p><i>Scope of the Works:</i></p> <ul style="list-style-type: none"> • Works in the collection of the library. • Works that are lawfully available to the public. • Whole or parts of works. • Excluded types of works (e.g., computer programs). <p><i>Scope of the Use:</i></p> <ul style="list-style-type: none"> • Library purposes only. • Regular activities of the library. • Internal library activities only. • Not for uses of works by library users. • Use must be on the premises of the library. <p><i>Limitations on Activities:</i></p> <ul style="list-style-type: none"> • While a general library exception does not specify any library activities, it may include terms that condition or restrict application: • Single copy only. • Number of copies limited to the needs of the purpose. 	<ul style="list-style-type: none"> • Of the libraries with a general library exception, only a few also have one or more specific exceptions. • The Tunis Model Act of 1976 includes multiple terms that may not be suitable for contemporary needs and modern library services. • Some countries include terms from the Three-Step Test in the language of a general exception. • Application of digital technologies. • Extension to works under neighboring rights. • Need to advise users about responsibility for downstream uses. • May be subject to general remuneration to rightsholders.

		<ul style="list-style-type: none">• Published or unpublished works.• Disclosed works.• Exclusion of certain works, such as computer software and databases.• Consistent with conventional library practices.	
--	--	---	--

TOPIC: Additional Conditions to Specific Exceptions			
Definition: Statutory provisions that add general requirements to the library exceptions and other specific exceptions.			
Scope of Libraries	Exceptions to which the Conditions Apply	Elements of the Conditions	Elements for Ongoing Consideration
<p><i>Types of Libraries:</i></p> <ul style="list-style-type: none"> • Any Library. • Public Library. • School Library. <p><i>Characteristics of Libraries:</i></p> <ul style="list-style-type: none"> • Publicly Funded. • Open to the Public or Outside Researchers. • Not Operating for Commercial Advantage. <p><i>Other Institutions within the Same Statute:</i></p> <ul style="list-style-type: none"> • Museums. • Schools and Educational Institutions. • Research Centers. • Archives. 	<p><i>Additional Conditions Apply to:</i></p> <ul style="list-style-type: none"> • Library Exceptions Only. • All Exceptions. • Specified Exceptions. • Exceptions to Neighboring Rights. 	<p><i>Removal of Conditions to Use:</i></p> <ul style="list-style-type: none"> • Consent of author or rightsholder not required. • Payment or remuneration to rightsholder not required. <p><i>Conditions Affecting the Copy or Use:</i></p> <ul style="list-style-type: none"> • Include name of author. • Include citation to source of the work. • No alteration of the work. • Exception does not prejudice moral right of author (although some laws do apply the exceptions to moral rights as well as economic rights). <p><i>Conditions Affecting the Provision of Library Services:</i></p> <ul style="list-style-type: none"> • Copies made under the exception may be added to the library collections. • Activities permitted under exceptions may not be waived by contract (although the non-waiver is sometimes limited to certain activities). • Specific service or action is not for any commercial advantage. 	<ul style="list-style-type: none"> • Only single copies of works are permitted (some statutes allow intermediate copies). • Multiple copies permitted as justified by the purpose. • Include copyright notice from original (although notice is not required under Berne). • Effect of extended collective licenses (ECL may or may not limit application of exceptions). • Subject to element of the Three-Step Test: Use does not conflict with the normal exploitation of the work. • Subject to element of the Three-Step Test: Use does not unreasonably prejudice the legitimate interest of the author.

[End of Document]