

# Toolkit on Preservation



I am pleased to present a new resource from the World Intellectual Property Organization (WIPO) with this *Toolkit on Preservation for Cultural Heritage Institutions – Libraries, Archives, and Museums*.

The manual is meant to help one of the main missions of cultural heritage institutions, which is to preserve the treasures and records entrusted to their care. With the advent of the digital age, new means are available to keep the memory of the original. This process may intersect with copyright. The international legal framework integrated this dimension from the very beginning in the foundational copyright and related rights treaties. Limitations and exceptions are foreseen to cover cases like reproduction for preservation purposes. And as usual the three-step test ensures that the balance of interest with exclusive rights is maintained.

Many years of consultation, studies, and work on the various typologies of rights and uses concerned culminated in three Regional Seminars and an International Conference held in 2019. The topic of preservation was part of a larger discussion on how to implement limitations and exceptions in the digital environment. One of the key outcomes of the International Conference was that there is no one-size-fits-all solution.

The idea arose from this process to provide toolkits to highlight and share with Member States and professionals worldwide existing experiences, to provide a panorama of best practices, and to offer guidance on appropriate and future-proof limitations and exceptions and their implementation.

This Toolkit on preservation is the first building block in a series of toolkits. Work is already underway on a toolkit on access to copyright protected content for cultural heritage institutions, which will complement this first Toolkit, and another one will follow to cover access to education and research material.

We hope that this first Toolkit on preservation will offer a pragmatic and efficient way to support Member States in their efforts to build or modernize their legal framework to ensure effective preservation of their cultural heritage, including by using emerging technologies. The ultimate objective is to empower and create a safe and secure environment for cultural heritage professionals to carry out their mission. Bringing them knowledge and solutions to address the copyright implications of their work is key to this endeavor.

In order to prepare a meaningful document, work on the Toolkit was carried out in an inclusive process that allowed a range of stakeholders to participate and contribute throughout the drafting process. However, in light of the ever-evolving conditions and circumstances for preservation, relevant policies and legislation must be reactive and may eventually require adjustments. The Toolkit therefore is not intended to be set in stone, but rather to be a living document undergoing updates and revisions over time.

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***WIPO Toolkit on Preservation  
for Cultural Heritage Institutions  
– Libraries, Archives, and Museums –***

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This toolkit should not be perceived as being normative in any way.

The information provided in this toolkit is the sole responsibility of its authors. The document is not intended to reflect the views of the Member States or the WIPO Secretariat.

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## INTRODUCTION

### *Origin of the Toolkit*

This toolkit fulfills a long-standing aim of the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) to make progress on limitations and exceptions for preservation copying, especially in the area of cultural heritage. In 2019, WIPO organized an International Conference preceded by three Regional Seminars in Singapore, Nairobi, and Santo Domingo. The events achieved a satisfying level of consensus on the need to move forward on preservation copying, as an integral element in stewarding cultural heritage collections, regardless of whether the collection is held in a library, archive, or museum. This toolkit embodies many of the ideas that emerged during those events.

It was understood in those discussions that well-crafted and thoughtfully implemented preservation exceptions<sup>1</sup> would serve the public interest as well as the interests of the author, creator, or rightsholder by safeguarding the world's cultural heritage for continued use by current and future generations – uses that would otherwise be made impossible by the loss or deterioration of the original. The drafting of a copyright statute pursuant to this toolkit would necessarily take into consideration the domestic copyright law of the Member State as well as the three-step test and other relevant provisions of international instruments, most notably the Berne Convention for the Protection of Literary and Artistic Works. These points are addressed more fully later in this toolkit.

### *Assistance for Lawmakers and Preservation Professionals*

This toolkit is intended to provide a new WIPO-endorsed resource which will help lawmakers and policymakers in WIPO Member States to consider all relevant issues with respect to preservation copying, and hence to draft more coherent and authoritative legislation. The toolkit is designed to help lawmakers or policymakers develop copyright legislation so that exceptions to copyright can coexist with other mechanisms that allow preservation reproduction.

The toolkit is also meant to be accessible and meaningful to multiple audiences, including cultural heritage professionals, policy experts, and others who will be providing input and advising lawmakers. It describes the rationale and the need for limitations and exceptions for preservation copying, and it surveys a range of factors which legislators, cultural heritage professionals, rightsholders, and others may take into account.

The toolkit identifies and organizes those factors around four basic questions legislators must consider and address in a meaningful preservation exception: Who may apply the exception? What works are within the scope of the exception? Why may the exception be applied? How may the preservation activities be carried out pursuant to the exception? The toolkit aims to offer a selection of potential clauses and specific provisions mostly derived from existing legislation, which can be included, as appropriate, in new or updated legislation. It works by offering options from which legislators can make choices that are suited to the conditions of national and local circumstances.

### *Meeting the Requirement of the Three-Step Test*

The Berne Convention, the leading multinational instrument on copyright law, provides that Member States may enact statutory exceptions to the rights of copyright owners. The preservation exceptions that result from this toolkit are examples of such exceptions. Those exceptions must be drafted in a manner that conforms to the requirements specified in Article 9(2) of the Berne Convention, widely known as the “three-step test.” Member States that utilize this toolkit to guide their drafting of statutory exceptions for preservation will be able to satisfy the requirements of the three-step test. The full text of Article 9(2) embodies the three-step test:

It shall be a matter for legislation in the countries of the [Berne] Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.<sup>2</sup>

The three-step test defines the parameters of allowable exceptions, and it does so with flexible language that may be adapted to new needs and changing circumstances. Some Member States include wording from the test in their statutory exceptions, but more typically a statutory exception conforms to the three-step test with practical language that creates a meaningful exception and simultaneously satisfies the Berne requirements with effective language, rather than repeating the conceptual terms of the test. This toolkit provides guidance for the drafting of copyright exceptions for preservation that are consistent with requirements of the three-step test.

In general, the first “step” is that the exception is applicable in “certain special cases.” This requires clear definitions and narrow scopes of application for exceptions. The term “certain” implies specificity without the need to explicitly identify all possible situations. The term “special” imposes both quantitative and qualitative considerations, requiring exceptions to be exceptional and distinctive. Accordingly, the exceptions addressed in this toolkit are for the limited purpose of facilitating preservation services by libraries, archives, museums, and other cultural institutions and are rooted in clear and sound public and cultural policy considerations, ensuring that authors’ rights are not arbitrarily curtailed.<sup>3</sup>

The second step provides that the use of the work does not conflict with the normal exploitation of the work. In nearly all circumstances where the statutory exception may be exercised, the preservation activity will not conflict with the manner in which copyright rights are normally exploited. Indeed, collections of unpublished works in archives, museums, and other institutions are often in need of preservation, and copyright owners seldom seek to assert or exploit any rights in such works. This toolkit offers statutory provisions that would require the institution to check the market for possible acquisition of the work before making the copy. By checking the market, the institution may not only be avoiding conflicts, but may in fact be supporting the rightsholder’s exploitation of the work.

The third step looks specifically at whether the exception might unreasonably prejudice the interests of the rightsholder.<sup>4</sup> A carefully tailored exception that allows for preservation activities pursuant to the overall terms of the statute is unlikely to pose unreasonable risk of prejudicing the interests of rightsholders.

### *Continuing Developments*

This toolkit, addressing the preservation of copyrighted works in cultural heritage institutions, is intended to be the first in a series of resources developed by WIPO to examine the intersection of cultural heritage practices and copyright law. This first toolkit provides guidance to Member States as they enact or revise limitations and exceptions enabling cultural heritage institutions to fulfill their duty of care and the mission to preserve collections. A subsequent toolkit is expected to cover a wide range of issues relating to access and use of works in the collections, including the preservation copies.

It is believed that this toolkit will be especially timely, because climate change has magnified the long-standing threats to the collections of cultural heritage institutions (libraries, archives, museums and others) posed by war, fire, flooding, inadequate storage facilities, and the normal deterioration process of physical objects. At the same time, digital technology now provides cultural heritage institutions with the means of engaging in preservation, including anticipatory preservation, on a mass scale. While digital technology provides a solution to the challenge of preservation, it also presents its own challenges because digital copies often are less stable than physical copies.

Preservation activities are defined in part I of the toolkit and encompass considerable expertise, time and expense. In order to fulfill their mission, cultural heritage institutions must often rely on external funders, such as grant funding agencies or private donors, to secure investment in their preservation activities. However, uncertainties regarding the legal aspects of preservation create complexities for funders, as they may fear that their investment could be associated with copyright infringements. A reliable legal framework that allows for anticipatory preservation will ensure that materials and objects in collections are chosen to be preserved for curatorial and historic reasons. Such a framework, therefore, is a way to facilitate funding and investment to support preservation efforts and implies a need for national and international collaboration.

### *Structure of the Toolkit*

The toolkit has been divided into four parts. Part I provides a baseline description of preservation activities, as well as the legal obligations and duty of care and mission of the organizations that steward cultural heritage collections. Subsequently, in Part II, the toolkit covers forward-thinking preservation considerations, and Part III suggests detailed considerations for addressing the intersection of copyright law with cultural heritage. Part IV describes how to construct a statutory exception for preservation. Finally, in the Appendix, the toolkit provides sample clauses and reference charts, together with instructions on how to use them to build legislative provisions that address exceptions to copyright for the purposes of preservation.



## **PART I: KEY FEATURES OF PRESERVATION PROGRAMS**

### **A. DEFINING PRESERVATION**

This section examines the range of activities that constitute the preservation of collections in a contemporary context, taking into account emerging practices that address the increased risks posed by global health crises, climate change, and human conflict. It also identifies the duty of care and the mission that cultural heritage organizations may have, regardless of their public or private status, to preserve their collections. Their obligations include the duty of care and the mission to preserve collections that are held in trust, with the beneficiaries of the trust being the general public.

#### **1. What is the Preservation of Cultural Heritage?**

The goal of preservation is to safeguard humanity's heritage, promote peace, and build resilience. Specifically, the preservation of cultural heritage aims at building national capacities for effective risk management – including disaster prevention and risk mitigation of cultural heritage – while also focusing on facilitating efficient local responses in order to protect heritage works during complex emergencies.<sup>5</sup>

The term “preservation” can include many activities. It can be a concept that refers to conservation, restoration, stabilization, or loss prevention. The terminology surrounding preservation of cultural heritage is often used loosely, particularly outside the circle of cultural heritage professionals, but the professionals tend to distinguish among specific and related types of activities that have distinct objectives. The preservation of cultural heritage is rooted in several United Nations Resolutions and the United Nations Educational, Scientific and Cultural Organization (UNESCO) Conventions and Recommendations.<sup>6</sup> Thus, cultural heritage organizations, such as libraries, archives, and museums, carry out diverse activities under preservation for distinct purposes based on practices related to the use of digital technologies and communication means.

Many of these preservation activities were identified specifically by participants during the WIPO 2019 International Conference and Regional Seminars devoted to copyright limitations and exceptions.<sup>7</sup> As risks to collections emerge and evolve, such as those posed by natural disasters, human conflict, and climate change (for example, deterioration caused by pollution, or loss or erosion of land caused by rising seas), innovative and evolving preservation practices and activities are required. Thus, broadly speaking, the preservation of collections can be categorized as conservation and stabilization, documentation, and preventive disaster planning. All of these preservation categories require some form of copyright assessment since rights may be implicated where the objects and materials are copied for preservation purposes.

In addition, preservation professionals may need to share their knowledge about their preservation activities and outcomes with each other and from one institution to another, irrespective of geographic location. This means that copies of works that were made for preservation purposes may be shared between preservation professionals who are based at any of the relevant cultural heritage organizations.<sup>8</sup> Thus, rights assessment is a necessary step and element in the preservation of cultural heritage and ongoing preservation practices should be planned in a manner that takes into account the relevant rights of all parties, both prospectively and proactively.

#### **2. Conservation and Stabilization**

The conservation and stabilization of materials or objects in a collection, particularly those of unique and significant cultural heritage value, requires detailed documentation and imaging. Conservation and stabilization practices can include the use of infrared photographic

technologies, 3D image technologies, and video documentation before, during, and after the conservation process.<sup>9</sup> These photographic reproductions are necessary to understand how to conserve, and to document processes during conservation. The reproductions also create a record or version of the object being conserved before and after conservation techniques are employed. Indeed, this can be true of objects and materials whether copyright protected or not, whether historic or contemporary, or whether created using one or multiple formats and media.<sup>10</sup>

### 3. Documentation of Object-Based Collections

As cultural heritage organizations – such as libraries, archives, museums, and other types of organizations – catalog and process their object-based collections, they are finding that reproduction of objects in the collection, using photographic and most recently digital reproduction methods, have become a standard part of the inventory process. Inventories, or the creation and use of records and information management tools and systems, are very much a part of the collections management process in cultural heritage organizations. They are recognized by international conventions, which call for the creation of national inventories of cultural heritage collections as a form of preservation, so that countries document their collections to ensure that a record remains of their existence.<sup>11</sup> The conventions also recognize the need to preserve and record as part of the safeguarding and protection of communities' intangible cultural heritage.<sup>12</sup> In addition, inventories are a primary tool used to deter illicit trafficking and safeguard cultural property; the reproductions made as part of the inventory can be used to alert border agents to the cultural heritage value of objects from the collections. Inventories ensure that there are adequate records in the event that objects are stolen or destroyed, so that a record of the world's humanity<sup>13</sup> is, in fact, preserved.<sup>14</sup>

Before collections management computer applications were routinely employed,<sup>15</sup> certain countries had already created national inventory databases loaded onto nationally maintained mainframe computers. The replicated records were held in the museums themselves, and they were created for the purpose of managing collections. With the rapid innovation in information management technologies, coupled with the development of the Internet and digital photography, multiple and detailed images were added as a necessity to inventories of museum collections, specifically as a means to combat illicit trafficking of cultural property, and to address preservation needs.<sup>16</sup>

### 4. Preservation and Preventive Disaster Planning

Preventive disaster planning is a form of anticipatory preservation, and has become an integral part of the preservation of collections, whether to combat natural disasters, to confront potential loss due to human conflict, or to address the current or potential impact of climate change. Some experts have identified ten agents that pose the greatest risk to cultural heritage collections<sup>17</sup> and they are:

- Physical force whether natural or manmade
- Vandalism
- Disassociation, such as theft or looting
- Fire
- Water damage
- Pests
- Pollution
- Light
- Temperature changes
- Humidity variation

Accurate, complete, accessible, and secure inventories of all types of cultural property are the obvious requirement for the good management of such resources – which include archaeological sites, historic buildings, museums, archives, and libraries.<sup>18</sup>

In order to combat these risks posed to collections, and as a means of preparedness, experts in conservation and disaster planning advise the creation of good inventories of collections well in advance of any loss or deterioration, including detailed digital photographic reproductions of the materials and objects held in the collection. These records aid in the response to any of these risks, whether engaging in conservation of a damaged object, locating an object that has been stolen or looted, assessing a collection to determine whether any objects or materials are missing, or documenting losses where the object cannot be recovered. Maintaining a reproduction of an original in a collection serves the purpose of representing what had previously been part of the entirety of knowledge that the collection represents.<sup>19</sup>

Events at the National Museum of Brazil, the University of Cape Town Library in South Africa, and other cultural heritage organizations suffering catastrophic losses of collections, illustrate the urgent need to create inventories with fulsome records, including digital reproductions of materials and objects in collections, in advance of any potential loss. As this toolkit took final shape, the historical city of Lahaina, Hawaii was totally destroyed by wildfire, including the culturally unique buildings, museums, and artifacts.<sup>20</sup> In addition, these catastrophic events illustrate how collections, lost to natural disaster or human conflict, can be reconstructed using digital representations of the originals in order that knowledge about humankind is not lost.<sup>21</sup> It must be possible to store these digital representations in a location far removed from the original collection in order to ensure that they survive any catastrophic event.

Finally, it is important to recognize that collections from diverse organizations can be related to each other. That is, one cultural heritage organization may hold objects and materials in its own collection that are connected substantively or historically to objects and materials held in collections of another. Museums, for example, may hold objects in their collections that are directly connected to archival collections, and held by archives distinct from the museum. In addition, more than one cultural heritage organization may share custody of a collection. Thus, as part of the preservation process, conservation and documentation specialists in one cultural heritage organization will, for example, need to share with those at another the knowledge, resources, and information, including photographic information, obtained during the documentation or conservation process.

## B. THE DUTY OF CARE AND THE MISSION TO PRESERVE

Cultural heritage organizations, such as libraries, archives, and museums, hold collections in trust for the benefit of the general public. The duty of care and the mission to safeguard -- that is, to preserve and manage collections responsibly – is an inherent part of the trust relationship. This is largely the case whether the library, archive, or museum is publicly or privately funded. Cultural heritage organizations are subject to governing laws and ethics principles, and their adherence to both, while stewarding collections in trust for the public, makes them *trusted institutions*.

Their duty of care and the mission to preserve collections in trust for the public is often codified in legislation that establishes national, provincial, or regional collections.<sup>22</sup> Their duty of care and the mission to preserve may also be found in various cultural heritage laws, community standards, and professional protocols. Even in the case of independent and non-governmental cultural heritage organizations, their charter documents, bylaws, and policy statements can articulate in detail the duty of care and the mission to preserve collections in trust for the public, as fundamental to fulfilling their mission.<sup>23</sup> Collections management policies that articulate this duty of care and the mission to preserve in greater detail are most often approved by the board

of trustees, and the board is responsible for ensuring that the duty of care and the mission to preserve collections is responsibly carried out by their professional staff.<sup>24</sup>

The duty to preserve also constitutes an important ethics principle. The International Council of Museums (ICOM) Code of Ethics includes the following principle:<sup>25</sup>

Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, provenance, permanence, documentation, accessibility and responsible disposal.<sup>26</sup>

The International Federation of Library Associations and Institutions (IFLA) statement on Libraries Safeguarding Cultural Heritage defines a library's duty of care to include preservation. It provides:

Documentary works in all formats, including digital, are a key part of our cultural heritage. Working with, preserving, and safeguarding them in order to provide access to future generations is at the core of the work of libraries globally.<sup>27</sup>

The International Council on Archives (ICA) acknowledges the duty of care to safeguard documentary heritage by declaring one of the fundamental aims of the archivist as: "Effective collection management which ensures the long-term physical survival of collections, the creation of reliable and detailed information about the content of the collections and sustainable care to ensure the long-term survival of collections."<sup>28</sup> Governmental support and the public trust that archivists hold will provide that the records in archival collections are preserved in ways that ensure their authenticity, reliability, integrity, and usability. The duty of care and the mission to preserve are also recognized in international recommendations.<sup>29</sup>

## PART II: FORWARD-THINKING PRESERVATION EXCEPTIONS

This toolkit seeks to provide intellectual property experts, policymakers, and cultural heritage professionals with suggestions and guidance on how to secure an optimal legal environment for exercising the duty of care and fulfilling the institution's mission in safe and effective conditions. It seeks to identify a path forward to reconcile the duty of care and the mission to preserve with the rights and interests of copyright owners, whose works are held in collections.

Recent losses of cultural heritage collections, resulting from either climate change or human conflict, signify an urgent need to address preservation activities at scale. While a good number of WIPO Member States have already adopted exceptions for the preservation of cultural heritage, this toolkit provides a roadmap for the development of preservation provisions that address preservation activities designed to meet growing contemporary challenges. These challenges require large-scale preservation in the context of evolving collections practices and the stewardship of complex copyright-protected works.

Part II provides an itemized overview of certain considerations when developing preservation exceptions to copyright. These issues were identified by cultural heritage and copyright experts, particularly during the 2019 WIPO International Conference and Regional Seminars,<sup>30</sup> and their importance became clearly apparent during the review of existing exceptions to copyright for preservation purposes for the preparation of this toolkit.

### A. FUTURE-PROOFING COLLECTIONS AND ANTICIPATORY PRESERVATION

As experienced at the outset of the Covid-19 global health crisis and in jurisdictions grappling with the effects of climate change or human conflict, future-proofing collections has become paramount. As referenced by representatives of Member States in 2019 at the WIPO International Conference and Regional Seminars,<sup>31</sup> it is no longer sufficient that preservation addresses only the existent fragility of the physical objects and materials. It is instead necessary to future-proof collections, that is, to record and copy collections in digital formats so that they are preserved in stabilized formats, well before they are placed at risk of deterioration. The objective is to ensure that objects and materials are preserved as exact copies of the original, prior to any deterioration having taken place. This anticipatory form of preservation serves the need to ensure that humankind has a record of the objects and materials comprising cultural heritage, even if the physical objects themselves may deteriorate, or are destroyed or lost.

While many efforts are being made to address the risks posed to the preservation of cultural heritage as a consequence of human conflict, climate change, and global health crises,<sup>32</sup> the losses experienced over the course of the past several years due to unforeseen events, such as those that occurred in Brazil,<sup>33</sup> Pakistan,<sup>34</sup> South Africa,<sup>35</sup> the United States,<sup>36</sup> and Europe,<sup>37</sup> suggest that cultural heritage preservation requires an urgent and proactive approach. In a dramatic example of the impact of climate change, it is predicted that, without concerted international cross-border action, all archival collections and archival institutions in the Marshall Islands in the Pacific Ocean will be below sea level within twenty years.<sup>38</sup> Digital representations of these collections could be created and stored in secure locations outside the Marshall Islands to ensure their availability to future generations. This latter example is clearly a cross-border matter that could be dealt with in a separate toolkit.

Several WIPO Member States have already built into their preservation exceptions – whether for any type of cultural heritage institution, or for specific types of institutions – the ability to make copies of works and even to provide copies of works for the purposes of preservation if a work is at risk of deteriorating. For example, some Member States address the need to make copies of works that are becoming obsolete or where a work is becoming “unavailable.”<sup>39</sup> Furthermore, it is important to recognize the need to make copies well in advance, before the

threat of inevitable deterioration or loss. The idea is to make an exact digital copy of the original, before a loss occurs due to unforeseen events, so as to provide humankind with a record of what existed before deterioration or catastrophic loss, such as experienced in cases of flood, fire, or human conflict.

## B. ADDRESSING DIGITAL MATERIALS

Digital objects or materials or, as they are known in cultural heritage parlance, “materials born digital,” have become commonplace in library, archive, and museum collections. The preservation of objects or materials born digital presents a host of copyright issues, including the need to reproduce them in order to overcome obsolete formats and software. This is even true of correspondence and other works that are commonplace in archival collections. Libraries, archives, and museums are often presented with hard drives, floppy discs, and other forms of obsolete formats when acquiring collections, and the formats include digital files of various sorts created by many rightsholders. Copyright exceptions are therefore necessary to extract and preserve these digital objects and other materials for prescribed purposes, such as preservation.

Consideration may accordingly be given to creating technological and format neutral exceptions, such that the exception applies regardless of either the type of media of the work or its supporting technology. As mentioned above, cultural heritage organizations are stewarding collections that contain varied media and formats that will likely become obsolete over time. Technologies that support digital materials can also inhibit access to the copyright protected work for the purposes of preservation because they capture or frame materials so that they may only be viewed, but not preserved. Exceptions that are not format neutral may require multiple amendments over time and meanwhile the ability to preserve cultural heritage will be lost as amendments to address exception provisions that are not format neutral are reconsidered.

Lawmakers in some jurisdictions have already recognized and addressed the necessity of copying digital objects or materials into alternative formats as a preservation activity. Notwithstanding, the intersection of the preservation of digital materials with provisions in copyright law addressing the prohibition of the circumvention of technological protection measures also remains an issue that is often not satisfactorily reflected in current law. Libraries, archives, and museums may avail themselves of an exception allowing preservation of digital objects and materials, but if those works are protected by technological protection measures, then additional exceptions may also be required to overcome the prohibition on circumvention. Member States may therefore wish to consider provisions that are medium or format neutral, and that address the circumvention of technological protection measures for preservation purposes. Otherwise, in a world where materials and objects held in collections are “born digital,” this oversight will assuredly lead to the loss of critical cultural heritage objects and materials in collections.

## C. CROSS-BORDER NATURE OF PRESERVATION ACTIVITIES

Libraries, archives, and museums are continuously adapting their practices, so as to increase knowledge about their collections. As an example, digital technologies have provided museums and their experts with the ability to compare and contrast insights and to seek the input of experts at other institutions elsewhere in the world who care for similar materials and objects in their collections. Online catalogues have made it possible for libraries, museums, and archives to make their holdings discoverable across borders.

In museums, the organic nature of collecting and donor acquisitions has led them to approach the stewardship of collections as a shared experience. Shared collections may be formally owned and managed by two or more organizations (and together with other types of cultural

heritage organizations, such as with a library or archive), whether within the same jurisdiction or across borders. In fact, sharing digital collections across borders has become a phenomenon increasingly practiced precisely because the collection is in digital format and lends itself to collection sharing.

Shared collections may also be informal in their curatorial nature, where objects and materials may be connected in provenance or subject matter, without a formal agreement between organizations that steward them and regardless of their legal jurisdiction. In libraries, museums, and archives, documents related to the history of a formerly colonized country or the complete materials by and about a particular author may be split across several repositories in different countries.

Consequently, cultural heritage organizations need to share their scholarship and research, as well as their images of objects and materials, in order to carry out consistent preservation practices. Given that copyright laws differ in many respects from one jurisdiction to another, preservation activities across borders could lead to increased legal risk. Depending on the legal culture and the risk averse nature of a cultural heritage organization, a cross-border context can also result in a shutdown of necessary and critical preservation activities.<sup>40</sup>

Preservation activities may include the need to complete or restore incomplete collections of archives, manuscripts, and other rare materials. The missing items in a collection held in one archival repository may be found in the archival collections of other cultural heritage organizations, regardless of jurisdictional boundaries. This activity is particularly important in preserving archival collections of unique and often unpublished materials. The purpose of the provision is to preserve and maintain the context of the items in an archival collection so that the collection represents a complete and truthful record of past events. This activity is inherently curatorial in nature and fundamental to preservation practices relating to archives. While national treatment provisions may address extra-jurisdictional practices in part, risk can only be limited where the legal treatment of preservation activities under copyright exceptions is the same or similar from jurisdiction to jurisdiction.

### **PART III: DETAILED CONSIDERATIONS**

A statutory copyright exception for preservation is more than a construct of statutory clauses. An effective exception must take into consideration broad principles that can directly shape the effectiveness of the exception, and statutory elements with direct implications for different stakeholders. These considerations reflect principles and priorities that have been tested through decades of preservation practice. They also reflect the principles and priorities that have emerged because cultural heritage is increasingly at risk of deterioration or loss. Part III of the toolkit offers an overview of broad principles and concepts that lawmakers in WIPO Member States may wish to consider when drafting and implementing a new preservation statute. Not all of the following points will be critical for all countries, and not all countries will address them in the same manner. Nonetheless, all Member States may in an appropriate manner consider the following significant concepts.

#### **A. PURPOSE STATEMENT**

Adding a statement of purpose to a copyright statute can acknowledge to lawmakers and citizens the fundamental nature of the preservation of cultural heritage and the necessary process of stewarding collections in trust for the public. The statutes may also have multiple purposes, such as promoting and assuring preservation activities, while simultaneously respecting the interests of rightsholders. A purpose statement can also aid in ensuring that copyright laws are interpreted within the context of the intended aims and objectives that lawmakers espoused when enacting the law. Similarly, the purpose statement could include a statement affirming that the conditions and limits of the exception cumulatively reflect respect for diverse interests consistent with the terms of the three-step test.<sup>41</sup>

#### **B. TECHNOLOGICAL AND FORMAT NEUTRALITY**

Preservation exceptions should be “format neutral;” that is, the preservation law should apply regardless of either the type of media of the work held in a collection, or its supporting technology. The statute should make clear that preservation copies may be made of works that initially exist in any media or format; the exception should also provide that cultural heritage institutions may use any appropriate technological means for making the copies. As a leading example, many statutes today refer to “reprographic reproduction,” which is sometimes understood to not encompass digital technologies. Such a restriction could jeopardize the usefulness of the copyright exception. Preservation exceptions that are format neutral can instead endure over time, without the need for further amendment as new forms of media and supporting technologies develop or evolve.

#### **C. AVAILABILITY OF PLATFORMS AND SOFTWARE**

Complexities surround the preservation of copyright protected works in cultural heritage collections that are in digital format, often because the software supporting digital objects and materials held in the collections has become obsolete over time. Thus, Member States may wish to consider developing format-neutral preservation exceptions that also generally permit correlative uses of the underlying software that supports digital objects or materials and permits institutions to retain and use any underlying programming and platform systems.

#### **D. PROACTIVE PRESERVATION**

Because of the ongoing and large-scale risks that libraries, archives, museums, and other cultural heritage institutions continuously face, Member States may wish to consider addressing preservation activities proactively and anticipatorily when developing preservation exceptions. The objective is to ensure that materials may be preserved as exact copies of their originals in their best state, prior to any deterioration or other loss. Too often, unique collections



suffer destruction or other harm because the law permits the preservation copying only after the loss occurs or when the threat of loss is immediate. By contrast, an anticipatory and proactive form of preservation – also known as “future-proofing” collections well in advance of any immediate threat of deterioration, destruction, or loss – serves to ensure for the future that an accurate record of the objects and materials comprising cultural heritage is maintained, even if the physical objects themselves later deteriorate, or are destroyed or lost over time. Proactive preservation is especially effective if the digital representations of the collection are stored at a separate secure location.

#### E. NUMBER OF ALLOWED COPIES

A copyright exception created for the purpose of preserving works held in a collection of a cultural heritage institution that is either silent about the number of copies or allows for an unspecified but reasonable number of copies can ensure that copyright protected works may be preserved regardless of technological requirements or advancements in preservation and conservation activities, techniques, and approaches. Put simply, modern technologies and effective preservation methods necessarily entail multiple copies of individual works. An effective preservation statute ought to avoid stating an exact limit on the number of copies, with an understanding that multiple copies are principally a necessary incident of technology and effective preservation practices.

#### F. SHARED COLLECTIONS

If diverse cultural heritage institutions share in either the stewardship or ownership of their collections, Member States may wish to consider how the preservation exception would apply in order to preserve works in the shared or split collection, notwithstanding the diversity of institutions responsible for stewarding them. Relevant elements for consideration could include the application of the provision to various types of institutions, recognizing and addressing the interdisciplinary nature of collection development and management. Further, if collections are shared across borders, their preservation will call for lawmakers to consider the need to identify cross-border issues and develop and pursue multi-national solutions.

#### G. COOPERATIVE PRESERVATION PROGRAMS

Where collections may be connected substantively, that is the materials and objects in one collection are related in either provenance or subject to those in another collection, cultural heritage institutions may look to counterpart institutions for copies of objects or materials so as to inform themselves about their respective collections for the purposes of carrying out preservation activities. Within the context of preservation, Member States may wish to consider the need to authorize a cultural heritage institution to complete an incomplete collection of another, as described in Part II, subsection C, of this toolkit. Again, addressing cooperative programs is likely to give rise to cross-border issues and it may be advisable to identify them and pursue appropriate resolutions.

#### H. DIVERSITY OF CULTURAL HERITAGE INSTITUTIONS

The law should acknowledge the many different types of cultural heritage institutions that exist within each of the Member States. Libraries, archives, and museums may be the most prominent institutions, but other organizations increasingly play an important role in the collecting and preserving of cultural works. These institutions also have diverse collection development policies and practices. This growing diversity may be considered in the development of new copyright law, with recognition that important preservation work is undertaken by many different types of organizations, notwithstanding whether the institution is categorized or identified as a library, archive, museum, or other familiar institution. Sometimes the label or name on an institution is simply traditional terminology, while new organizations are

emerging to serve specialized collections. Flexibility about the scope and character of the institutions can allow the law to meet changing needs and circumstances. A wider range of specific institutions, and any relevant conditions or subcategories (e.g., “libraries” or “nonprofit public libraries”), are reviewed more thoroughly in the charts set forth in the Appendix.

#### I. IMPORTANCE OF RIGHTS METADATA

Standardized rights metadata for preservation copies in cultural heritage collections could be a useful part of the broader curatorial and collections management workflows. Metadata could include cataloging the circumstances of the preservation copy and the level of permitting rights, both at accession and at subsequent digitization. Rights metadata is designed to support the respectful and lawful subsequent uses of digital or digitized copyright protected works in cultural heritage collections. Metadata can also record the provenance of materials and assist in the development of catalogs and inventories. Member States may wish to consider encouraging the use of rights metadata through initiatives that support standardized systems developed by the professionals in the field of preservation and cultural heritage.

#### J. A NOTE ON DARK ARCHIVING

The issue of dark archiving has not been addressed in this toolkit, but will be addressed in the forthcoming toolkit about access to collections.

## PART IV: CONSTRUCTING A STATUTORY EXCEPTION FOR PRESERVATION

### A. HOW TO USE THE CHARTS

Part IV of the toolkit is intended to guide lawmakers and other readers through the process of selecting appropriate details to include in a preservation statute, and then organizing and connecting those details into the form and language of a statutory copyright exception. It should be understood that the formulations proposed in the toolkit are in no way normative, but serve the sole objective of supporting Member States to craft their own solutions, making use of the various options suggested that are already functioning in Member States, or of possible options to address new issues that are arising, especially in the digital age. This Part IV presents those details, with possible alternative statutory language, for the drafter to review and select. Detailed elements of possible statutes for use by any WIPO Member State are organized and presented in the Appendix.

The process of drafting an effective copyright exception – one that is appropriate to the needs and conditions of each Member State – requires evaluation of the several elements of such a statute and the policy considerations represented by the alternative language options. As the charts in the Appendix make clear, most of the elements of a preservation statute may be organized as follows:

- ***Who May Apply the Exception?***
  - Specifies the range of cultural heritage institutions, including libraries, archives, museums, and other institutions, that may exercise the opportunities set forth in the preservation statute.
- ***What Works May be Included?***
  - Specifies the scope of works that may be reproduced or otherwise used in a manner consistent with the preservation statute. The scope generally includes any works in the institution's collection, but a statute might add details to clarify that scope or possibly to set conditions on some uses.
- ***Why May the Exception be Applied?***
  - The statutes that are the subject of this toolkit are obviously for purposes of preservation of copyrighted works, but an effective statute could add clarification that the statute may be employed not only for preservation activities, but also for related services and activities, such as replacement of lost materials or conservation of works at risk of deterioration.
- ***How May the Preservation Activities be Carried Out Pursuant to the Exception?***
  - Additional provisions to clarify various details about the preservation process, such as conditions on the number of copies or the uses of digital technologies. These elements are distinct from the later or downstream uses of the copies made for preservation purposes by the institution, researchers, or others; those uses will be the subject of a later toolkit.

It is appropriate that these elements are presented as questions, rather than direct statements. The important point is that each Member State could make its own policy decision about its answer to each question, and hence make a decision about the scope and application of its preservation statute. The charts in the Appendix offer details for the available choices that Member States might consider and select as they identify the elements of a preservation statute that is most appropriate for that country.

The charts are thus an elaborate and organized starting resource for comprehending possible alternative provisions for a thoughtful and effective preservation statute. The practical process of drafting the copyright exception thus follows these three stages for statutory construction:

*Stage 1: Identify the Chosen Elements.*

Looking ahead to the Appendix, readers will find detailed charts that present and organize the possible elements of the statute, with alternative language and provisions. The charts facilitate assessing options for terms to include in the statute.

*Stage 2: Select the Statutory Language.*

The charts in the Appendix further offer possible language to include in the statute with respect to each element. The person drafting the statute could clip the desired language and gather it for recompiling into statutory form.

*Stage 3: Construct and Draft the Statute.*

The example language in the charts is a start, but it will need to be organized and revised into an overall cohesive structure, and probably structured in a manner that comports with the style and language of the Copyright Act of the Member State.

To be clear, the charts in the Appendix are part of this toolkit in order to offer choices to Member States, and yet no country ought realistically to consider including all or even most of the points presented here in their copyright statutes. Indeed, a Member State will often do well by choosing *not to include* some details from the charts. Nevertheless, because Member States could choose different elements and could draft the relevant language in different ways, many different statutory exceptions are possible. Ideally, each country will use this toolkit to learn more about its options and draft a statute that is optimally aligned with the country's specific needs and priorities.

Just the same, some degree of commonality among the statutes in different countries is desirable. A significant level of consistency of domestic law has been one of the objectives of international copyright law. For example, Member States might work with other countries in their region, or with countries that are leading trade partners, to draft a common statute. By having the same or similar language in their copyright laws, the countries can still meet their domestic objectives and at the same time achieve practical and legal consistency. Further, as noted earlier in this toolkit, some similarity of copyright exceptions in different countries can facilitate cross-border activities and sharing of collections.

## B. DRAFTING AN EXAMPLE STATUTE

This subsection of the toolkit demonstrates in "stages" the process of drafting a statutory copyright exception for the preservation of works in libraries and other institutions. The three stages summarized above are implemented here to show how they can facilitate the drafting of a meaningful and effective preservation statute.

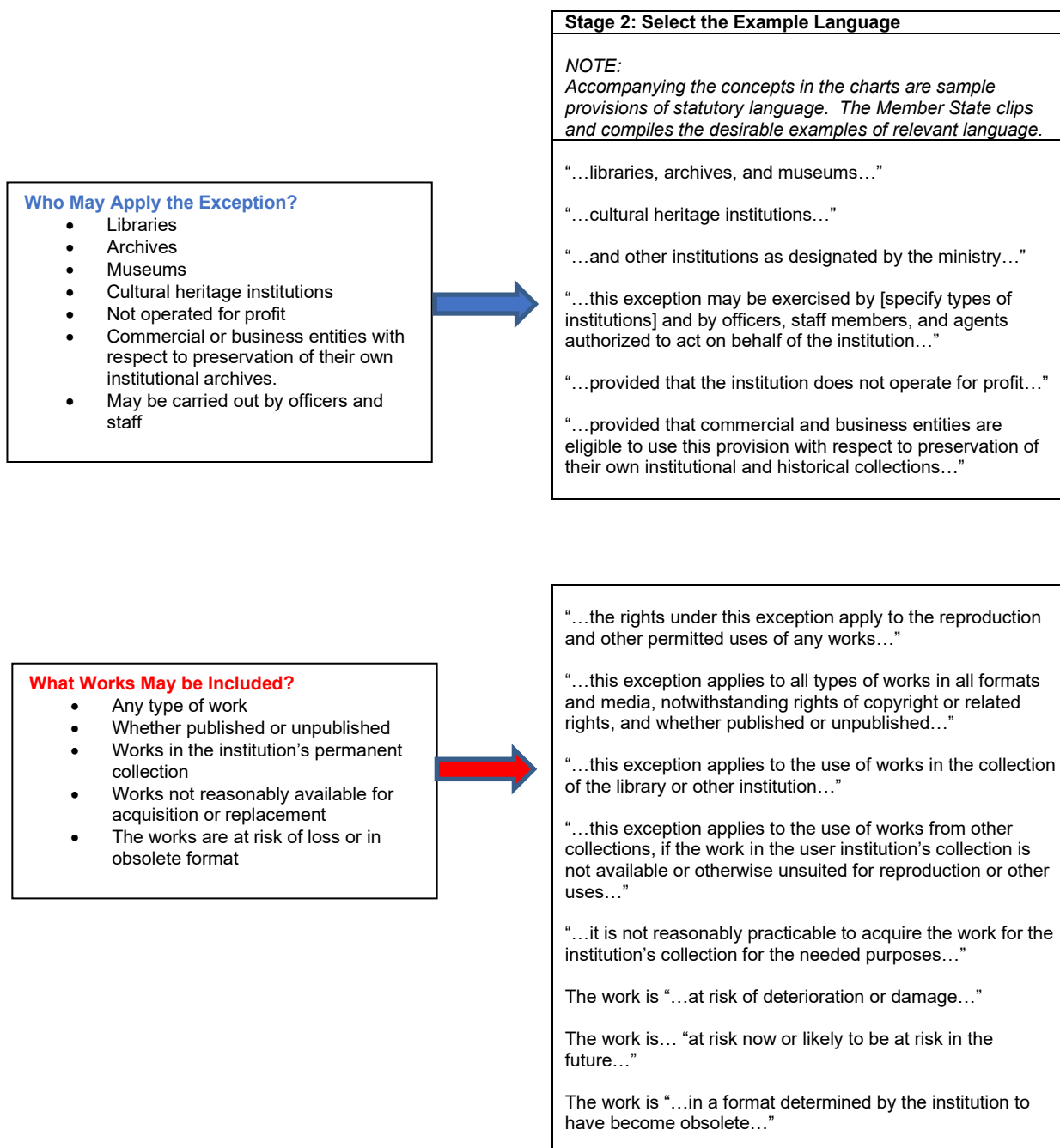
### Stage 1: Identify the Chosen Elements.

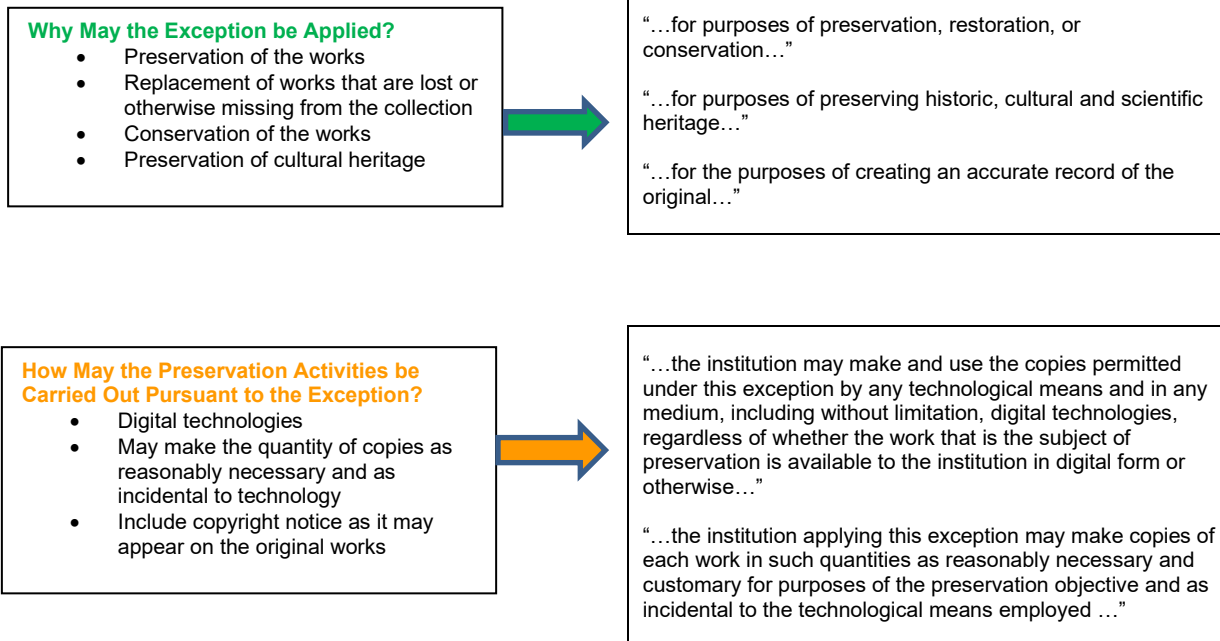
From the charts in the Appendix, the policymakers developing a statute would select the desired terms to be part of the Member State's law. The following graphic is an example of the selections made by the hypothetical country, organized into lists.

<b>Stage 1: Identify the Chosen Elements</b>
<p><b>NOTE:</b>  <i>The hypothetical Member State would first review the charts in this toolkit and identify concepts and provisions to be included in that country's preservation statute, as listed below.</i></p>
<p><b>Who May Apply the Exception?</b></p> <ul style="list-style-type: none"> <li>• Libraries</li> <li>• Archives</li> <li>• Museums</li> <li>• Cultural heritage institutions</li> <li>• Not operated for profit</li> <li>• Other designated institutions, including commercial or business entities with respect to preservation of their own institutional archives.</li> <li>• May be carried out by officers and staff</li> </ul>
<p><b>What Works May be Included?</b></p> <ul style="list-style-type: none"> <li>• Any type of work</li> <li>• Whether published or unpublished</li> <li>• Works in the institution's permanent collection</li> <li>• Works not reasonably available for acquisition or replacement</li> <li>• Works that are at risk of loss or in obsolete format</li> </ul>
<p><b>Why May the Exception be Applied?</b></p> <ul style="list-style-type: none"> <li>• Preservation of the works</li> <li>• Replacement of works that are lost or otherwise missing from the collection</li> <li>• Conservation of the works</li> <li>• Preservation of cultural heritage</li> </ul>
<p><b>How May the Preservation Activities be Carried Out Pursuant to the Exception?</b></p> <ul style="list-style-type: none"> <li>• Digital technologies</li> <li>• May make the quantity of copies as reasonably necessary and as incidental to technology</li> <li>• Include copyright notice as it may appear on the original works</li> </ul>
<p><b>Additional Provisions and Conditions</b>  <i>Note: These provisions might be included elsewhere in the copyright law, and not necessarily in the specific preservation exception.</i></p> <ul style="list-style-type: none"> <li>• Limits on infringement liability</li> <li>• Circumvention of technological protections</li> <li>• Non-waiver of the exception by licenses and agreements</li> <li>• Specific provisions related to orphan works</li> <li>• Cross-border delivery and receipt of works and copies for preservation purposes</li> <li>• Rights management information</li> </ul>

## Stage 2: Select the Statutory Language.

The charts in the appendix also offer some sample language to assist with the drafting process. The graphic below shows how the elements selected at Stage 1 have corresponding wording, also in the charts, that can be used to start formulating the statute itself.





### *Stage 3: Construct and Draft the Statute.*

The final Stage 3 of the process is to combine the concepts and suggested language into statutory form. Each Member State will probably adopt a different statutory language structure in order to conform to customs in the country and the wording and style of the country's overall Copyright Act. Nevertheless, the following example demonstrates how to integrate the elements and the language above into a cohesive statutory provision.

**Stage 3: Construct and Draft the Statute****NOTE:**

*The draft statute below incorporates the example language that the hypothetical Member State has determined to be desirable for including in the country's statute. The result is a statute drafted and modified to include the distinctive needs and priorities of that member state.*

Notwithstanding the rights as set forth in Article [insert number] of this Copyright Act, the reproduction or other use of works consistent with this Article [insert number] is not an infringement of the rights of copyright, related rights, or moral rights. This provision furthers the mission of copyright to serve the public interest by enabling the preservation of a shared cultural heritage. It also serves the objectives of copyright by setting limits and conditions on uses of copyrighted works in order to prevent conflicts with the interests of rightsholders. The conditions and limits of this provision cumulatively reflect respect for diverse interests consistent with international principles.

- (a) Libraries, archives, museums, cultural heritage institutions, and other institutions as designated by the ministry, may make and use copies of works in a manner consistent with this statute, provided that the institution does not operate for profit.
  - (i) Notwithstanding the foregoing, libraries and archives in entities that do operate for profit may make and use copies of works as permitted under this statute to preserve their own institutional and historical records and archival collections.
  - (ii) This exception may be exercised by the institution as a legal entity or by officers, staff members, and agents acting on behalf of the institution.
- (b) The institution may apply the exception to the work for one or more of the following purposes:
  - (i) For preservation, restoration, or conservation of the work in the collection of the institution or in the collection of another such institution;
  - (ii) For replacing a work that is lost, stolen, or no longer available, or is damaged or deteriorated to such an extent that it may not be reasonably read or otherwise used; or
  - (iii) For preserving and maintaining historical, cultural and scientific heritage.
- (c) This exception applies to all works in the collections of the institution, and to all types of works in all formats and media, notwithstanding rights of copyright or related rights, and whether published or unpublished. It further applies to works obtained temporarily from other collections if the work in the user institution's collection is not available or is otherwise unsuited for reproduction or other uses.
- (d) A work may be used in accordance with this exception only if the institution has determined that:
  - (i) It is not reasonably practicable to acquire the work for the institution's collection for the needed purposes, including a search of the available market with respect to published works; and
  - (ii) The work in the institution's collections is any of the following: at risk of deterioration or damage, either currently or likely to become at risk in the future, or is in a format determined by the institution to have become obsolete.
- (e) The institution may make and use the copies permitted under this exception by any technological means and in any medium, including without limitation, digital technologies, regardless of whether the work that is the subject of preservation is available to the institution in digital form or otherwise, and the institution may make such quantities of copies as reasonably necessary and customary for purposes consistent with this statute and as incidental to the technological means employed.
- (f) Copies made pursuant to this exception shall include the copyright notice as it may appear on the version of the work being copied.

[end of example statute]

**Who May Apply the Exception?**

**Why May the Exception be Applied?**

**What Works May be Included?**

**How May the Preservation Activities be Carried Out Pursuant to the Exception?**



## CONCLUSION

The toolkit for the preservation of copyrighted works in cultural heritage institutions is intended to be the first resource in a series to examine the intersection of cultural heritage practices and copyright law. As countries develop copyright provisions that address the duty to preserve collections using this toolkit, issues concerning the access to and uses of the preservation copies may be considered in a potential subsequent toolkit.

The development and implementation of exceptions to copyright for preservation can be aided greatly by the development of usable and functional tools, such as checklists, guidelines, and policies. Copyright education for cultural heritage professionals, and the use of standardized rights metadata statements describing works held in collections, may be considered to ensure that collections management practices include assessments of rights and interests. Therefore, in addition to the development of further toolkits, this section suggests potential next steps to complement the introduction of preservation exceptions.

In addition to legislative changes to facilitate the preservation of cultural heritage collections, certain related practices can facilitate responsible rights management in libraries, archives, and museums. Checklists, policies, and guidelines can synthesize the law and facilitate a better understanding of the application of the law to collection management practices. Libraries, archives, and museums may be encouraged to employ these management techniques in ways consistent with the normative practices of their respective jurisdictions, communities, and protocols to ensure that copyright exceptions for the purposes of preservation are applied consistently.

Checklists, for example, have played a positive role in this regard. This device is particularly relevant where the law requires certain considerations or conditions in order to apply a copyright exception. A checklist can ensure that issues are considered and steps are taken consistently and responsibly by staff when applying copyright exceptions to the use of their collections.

Similarly, questionnaires may be used to gather relevant information about rights, community interests, and protocols, particularly at the time of acquisition, when donors, who may also be rightsholders, can supply useful information about rights associated with collections. For example, if the donor of a collection knows that some materials have been obtained from other sources, or if the donor knows that some materials are subject to third-party permissions and licenses, any details and information secured at the time of acquisition can prove essential in the future. Such information can shape whether the collection or the rights may even be donated to the institution, and it may determine who has rights in the unlikely event of future conflicts with claimants. The information can also, and most constructively, ease the process for reaching out to rightsholders in the future when libraries, museums, archives, researchers, or publishers want to make uses of works in ways that affect third-party rights.

Copyright guidelines and policies can also play a positive role in ensuring that copyright is applied consistently as it relates to collections management practices, including preservation. Guidelines and policies will direct staff to apply exceptions in keeping with expectations found in the law as well as in keeping with the mission and vision of their respective library, archive or museum. Courts in certain jurisdictions have not only validated this approach but have encouraged it as consistent practice.<sup>42</sup> Sample guidelines and copyright policies for museums, for example, were published by WIPO in 2013.<sup>43</sup>

While certain international organizations can and do address copyright issues, whether in newsletter communications, in the development of written materials or at conferences, copyright law as it applies to preservation is ultimately domestic law, and thus will vary with the jurisdiction. Therefore, considerable effort needs to take place at national levels to develop educational modules relating to copyright law and collections management practices, including

preservation, in order to inform and educate professional staff working with collections so as to ensure that copyright law is applied consistently in their daily professional practices.

This toolkit is the start of that process for improving the legal framework, and for better implementing the law in the many diverse libraries, archives, museums, and other cultural heritage institutions within each WIPO Member State. The subject is preservation in the broadest sense, but specifically creating a copyright exception to facilitate making preservation copies. The next general issue is the ability to access and make specified uses of those copies for learning, teaching, research, exhibition or other purpose; that broad issue is expected to be the subject of a subsequent toolkit from WIPO. Meanwhile, this toolkit is aimed primarily to assist lawmakers, policymakers, and other officials, but it may also become a useful guide for the many professionals working in and with cultural heritage institutions, as they seek to implement and work with the requirements of copyright law. Cultural heritage professionals are also more than mere adherents of the law. They are in an important position to work with their government officials to help shape the law and to report their experiences. Through their feedback we can all learn whether our legal framework is effective and whether the crucial objectives of cultural preservation are in fact being served.

## APPENDIX: THE CHARTS OF STATUTORY ELEMENTS

The charts below are a means for reviewing and synthesizing the various possible elements of a statutory exception permitting libraries, archives, museums, and other institutions to reproduce and make other uses of copyrighted works for the purpose of preservation and related activities. They represent statutory elements already existing in WIPO Member State copyright legislation that includes exceptions for preservation purposes.

The charts are reference tools from which a reader may build statutory elements. The main function of these charts is to facilitate the drafting of a statute or other legal provision that would become a copyright exception for preservation by the applicable institutions. The charts also emphasize that countries have many choices in the drafting of statutes. Some countries may need a statute that applies to many different institutions and that allows for preservation of a wide range of works in the collections. Other countries may have reason to permit only limited types of institutions to exercise flexibilities and opportunities under the law, and perhaps to extend the exception to certain specified classes of works.

To be sure, no one country will include all concepts and details in its law; an exhaustive statute would likely be too burdensome and complex to actually implement and follow. Moreover, choosing to omit some concepts from a statute is itself a strategic or policy decision. If a concept is not appropriate for the needs and culture of a Member State, leaving it out can sometimes be the wisest move. It is worth emphasizing that a leading objective of this toolkit is to enable each country to learn more about its options and to draft a statute that is optimally aligned with the country's specific needs and priorities.

The following charts are also organized in a manner that is intended to enable lawmakers to efficiently identify the possible elements of a preservation statute and to guide the drafting of a statute suited to the needs of any of the Member States. To advance that goal, the charts are organized around *Categories* and *Subcategories* of issues. A meaningful statute will surely address all of the *Categories* and most or all of the *Subcategories* of issues. Within those *Subcategories* are the detailed options that a lawmaker might choose. At various places in this toolkit, those details might be described as “elements” or “concepts” or identified with other terminology. Regardless of the label, the specific points are details to consider. Again, no country is expected to include all of the details. The example statute in the toolkit is an example of a statute based on a well-considered selection of issues and options, and the example certainly does not include all concepts from the charts.

## Category A: Who May Apply the Exception?

Objective of this Section:  
To Specify Institutions Permitted to Apply the Exception.

<b>Subcategory A.1: Range of Institutions</b>		
<p>Many different types of institutions may be permitted to utilize the copyright exception. With the increasing availability of equipment and professional expertise, many more institutions are engaging in preservation practices. Even if an institution does not have a full preservation program, it may have rare or distinctive collections that occasionally need to be copied in support of a preservation program elsewhere. The most effective preservation program will allow the widest range of institutions to participate.</p>		
<i>Select Any or All as Appropriate:</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
Institution	The term "institution" refers to any type of organization that could exercise the rights of use under the exception. While a statute might at times refer to "institutions" that use the exception, the statute ought to specify the libraries and other types of institutions that are within the law's scope.	
Libraries	"Library" can be an institution of many different descriptions, serving a wide range of users and researchers. Familiar types of libraries include public libraries, academic libraries, specialized research libraries, government and national libraries, and business and corporate libraries. A preservation statute could apply to all types of libraries, or a Member State may have reason to apply it only to certain types of libraries. Because preservation programs occur in many types of libraries, any narrowing of the list should be done with caution.	<p><i>Designate the types of institutions:</i> Exception may be exercised by "...libraries and archives..."</p> <p>"...libraries, archives, museums, scientific and research institutions, and educational establishments..."</p> <p>"...cultural heritage institutions..."</p> <p><i>May limit certain institutions:</i> ...scientific and research institutions, and educational establishments, but only with respect to the offices or services within such institutions that are operating as libraries, archives, or museums..."</p> <p><i>May add to the provision:</i> "...and other institutions as designated by the ministry..."</p> <p>Note: Even these familiar types of institutions are seldom defined in the statutes. It may be best to list types of institutions and not try to define them. Any definition would need to grapple with the changing nature of libraries and other institutions and not unnecessarily narrow the eligibility of diverse institutions to engage in preservation services. At a time when libraries, archives, museums, and other institutions are highly diverse and in steady change, any definition today might be quickly outmoded.</p>
Archives	"Archives" are of many types, with diverse collections and many different missions. For example, an archive may be a governmental agency, collecting and preserving governmental records, or it could be a research center, specializing in maintaining unique and unpublished manuscripts that are at steady risk of loss. An archive might also be a unit of a library that builds collections of all types of works in service to the research community, or it might be an office within a commercial entity, collecting records of business history.	
Museums	"Museum" need not be defined in the statute, although the statute may explicitly state that museums are within scope, and perhaps specify types of museum or other details. Many countries have non-copyright law applicable to museums, and the copyright exception might refer to museums within the scope of those statutes. <sup>44</sup>	

Cultural Heritage Institutions	Other types of institutions within the scope of the law might include: theaters, historical societies, historical sites, national parks and monuments, and many other organizations.	
Scientific and Research Institutions	This scope would allow the law to reach independent research institutions that might also have rare and specialized collections in need of preservation, but that might not fit the general concept of a library.	
Educational Institutions	Educational institutions may have libraries, museums or archives, or hold collections of works that are rare or specialized and in need of preservation. The statute might apply to all such institutions, or it may encompass a narrower list, according to level of institution, such as: any level; upper level; college and university; etc. A subtle but important point is that legally the exception applies to the parent institution, because that entity would in most cases actually face the legal liability. The statute could specify that the preservation activities may be carried out by the library or other institution.	
Prescribed Institutions	A governmental office may be vested with authority to set requirements and prescribe the specific libraries or other institutions that may use the exception.	
<i>Optional:</i>		
Authorized officer, staff member, or agent to act on behalf of the institution	<p>Ordinarily, listing an institution in the statute implies that individuals acting on its behalf are authorized to act and have the benefit of protection from liability; some countries may have a need to specify that individuals are within the scope of the exception.</p> <p>In a related concept, the institutions often could benefit from retaining third parties to perform certain services, such as digital scanning and online storage and access. Clear authorization under the statute is reassuring to all parties.</p>	<p><i>May add:</i> “.. this exception may be exercised by [specify types of institutions] and by officers, staff members, and agents authorized to act on behalf of the institution...”</p> <p><i>May add:</i> “..an institution may retain the services of third parties to perform specific acts or provide specific services in furtherance of the institution’s application and exercise of rights and opportunities under this exception...”</p>
<i>Optional:</i>		
National Library or other specified institution	Some Member States have allowed distinct preservation opportunities solely for their national libraries. Examples include nationwide lending of digitized books or systematic preservation of landmark motion pictures.	<p>Note: The preservation statutes that are within the scope of this toolkit are generally applicable to numerous institutions and are not by definition usable by only one entity. A statute applicable to one program and one institution is probably best included in a separate statute.</p>

<b>Subcategory A.2: Attributes of the Institutions</b>		
Whatever the definition of “library” or “archive” or other institution, exceptions may specify certain attributes of the institution.		
<i>The following provisions set forth optional conditions. A Member State might choose not to include any of these concepts in the statutory exception. If a state does include these provisions, it should select not more than one provision from “Group 1” and not more than one from “Group 2.”</i>		
<b>Group 1</b>		
<i>Optional Concept: Non-commercial character.</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
The reproduction or uses made under the exception are not for direct or indirect commercial profit.	Applies the exception to all eligible institutions, but the specific service under the exception must be non-commercial.	<p><i>All of the following are optional; some statutes do not require any of these conditions.</i></p> <p><i>May add to the designation of institutions:</i> “...provided that activities of the institution do not serve direct or indirect gain...”</p> <p><i>Alternative provision:</i> “...provided that the activities carried out under this provision are not for direct or indirect commercial purposes...”</p> <p><i>Alternative provision:</i> “...provided that the institution does not operate for profit...”</p> <p><i>Note:</i> While it may seem logical to require that the institution have a formal “nonprofit” status under another part of the national law, making that connection could be problematic by effectively limiting the copyright provisions to those parties who have satisfied unrelated requirements of tax and corporate law.</p>
The activities of the institution must not serve direct or indirect gain.	Applies the exception to eligible institutions, but only if its activities are non-commercial.	
The institution does not have the purpose of direct or indirect commercial profit.	Applies the exception only if the institution itself has a non-commercial purpose.	
<b>Group 2</b>		
<i>Optional Concept: Public Accessibility</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
The institution must be open to the public.		<p><i>All of the following are optional; some statutes do not require any of these conditions.</i></p> <p><i>May add to the designation of institutions:</i> “...provided that the institution is open to the public either at the location of the institution or through online or remote services...”</p> <p><i>Alternative provision:</i> “...provided that researchers and users who are not affiliated with the institution may use the collections or services...”</p> <p><i>Alternative provision:</i> “...provided that the institution is supported substantially by public funds...”</p>
The institution must be open to the public or at least open on request by researchers not affiliated with the institution.		
The institution must be accessible to the public either directly or through interlibrary loans.		
The institution must be supported by public funds.		

## Category B: What Works May be Included?

Objective of this Section:

To Specify the Works that may be Reproduced or may be Included under the Provisions of the Exception.

<b>Subcategory B.1: Range of Works</b>		
Cultural heritage is manifest in a wide range of works in all media and formats, including books, music, motion pictures, artworks of all forms, and computer programming. All of these different types of works may also be in need of preservation. The copyright law may specify the range of works within a preservation exception; the broader the range of works, the more robust the preservation program may be. The broadest options are at the beginning of the list; more restrictive choices are toward the end of the list.		
<i>Select Any or All as Appropriate:</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
Works	This is the broadest option, and it can allow for the most robust preservation program.	<i>Possible language:</i> “...the activities permitted under this exception apply to the reproduction and other permitted uses of any works...”
Copyrighted works	Some Member States have specifically applied their preservation statutes to “copyrighted works.” That provision may help clarify that the preservation exception does apply to legally protected works. However, that added condition is not essential, because works that are not “copyrighted” are in the public domain, and a copyright exception is not needed.	
<i>Optional: Specify the Source of the Work</i>		
Works must be in the collection of the institution making the copy. Ordinarily, a work is in the collection if the institution owns the copy, or possesses it on long-term loan or other arrangement of long-term or indefinite duration.	Preservation exceptions typically permit the institution to make copies only of works that are in its own collection.  This provision is not intended to prevent the library from borrowing a work from another institution in order to make the copy, or to prevent an institution from making a copy on behalf of an institution that needs the preservation copy. Such circumstances can easily arise if the work to be preserved is missing or severely damaged. Suggested language on these points is set forth in the next column.	<i>May add:</i> “...this exception applies to the use of works in the collection of the library or other institution...”  <i>May expand:</i> “...this exception applies to the use of works in the collection of the library or other institution, subject to exceptions in the statute allowing copying of works from the collections of another institution...”  <i>Alternative:</i> “...this exception applies to the use of works in the collection, provided that the institution does not know or does not have reasonable grounds for concluding that the work is not lawfully made, acquired, or licensed...”
Work to be copied must be in the collection in an “original form” as prepared by the author or other creator.	This language is intended to prevent the situation of making a “copy of a copy” that could conceivably harm the market for the original. However, those implications are unlikely. This restriction could also interfere with the preservation of rare items, or document collections that are a mix of originals and copies. In all cases,	<i>Useful to add:</i> “...this exception permits uses of works that the institution obtains by loan or otherwise, from other collections, if the work in the institution’s collection is not available or is otherwise unsuited for reproduction or other uses...”  “...this exception permits another institution to make and deliver a copy at the request of the institution needing the preservation copy, if the

	<p>this condition could bar the making of new preservation copies when technologies change or when the preservation copy itself is deteriorating or missing.</p>	<p>work in the requesting institution's collection is not available or is otherwise unsuited for reproduction or other uses..."</p>
<p>Works in the collection of another institution.</p>	<p>This provision may be critical to allow a library to borrow a work in order to make a copy of it as allowed under the statute. Borrowing the work is most important when the version in the collection is lost or damaged, as described above.</p>	
<p><i>Optional: Specify the Types of Works</i></p>		
<p>Types of works that may be used pursuant to the exception.</p>	<p>Modern preservation needs and capabilities extend to all types of works. The statutes in some Member States limit the exception to certain types of works; the implications of such restrictions are examined later in this section.</p>	<p><i>All of the following are optional; some statutes do not require any of these conditions.</i></p> <p><i>May add:</i> "...with respect to the preservation, this exception applies to all types of works in all formats and media..."</p>
<p>Clarify that the scope of works includes unpublished works and that the exception applies to copyright and related rights.</p>	<p>Because cultural heritage works can exist in all forms, and because some existing statutes limit the types of works, it can be important to clarify the scope of works. Of critical importance is the inclusion of unpublished works of all types, as well as audiovisual, broadcast, and recorded works. Archival collections are principally unpublished works, and because of their vulnerable and rare or unique character, they are often in greatest need of preservation.</p> <p>Published works are also in need of preservation, but the economic and other interests of publishers may warrant a need to check the market for an available copy of a published work before making the preservation copy. This concept is revisited in detail below.</p> <p>Audiovisual works, broadcasts, and recorded works, whether digital or analog, often possess the same critical preservation needs, especially since many twentieth-century formats are combustible and chemically unstable, or they are operable only on devices that are steadily becoming obsolete.</p> <p><i>Language to avoid:</i> "Disclosed works." This concept means something less than published, and it exists in the laws of few countries. There is no reason to have this limit for preservation, and it is not a well-established concept in most countries.</p> <p><i>Language to avoid:</i> "Excluded works." Some Member States explicitly exclude certain types of works from the scope of the exception, such as software. These conditions have proved to be a severe restraint on preservation. While there may have been reason to</p>	<p><i>May add:</i> "...this exception applies to all types of works in all formats and media, notwithstanding rights of copyright or related rights, and whether published or unpublished..."</p> <p><i>May further add:</i> "...including any illustrations, images, quotations, typographical arrangements, and other elements accompanying or part of any work..."</p> <p><i>May further add:</i> "...including without limitation any type of work that may be protectable under copyright law or related rights, including without limitation audiovisual works, broadcasts, and sound recordings..."</p>



	exclude certain works in some previous years, those works are now often in greatest need for preservation and have important cultural significance. Excluding certain works today will also likely create a need to revisit and revise the statute as preservation needs change.	
Clarify that the scope of works includes digital works.	Because all types of works can embody cultural heritage and thus be appropriate for preservation, the exception ought to encompass works that are "born digital." In fact, many digital works such as movie DVDs, computer games, and software are in need of preservation.	<i>May add:</i> "...this exception applies to all types of works in all formats and media, notwithstanding whether the work was created, published, or available in the institution's collection in a digital, analog, or other medium..."

<b>Subcategory B.2: Requirement of Works</b>		
A copyright exception may set requirements for the condition or qualities of the specific copy of the work that is in the collection of the institution in need of the preservation copy. For example, the preservation law might require that the work has incurred, or is at risk of incurring, some loss or damage before the institution makes the copy. Because these provisions limit the main objective of supporting preservation of cultural heritage, Member States should include these provisions with some caution. These concepts are also often unwarranted with respect to unpublished works and archival collections, where preservation copying would have little effect on the market for the works.		
<i>Select Any or All as Appropriate:</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
Anticipatory preservation.	Before reviewing the availability or condition of the work, as detailed below, a Member State may wish to consider when a work may be preserved, regardless of its condition or other circumstance. Especially with respect to unique, rare, or unpublished works which are often irreplaceable, and works that may be at risk of harm, the law may permit institutions to make preservation copies without having to wait for fire, flood, or other catastrophe to occur.	<i>Option:</i> "...any work that is subject to this preservation statute may be reproduced and otherwise used in a manner consistent with this statute for purposes of preserving the work..."  <i>Option:</i> "...in order to assure the preservation of works that may be rare or of cultural significance, the institution may make the preservation copies in a manner consistent with this statute without requirement that the work has been lost, damaged, or suffered other harm..."
Availability of a copy of the work on the market.	Current law in some Member States requires the institution to check the market for a purchase of a replacement work on the market, rather than make a copy. This concept is principally relevant with respect to published works, due to the economic and other interests of publishers. Member States may want to limit the provision to published works.  Most provisions on this point are simple, but some Member States impose elaborate and rigid requirements. Any requirement to check the market ought to be implemented in a manner that does not unduly burden the preservation objective and that is realistic for libraries and other institutions throughout the Member State to satisfy.	<i>Degree of availability:</i>  "...with respect to published works, the institution has determined that it is not reasonably practicable to acquire the work for the institution's collection for the needed purposes..."  "...with respect to published works, the institution has determined, after a reasonable effort, that an unused copy of the work cannot be obtained at a fair price..."  <i>May further add:</i> "...with respect to published works, the institution has conducted a reasonable search of the market for a new copy of the work at a fair price and has found no such copy suited to fulfilling preservation needs..."

		<p><i>Means of availability:</i></p> <p>"...cannot obtain an unused copy of the work under reasonable conditions..."</p> <p>"...cannot obtain an unused copy of the work through ordinary commercial channels..."</p> <p><i>May add details:</i></p> <p>"...obtain an unused copy of the work, from or under authority of the rightsholder..."</p>
<p>Work to be copied must be in need of preservation or replacement.</p>	<p>A preservation statute may require that the work in question be in need of preservation, by virtue of being lost or damaged or have some other deficiency, or be at some degree of risk of such malady. For a preservation exception, there is good reason to consider not requiring in the statute that a work have already incurred loss or harm before it may be copied. A detailed examination of the need for anticipatory preservation, particularly to address modern conditions, is included in Parts II and III of this toolkit.</p>	<p><i>The following provisions are optional:</i></p> <p>"...the exception applies to works that are lost, stolen, damaged, or that the institution has determined are at risk of such adverse development..."</p> <p><i>Other concepts that may be included on such a list:</i></p> <ul style="list-style-type: none"> <li>...fragile...</li> <li>...missing from the collection...</li> <li>...rendered unusable...</li> <li>...rare...</li> <li>...of exceptional importance...</li> <li>...in a format that has become obsolete...</li> </ul>

## Category C: Why May the Exception be Applied?

Objective of this Section:

To Specify the Purpose for Applying the Statutory Exception and Making the Copies and Related Activities.

<b>Subcategory C.1: Reason for Making the Copy</b>		
This toolkit is obviously centered on issues related to preservation of copyrighted works, and it would be easy to state simply that the purpose is preservation. However, definition and implementation of preservation programs can be nuanced, and preservation is closely related to other concepts, particularly the making of replacement copies.		
<i>Select Any or All as Appropriate:</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
To preserve the work in the institution's collection.	As the introduction to this toolkit demonstrates, preservation has many meanings and embodies multiple concepts. Details are not usually included in any statute, and a broad authorization to use the exception for all activities related to "preservation" can give libraries and other institutions the flexibility they need. Preservation is closely related to concepts of "restoration" and "conservation." A Member State may find it useful to include those terms among the statutory purposes.	<p><i>Suggestion:</i> "...to make a copy of a work in the institution's collections for purposes of preservation..."</p> <p><i>May add:</i> "...for purposes of preserving the cultural and scientific heritage..."</p> <p><i>May add:</i> "...for purposes of preservation, restoration, or conservation..."</p> <p><i>May add replacement concept:</i> "...to make a copy of a work in order to replace a work that is part of the institution's collections, but that is not suitable for copying..."</p>
To replace a work in the institution's collection.	While preservation is generally to assure a work's indefinite accessibility, the concept of replacement is more about meeting today's needs when a work in the collection is unavailable. This purpose is of growing need at a time when floods, fires, pandemics, and other disasters have destroyed collections or left them unavailable for extended periods.	<p><i>May add:</i> "...and to add the copy to the collection in addition to or in place of the original work..."</p>
To make a copy available to another library or other institution.	Effective preservation often means making a copy that is to be held by another library or other institution. It may be placed there for safekeeping.	<p><i>May add:</i> "...to make a copy for deposit in the collection of another institution for the purposes of research, security, and safekeeping..."</p>
To preserve a work in the collection of another institution.	Often an institution may be prepared to make a preservation copy of a work, but a copy in another collection is in better condition or for any reason better suited for making the preservation copy. The institution holding the better copy may be able to make the preservation copy for the other institution.	<p><i>May add:</i> "...to make a copy of a work in the institution's collections for purposes of supplying it to another institution that has requested the copy specifically to retain and use consistent with its application of this statutory exception or other comparable statutory exception applicable in its jurisdiction..."</p>
To complete a work or other item held in an institution's collection by adding content as needed.	The concept of completion could ordinarily apply to relatively short parts of a larger work, such as missing pages from a book, a brief volume from a series, or artifacts from an archival collection. The concept of completion is ordinarily applied only with respect to discrete works currently held in an institution's collection.	<p><i>May add:</i> "...for purposes of completion of works, including supplying content in order to complete an individual work or a part, volume, or other brief and discrete element of a larger work currently in the collection of a specified institution..."</p>

## Category D: How May the Preservation Activities be Carried Out Pursuant to the Exception?

Objective of this Section:

To Specify the Circumstances and Means under which the Institution May Make Preservation Copies.

<b>Subcategory D.1: Conditions of Making Copies</b>		
In addition to limiting the exception to certain institutions and certain works, the statutes frequently add other conditions on the making of copies. The conditions summarized here have immediate and practical effect on the establishment and conduct of a preservation service.		
<i>Select Any or All as Appropriate:</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
Application of digital technologies.	<p>The ability to use digital technologies for making and using the preservation copies is imperative. Nearly all preservation programs involve digitizing works and usually maintaining and using them in digital form. Many current statutes do not allow digital technologies, but without the use of digital technologies, the preservation program will not succeed.</p> <p><i>Language to avoid:</i></p> <p>“Reprographic reproduction.” Often this term is interpreted to encompass means of making copies that do not use digital technology. Avoiding the phrase can avoid the narrow interpretation.</p> <p>“Facsimile copies.” Often understood to mean a format that preserves the appearance or image of the work, and nothing more.</p> <p>These phrases may have been relevant in an era of photocopying or microfilm, but they have been interpreted as a bar on the use of digital technology and its added capabilities.</p>	<p><i>Preferred language:</i></p> <p>“...the institution may make and retain the copies permitted under this exception by any technological means and in any medium, including without limitation, digital technologies, regardless of whether the work that is the subject of preservation is available to the institution in digital form or otherwise...”</p>
Source of the work.	<p>Many Member States require that all copies made under certain exceptions include a citation or reference to the sources of the work. Typically, this may be little more than adding a citation or making a copy of the cover, title page, or other part of the work with the source information.</p> <p>This condition is separate from any rights or obligations under moral rights. Some statutes specify that the copyright exception does not in any way affect the moral rights of the author.</p>	<p><i>May add:</i></p> <p>“...all copies made pursuant to this exception shall include the name of the author or the source of the work, if reasonably available...”</p> <p><i>May add:</i></p> <p>“...nothing in this exception derogates any moral rights provided in this Copyright Act...”</p>
Copyright notices on copies.	<p>The statute may require that all copies include the form of a copyright notice as it may appear on the version of the work that is being reproduced. Users do not need to locate other copies, but may rely on the version in hand. The statute could call for including any form</p>	<p><i>May add::</i></p> <p>“...copies made pursuant to this exception shall include the copyright notice as it may appear on the version being copied...”</p> <p><i>May add::</i></p>

	of a copyright statement, including a Creative Commons license or other statement of permitted use, as it may appear on the work with the authorization of the rightsholder. To be clear, this provision is about keeping the copyright notice or statement on the original; it is not about any claim of rights by the library or other institution.	<p>“...copies made pursuant to this exception shall include the copyright notice or other copyright statement or grant of any nature, as it may appear on the version being copied...”</p> <p><i>May add:</i> “...if the version of the work being copied does not include a copyright notice or statement, all copies of such work made pursuant to this exception shall include a legend stating that the work may be protected by copyright...”</p>
Permitted number of copies.	Current statutes often limit the number of copies that may be made of each work. Some statutes state a specific number, most often allowing only one copy. Other statutes are flexible and permit copies as appropriate for meeting the objectives of the preservation programs.	<p><i>Preferred language:</i> “...the institution applying this exception may make copies of each work in such quantities as reasonably necessary and customary for purposes of the preservation objective...”</p> <p><i>May add:</i> “...this provision relates solely to the making of copies, but the number of copies that are accessible or that may be used by any person at any time is subject to other provisions of this statute...”</p>
Isolated act of copying.	This provision appears frequently. The objective is to limit the copying to isolated and unrelated instances. The concern is to prevent the systematic making of multiple copies that could affect the market. The copyright exception might better serve that objective with alternative language, suggested here.	<p><i>Common language:</i> “...provided each reproduction of a work pursuant to this exception is an isolated, one-time occurring instance...”</p> <p><i>Alternative:</i> “...provided that for each instance of reproduction of a work, the institution has met the requirements of this exception...”</p>

## Category E: Additional Provisions and Conditions

Objective of this Section:

To Summarize the Various Additional Provisions and Terms that May be Included in the Statutory Exception for Preservation.

<b>Subcategory E.1: Additional Terms to Consider</b>		
Beyond the language of the statutory exception for preservation are various other relevant conditions and terms in the copyright statutes. These provisions might be critical in the application of the law, but they are ordinarily not directly part of the roster of actions and processes implemented and carried out by the institution and its preservation program.		
<i>Select Any or All as Appropriate:</i>	<i>Notes and Comments:</i>	<i>Example Language:</i>
Reference to the three-step test	Under the Berne Convention and other instruments, countries have the authority to enact copyright exceptions, subject to the three-step test (3ST). The international instruments do not require the use of the 3ST language in domestic statutes. Instead, the objectives of the 3ST are achieved by applying the exception to certain specific uses (e.g., preservation) and making the terms subject to conditions that do not conflict with normal exploitation, nor prejudice interests of the author or rightsholder. The many specific elements examined in this overview can be adopted to achieve compliance with these elements of the 3ST.	<p><i>Alternative:</i> Rather than explicitly referencing the 3ST or repeating its language, Member States may instead acknowledge that the details of the preservation exception are the means for complying with the standards of the 3ST.</p> <p><i>Alternative:</i> Rather than including the language of the 3ST in the statute, a Member State may consider drafting an explanatory study to accompany adoption of the law, explaining specifically how the new copyright exception complies with the 3ST.</p> <p><i>Alternative:</i> A Member State may consider adding to the preamble or elsewhere in the statute a confirmation that the exception is consistent with the 3ST and international principles in general: "The conditions and limits of this provision cumulatively reflect respect for diverse interests consistent with international principles."</p>
Limitations of infringement liability for users of the exception.	When a copyright exception is properly applied and used, no copyright infringement occurs. However, situations will arise when the librarian or other user interpret or apply the law in a manner found to be incorrect. The statute might include two relevant provisions. First, an explicit statement that the institution and staff members are protected from liability when the law is correctly applied. Second, a protection from liability if the individuals applied the law in good faith, even if a court were to determine that the exception was not properly applied.	<p>May add: "...the protections and limitations on potential liability under the Copyright Act for persons seeking to apply this copyright exception extend to the authorized institution and to its officers, staff, and employees..."</p> <p><i>May add::</i> "...no person or institution shall be liable for [monetary damages for] infringement of copyright or related rights resulting from the good-faith application of this statutory exception..."</p>
Circumvention of Technological Protection Measures.	Pursuant to the WIPO Copyright Treaty of 1996, many Member States have made unlawful the circumvention of technological protection measures (TPMs) that may control access to or use of copyrighted content. Many copyrighted works that may be preserved consistent with the exception can be locked behind TPMs. Member States have enacted various means for	<p><i>Most direct language:</i> "...notwithstanding the general prohibition, it is not a violation for any person authorized to apply and exercise the opportunities under a copyright exception to circumvent the technological protection measures with respect to a work that may be used consistent with the exception..."</p> <p><i>Alternative provision:</i></p>

	enabling circumvention in order to carry out the terms of a copyright exception.	Some Member States have adopted a process for submitting a request to a governmental agency for authority to circumvent.  <i>Alternative provision:</i> Some Member States have adopted a process for submitting a request to the rightsholder of the copyrighted work, requiring the rightsholder to provide the needed access.
Defined statutory terms.	The definitions of terms used in the overall copyright law, or just in the one exception, are often of great importance. Existing statutes seldom include definitions of more than a few terms, and often the most salient terms are left undefined. Definitions of some terms are usually helpful (e.g., clarifying that a "reproduction" can be in any medium). Definitions can also be controversial in a time when institutions, technologies, and needs are steadily changing (e.g., the nature of a "library" or "museum"). Some terms are best left flexible and perhaps even undefined to meet future needs. All should be drafted with great care.	<i>Terms to consider:</i>  "Library," "museum," "archive," or other institution. For various reasons, these terms are seldom defined, and it is probably best not to include definitions in the statute. See discussion at Subcategory A.1 above.  "Reproduction" or "copy." The definition is an opportunity to include reference to digital and other means for making and creating the copy.
Additional defined statutory terms.	Examples of defined terms. Rather than attempt to define terms in full, which can be contentious and can have the practical effect of confining the law to narrow circumstances, a useful definition can clarify at least a portion of the definition, or specify what the term does not include.	
Relationship to Licenses.	Member States invest heavily in the careful development and implementation of a copyright exception, only to face the possible override of the provision by contract. Many copyrighted works are part of the collections of libraries and other institutions under the terms of license or purchase agreements. Some countries have enacted provisions that protect the goals of the exception by making contrary agreement void.	<i>Possible language:</i> "...the preservation opportunities pursuant to this copyright exception may not be waived by agreement or terms of a grant; any attempt to stipulate such waiver may not be enforced in a manner that limits the implementation and carrying out of the terms of this exception..."

<sup>1</sup> Although “limitations” and “exceptions” have some conceptual differences, the terms are used in this toolkit interchangeably.

<sup>2</sup> Berne Convention for the Protection of Literary and Artistic Works, art 9(2), Sept. 9, 1886, revised, Paris, July 24, 1971, 25 U.S.T. 1341.

<sup>3</sup> This summary application of the three-step test is informed in large part by two WIPO publications that examine the language of the major treaties administered by WIPO. See Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (Geneva, Switzerland: The World Intellectual Property Organization, 2003); and *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, prepared by Mr. Sam Ricketson, document SCCR/9/7 (April 5, 2003), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16805](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805)

<sup>4</sup> The WTO agreement on intellectual property includes at Article 13 language nearly identical to the Berne version of the three-step test, but most significantly Berne’s reference to “authors” is changed to the broader range of “interests of the right holder.” Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299 (1994).

<sup>5</sup> International Centre for the Study of the Preservation and Restoration of Cultural Heritage (ICCROM), <https://www.iccrom.org/section/disaster-resilient-heritage> accessed January 27, 2022.

<sup>6</sup> For example, *United Nations Resolution 2347 (2017)* condemns the unlawful destruction of cultural heritage, including the destruction of religious sites and artefacts, and the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, notably by terrorist groups, <https://www.un.org/securitycouncil/s/res/2347-%282017%29>. For a full review of UNESCO conventions concerning the preservation of cultural heritage, see <https://en.unesco.org/about-us/legal-affairs/instruments/conventions> accessed January 27, 2022. See also the 2015 UNESCO Recommendation concerning the *Preservation of, and Access to, Documentary Heritage Including in Digital Form*, <https://unesdoc.unesco.org/ark:/48223/pf0000244675>.

<sup>7</sup> *WIPO Report on Regional Seminars and International Conference on Limitations and Exceptions*, document SCCR 40/2 (November 15, 2020), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=515597](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=515597).

<sup>8</sup> Rina Elster Pantalony, *WIPO Guide to Managing Intellectual Property for Museums*, 2013 Edition (Geneva: WIPO, 2013), 22-33. [https://www.wipo.int/edocs/pubdocs/en/copyright/1001/wipo\\_pub\\_1001.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/1001/wipo_pub_1001.pdf).

<sup>9</sup> For example, Smithsonian Conservation Institute’s Imaging Studio uses infrared imaging technologies in museum object conservation. See [https://www.si.edu/MCIImagingStudio/IR\\_UV](https://www.si.edu/MCIImagingStudio/IR_UV) accessed January 27, 2022.

<sup>10</sup> For greater detail on conservation practices of objects in museum collections, see Canadian Conservation Institute information on conservation techniques for objects in collections, at <https://www.canada.ca/en/conservation-institute/services/care-objects.html>. See also Smithsonian Museum Conservation Institute, <https://www.si.edu/mci/index.html>, and The Louvre Conservation Centre, <https://www.louvre.fr/en/the-louvre-in-france-and-around-the-world/the-louvre-conservation-centre>.

<sup>11</sup> UNESCO Convention Concerning the Protection of the World and Natural Heritage (November 16, 1972), Article 11, <https://whc.unesco.org/en/conventiontext/>.

<sup>12</sup> UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003, <https://ich.unesco.org/en/convention> <https://ich.unesco.org/en/convention>.

<sup>13</sup> ICOM Code of Ethics, <https://icom.museum/en/resources/standards-guidelines/code-of-ethics/>.

<sup>14</sup> Nao Hayashi and Edouard Planche, *Why are Museum Documentation and Inventories so Important in Dealing with Emergency Situations?* (UNESCO, Paris, 2017).

<sup>15</sup> For example, see Gallery Systems, <https://www.gallerysystems.com/>.

<sup>16</sup> For example, the Canadian Heritage Information Network’s *Artefacts Canada*, Canada’s National Inventories database, was created pursuant to Article 11 of the UNESCO Convention Concerning the Protection of the World and Natural Heritage at [https://app.pch.gc.ca/application/artefacts\\_hum/indice\\_index.app?lang=en](https://app.pch.gc.ca/application/artefacts_hum/indice_index.app?lang=en).

<sup>17</sup> Canadian Conservation Institute (CCI), International Centre of the Study for the Preservation and Restoration of Cultural Property ICCROM), *A Guide to Risk Management of Cultural Heritage* (ICCROM, Rome, 2016), at [https://www.iccrom.org/sites/default/files/2017-12/risk\\_management\\_guide\\_english\\_web.pdf](https://www.iccrom.org/sites/default/files/2017-12/risk_management_guide_english_web.pdf).

<sup>18</sup> Peter Stone, “War and Heritage: Using Inventories to Protect Cultural Property,” *Conservation Perspectives* (Fall 2013), [https://www.getty.edu/conservation/publications\\_resources/newsletters/28\\_2/war\\_heritage.html](https://www.getty.edu/conservation/publications_resources/newsletters/28_2/war_heritage.html).

<sup>19</sup> Supra, footnote 25.

<sup>20</sup> Some historical documents maintained in Lahaina reportedly had been made available online, holding out the prospect that digital copies survived when the paper originals were incinerated. That bit of hope underscores the importance of acting soon to preserve the cultural record before it vanishes in only an instant. Shawn Hubler, “The Historic Town of Lahaina, and Its Legacy, is in Ashes,” *New York Times*, August 10, 2023, <https://www.nytimes.com/2023/08/09/us/lahaina-maui-hawaii-fires.html>.

<sup>21</sup> Victoria Chisholm, *Preventative Planning and Disaster Management Planning in Cultural Institutions* (Master’s Thesis, Graduate School – New Brunswick, Rutgers, the State University of New Jersey, 2015), <https://rucore.libraries.rutgers.edu/rutgers-lib/47340/PDF/1/play/>.

<sup>22</sup> See for example, Canada’s *Museums Act*, S.C. c.3, as amended, which established Canada’s national museums and provides for their powers and responsibilities, <https://laws-lois.justice.gc.ca/eng/acts/m-13.4/page-1.html>.

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<sup>23</sup> See for example, the Collections Management Policy of the Metropolitan Museum of Art, New York, approved by its Board of Trustees, on September 13, 2022, <https://www.metmuseum.org/-/media/files/about-the-met/policies-and-documents/collections-management-policy/Collections-Management-Policy.pdf>.

<sup>24</sup> Ibid.

<sup>25</sup> ICOM Code of Ethics, <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>.

<sup>26</sup> Ibid.

<sup>27</sup> IFLA statement on Libraries Safeguarding Cultural Heritage, <https://www.ifla.org/news/libraries-safeguarding-cultural-heritage/>.

<sup>28</sup> ICA Statement on documentary heritage found at <https://www.ica.org/en/what-archive>.

<sup>29</sup> UNESCO's *Recommendations Concerning the Preservation of, and Access to, Documentary Heritage Including in Digital Form* are guiding principles that capture the essence of the duty of care to preserve cultural heritage. When access to specific documentary heritage items may need to be restricted to protect personal rights, the UNESCO recommendations provide that: "The existence of possibly legitimate access restrictions on any part of the documentary heritage should not inhibit or limit the ability of memory institutions to take preservation action." See ICA Statement on documentary heritage, at <https://www.ica.org/en/what-archive>.

<sup>30</sup> Regional Seminars on Libraries, Archives, Museums and Educational & Research Institutions in the Field of Copyright. See [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=515597](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=515597), and proposed in accordance with the Action Plan on Limitations and Exceptions and approved by Member States at SCCR/36 in June 2018. See [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=408219](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=408219).

<sup>31</sup> WIPO Report on Regional Seminars and International Conference on Limitations and Exceptions, document SCCR/40/2 (November 15, 2020), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=515597](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=515597), proposed in accordance with the Action Plan on Limitations and Exceptions and approved by Member States at SCCR/36 in June 2018, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=408219](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=408219).

<sup>32</sup> For example, the many preservation programs and recommendations of digital future proofing made by ICCROM, at <https://www.iccrom.org/>. See also the ongoing worldwide digital preservation of endangered archives by the Endangered Archives Programme, at <http://eap.bl.uk/>, and documented by Maja Kominko, ed., *From dust to digital: ten years of the Endangered Archives Programme* (Cambridge, UK: Open Book Publishers, 2015).

<sup>33</sup> The National Museum in Rio de Janeiro, housing Brazil's national science collection, suffered a catastrophic fire in 2018 that led to the destruction of its collection, which was amassed over 200 years. Michael Greshko, "Fire Devastates Brazil's Oldest Science Museum," *National Geographic* (September 6, 2018), <https://www.nationalgeographic.com/science/article/news-museu-nacional-fire-rio-de-janeiro-natural-history>.

<sup>34</sup> Several heritage sites and museums in Pakistan suffered severe damage following monsoon rains and flash floods, <https://www.theartnewspaper.com/2022/09/27/pakistans-heritage-suffers-brutal-effects-of-record-monsoon-rains>.

<sup>35</sup> The University of Cape Town Library suffered a devastating fire destroying much of their collection of cultural heritage relating to South Africa and the southern region of Africa in 2021, after wildfires sparked by drought overtook the library and part of the university campus. Nora McGreevy, "Why the Cape Town Fire is a Devastating Loss for South African Cultural Heritage," *Smithsonian Magazine* (April 20, 2021), <https://www.smithsonianmag.com/smart-news/cultural-heritage-historic-library-destroyed-south-africa-blaze-180977539/>.

<sup>36</sup> The Performing Arts Readiness program in the United States is assisting arts organizations in preventive disaster planning so that their archives (whether historic records, stage sets, costume collections, music compositions, or recordings) do not perish as a result of climate disasters or pandemic neglect. Performing Arts Readiness, <https://performingartsreadiness.org/>. For particular case studies, see <https://performingartsreadiness.org/blog/>.

<sup>37</sup> In the summer of 2021, France, Belgium, Germany, and the Netherlands experienced catastrophic flooding that placed many cultural heritage organizations and their collections at risk, documented by ICOM at <https://icom.museum/en/news/european-museums-flooding/>.

<sup>38</sup> LINKS, *Adventures in Archives*, Iowa State University, vol.8, issue 1 (May 2019), <https://link.las.iastate.edu/2019/05/21/adventures-in-archives/>.

<sup>39</sup> Copyright Act of Canada, R.S.C. c-42, s.30.1, as amended, at <https://laws-lois.justice.gc.ca/eng/acts/C-42/Index.html>.

<sup>40</sup> WIPO Report on Regional Seminars and International Conference on Limitations and Exceptions, document SCCR 40/2 (November 15, 2020), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=515597](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=515597), proposed in accordance with the Action Plan on Limitations and Exceptions and approved by Member States at SCCR36 in June 2018, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=408219](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=408219).

<sup>41</sup> The three-step test is explained in the introduction to this toolkit, and its place in the drafting of statutory language is included in the Appendix.

<sup>42</sup> *CCH Canadian Limited v. Law Society of Upper Canada* (Supreme Court of Canada), 1 SCR 339, 2004 SCC 13, 236 DLR (4th) 395, 30 CPR (4th) 1, 247 FTR 318.

<sup>43</sup> Rina Elster Pantalony, *Managing Intellectual Property for Museums* (Geneva: WIPO, 2013) <https://www.wipo.int/publications/en/details.jsp?id=166> accessed January 28, 2022.

<sup>44</sup> By way of example, the International Council of Museums establishes professional and ethical standards for museum activities; it has developed a definition of "museum." See: [https://icom.museum/wp-content/uploads/2022/09/Statutes\\_2022\\_EN.pdf](https://icom.museum/wp-content/uploads/2022/09/Statutes_2022_EN.pdf) (Article 3, Section 1). Member States might consider adopting aspects of that definition, but any definition of one type of institution raises the likely need to define them all.

