

Library Copyright Alliance

Issue Brief

International Copyright: Why It Matters to Libraries

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Because libraries share a unique social responsibility for preservation of and access to the world's intellectual heritage, they have an interest in promoting copyright laws that provide the broadest possible use of information for creativity, research and education. The Library Copyright Alliance (LCA) is working to address an increasing number of international legal and policy issues that affect libraries and the public, because of the many unresolved aspects of intellectual property rights in information in the digital age.

The library community has long been engaged in responding to and developing proposals to amend international copyright law. In 2007 LCA gained accreditation as a non-governmental organization with observer status at the World Intellectual Property Organization (WIPO). This has enabled even more direct involvement. LCA represents the U.S. library community at WIPO at the Standing Committee on Copyright and Related Rights (SCCR), Committee on Development and Intellectual Property (CDIP), and Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and in other international fora.

International Copyright: An Ongoing Process

In the global information society, international copyright norms govern access to information in all parts of the world. International copyright treaties and agreements, implemented into national laws and information policies, form a system of interrelated laws that provide a basis for copyright protection for literary and artistic works and neighboring rights protection for performances, phonograms and broadcasting organizations.

Copyright laws are shaped by the international treaties and agreements that have developed since the late 19th century to provide some degree of harmonization across national jurisdictions. For more than a century, major treaties and conventions have been established to respond to needs arising from the increasing interdependence of nations. International agreements are in a constant process of change, and are shaped by social and economic needs and technological advances.

The **Berne Convention for the Protection of Literary and Artistic Works**, administered by WIPO, was adopted in 1886 as the result of an effort that began in the mid-19th century, when international cooperation was needed to standardize protection of authors' rights among nations. The **Universal Copyright Convention**, administered by UNESCO, was conceived in the wake of the Second World War, when it was necessary to bring more nations into common agreement on

copyright protection at a time when many held that the standards of the Berne Convention were too high. The **WIPO Copyright Treaty** and **WIPO Performances and Phonograms Treaty**, administered by WIPO, were adopted in 1996 to address specific aspects of copyright protection relating to advances in computer technology and digital applications. Expanding on the Berne Convention, they adapt copyright to the digital age. The **Agreement on Trade-Related Aspects of Intellectual Property Rights** (TRIPS), administered by the World Trade Organization, was developed to address the growing issue of enforcement of intellectual property laws and disputes. By linking international trade and intellectual property protection, it puts “teeth” into the Berne Convention within the world trading system.

Today international and regional treaties and agreements are negotiated among member states of international bodies. WIPO negotiations are member-driven process, based on consensus among participating nations, who negotiate the texts of treaties and agreements. Nations, guided by public policy considerations, have choices in the language and scope of treaties. Nations also have some flexibility on how to implement treaties nationally. The international copyright system allows for nations to formulate national copyright laws that are in their best interest. Flexibilities include minimum copyright terms, in order to maintain a substantial public domain; use of copyright limitations and exceptions to fulfill compelling public policy needs such as education, research, creativity, library and archival activity, and access to information for blind, visually impaired and other reading disabled persons; personal and private uses; defining the scope of protected works; and setting the scope of exclusive rights.

While certain fundamental principles have long existed to govern copyright laws internationally, copyright law is flexible and adaptable.¹ Because of the policy space available to nations, it is possible to work toward solutions that benefit the broadest possible range of social interests. A central challenge today is to restore the balance between private and public interests that is necessary for a durable and sustainable global information society.

Issues Relevant to Libraries

Issues being discussed at in highest levels in international policymaking have direct implications on the work of libraries and the future of information access. Many are currently on the agendas of WIPO committees. They concern new treaty proposals and other initiatives on which LCA advances the interests of libraries and information users by preparing written policy statements and delivering statements at WIPO meetings.

Copyright limitations and exceptions

One of the most important issues for libraries at the present time is the need to reinforce copyright limitations and exceptions. Limitations and exceptions that enable uses of works without prior consent of or payment to the copyright holder or payment, for purposes such as research, scholarship and teaching, library preservation, and interlibrary loan, are a fundamental part of the copyright system, but they have not expanded at an equal pace with enhanced rights and protections in recent years. Internationally higher standards of protection and enforcement have been mandated by TRIPS, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. In many nations including the U.S., extension of copyright terms, anti-circumvention legislation, and a steadily increasing culture of enforcement have created additional restrictions to use of information. There has been no expansion of limitations and exceptions.

Furthermore, today developing nations are adopting higher and more rigid standards of protection than would best serve them domestically, and are not taking advantage of limitations and exceptions available in the intellectual property system that would ease their transition into the global information society. They often do this in order to keep their markets open for other types of trade, under pressure from trading partners, with the effect that available limitations and exceptions are not being used for the benefit of creativity, research and education.

There is support within the library community for a new international instrument on limitations and exceptions that would restore balance to the international copyright system, by counteracting the increased standards of protection mandated by treaties and trade agreements and introduced in national laws. Work on limitations and exceptions occur at the WIPO SCCR meetings.

Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives

In support of increasing minimum mandatory limitations and exceptions internationally, LCA, along with Electronic Information for Libraries and the International Federation of Library Associations and Institutions, drafted a *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives*, submitted to the WIPO Secretariat in May 2009.² The Statement outlines the urgency of taking action to expand limitations and exceptions to meet the needs of librarians and the public in the digital environment.

It urges Member States adopt principles to guide the formulation of copyright limitations and exceptions for libraries and archives in national copyright laws:

- **Preservation**
A library should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats.
- **Legal deposit**
Legal deposit laws and systems should be broadened to include works published in all formats and to allow for preservation of those works.
- **Interlibrary loan and document supply**
Libraries should be able to supply documents to the user directly or through the intermediary library irrespective of the format and the means of communication.
- **Education and classroom teaching**
It should be permissible for works that have been lawfully acquired by a library or other educational institution to be made available in support of classroom teaching or distance education in a manner that does not unreasonably prejudice the rights holder. A library or educational institution should be permitted to make copies of a work in support of classroom teaching.
- **Reproduction for research or private purposes**
Copying individual items for or by individual users should be permitted for research and study and for other private purposes.
- **Provision for persons with disabilities**
A library should be permitted to convert material from one format to another to make it accessible to persons with disabilities. The exception should apply to all formats to accommodate user needs and technological advances. To avoid costly duplication of alternative format production, cross-border transfer should be permitted.
- **General free use exceptions applicable to libraries**
A general free use exception consistent with fair practice helps ensure the effective delivery of library services.

- **Orphan works**
An exception is needed to resolve the problem of orphan works, where the rights holder cannot be identified or located.
- **Copyright term**
Consistent with the Berne Convention, the general term of copyright should be the life of the author plus 50 years.
- **Technological protection measures that prevent lawful uses**
It should be permissible for libraries and their users to circumvent a technological protection measure for the purpose of making a non-infringing use of a work. Implementation of anti-circumvention legislation in many nations exceeds the requirements of Article 11 of the WIPO Copyright Treaty, effectively eliminating existing exceptions in copyright law.
- **Contracts and statutory exceptions**
Contracts should not be permitted to override exceptions and limitations. The goals and policies providing for exceptions are important statements of national and international principle and should not be varied by contract.
- **Limitation on liability**
There should be a limitation on liability for libraries and library staff who act in good faith, believing or having reasonable grounds to believe, that they have acted in accordance with copyright law.

In the last six years WIPO has initiated five expert studies highlighting the importance of copyright limitations and exceptions, four of which have been completed.³ The studies are comparative in nature, comparing levels of limitations and exceptions across national laws worldwide. The *Study on Copyright Limitations and Exceptions for Libraries and Archives* conducted by Kenneth Crews provides the first comprehensive overview of statutory provisions in national copyright laws of WIPO Member States for the benefit of libraries and archives, and underlines the need for expanding the scope of copyright limitations and exceptions for libraries and archives worldwide.

Proposal for WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons

Recent efforts by the World Blind Union (WBU) have set a path for development of new international standards for limitations and exceptions. In October 2008, the WBU submitted a proposal to WIPO for a Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons. The main features of the proposed treaty are to provide a minimum standard for limitations and exceptions for the blind and visually impaired and reading disabled, reflecting current technological opportunities, and to allow for the import and export of works in accessible formats by eligible parties. LCA gave input in the drafting of the treaty and fully supports it.

Visually disabled people need to have access to copyright protected works in readable formats, such as Braille, large print, and audio versions. National laws in some countries allow such copying and adaptation without the permission of the rightholder. In other countries, however, these acts could infringe copyright if undertaken without authorization. The need for improved access for blind, visually impaired and other reading disabled persons is universal.

- The World Health Organization estimates that there are 314 million people worldwide who are visually impaired. Of these, 45 million are blind, of whom 90% live in low-income countries. According to a recent report on blindness and visual impairment, the

actual magnitude of blindness and visual impairment is likely to be higher than estimates indicate.⁴

- It is estimated that in the United States, less than 5% of published works are available in accessible formats. Some 95 percent of books never become available to blind and partially sighted readers, who use alternative formats such as audio, Braille or large print.⁵
- The recent WIPO *Study on Copyright Limitations and Exceptions for the Visually Impaired* by Judith Sullivan reports that significantly fewer than half of WIPO Member States have been found to have a provision for visually impaired people in the national copyright law. The study identifies and analyzes 57 specific exceptions in national laws.⁶

The WBU treaty proposal was formally introduced at the May 2009 SCCR meeting by Brazil, Ecuador and Paraguay, and will be discussed at the SCCR committee meeting in December 2009. Its essential provisions are for an exception allowing for persons or organizations to make and supply an accessible format of a work to a visually impaired person by any means under certain conditions, on a nonprofit basis, without authorization of the copyright holder. The treaty would allow for export to another country of an accessible version made under the terms of the treaty, and for import in the other country, without authorization of the copyright owner.

In connection with WIPO discussions of the proposed treaty, the U.S. Copyright Office supported fact finding and the exploration of best practices. The U.S. has relevant limitations in Section 121 of the U.S. copyright law, also known as the Chafee Amendment, that limits exclusive rights of copyright holders for the social benefit of blind or other people with disabilities.⁷ Compared to many other nations, the U.S. has a workable solution for the visually impaired, but improvements could be made, and the cross-border issues remain problematic.

These issues were addressed in the submission by the American Library Association, Association of College and Research Libraries, and Association of Research Libraries in response to the Notice of Inquiry and Request for Comments of the U.S. Copyright Office on this issue. The three library organizations provided written comments and oral testimony to the U.S. Copyright Office on the effectiveness of Section 121. The submission is available at <http://www.copyright.gov/docs/sccr/comments/2009/russell.pdf>.

Facilitating access to copyrighted works for blind, visually impaired and other reading disabled persons is a fundamental social responsibility. The library community strongly supports the constructive and much-needed change that could result from the WBU treaty proposal. A separate issue brief on the treaty proposal is available at: **[Provide URL]**

Digital Preservation and Copyright

One of the most critical areas in which copyright limitations and exceptions have failed to maintain a balance in the digital environment is library preservation, which faces an uncertain future due to the absence in many nations of adequate copyright laws and policies. In July 2008 WIPO held its first International Workshop on Digital Preservation and Copyright at which national representatives presented preservation scenarios in their own countries, revealing variations and flaws in public policy and legal approaches to preservation of cultural heritage and memory.⁸

Some of the problems noted were:

- Some countries require legal deposit, while some have a voluntary legal deposit system. Some require legal deposit only for print material; often materials, such as films, sounds recordings, and audiovisual works, are excluded from mandatory legal deposit.
- Copyright limitations and exceptions are limited and not sufficiently developed to allow for digital preservation. They do not apply to many formats and types of works.
- Many countries have a limitation on exceptions that denies preservation to works that are still commercially available.
- Many countries allow preservation only for works in poor condition and do not allow for up-front digital preservation of at-risk works.
- The number of preservation copies that can be made is often limited.
- Preservation provisions often do not encompass the making available right.
- Most countries do not have an orphan works provision.
- Most countries have anti-circumvention provisions that hinder preservation efforts.
- Most libraries are not comprehensively preserving materials.
- The extent to which fair use or fair dealing may be applied to digital preservation is not clear in most relevant laws.
- Contract law may override copyright limitations allowing for digital preservation.

The workshop coincided with a study released in July 2008 by the International Digital Preservation and Copyright Initiative to survey recent developments and trends in digital preservation and copyright. The *International Study on the Impact of Copyright Law on Digital Preservation* provides recommendations to improve national copyright and related rights laws and policies that concern the digital preservation of copyrighted works.⁹

There is an urgent global need for more attention to limitations and exceptions for digital preservation. Many works are physically disappearing, resulting in loss of cultural heritage and the historical record. This problem is likely to become more serious more in the coming years. LCA is following this issue, and supports provisions in copyright laws to enable more robust systems of digital preservation.

WIPO Development Agenda

The WIPO Development Agenda is a set of 45 recommendations adopted on September 2007 by the WIPO General Assembly.¹⁰ It aims to address inequities in the intellectual property system and at improving information technology infrastructure in developing and least developed countries. It originated in an effort to ensure that intellectual property law and policy continue to serve the public good by encouraging and rewarding innovation and creativity in a balanced way in all parts of the world.

Librarians support a copyright system that is balanced to serve all members of society in all parts of the world. In contributing to discussions that transform the 45 recommendations into concrete activities, the U.S. library community seeks to enable developing and least developed countries to fully benefit from the global intellectual property system, through:

- a fair balance between intellectual property protections and the public interest
- minimizing levels of copyright protection in developing and least developed countries
- adequate limitations and exceptions for the purposes of education, scholarship, creativity; and preservation and access to information.

The WIPO CDIP is concerned exclusively with the WIPO Development Agenda. The work program to implement the recommendations is also being mainstreamed into the activity of other WIPO committees. A separate issue brief on the WIPO Development Agenda may be found at: <http://www.arl.org/lca/bm~doc/issuebriefdevagendajune172009final.pdf>.

Traditional Cultural Expression

For over four decades the international community has sought a solution to the issue of copyright and other legal protection of traditional cultural heritage. This includes indigenous works such as stories, myths, folk tales, songs, music, symbols, designs, paintings, sculptures, carvings, handicrafts, dances, and rituals.

The Berne Convention was amended in 1967 by Article 15(4) to provide a means for protecting works of folklore. Various sets of model laws and provisions have also been drafted over the years by WIPO and UNESCO. Expert groups have addressed the issue, and indigenous groups have been active advocates at WIPO. There is no international mandate for protection of TCE, and there is still disagreement about what type of protection there could or should be. Some nations protect TCEs, while others do not, and still others do not specify in their laws.

The WIPO IGC been working since 2001 toward possible *sui generis* protection of TCE, a special kind of protection for these works that fall outside the framework of the existing copyright system, because the copyright system is not suited for works that are traditionally unpublished; often not fixed in tangible medium; created not by one individual known author but collectively, by a community; and created not on a certain date but over time.

Indigenous peoples seek protection of their works and expressions to prevent misappropriation, and also so that might benefit economically, if they so choose, from the value of those works. Indigenous peoples seek recognition of and respect for their traditions and cultures, and of customary laws and protocols that govern use of their creations, that are an expression of living culture, reflecting a community's history, cultural and social identity, and values. Expressions are often considered sacred, not to be shared outside the community. Indigenous peoples and traditional communities wish to be respectfully consulted in use of their cultural heritage.

Because libraries play a primary role in preserving and providing access to cultural heritage, the library community needs to approach traditional cultural expressions in a way that respects the rights of indigenous communities and traditional creators of works. Within a legal and cultural policy framework, libraries can play a positive role in the preservation and use of indigenous works. In respecting the rights of indigenous peoples, libraries can contribute toward the greater social good that results from preservation of cultural heritage, promotion of cultural diversity, and cultural development.

ALA convened a working conference in November 2008 to bring together members of the library and cultural heritage communities to clarify key issues for a statement of principles to guide libraries in collecting, making available, and preserving works of TCE, and to frame positions representing the U.S. library community in international discussions. A draft Statement of Principles, entitled *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*, is currently available for comment at ALA's website devoted to Traditional Cultural Expression and Libraries, at <http://wo.ala.org/tce/>.

A separate Issue Brief on Traditional Cultural Expression is available at:
<http://www.librarycopyrightalliance.org/bm~doc/issuebrieftce.pdf>.

Other WIPO Treaty Proposals

LCA international copyright activity is about proposing and supporting positive new measures, and constructively opposing measures that will not support libraries or the broader public in ways that are necessary to maintain a dynamic information environment. LCA opposes two treaty proposals under discussion at WIPO. The U.S. library community opposes these treaty proposals because they would create additional obstacles to use of works, it does not see any demonstrated need for the treaties, and there is no compelling public policy reason to adopt them.

Proposal for Audiovisual Performances Treaty. Since 1996 there has been prolonged discussion in WIPO on a proposed treaty for the protection of audiovisual performances. It would protect the rights of audiovisual performers in their contributions to audiovisual fixations, beyond the basic rights provided in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 1961.

This issue of protection for audiovisual performances was left out of the 1996 WIPO Performances and Phonograms Treaty. The proposed treaty is predicated to fill this gap, by providing enhanced rights to performers, such as actors, in the films they act in. The U.S. did not adhere to the Rome Convention, and the library community sees no benefit in imposing another layer of protection for audiovisual performances, which are managed in the U.S. through contract law.

Discussions of the proposed treaty led to a diplomatic conference in 2000, but the negotiations collapsed. The issue is on the agenda for the SCCR meeting to be held in December 2009, and there are indications that high-level negotiations on the proposed treaty may resume.

Proposal for Treaty on Broadcasting Rights. Since 1998 WIPO has discussed the possibility of a proposed treaty on the protection of broadcasting organizations. Proponents of the treaty proposal argue that advances in technology are not adequately covered by the 1961 Rome Convention, and that a treaty covering broadcasting, cablecasting and possibly webcasting is necessary in order to prevent piracy and theft of signals. This is also an issue that was left out of the 1996 WIPO Performances and Phonograms Treaty.

The proposed treaty would grant television and radio broadcasters protection over their transmissions for a fixed term, by granting an exclusive right in broadcast signals for traditional and newer methods of broadcasting, such as satellite broadcasts, cablecasts, and simulcasts. A controversial proposal to include webcasting in the scope of the treaty would protect program-carrying signals over a computer network. The treaty would mandate protection of broadcast signals, prohibit copying and redistribution of transmissions, and would be enforceable through TPMs.

Opponents of the treaty proposal, concerned about the creation of a new set of rights for merely packaging and distributing content, have argued that it would have the effect of protecting content in the broadcasts. The position of the library community is that there is no compelling public policy reason to adopt a new broadcast treaty, given the existence of the Rome Convention and the absence of any harm suffered by broadcasters. It could restrict educational and research uses

of broadcast television and radio programs and public domain materials, and hinder public discourse involving news and public affairs programming.

WIPO has commissioned a study on the socioeconomic dimension of the unauthorized use of signals, and at the SCCR meeting in May 2009, held an information session on developments in broadcasting. The issue is on the agenda for the SCCR meeting to be held in December 2009.

Conclusion

LCA recognizes the need to be actively involved in the direction of international copyright law. Working in the interest of the U.S. and world library community, LCA is engaged in the dialogue that shapes the development of copyright laws and policies at the highest level. LCA participation in WIPO discussions is a way of directly influencing the way that libraries and the public use copyrighted works and the opportunities available to use them into the future.

1. The *territoriality* principle is grounded in the idea of national sovereignty, holding that a country's laws have effect only within its borders and do not apply outside its borders. The principle of *national treatment* holds that each country signing a convention grants the same protection to citizens of other countries that it grants to its own nationals. The principle of *minimum treatment* obligates member countries to extend minimum standards of protection to copyrighted works originating in other treaty parties.
2. Electronic Information for Libraries, International Federation of Library Associations and Institutions, Library Copyright Alliance, *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives*, http://www.librarycopyrightalliance.org/bm~doc/wipo_statement-of-principles.pdf.
3. WIPO Standing Committee on Copyright and Related Rights, Seventeenth Session, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, prepared by Kenneth Crews (SCCR/17/2), August 26, 2008, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192; WIPO Standing Committee on Copyright and Related Rights, Fifteenth Session, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan (SCCR/15/7), February 20, 2007, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696; WIPO Standing Committee on Copyright and Related Rights, Fourteenth Session, *Automated Rights Management Systems and Copyright Limitations and Exceptions*, prepared by Nic Garnett (SCCR/14/5), April 27, 2006, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952; WIPO Standing Committee on Copyright and Related Rights, Ninth Session, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, prepared by Sam Ricketson, (SCCR/9/7), April 5, 2003, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805.
4. World Health Organization, "Prevention of Avoidable Blindness and Visual Impairment: Report by the Secretariat," Sixty-Second World Health Assembly, Provisional Agenda Item 12.3 (A62/7), April 2, 2009, http://apps.who.int/gb/ebwha/pdf_files/A62/A62_7-en.pdf.
5. Letter of Christopher E.B. Friend, Chair, WBU Copyright and Right to Read Working Group, to Dr. Francis Gurry, WIPO Director General, October 28, 2008, http://www.keionline.org/misc-docs/tvi/wbu_coverletter_gurry.pdf.
6. Judith Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired*, 28.
7. See <http://www.copyright.gov/title17/92chap1.html#121>.
8. See http://www.wipo.int/meetings/en/details.jsp?meeting_id=16162.

9. The Library of Congress National Digital Information Infrastructure and Preservation Program, The Joint Information Systems Committee, The Open Access to Knowledge (OAK) Law Project, The SURFfoundation, *International Study on the Impact of Copyright Law on Digital Preservation*, http://www.digitalpreservation.gov/library/resources/pubs/docs/digital_preservation_final_report2008.pdf.

10. See <http://www.wipo.int/ip-development/en/agenda>.