

Toolkit on Access



***WIPO Toolkit on Access to Copyrighted Works in the
Collections of Cultural Heritage Institutions***

– Libraries, Archives, and Museums –

*prepared by J. Joel Baloyi, Kenneth D. Crews, Carol Newman, Rina Elster Pantalony, and
David Sutton*

This document 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.

The authors gratefully acknowledge the research contribution of Ms. Emily Taylor, MS Nonprofit Management, Columbia University School of Professional Studies.

Authors Joel Baloyi, Kenneth D. Crews, Rina Elster Pantalony, and David Sutton dedicate this publication to their co-author Carol Newman, whose contributions and insight in writing this publication were invaluable. She is sadly missed.

TABLE OF CONTENTS

Introduction	5
A. The Importance of Access and Objectives of this Toolkit	5
1. Origin and Purpose of the Toolkit on Access	5
2. Assistance for Lawmakers and Cultural Heritage Professionals.....	6
3. Meeting the Requirement of the Three-Step Test	6
4. Continuing Developments and the Rise of Artificial Intelligence	7
B. Optimizing Access and Putting the Toolkit to Use	8
1. Structure and Practical Application of the Toolkit.....	8
2. Utilizing the Toolkit for Development of Law and Policy	8
Part I: The Purpose and Importance of Access.....	10
A. Stewardship and Cultural Heritage Institutions.....	10
B. The Duty of Care and the Provision of Access	10
C. Access and the Mission of Cultural Heritage Institutions	11
1. Access as a Fundamental Purpose of Cultural Heritage Institutions	11
2. Access to Enable Preservation of Works at Risk.....	11
3. Access and the Promotion of Knowledge and Learning	12
4. Access and Cultural Identity.....	12
Part II: The Dimensions of Access to Cultural Heritage Collections	13
1. Access and Copyright.....	13
2. Access and Digital Technologies.....	13
3. Remote Access and Access Across Borders	13
4. Access and the Scope of Authorized Users	14
5. Access and Digitized Works and Works Born Digital.....	15
6. Access for Permitted Purposes	15
7. Access and Monitoring and Administration.....	15
Part III: Access Solutions in the Environment of Law and Liability Risk.....	16
A. Enhanced Access Solutions.....	16
1. Access and Specific Copyright Exceptions and Limitations.....	16
2. Access and Orphan Works	17
3. Access and Fair Dealing or Fair Use.....	18
4. Access and Limitations on Liability for Copyright Infringement.....	18
5. Access and Avoiding Infringement: Safe Harbor Provisions	18
6. Access to Public Domain and Works Affected by Duration Limits.....	19
B. Access and Licensing	20
1. Access and Licensing to Libraries, Archives, and Museums	20
2. Access and Licensing to Patrons and Researchers	20
3. Access and Collective Licensing	21
C. Access and the Mitigation of Possible Liability Risks.....	21
1. The Use of Technological Protection Measures	22
2. Access and the “Virtual Reading Room”	22
3. Rights Metadata and Collections Management Practices.....	23
4. The Use of Digital Resolution as a Mitigation Technique	23
5. Intellectual Property Mediation and Arbitration	23

Part IV: Constructing a Statutory Provision for Access..... 25

- A. How to Use the Charts 25
- B. The Dimensions of Permitted Access 25
- C. Stages in the Charts and the Scope of Access..... 26
- D. Drafting an Example Statute 27

Part V: Conclusion..... 30

Appendix 32

Introduction

A. The Importance of Access and Objectives of this Toolkit

1. *Origin and Purpose of the Toolkit on Access*

This toolkit is intended to examine the practices, opportunities, and challenges of facilitating access to copyright protected works held in the collections of cultural heritage institutions, and to do so within the structure of the current international copyright framework. This task acknowledges that any consideration regarding access to copyrighted works must of necessity ensure respect for the rights of copyright owners. The toolkit examines the modalities of access and acknowledges that, in keeping with the current copyright framework, licensing remains a primary means of accessing copyright protected works. At the same time, where appropriate, the current framework allows for exceptions to copyright as discussed in detail throughout this toolkit. More specifically, the charts and guidance in this toolkit demonstrate how new or existing statutory exceptions may be modified to clarify opportunities for accessing works in furtherance of the mission of the cultural heritage institutions. Finally, this toolkit examines mitigation practices that may be appropriate to address risk in uncertain circumstances.

Copyright exceptions, which form part of the current international copyright framework, are addressed in this toolkit as a means by which the public interest may be taken into account when granting access to copyright protected works. Any exceptions to copyright within the current international framework are subject to the three-step test, referenced in greater detail within this toolkit. The means by which the public interest is taken into account is premised on the acknowledgement that, from its very inception, the copyright system – whether in the common law or civil law traditions – is concerned with granting limited exclusive rights to authors to incentivize them to make more and better works for access by the public in the advancement of knowledge and the arts. Recognizing the nature of legal responsibilities and decisions, this toolkit describes certain practices that have emerged to mitigate the risks of infringement where liabilities remain unclear when cultural heritage institutions seek to meet their mission-driven mandates in granting access to their collections. Mitigation techniques mentioned in this toolkit are discussed within the scope of permissible international copyright norms.

This toolkit on issues of access to copyrighted works, like the earlier *Toolkit on Preservation*, 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 legal and policy development enhancing access, 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.¹ The events achieved a satisfying level of consensus on the need to address access modalities to worldwide cultural heritage in the digital era, given the central role of cultural heritage institutions, that is, libraries, archives, and museums,² in stewarding their collection as well as in fulfilling their mission to the public. As emphasized in the *Toolkit on Preservation*, these are generally “trusted institutions” that are widely recognized as serving the public interest. This toolkit embodies many of the ideas that emerged during those events.

It was understood in all of those meetings and discussions that well-crafted and thoughtfully implemented exceptions and underlying policies³ would serve the public interest as well as the interests of the authors, creators, or rightsholders to safeguard the world’s cultural heritage for continued use by current and future generations. Many of those beneficial uses would otherwise be made impossible by the loss or deterioration of the original. However, copying and other uses are most often undertaken in a library, archive, or museum with the understanding not just to preserve the original work, but to enable access to it, whether for research, exhibition, education, or other means of serving the public interest. This toolkit examines the statutory means by which access may be enabled, and the risk mitigation techniques (whether statutory,

technical, or contractual) that may be employed by and for the benefit of cultural heritage institutions, the public they serve, and the rightsholders who may be affected.

It is important to note that the copyright exceptions discussed in this toolkit apply to cultural heritage institutions that are recognized as “trusted institutions” specifically tasked with preserving and providing access to their collections for the benefit of the public, while also respecting the interests of rightsholders. This means that not every institution or organization that has a collection will qualify as a trusted institution. Trusted institutions are generally described as having been created to hold collections for the benefit of the public, based on specific professional standards of practice, and whose primary mission-driven activities are inherently noncommercial in nature. In addition, trusted institutions are defined by mission-based activities that are grounded in adherence to legal, professional, and ethical standards tied to conservation, copyright, and stewardship. As such, 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.

2. Assistance for Lawmakers and Cultural Heritage Professionals

The leading function of this toolkit is to help lawmakers and policymakers draft new or revised copyright legislation. This toolkit will help address innovative ways to provide access with the advantages of digital technologies, and especially address new means for managing questions related to navigating this rapidly evolving landscape. The guidance in this toolkit carefully balances the need for public availability with the ethical, legal, and practical considerations tied to conservation, copyright, and stewardship.

The toolkit is also meant to be practical 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, licensing, and liability mitigation techniques that facilitate access to copyright-protected materials found in collections. It also surveys a range of factors which legislators, cultural heritage professionals, rightsholders, and other interested parties may take into account in their professional pursuits.

Access may be affected by many other legal conditions other than copyright, including personal safety, confidentiality, privacy, other forms of cultural or intellectual property, and national or governmental security restrictions. Significant in some countries is the distinct body of law protecting works of cultural heritage, separate and apart from the law of copyright. Although these legal issues deserve greater attention, this toolkit centers on copyright. Copyright law (similarly, the associated “neighboring rights”) applies broadly to many different original works, and copyright is the subject of multiple major international treaties and other instruments administered by WIPO.

3. Meeting the Requirement of the Three-Step Test

The domestic copyright law of most countries is shaped substantially by the obligations of various multinational agreements. The *Berne Convention* is the leading multinational instrument on copyright law, and it provides that Member States may enact statutory exceptions to the rights of copyright owners. This toolkit provides examples of exceptions that Member States may incorporate to provide access to copyright protected works in the collections of cultural heritage institutions, based on the current international copyright framework. 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, do so with the understanding that any proposed exceptions should satisfy the three-step test. The Berne three-step test provides in full: “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.”⁴ Later multinational instruments extend the test beyond merely reproduction and apply it to other uses that are governed by copyright law.

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 provisions related to access that, if duly drafted and implemented, can be consistent with requirements of the three-step test.

In general, the first “step” is that the exception is applicable in “certain special cases.” This condition ordinarily requires clear definitions and a prescribed scope 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 access services by libraries, archives, museums, and other cultural institutions and are rooted in clear and sound public and cultural policy considerations, ensuring that the rights and interests of the public and of rightsholders are not arbitrarily curtailed.⁵

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 access activity will not conflict with the manner in which copyright rights are normally exploited. 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 author and other rightsholder.⁶ The terms of the statute and any specific exception need to be examined to avoid posing risks of unreasonably prejudicing the interests of the rightsholders. The interests may overlap with the second factor, but they could go beyond common perceptions of exploitation. For example, a rightsholder may have an interest in controlling the time or manner of publication, or giving credit to contributors and others.

4. Continuing Developments and the Rise of Artificial Intelligence

This toolkit is the second in a series of resources developed by WIPO to examine the intersection of cultural heritage practices and copyright law. Digital technology now provides cultural heritage institutions in many countries with the means of enabling their users to access digital materials in their collections. At the same time, 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 access activities. However, uncertainties regarding the legal aspects of access create complexities for funders, as they may fear that their investment could be associated with copyright infringements. A reliable legal framework that allows optimal access will ensure that materials and objects in collections, which have been chosen to be preserved for curatorial and historic reasons, are subsequently made accessible for specific purposes, perhaps for specified audiences and subject to terms and conditions that are lawful and transparent. Such a framework, therefore, is a way to facilitate funding and

investment to support preservation and access efforts, and it implies a need for national and international collaboration.

The authors recognize that this toolkit has been released to Member States at exactly the time when artificial intelligence (AI) seems to be challenging nearly all fundamental legal structures. Questions about the meaning and scope of copyright ownership and copyright exceptions, in the light of AI developments, are now matters that have gripped the attention of legislators, policymakers, and courts, in many Member States of WIPO. During this time of transition, this toolkit will continue to evolve. Future deliberations and discussions will likely center on fundamentals about ownership rights and copyright exceptions. As the law adapts to change, so may policy developments and, potentially, technical drafting of statutory language.

B. Optimizing Access and Putting the Toolkit to Use

1. Structure and Practical Application of the Toolkit

The structure of this toolkit is intended to build toward a practical outcome – to assist and guide lawmakers, senior officers at cultural heritage institutions, and any other responsible party to draft standards and procedures that enhance access to works found in collections in a manner consistent with existing law and respectful of diverse stakeholders. In so doing, the toolkit has been divided into four interrelated parts. The early parts of this toolkit lay a foundation. Part I provides a baseline description of access activities, as well as the legal obligations and duty of care and mission of the organizations that steward cultural heritage collections. In Part II, the toolkit covers the dimensions of access. Part III suggests detailed means of access that are statutory, contractual, or rooted in institutional practices at the intersection of copyright law and cultural heritage. Part III also provides a detailed description of potential exceptions to copyright, exceptions to statutory damages for copyright infringement, and provisions that provide risk mitigation pathways, such as the use of any safe harbor provisions. Part IV describes how to construct a statutory or policy provision. 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 statutory provisions that include exceptions to copyright for the purposes of access and mitigation of possible risk. It is worthwhile to note that the detailed descriptions found in Part III and the sample clauses and reference chart found in the Appendix is premised within the confines of the existing international copyright framework.

2. Utilizing the Toolkit for Development of Law and Policy

Part IV is the operational center of the toolkit. It provides detailed insights into the process and outcomes that are a centerpiece of this project. The authors of this toolkit recognize that readers delving into those early parts will benefit from some added context, particularly an example of engaging with the guidance presented here and identifying the elements and options for drafting access provisions. Put simply, a brief look at an example of the outcomes can give greater context for understanding the earlier parts of the toolkit.

Example of Dedicated Terminals in Libraries:

Many Member States, especially in the European Union, have enacted copyright statutes that allow certain libraries, archives, museums, or educational institutions to make works in their collections viewable by readers at dedicated computer terminals so long as uses are not for commercial gain.⁷ The main effect of these statutes is to significantly expand access to the works by permitting digitization of works, storing the digital copies, and allowing the public to view them on dedicated computer terminals. In other countries the policy may be by license or by interpretation of fair dealing. In any event, this toolkit guides users through the process of deciding the scope of the concept, such as: who may exercise the right, and what conditions apply. The toolkit will then guide the user through optional language and terms for

the policy standard. That process is presented on the charts in the Appendix, and a sample chart is examined here.

The example chart below applies specifically to the decisions surrounding the development of law or policy on the matter of digitizing works and accessing them on dedicated terminals. This subject provides a helpful example, because the law originated in one group of countries (the European Union), but has been adopted by other countries in other parts of the world. This example also sets up a situation that facilitates controlled and limited access to all types of works, but these statutes restrict or bar uses such as downloading and other actions that could interfere with the rights of copyright owners. The chart organizes and systematically facilitates each step of the drafting and implementation process. That process is a series of questions and decisions organized in the charts. Presented here is a simplified version of the chart for this issue. The corresponding chart in the Appendix offers greater detail. But this abbreviated version demonstrates the relevant steps and some suggestions of the details at all stages. Part IV of this toolkit details the processes, but even from the simplified example chart, one can see that the path ahead involves an analytical approach, culminating in drafting some of the specific clauses for the statute or policy.

Example Chart:

This example is provided here as an introduction to the function of the toolkit; details are added to the same chart as it appears in the Appendix.

TOPIC:

Accessing Digitized Works that are Made Available on Dedicated Terminals

Proposed Access Solution:

Statutory copyright exception authorizing cultural heritage institutions to use copyrighted works in digital formats for the primary purpose of making the works available for viewing and other uses on terminals at the institution. This chart can guide lawmakers in Member States as they draft new or revised statutory exceptions, which have practical application and address interests reflected in the three-step test.

Stage ONE: Specify Intended activities that can expand access.	Stage TWO: Identify ownership rights that could be affected.	Stage THREE: Elements of Relevant Statutory Exceptions or Policy Measures	Sample clauses and terms for possible inclusion in the relevant statute.
<i>List specific and practical actions that are part of providing the service. Examples begin with making and retaining digital copies.</i>	<i>List the legal rights held by rightsholders that may be affected. Examples begin with reproduction and making available.</i>	<i>Summarize and outline the elements or specific terms that the lawmakers have chosen to include in the proposed new or revised statute.</i>	<i>Draft a series of individual clauses that may be included in the final statute as enacted by a Member State and reflect the elements and policy positions chosen to be appropriate for that country.</i>

Part I: The Purpose and Importance of Access

A. Stewardship and Cultural Heritage Institutions

Cultural heritage institutions, such as museums, archives, and libraries, play a pivotal role in preserving the rich and diverse histories of every society. They house objects, artworks, films, music, documents, and other materials that offer a window into our collective past, informing us about our present and shaping our future. At the heart of each institution's mission is the obligation to provide access to the collections they manage, and in doing so, enable people from all walks of life to interact with, experience, and learn from cultural heritage.

Part I of the toolkit explores the key elements of access within cultural heritage institutions. By identifying and delving into the essential features that define access within those institutions, this toolkit also examines how the mission drives their approach to access. Providing access to the materials in their custody forms a critical part of their stewardship. This Part I provides an understanding of why access is important, what drives cultural heritage institutions to prioritize it, and their responsibility to assure access.

This toolkit also considers the international legal frameworks pertaining to copyright and the conditions under which access to protected works is permitted. This sets the stage for providing practical guidance on how to navigate new opportunities along with potential challenges to facilitate responsible access consistent with respect for copyright. By understanding these core elements, we can better appreciate the delicate balance cultural heritage institutions must maintain in fulfilling their mission of providing access, while at the same time fulfilling their own responsibility to act in accordance with copyright laws.

B. The Duty of Care and the Provision of Access

Fundamental to the mission of cultural heritage institutions are their dual responsibilities: to preserve the invaluable collections entrusted to them and to make these resources accessible to the public. Ensuring that cultural materials are safeguarded for future generations while allowing current audiences to engage with them in meaningful ways is at the core of their mission. There are, however, significant legal, ethical, and practical considerations at play when contemplating the provision of access to heritage collections.

Institutions must carefully manage these responsibilities by balancing practical concerns: Assuring public availability, respecting the rights of creators, and protecting fragile, rare, or culturally sensitive items. Optimizing access in this context raises ethical dimensions and creates several challenges. In understanding these duties, one can appreciate the thoughtful, measured approach institutions must take in making their collections available while maintaining the integrity and respect these items deserve.

Cultural heritage organizations – especially libraries, archives, and museums – hold collections in trust for the benefit of the general public.⁸ Their duty of care and the mission to provide access – that is, to preserve and manage access to 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, professional standards and ethics principles that are often overseen and applied by independent professional societies. Their adherence to the rule of law and ethical standards, while stewarding collections in trust for the public, makes them trusted institutions.⁹

Their duty of care and the mission to preserve and provide access to collections in trust for the public is often codified in legislation that establishes national, provincial, or regional collections.¹⁰ 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.¹¹ Collections management policies that articulate these duties of care in greater detail are most often approved by the board of trustees, and the board is responsible for ensuring that their duty of care and mission driven activities are responsibly carried out by their professional staff.¹² The duty of care to provide access to collections also constitutes an important ethics principle. The International Council of Museums (ICOM) *Code of Ethics for Museums*¹³ includes the following principle: “Museums have particular responsibilities to all for the care, accessibility and interpretation of primary evidence collected and held in their collections.”¹⁴

The International Federation of Library Associations and Institutions (IFLA) statement on *Libraries Safeguarding Cultural Heritage* defines a library’s duty of care to include both preservation and access. 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”.¹⁵

The International Council on Archives (ICA) acknowledges the duty of care of archives to provide access to archival collections in its adopted *Principles of Access to Archives*¹⁶ standards statement: “1. The public has the right of access to archives of public bodies. Both public and private entities should open their archives to the greatest extent possible.”¹⁷

C. Access and the Mission of Cultural Heritage Institutions

The foregoing analysis makes clear that a single cultural heritage institution can simultaneously have multiple missions, and facilitating access to works and artifacts in their collections is often critical to fulfillment to any one of the missions. Part I of the toolkit identifies many of those institutional missions. In so doing, it also reveals how providing access to collections is inescapably intertwined with fulfilling core institutional objectives.

This toolkit is not merely asserting that access is critical to the missions of cultural heritage institutions. This toolkit emphasizes that access and other activities of cultural heritage institutions are worthy of broad support, because access to a society’s cultural wealth is an important means for contributing to cultural and intellectual development. Individual readers, publishers, educators, businesses, and government agencies all benefit from access to resources that define their roots and their presence. Access to collections can inform, invite, and instill a spirit of innovation. Therefore, the role of access can occur in many ways:

1. Access as a Fundamental Purpose of Cultural Heritage Institutions

Museums, libraries, and archives – as leading cultural heritage institutions – exist to preserve, celebrate, and expand upon their historical and social context of their collections. Whether a user of those collections is simply reading or engaged in nuanced analysis, access to the works of interest is obviously crucial. Without access, the objectives of the institution and individual fail.

2. Access to Enable Preservation of Works at Risk

Collections include a rich variety of works in all media, and many collections house unique manuscripts and fragile artifacts that are at high risk of loss. As described at length in the *Toolkit on Preservation*, preservation of works is one of the critical functions of cultural heritage institutions, as they establish safeguards to prevent loss of historical and current knowledge, thus protecting their availability for future generations. The preservation process itself cannot occur without the ability of the institution stewarding the collection to access the original or other copies of the work at the outset.

3. Access and the Promotion of Knowledge and Learning

The collections maintained by cultural heritage institutions are a vast repository of knowledge and a driver for education and research in history, science, business, art, literature, and more. The collections are the foundation of traditional educational programs, public exhibitions, film documentaries, and other means for sharing and expanding knowledge. Sharing the content is made possible through expanded access, and digital tools now invite access opportunities at the cultural heritage institution and at potentially any location throughout the home country and around the world.

4. Access and Cultural Identity

The cultural heritage institution's function as custodians of national and community heritage and perform the consequential role of fostering cultural continuity over time. They do so by preserving and providing access to documents, images, and other resources from the past that guide the peoples sharing the cultures today and tomorrow. Access to collections enables each of us to understand our own cultures and to share them, without necessarily encountering artificial transitory limits on time, borders, and politics.

Part II: The Dimensions of Access to Cultural Heritage Collections

Part I of this toolkit surveys the essential role of access in bringing meaning to collections, and this Part II demonstrates that the attributes and conditions of access in copyright law can have many different qualities – often referred to here as “dimensions” – that can be adapted to specific needs. This Part II offers a review of the general dimensions to be considered in facilitating access. As shown in the previous *Toolkit on Preservation*, the drafters of a relevant law or policy might consider dozens of relevant details and need to make a series of choices. Some of that will be necessary here, too. But at this stage, Part II offers a more general overview of fundamental concepts – the critical dimensions – that policymakers shaping the law ought to consider and perhaps integrate in some manner into the standards for allowing and enabling access to works in the institution’s collections.

1. Access and Copyright

As cultural heritage institutions fulfill their missions, as reviewed in Part I, they will regularly use works in their collections that can implicate the rights of copyright owners. Many copyright issues regarding access to digital materials, for example, relate to the making of reproductions and derivatives by cultural heritage institutions. Part IV of this toolkit offers extensive detail about copyright and access, but the general copyright consideration here is that the terms of access must further the mission to serve research, education, and more, while at the same time respecting the interests of copyright owners. Those copyright interests are established primarily through the relevant statutes in the country with appropriate jurisdiction. Those laws are shaped in many ways by a series of multinational treaties. Some treaties include the “three-step test” that authorizes Member States to enact exceptions to the rights of copyright owners. Many services of libraries, archives, and other institutions are offered pursuant to the details of copyright exceptions, and those exceptions are drafted to be consistent with the “three-step test.”

2. Access and Digital Technologies

The growth of technologies has opened numerous new possibilities and expanded services at nearly all cultural heritage institutions. These new services can be affected by copyright law in many ways, and the uses can implicate derivative works, making available, and transmissions, in addition to reproductions. These innovative uses can also intersect with the law of cultural property. The new opportunities for access and the possibility of multiple rightsholders illustrate the need for new ways of clearing diverse rights in this context and the need to be innovative while respecting potential legal rights that could survive beyond the term of copyright. The charts in Part IV include added details about the implications of digital technology and the choices for responding to it. Regardless, the ability to deploy new technologies in furtherance of the missions of cultural heritage institutions becomes an imperative. It is essential for the standards of access to include the adoption and implementation of new technologies. In this context, the present toolkit pays particular attention to identifying solutions which could combine safety for those working in cultural heritage institutions to fulfill their mission, security for users, and, of course, protection of and respect for rightsholders.

3. Remote Access and Access Across Borders

Works in digital formats found in collections may be made accessible on their premises but they may also be made accessible remotely. Any remote access can raise technical questions about possible copyright risks about reproduction, transmission, screen displays, and downloading that are seemingly inherent in the process. Additional issues arise in cross-border access to copyright protected works or when the remote access to cultural heritage collections involves cross-border transmission and delivery of copyrighted works. The research materials in collections are often rare and held by few institutions in distant locations.¹⁸ Because the rights

and limitations of copyright are established by the laws of each country, each cross-border transaction may be governed by the laws of two or more countries. Also because the copyright exceptions are typically not consistent among Member States, the law applicable to each transaction might not be the same as it reaches each national border. Access and other activities that may be deemed legal in one country may be considered infringing in another country. The decentralized nature of the internet, coupled with the territorial nature of copyright, create complex access challenges.

Example of Research Consortia:

Cultural heritage institutions are participating in research consortia and digitization projects where digital materials and other research data are uploaded and downloaded by members of the consortia from multiple jurisdictions. This is the case, for example, in the development of international data and data set repositories.¹⁹ Research consortia often operate across borders. This is especially important where collections are connected, whether shared administratively, or by subject, across institutions. Some archives now practice post-custodial collection building that seeks to share digital surrogates of copyright-protected materials found in collections without the originals leaving their jurisdictions of origin.

4. Access and the Scope of Authorized Users

Access can be allowed broadly, or it may be narrowly limited to defined user categories. Users, most narrowly defined, can be limited to the librarians, archivists, and curatorial staff who are responsible for managing collections. Authorized users can then be broadened progressively to include institutional researchers, faculty, students, independent researchers, staff, and researchers from other like institutions. The broadest group of users would be the public. The image below illustrates the progression of users of copyright-protected materials and objects in cultural heritage collections from narrow to broad, which are not necessarily mutually exclusive, and scope of use. Finally, in the case of cultural heritage institutions and users operating across borders, policy and lawmakers may need to identify specific cross-border issues and develop and pursue multinational solutions to define user groups in a consistent manner.



5. *Access and Digitized Works and Works Born Digital*

The need for access may not be limited to certain types of works or media formats. Access principles can extend to digital books, motion pictures, art, and much more. However, access could reasonably vary depending on other traits of the work in question. This is especially true for works held in the collection of the institution in digital form. Cultural heritage institutions are digitizing works held in their collections as well as acquiring works “born digital” (that is, the form of the works collected is only digital, as opposed to having been “digitized” or copied into digital format). Certain born-digital works may be subject to technical protection measures whose very purpose is to limit access. This is also true since so many types of works in the collections are now created by using various technologies and proprietary platforms. The ability to access and use such works can depend on having the required software and systems, which are usually subject to licensing terms and conditions.

6. *Access for Permitted Purposes*

As provided for in the *Toolkit on Preservation*, cultural heritage institutions preserve works in furtherance of specified purposes defined by their missions and mandates. This is true of access, as well. Access requirements are most often driven by objectives aligned with their missions, such as research, community outreach or education. As trusted institutions that hold collections for the benefit of the public, cultural heritage institutions may also carry out programmatic activities that appear less connected to their missions but may be required in order to generate revenues as a means of supplementing budgetary shortfalls. A detailed list of distinctions in purpose may be found in Part IV of this toolkit that provides law and policymakers with a nuanced understanding of how purpose can frame potential access solutions, examined more fully in Part III.

7. *Access and Monitoring and Administration*

Some Member States, with respect to certain uses of copyrighted works, require confirmation and documentation of compliance with copyright exceptions, including key provisions authorizing access. A country’s law, for example, may allow copies of works for private study, and it may require documentation of the user’s request and the library’s delivery of the copies. Other countries have no such formal requirements.²⁰

Alternative forms of monitored access may include the requirement that a copy of a work in a collection must be in writing or a prescribed form. In addition, researchers may be required to register with the cultural heritage institution to gain access to digital materials on site or remotely. In some cases, documentation may be made available for review while personal information may be redacted, as required under data protection legislation of certain Member States, to ensure the anonymity of the researcher. A full list of alternatives is provided in Part IV of this toolkit.

Part III: Access Solutions in the Environment of Law and Liability Risk

This Part III highlights and describes various means for enabling and optimizing access to works in cultural heritage collections, particularly in an environment influenced by copyright law and the expanding opportunities and legal risks presented by improper use of digital technologies.²¹ Licensing and permissions remain the cornerstone of providing access to certain types of copyright protected works within the copyright system. Nevertheless, many uses of copyrighted works raise at least the possibility of an infringement, if the use is not explicitly permitted under law. Certain solutions might eliminate that possible risk, while other solutions are recognized as risk mitigation techniques. Consideration may be given to how solutions may operate in concert under certain circumstances. There will be circumstances where the leading solution may be to seek elimination of risk altogether by requiring licenses that authorize access, or by introducing permissible exceptions to copyright. In any circumstance, it would be useful to consider innovative mitigation techniques that facilitate reasonable and practical management of risks within the applicable legal framework.

Solutions that could eliminate or mitigate risks operate to the benefit of all parties in the copyright ecosystem. For cultural heritage institutions, their professionals, and their patrons, the copyright provisions provide a significant degree of certainty surrounding remote access to collections in digital form. For the general public, mitigation techniques, including terms and conditions of use, enable the public to access cultural heritage materials remotely based on knowledge about permitted downstream uses. Similarly, entities and foundations,²² which invest in and support digitization and remote access to collections, will be better able to assess and manage possible risks. Finally, rightsholders will have a greater degree of certainty about remedies in situations when their rights could have been violated, albeit unintentionally, to what extent they may expect cultural heritage institutions to mitigate risks, and what conditions and limits may be deployed to protect owner's rights from unauthorized exploitation.

A. Enhanced Access Solutions

Copyright licenses and permissions, and copyright exceptions for prescribed purposes within the current copyright system, enhance access by removing or at least reducing the risk of infringement. For example, where a donor holds rights to objects and materials in a collection, the acquisition agreement can include assignments, licenses and permissions. In addition, clear information about copyright status and rightsholders, referred to as rights metadata, is always a useful access tool. These provisions for enhanced access are solutions in the sense that they can properly achieve desired access while also managing risks, or at least providing significant and established techniques to mitigate risks. To achieve that result, these solutions are rooted in the law and offer protection from legal liability. These solutions can also operate to the benefit of diverse parties in the copyright ecosystem. Clearly, for cultural heritage institutions, their professionals, and their patrons, many such techniques provide a greater degree of certainty, even when providing remote access to collections in digital form.

1. Access and Specific Copyright Exceptions and Limitations

Copyright exceptions are statutory provisions that enable defined users including cultural heritage institutions, to reproduce and distribute copyright-protected works for specified patrons and purposes without having to seek the prior consent of rightsholders. Many Member States currently have exceptions that facilitate, in reasonably specific terms, the making of copies for preserving works, supporting research and study, displaying collections on local terminals, and developing exhibitions for remote and international sharing of cultural artifacts. For Member States, these copyright exceptions are drafted with adherence to the three-step test, and its commitment to respecting the interests of rightsholders. Because of their relative specificity, these statutory exceptions authorize institutions to develop access policies that involve making digital copies in a lawfully protected manner.

These exceptions have been part of copyright law for many decades, and they generally extend to the newer digital environment. With the expanded opportunities provided by digital technologies, cultural heritage institutions are able to better serve the public and their research patrons by providing remote access to their collections in digital formats. In addition, their collections are becoming more diverse in format, with professional practices reliant upon advanced technologies, including communication capabilities that can enable access to works at multiple institutions and often across national borders. Collections across institutions may be connected to each other by subject or owned by multiple institutions jointly and across borders, creating extensive and beneficial knowledge-sharing opportunities. Copyright exceptions apply to cultural heritage institutions because they are recognized as “trusted institutions,”²³ specifically tasked with preserving and providing access to their collections, while also respecting the interests of rightsholders. This is especially true when managing complex media collections.

2. Access and Orphan Works

Orphan works solutions seek to address uncertainty in carrying out the duty of care to provide access faced by users of copyright protected works, including cultural heritage institutions. Orphan works are works that are protected by copyright, but the copyright owner cannot be identified or located. Orphan works are a particular challenge for cultural heritage institutions, since many orphan works are found in museum and archival collections, or in the special or distinctive collections of libraries. This is often the case because donors of collections may not necessarily be the rightsholders of the objects and materials found in their collections. When the rightsholder cannot be identified or found, securing valid permission to use an orphan work is often impossible. A challenge arises from the fact that copyright law grants automatic protection to works which endures for a defined period of years. However, considering the complexity of this situation, specific statutory exceptions aimed at addressing these circumstances may provide a solution.

Where copyright law requires permission for access to works held in collections and where rightsholders cannot be identified or located, access solutions become essential to enable libraries, archives, and museums to carry out their mission-driven access activities. In addition, where objects or materials in collections are anonymous and undated, it may be nearly impossible to determine with any degree of certainty whether a work remains protected by copyright. As a result, such materials and objects are often treated as copyright-protected in order to minimize potential liability risks, even where this may not in fact be the case. Consequently, many collections remain inaccessible, including those of significant cultural or historical value, because of the absence of access solutions capable of addressing the lack of information that is required to obtain permission. This is not a new issue but one that demands attention and requires special consideration when contemplating access solutions for libraries, archives, and museums. While certain Member States have either considered solutions or have introduced legislative provisions that have addressed, in part, orphan works, effective solutions remain limited for large collections of objects and materials. Copyright protected works that form part of these collections may either have multiple rightsholders, who may be neither identifiable nor locatable or present circumstances where a diligent search may prove to be either too burdensome or inconclusive.²⁴

Example of Archives and Orphan Works:

Archival collections illustrate the challenge of orphan works clearly. For example, a renowned archival foundation holds a rare and important publication in its collection. The publication was written by José Reis (1907-2002), a renowned science communicator, and the publication, written by him as a child, was printed by a now-defunct publisher. Little is known about the publisher or the status of rights to the publication, or its

publication date and, as a result, the archival institution has not been able to provide meaningful access to it. This is a clear example where rights metadata would have been useful to provide access to the publication.²⁵

3. *Access and Fair Dealing or Fair Use*

In addition to specific exceptions, a growing number of Member States include fair dealing or fair use provisions in their copyright laws.²⁶ Fair dealing or fair use can provide a cultural heritage institution and its patrons with a critical level of flexibility when making digital copies of works and when providing remote access to them. Fairness may be assessed on specified factors which may vary from one jurisdiction to another. They may include the purpose of the use in relation to the intended purpose of the rightsholder in having created the work, the effect on the marketplace for the work, or the amount and substantiality of the portion of the work being used.²⁷ Fair dealing and fair use provisions have played a significant role in assessing the lawful digital reproduction and online distribution of copyright-protected works.

The flexibility afforded by such provisions has advantages, but because such provisions may not define exact boundaries of permissible uses, there is routinely a level of uncertainty about whether the use contemplated is lawful.²⁸ Particularly in the case of fair use, users of copyright-protected works are expected to assess their uses according to the factors prescribed by law, and in the event that rightsholders allege an infringement, the defense that users have is one of fair use. In addition, cross-border issues may arise when considering remote access to digital surrogates, particularly where, for example, copyright laws in the jurisdiction of origin of the rightsholder do not include fair use or fair dealing. In contemplating access solutions, policy and lawmakers of Member States who already have fair dealing or fair use provisions in their copyright laws may wish to consider how potential access solutions work in concert with such provisions.

4. *Access and Limitations on Liability for Copyright Infringement*

Certain Member States have enacted provisions for exceptions into their copyright laws to reduce damages in the event of infringement, so long as specific circumstances prevail, such as where the work has been reproduced or distributed for noncommercial purposes. This remains one of the most important legislated access solutions for trusted institutions, such as libraries, archives, and museums, that are trying to provide access to works in their collections online.²⁹ Other jurisdictions have introduced provisions that reduce or eliminate statutory damages³⁰ for trusted institutions, such as libraries, archives, and museums that carry out mission-driven activities for the benefit of the public. Thus, policymakers and lawmakers may wish to consider access solutions that enable and encourage access for the benefit of the public interest, by lowering and therefore mitigating the possible risk of damages relating to core cultural heritage activities.³¹

5. *Access and Avoiding Infringement: Safe Harbor Provisions*

Other Member States³² include provisions in their copyright laws that minimize damages for infringement of copyright upon receipt of a notice by a copyright owner that their rights have been infringed, acts upon the notice by taking down the digital materials that are the subject of the allegation of infringement. In certain jurisdictions, and where libraries, archives, and museums operate in the online environment and post digital copies of their collections online, they may be able to avail themselves of these “safe harbor” provisions.

In most of these jurisdictions, there is an additional requirement that the entity hosting the alleged infringing works online is required to have acted in “good faith.” The key is found in the risk assessment. The library, archive, or museum will be expected to assess copyright risks in

good faith, as would any other party operating under safe harbor provisions. Therefore, in circumstances where it is of great interest for a library, archive, or museum to provide access to digital materials online and they have assessed copyright risks and their assessment remains inconclusive, mitigation provisions may eliminate some or all risks of damages being assessed for infringement.

6. Access to Public Domain and Works Affected by Duration Limits

As examined earlier, certain circumstances suggest that certain prescribed exceptions to copyright may be the only clear way to eliminate or substantially reduce copyright infringement liability risks for libraries, archives, and museums in connection with their use of works that are currently in copyright. This is especially true when managing complex media collections. However, other possible risks unrelated to copyright may be largely mitigated as well in the case of works with expired copyrights (i.e., works that are in the public domain). Specifically, rights associated with specific contractual limitations on access found in donation agreements, privacy issues, publicity rights, trade secrets, and even security issues may also be subject to duration limits so that time may also reduce their application to works in the collection, thereby reducing risks associated with access. In other instances, other forms of intellectual property that may not be subject to duration limitations may continue to play a factor in accessing works in a collection, notwithstanding the expiry of copyrights or other rights and limitations.³³

The possibilities for copyright infringement risks are mitigated with respect to works that are in the public domain, because there is no need to seek permission from anyone for the use of such works. Subject to a full access assessment review, cultural heritage institutions can therefore give access to such works without fear of liability for copyright infringement. A similar situation arises in the case of works donated to the institution by the copyright owner, where the donation entails an assignment or license of rights in the work concerned, often with specific terms and conditions³⁴. Therefore, it is particularly important that cultural heritage institutions undertake rights and risk assessments of the materials found in their collections, with the primary objective of identifying works whose copyrights have expired or to fully document the licenses and permissions obtained.

The foregoing situation is not always clear however, as in some cases the use of works that are in the public domain may still be subject to payment (as in the case of the *domaine public payant*). Such payment is usually paid to an author's society or to the state, for cultural purposes or to support authors and their families.³⁵ While the use of the *domaine public payant* system seems to be diminishing, other jurisdictions, such as countries that are signatories to the Bangui Agreement, still uphold this system³⁶ It would be therefore important to ascertain the applicable legal position in all cases.

It would also be useful to assess the impact of other legal provisions that might apply to works in a collection, independently of copyright law. For example, clear information on any limits to access stemming from cultural property provisions or laws governing cultural heritage institutions would also be essential for a complete analysis of opportunities to provide access to works in a collection.

Donation of copyrighted works to cultural heritage institutions may be an effective way to empower them to fulfil their mission of providing access to the public. In this case however, it would be important to determine if the copyright owner is only donating the physical copy of the work, while retaining copyright; or in the case of a transfer of copyright, whether this is a full or partial transfer; the scope of the rights transferred and any conditions or limitations of use.

The example referenced in the box below is an excellent illustration of the complexities of donated collections where underlying rights may not have been donated with the materials in a collection.

Example of Film & Television Archives:

Cultural heritage institutions, such as film and television archives,³⁷ hold rare and unique film and video collections and sound recordings, have an urgent need to develop access solutions, particularly to meet, at a minimum, research and study requirements and even limited screening abilities for specific scholarly purposes. Licenses for many of the films and videos in such collections are not available for license in the marketplace. Because of the complexities associated with film and music production as an aggregate of a multiplicity of copyright-protected works, the ability to screen a film or hear an audio recording may be limited even when it has been preserved, unless an archive can identify all rightsholders whose works were used in the film, find and contact them, and obtain their permissions. This might be hard to achieve, depending on the circumstances, such as the age of the film and consolidation practices in the industry. More specifically, a film and video archive may receive a donation from a film producer that includes all rights and interests in the film as a copyright protected work. However, the ability to screen a film in the collection to even a closed audience for a limited purpose may still be restricted because of underlying rights. A film and video archive may not have the requisite administrative documentation and production agreements to assess the underlying rights because the production agreements that memorialized them may not have been donated as part of the collection.

B. Access and Licensing

Licenses for uses of copyrighted works exist in various forms, from simple grants of permission for individual uses to complex and negotiated structures applicable to whole collections of works. Licenses may be granted without a fee or at a substantial cost. Licenses may be succinct and informal, or they may be extensive agreements and integrated with elaborate legalistic provisions. A license may be available to grant to cultural institutions the permissions they may need for extensive programs, but in many cases, a license is useful only if the copyright owner has been identified, and the conditions and costs are feasible. For this toolkit, the following types of licenses are most relevant:

1. Access and Licensing to Libraries, Archives, and Museums

In the case of libraries, and museums, the grant of permissions and licenses to use a work in digital format in particular ways is primarily used means to accessing copyrighted works.³⁸ This is also true for archives whose primary mission is to preserve and provide remote access to commercially produced film, video, and music collections.³⁹ In this regard, it is important to note that cultural heritage institutions may be rights owners, users, and facilitators. Where libraries, archives, and museums do not own the copyright in the materials in their collections, which is often the case, they will, where possible, obtain a license for the right to digitize or otherwise provide access to works in collections from rightsholders or their decedents or heirs. Specifically, permissions for use may be requested where no transfer of rights or licensing has taken place, together with the sale, donation, bequest, or loan of the physical objects and materials in a collection. In other cases, licenses or permissions may be obtained as a condition of acquisition or gift. The license may also cover multiple works and activities, and may be exclusive, non-exclusive, or even implied.

2. Access and Licensing to Patrons and Researchers

The use of public licenses to facilitate remote access to digital copies of works in a collection for their patrons' use (e.g. Creative Commons licenses and open licensing) is another option. The Open Culture project supported by Creative Commons (Open Culture), which seeks to enable

access and the re-use of digital cultural heritage where the rights may or may not be owned by the cultural heritage institution, is a case in point.⁴⁰ Cultural heritage institutions can release digital content using standard open licenses so long as the underlying materials or objects are in the public domain, where they hold the rights, where they have obtained the rights to do so from the rights holder, or when exceptions, fair use or fair dealing may permit such access activities. Consequently, libraries, archives, and museums are increasingly becoming more committed to using open access licensing tools to fulfil their duty of care to provide access to the public. This often takes the form of an Open Access Policy with the terms of use posted on institutional websites.⁴¹ Such policies and terms of use often outline the parameters for accessing and using works in the collections.

3. Access and Collective Licensing

While transactional or case-by-case licensing is more prevalent in the cultural heritage ecosystem, collective licensing through collective management organizations (CMOs) plays a role in certain situations. This is the case where there is a need to clear rights and agree on terms and conditions, but pursuing licenses for a large number of individual transactions is not efficient or practical. Licensing options, including extended collective licensing, allows for a degree of certainty that for prescribed uses by cultural heritage institutions, and for works represented in a CMO repertoire, access to the entire repertoire is guaranteed for the duration of the license. Collective license solutions, whether voluntary, voluntary with support mechanisms, or legal licenses, as identified in relevant WIPO publications⁴² can facilitate access for certain copyright protected works found in cultural heritage collections. For instance, legal techniques like extended collective licenses (ECL), extending the effects of a copyright license to also cover the works of non-represented rights holders, or legal presumption of representation, where a representative CMO is presumed to represent the interests and rights of both member and non-member rights holders, are entered into in certain jurisdictions, by cultural heritage institutions, for specific types of works, uses and formats.⁴³ It is worth noting, however, that in certain jurisdictions, rightsholders may exclude their works from an ECL repertoire or else not make provision for ECL.⁴⁴ Furthermore, ECL licenses may have less relevance to archival collections that include many copyright protected works that are unpublished or inherently noncommercial in nature.

Terms and conditions of use can be beneficial for certain cultural heritage institutions and rightsholders within certain circumstances. In jurisdictions where the law provides for mandatory collective licensing, lawmakers and policymakers may rely on prescribed terms and conditions of use (developed in consultation with relevant stakeholders) and expect that the CMOs will implement such provisions through standardized statutory or compulsory licenses. Alternatively, the negotiation of terms and conditions may by statute be left to the CMOs within the framework of the dimensions of access outlined in Part II.

CMOs can also be relied upon in the grant of *ad hoc* commercial licenses, where the cultural heritage institution does not own the copyright or hold sufficient rights and where cross-border licensing is involved (due to the reciprocal arrangements that they have with similar entities in other parts of the world). CMOs also become relevant when authorization is required to access materials that were digitized for preservation purposes.⁴⁵ As stated in Part II, one of the purposes of access may be to generate revenue for the heritage institution as a means of cost-recovery for mission-driven activities. This would be the case where the institution concerned owns the copyright in the material concerned. Because of their competence and experience in license negotiation, CMOs may be mandated to negotiate such licenses.⁴⁶

C. Access and the Mitigation of Possible Liability Risks

Lawmakers in some Member States have enacted provisions that can have the effect of reducing exposure to infringement liability that can result from the mission-driven activities of

cultural heritage institutions. Professionals working in cultural heritage institutions may also benefit from the following approaches that could, if assessed in the context of copyright laws governing their own jurisdictions, mitigate risk.

1. *The Use of Technological Protection Measures*

In many jurisdictions, cultural heritage institutions have long rejected the use of technological protection measures (TPMs) as means of reducing possible risk. Notwithstanding, certain cultural heritage institutions have begun to use them in circumstances where their uses satisfy rights holders that possible risks of commercial exploitation will be reduced to enable them to provide permission for remote access to their copyright-protected works found in library, archive, and museum collections.

Example of Using Technology to Regulate Access:

Certain museum and archival organizations in the United States,⁴⁷ employ digital audio watermarking on audio recordings that are streamed remotely from their website. They also provide certain terms and limitations, such as restrictions on use, in the form of online terms of use through the use of click through agreements. This approach may mitigate risk sufficiently to enable the museum or archival organization to stream works for noncommercial uses. Recent developments in digital audio watermarking may also enable the embedding of silent watermarking where data is embedded into the track to allow for enhanced security and meta-tagging, a feature that may prove particularly important in the age of AI. Thus, digital audio watermarking, coupled with terms and conditions of use more fully described above, may play a useful role in enabling access to audio tracks while mitigating the potential for unauthorized reproduction and distribution for commercial purposes.

2. *Access and the “Virtual Reading Room”*

Access conditions have long been employed by libraries and archives when patrons wish to access rare and unique materials. The purpose of the “Virtual Reading Room” approach is to mirror existing standards of onsite access to the online environment. It does so by employing online registration requirements and click-through agreements that bind the library or archive’s patron to terms and conditions of access. A click-through agreement can also include express statements requiring the patron, accessing the copyright-protected digital work, to only use the work for prescribed purposes, such as personal use or research, or to limit any downstream third-party distribution. In addition, a library, archive or museum, employing this access tool may also choose to restrict access further by limiting it to a prescribed user group that has registered for login credentials. In addition, the library, archive or museum employing this access tool may choose to disable downloads as a further mitigation technique. Finally, the library, archive or museum may also choose to couple this access approach with the use of TPMs, discussed above, as a means of employing additional techniques to mitigate possible risks.

Example of a Specialized Archive:

Certain television news archives such as the Vanderbilt Television and News Archive⁴⁸ at Vanderbilt University Library, have recorded major news broadcasts in the United States since 1968 as a way to preserve them for future generations and to provide access to the preserved broadcasts for research purposes. In order to access their collection of news broadcasts, they require libraries and archives to maintain an affiliation with them on specific access terms and conditions. In this manner, they are able to offer extensive access to their news collection for scholarly and research purposes within the bounds of

copyright restrictions to all of their archival affiliates, and to the public through the Moving Image Resource Center of the Library of Congress.

3. *Rights Metadata and Collections Management Practices*

Metadata is “data describing data and data systems that may include the structure of databases, their characteristics, location, and usage.”⁴⁹ The purpose of metadata is to enhance the usefulness of the data it describes. Moreover, access to digitized works, such as photographs, is enhanced by metadata, including title, date, description and probable identity of the photographer. Metadata enables search capability by pairing the query with the data used to describe the digital object. Without access to the metadata, the digital object itself is less likely to be identified and accessed. Metadata can also record the provenance of materials and assist in the development of catalogs and inventories. In addition, standardized rights metadata for digital copies of works in cultural heritage collections can be integrated as a useful part of the broader curatorial and collections management workflows. Metadata can include memorializing or documenting the circumstances under which the digital copy can be accessed and used, or the level of allowable rights of use that may have been established either at accession or at subsequent digitization.⁵⁰

Rights metadata is designed to support the respectful and lawful subsequent uses of digital or digitized copyright-protected works in cultural heritage collections. Rights metadata plays the role of ensuring that rightsholders and creators are accredited with their work and provide another means by which users of copyright-protected materials who access these materials in digital form are informed about the terms of use relating to the materials in collections.

4. *The Use of Digital Resolution as a Mitigation Technique*

In certain circumstances and jurisdictions, the use of lower resolution formats of digital images may play a role in mitigating risks. This is especially true in common law jurisdictions that rely on case law finding in favor of fair dealing or fair use with resolution or image size playing a critical role in the assessment.⁵¹ Certainly, from a practical perspective, lower resolution formats are generally less useful for commercial reproduction and distribution purposes. It should be noted, however, that low resolution formats may not necessarily mitigate moral rights violations and where low resolution impacts the clarity or coloration of the image of the work, it may itself lead to a claim of distortion. Thus, the usefulness of this mitigation technique should be considered in the context of the laws of specific jurisdictions.

5. *Intellectual Property Mediation and Arbitration*

Certain jurisdictions, through practice, are more inclined to use mediation and arbitration services and include mediation and arbitration provisions in licensing agreements. However, cultural heritage institutions may wish to consider including mediation or arbitration provisions in licensing agreements as a mechanism to ensure ongoing access despite the development of a dispute among the parties.

Example of Mediating and Legal Liabilities:

By example, cultural heritage institutions that are state funded may be required to agree to only their own local laws as the choice of law clause their own jurisdiction as a choice of legal venue to litigate disputes. In circumstances where licensing agreements are entered into with parties across borders, where choice of law and jurisdiction clauses remain a concern, an agreed upon arbitration or mediation provision can enable parties to remain neutral concerning choice of law or jurisdiction but at the same time include dispute resolution provisions that facilitate ongoing access to collections, notwithstanding

a dispute having arisen between the parties. To this end, WIPO's Alternative Dispute Resolution Center for Art and Cultural Heritage⁵² is a leader in the field and can provide guidance, services and expertise in this regard. The Center focusses on both cultural property and intellectual property dispute resolution for collectors and cultural heritage institutions alike.

Part IV: Constructing a Statutory Provision for Access

A. How to Use the Charts

Part IV of the toolkit is intended to guide lawmakers, policymakers, and others with responsibilities associated with cultural heritage institutions through the process of drafting or implementing the possible solutions for enabling access to works in the institutions' collections. Part IV operationalizes the concepts and principles reviewed in the earlier parts of this toolkit. It also expands on WIPO's recent *Toolkit on Preservation* by offering specific language that might be added to copyright statutes to authorize access to the copies that an institution makes for preservation.

The procedures outlined below guide users through selecting desired concepts and details for the rules of access, then organizing and connecting those details into the form and language of a statutory copyright exception or other means of access. Those details, with possible statutory language, are offered here for the drafter to review and select, with each subject area considered separately and that scope or rights considered in one subject area may not necessarily be appropriate for consideration in the other. These specifics are organized into charts in the Appendix, presented in a manner that any Member State may find useful.

B. The Dimensions of Permitted Access

The procedures and charts offered here generally comport with those in the *Toolkit on Preservation*, but here they are focused on access concepts. By centering on just that one element, this toolkit is naturally briefer than the previous project. This toolkit does not claim to provide guidance for drafting complete statutes. Instead, it offers direction for drafting just the access clauses.

The process of drafting even a portion of 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. Often just the relatively narrow clause about access can benefit from considering various of the possible elements that shaped the *Toolkit on Preservation*. When looking back at the example in the Introduction regarding making digitized works available on dedicated terminals, one can see that the dimensions may be drawn out by posing analytical questions:

- **Who May Make the Works Accessible?**
 - This dimension specifies the range of libraries, archives, museums, and other institutions that may exercise the access terms. A Member State may adopt a broad scope, or it may limit the provision to specified types of cultural institutions. In some Member States, the scope of trusted institutions, such as foundations, galleries, and even banks may merit mentioning. Member States with concerns about institutions that may not be conventional in structure, but which describe themselves as a library, museum, or archive, may choose to add terms such as “nonprofit,” “noncommercial,” or “for the public good” to ensure that the cultural heritage institutions that avail themselves of the exception are recognized *trusted institutions*. It bears mentioning, as well, that the types of cultural heritage institutions referenced here can vary significantly from jurisdiction to jurisdiction.⁵³
- **What Works May be Made Accessible?**
 - This dimension specifies the scope of works that may be reproduced or otherwise be made accessible. These statutes generally apply to any works in the institution's collection, but there may be reason to put limits on some types of works, for example where security and privacy are critical.

- **Why May the Works be Accessed?**
 - This dimension specifies the reasons for allowing access. In the example of dedicated terminals, the purpose is largely undertaken to help ease access and ensure that the works are available; further limits on purpose and adding other conditions may be inappropriate. By contrast, when copies are made for preservation, an effective statute could clarify that the preservation copy may be used on the same terms as the original, and that the original may be retained in the collection, but perhaps only for research objectives, where the original is needed.
- **How May the Works be Accessed?**
 - This dimension is fundamentally a question of access, and the *Toolkit on Preservation* reserved these issues for this new toolkit. A statute allowing an institution to make digital copies of works in their collections, in order to make those copies available for viewing on dedicated terminals might include provisions stipulating access details, such as the number of copies for simultaneous use, and the standards for permitting users to make isolated copies, or any copies or downloads at all, whether digital or print.

C. Stages in the Charts and the Scope of Access

Each Member State may deliberate and make its own policy decisions about the scope of allowed access, based on its answers to each question posed above. The charts in the Appendix offer details for the available choices that Member States might consider and select as they identify the elements of an access statute that are 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 statute. The practical process of drafting the copyright exception thus might adhere to the following three steps. In the *Toolkit on Preservation*, the effort was to draft a full statutory provision. By contrast, this toolkit offers an analogous process that ultimately guides users to a section of brief clauses appropriate to the proposed need.

Stage ONE: Specify Intended Activities that Can Expand Access.

In the context of access on dedicated terminals, access is optimized through various activities and services that call for uses of works in the collection. Many such activities implicate copyright: making and storing digital copies; allowing the works to be viewed from identified terminals; possibly permitting researchers to make print or digital copies for study under specified circumstances.

Stage TWO: Identify Ownership Rights that Could be Affected.

Each of the activities and services of the institution may implicate rights of third-party copyright owners, such as reproduction of works; distribution on digital networks; circumvention of technological protection measures; public display and performance.

Stage THREE: Draft Elements of Relevant Statutory Exceptions or Policy Measures.

Whether developing a policy position or the language of a statute, drafters of the measure make the decisions about the desired activities, the dimensions of the policy position (as described above), and the legal implications. The final step includes drafting the language of the statute or policy that resolves the copyright issues and supports the full range of desired access in furtherance of the institutional mission.

To be clear, the charts in the appendix are part of this toolkit in order to offer choices to drafters in the Member States, and yet no country should realistically consider including all or even most

of the points presented here in their copyright statutes. 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.

D. Drafting an Example Statute

The *Toolkit on Preservation* includes a detailed description of a process for drafting a statutory exception to support preservation and respond to the interests of diverse stakeholders. As emphasized in this toolkit, the drafters using the *Toolkit on Preservation* have choices about the content of the statute and its exact language. That toolkit includes a detailed example statute, which shows how the desired elements can be incorporated into a single provision of the copyright law. This *Toolkit on Access* includes an example statute containing selected access provisions.

The example statute below begins with the example from the *Toolkit on Preservation*. This toolkit adds to the example by adding a selection of clauses that are especially appropriate for enhancing access and including limits and safeguards to protect rightsholder interests. While the following example was developed according to the toolkit processes and has been thoroughly reviewed by the Member States and interested stakeholders, it should be noted that the underlying preservation example and the modifications are not presented here as a model. They are instead a representation of the choices a country may make as it develops this aspect of copyright law.

Construct and Draft the Statute

NOTE:

*The draft statute below is the text of the "example statute" found in the previous WIPO toolkit on preservation issues. That toolkit centers on the distinct and substantive terms that may be included in a statutory exception, with provisions related to access reserved for detailed examination. This current toolkit now demonstrates how additional terms may be added to the statute. The terms reviewed here may be added to a statute in order to optimize access to works in the collection while respecting the interests of rightsholders. A statute on preservation issues is used as an example; access provisions may be included in statutory exceptions on many other subjects. **The added provisions are identified by the green font.***

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 **and facilitating access, where applicable, to original works and their copies made for preservation.** 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, **and allow authorized users to access and use such copies,** in a manner consistent with this statute **and other applicable law,** provided that the institution does not operate for profit.

Preamble Language

Makes clear from the beginning of the statute that it is intended to facilitate access to the works in question.

- (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;
 - (iii) **For allowing access by authorized users to a substitute copy of a work in the collection of the institution in order to prevent loss of or damage to a work that is fragile, valuable, or otherwise at risk;**
 - (iv) **For converting or adapting the format or media of a work in the collection of the institution in order to be compatible with available technology and devices that enable access to the work by authorized users;**
 - (v) **For protection and safekeeping of a work in the collection, when that work or a copy of it is being placed on exhibition at the institution or is being shipped to another institution or other location for exhibition there or for any other purpose;**
 - (vi) For preserving and maintaining historical, cultural, and scientific heritage.
- (c) **Any institution authorized to make, possess, or otherwise use copies of a work pursuant to this exception may, consistent with its applicable law:**
- (i) **Allow access to the work and any copies of it by authorized readers and researchers by formally adding such copies to the institution's collection and catalog and other records; and**
 - (ii) **Retain additional copies of the work made incidental to the process of implementing this exception, provided that these copies are not made accessible to the public and are used only for the maintenance or management of the collection or administrative functions of the institution.**
- (d) 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.
- (e) A work may be used **by the institution** 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; 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.

§ (b)(iii) Substitute Copy

Copies of works at risk to enable immediate reading and research needs.

§ (b)(iv) Adaptation to Technologies

Adaptation of works to be readable or accessible with available technologies.

§ (b)(v) Exhibition Copies

Enabling access to works on exhibition by allowing copies for safekeeping.

§ (c)(i) Copies in the Collections

Adding copies to the collections and making them accessible to users.

§ (c)(ii) Incidental Copies

Retaining incidental copies and restricting their access and use.

- (f) 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.
- (g) 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]

Part V: Conclusion

The toolkit on access to copyrighted works in cultural heritage institutions is the second resource in a series that is intended primarily to examine the intersection of cultural heritage practices and copyright law. It underscores the importance to these institutions when considering questions related to digital access and the need for digitalization of collections, as well as access to copies of works in digital or analog format, all in the context of rapidly evolving technological developments.

The first resource in this series is the *Toolkit on Preservation* designed to develop copyright provisions that address the duty to preserve collections. This second toolkit builds on that first toolkit and addresses the challenge of assuring lawful access to the works, whether in their original form or as copies made pursuant to a statutory copyright exception. The need for clarification of that access framework can be considered by using this toolkit.

The development and implementation of exceptions to copyright for preservation and access can be aided greatly by the development of usable and functional tools, such as checklists, guidelines, and policies. In particular, non-prescriptive, scalable practices, copyright labels⁵⁴ and notices⁵⁵ identifying materials as being subject to cultural or community-informed protocols or practices can be very helpful to support respectful access consistent with public access objectives. 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, consistent with the *Toolkit on Preservation* and in addition to the development of further toolkits, these are suggested potential next steps to facilitate access.

In addition to legislative changes to facilitate access to 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 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 institutional policies can also play a positive role in ensuring that copyright is applied consistently as it relates to collections management practices that include preservation and access to copyright protected materials and objects in collections. 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.⁵⁶ Sample guidelines and copyright policies for museums, for example, were published by WIPO in 2013.⁵⁷

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 access 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, 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. While the subject of the first toolkit was making copies for preservation purposes, this toolkit addresses the potential generated by digital technologies to increase access and make specified uses of those copies for learning, teaching, research, exhibition or other purposes.

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 "*raison d'être*" of cultural heritage institutions is in fact being served.

Appendix

Charts for the Development of Access Provisions

This appendix to the toolkit includes a selection of charts intended to demonstrate a means for developing exceptions in copyright law that can enhance access to copyrighted works held in the collections of cultural heritage institutions. The toolkit includes a detailed review of the problem addressed, the various ways in which access may be enhanced or optimized, and the process for identifying the terms on which access may be permitted. The charts can aid policymakers as they work through those processes, and the charts offer some sample clauses that may be integrated with other statutory language. The result can then be a copyright statute, for example, with added language to assure a desirable level of access. That result should also offer access levels that can help fulfill the mission of cultural heritage institutions while simultaneously upholding and respecting the rights of copyright owners.

This appendix includes charts as follows:

- Chart 1: Copyright Exceptions, Ownership Rights, and Enhancement of Access.
- Chart 2: Accessing Digitized Works that are Made Available on Dedicated Terminals.
- Chart 3: Including Works from the Collection in Public Exhibitions.

These charts offer a meaningful foundation for the development of statutory exceptions. These charts can also offer models for the crafting of charts on other topics and other circumstances where cultural heritage institutions can optimize access to copyrighted works in their collections.

Chart 1

TOPIC:

Copyright Exceptions, Ownership Rights, and Enhancement of Access

The following chart demonstrates how statutory exceptions can specifically respect and respond to the rights of copyright owners in order to enhance access to copyrighted works in the collections of cultural heritage institutions. In achieving that objective, this chart sets forth four columns of concepts and principles in a sequence to clarify the decision-making process for drafting new or revised statutes that optimize access.

Column 1: Copyright Exceptions Currently in Effect

This toolkit does not examine every possible copyright exception. Listed here are a selection of example copyright exceptions that are directly relevant to the mission of many cultural heritage institutions.

Column 2: Ownership Rights Affected by Current Exceptions

Not all rights of copyright owners are implicated by each exception. However, isolating and specifically identifying ownership rights and neighboring rights can help to better understand the role of copyright and see the possibilities for beneficial uses of protected works.

Column 3: Basic Elements of Many Exceptions

While statutory exceptions on the same topic can vary greatly among the many Member States, this chart identifies some of the fundamental elements that are a critical part of any statute on any of the listed topics.

Column 4: Additional Elements to Enhance Access

This column is essentially a set of proposals for possible inclusion in a new or existing statutory exception, with the objective of enhancing access to the copyrighted works subject to each of the exceptions.

Column 1	Column 2	Column 3	Column 4
Copyright Exceptions Currently in Effect	Ownership Rights Affected by Current Exceptions	Basic Elements of Many Exceptions	Additional Elements to Enhance Access
Preservation (The subject of an earlier toolkit.⁵⁸)	Reproduction	** May make copies for specified purposes. ** May be limited to specific types of works.	** Permit copying before deterioration or other loss. ** Allow copies for safekeeping at other institutions.
	Distribution Making Available	** Copies may be accessed by authorized users.	** Clarify that uses on the premises and at terminals are allowed. ** The institution may allow access by authorized users. ** The institution may transmit or deliver copies for permissible uses at other CHIs.
Private Study & Research	Reproduction	** May make copies for specified purposes. ** May be limited to specific types of works.	** Avoid limits on types of works.
	Distribution	** Copies may be delivered to user who made the request.	** Retention of digital copies for allowed purposes. ** Clarify that recipient may use copies consistent with copyright.
Exhibitions of Collections	Public Display and Performance	** Few Member States have included exhibitions in their copyright exceptions.	** Expand the opportunity to other Member States. ** Display and performance anticipate uses of diverse media. ** May display, perform, and view works on the premises in the context of an exhibition. ** May display, perform, and view works as part of online exhibitions.
	Reproduction	** Sometimes included in statutes as a limited administrative use of the copyrighted works.	** Allow copies for safekeeping of works that are included in exhibitions. ** Allow copies of works in order to facilitate means of exhibiting on premises or online.
	Distribution		** Allow lending of works to other institutions for purposes of exhibitions.

			** Clarify that digital transmissions are not a distribution infringement.
	Derivatives		** Works may be modified or altered to facilitate exhibition. ** Works may be included in programs, catalogs, and promotional materials consistent with copyright. ** Exhibition materials may be retained by the institution for archival purposes.
Dedicated Terminals	Reproduction	** Allows copies of works for access on dedicated terminals. ** Copies made at the request of users. ** Copies limited to certain types of works.	** Expand scope of works. ** Clarify that works may remain accessible indefinitely. ** Accessibility is not limited to the user making the request. ** Retain copies for future needs.
	Public Display and Performance	** Copies may be accessed at terminals on the premises of the institution.	** Accessibility may be expanded to other locations, on other equipment, subject to safeguards.
	Derivatives	** Institution must adhere to limits in applicable and binding license agreements. ** Institution must prevent copying by users.	** Limit or remove the effect of contracts and their application to the exception. ** Clarify interpretation in case from the EU Court of Justice. ⁵⁹ ** Responsibilities for copying and actions of users.

Chart 2

TOPIC:

Accessing Digitized Works that are Made Available on Dedicated Terminals

Proposed Access Solution:

Statutory copyright exception authorizing cultural heritage institutions to use copyrighted works in digital formats for the primary purpose of making the works available for viewing and other uses on terminals at the institution. This chart can guide lawmakers in Member States as they draft new or revised statutory exceptions, which have practical application and address interests reflected in the three-step test.

Stage ONE: Specify Intended Activities that Can Expand Access.	Stage TWO: Identify Ownership Rights that Could be Affected.	Stage THREE: Elements of Relevant Statutory Exceptions or Policy Measures.	Example Clauses and Terms for Including in the Relevant Statute.
<ul style="list-style-type: none"> • Making digital copies of works. • Storing copies on secured systems. • Allowing access to digital copies via terminals on the institution's premises. • Allowing access at other locations under defined conditions. • Allowing copies of works for research needs. 	<ul style="list-style-type: none"> • Reproduction. • Digital dissemination. • Making available. • Public display or performance. • Moral rights. • Individual and collective licensing. 	<p><i>Which Institutions:</i></p> <ul style="list-style-type: none"> • Cultural heritage institutions that figure prominently in each country, such as libraries, archives, and museums • Other possible institutions, such as research and scientific centers, educational institutions. • Definitions or conditions, such as nonprofit or open to public, or types of institutions. <p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> • Any type of work. • Limit to certain types of works as appropriate. <p><i>Conditions on Use:</i></p> <ul style="list-style-type: none"> • Implication of applicable collective license or acquisition agreement. • Restrictions on ability of users to download or make copies. • Limit on the number of simultaneously accessible copies. • Allowable purposes for the access, such as private study or research. <p><i>Location of Permitted Access:</i></p> <ul style="list-style-type: none"> • Premises of the Institution. • Remote access with conditions. 	<p><i>...accessible at any location that is administered as part of the same institution...</i></p> <p><i>...users may download and use isolated single copies of works for use in research or private scholarship...</i></p> <p><i>...institution may maintain availability of works without limit on duration, provided the use is made consistent with this exception...</i></p> <p><i>...exception applies notwithstanding collective license respecting the use of the works...</i></p> <p><i>...institution may alter or adapt formats and technological platforms as reasonably necessary to exercise the opportunities in this exception...</i></p>

Chart 3

TOPIC:

Including Works from the Collection in Public Exhibitions

Statutory copyright exception authorizing cultural heritage institutions to allow the use of diverse copyrighted works in exhibitions open to the public and held at the institution holding the work or at other locations. This chart can guide lawmakers in Member States drafting new or revised statutory exceptions, which should enable public access as part of an exhibition and address interests reflected in the three-step test.

Stage ONE: Specify Intended Activities that Can Expand Access.	Stage TWO: Identify Ownership Rights that Could be Affected.	Stage THREE: Elements of Relevant Statutory Exceptions or Policy Measures.	Example Clauses and Terms for Including in the Relevant Statute.
---	---	---	---

<ul style="list-style-type: none"> • Making digital or analog copies of works. • Storing copies on secured systems. • Allowing public viewing and other forms of access to the selected works. • Allowing exhibition of original works or copies. • Permitting exhibitions on the institution's premises. • Allowing access at other locations under defined conditions. • Allowing copies of works for related uses, such as advertising, promotion, and books and other uses. 	<ul style="list-style-type: none"> • Reproduction of works placed on exhibition. • Reproduction of selected works for promotion of the exhibition. • Digital dissemination of online exhibition. • Making available. • Public display or performance. • Moral rights. • Individual and collective licensing. 	<p><i>Which Institutions:</i></p> <ul style="list-style-type: none"> • Cultural heritage institutions that figure prominently in each country, such as libraries, archives, and museums • Other possible institutions, such as research and scientific centers, educational institutions. • Definitions or conditions, such as nonprofit or open to public, or types of institutions. • Clarify whether access can be limited to certain communities and whether fees charged for admission. <p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> • Any type of work. • Diverse media. • Limit to certain types of works as appropriate. <p><i>Location of Permitted Access:</i></p> <ul style="list-style-type: none"> • Premises of the Institution. • Remote access with conditions. 	<p><i>...institution may include in exhibitions any display or performance, or other relevant use, of any work in its collections, whether such work is in its original form or is a copy of it...</i></p> <p><i>...works may be accessible at any location that is administered as part of the same institution...</i></p> <p><i>...institution may maintain availability of works without limit on duration, provided any uses of the work are part of or related to the exhibition...</i></p> <p><i>...exception applies notwithstanding collective license respecting the use of the works...</i></p> <p><i>...institution may alter or adapt formats and technological platforms as reasonably necessary to conform to the conditions of the exhibition...</i></p>
--	---	--	---

[end of Appendix]

¹ WIPO International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions, October 18-19, Geneva, 2019 at https://www.wipo.int/meetings/en/2019/international_conference_copyright.html, accessed April 12, 2026.

² Cultural heritage institutions as trusted institutions are discussed in greater depth in Part I, Sections A, B, and Part III, Section B.

³ Although “limitations” and “exceptions” have some conceptual differences, with limitations tending to be more general and structural, whereas exceptions more prescriptive, in this Toolkit the phrase “limitations and exceptions” is used as a single concept.

⁴ *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.

⁵ 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: 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, accessed April 12, 2026.

⁶ 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

[Endnote continued on next page]

[Endnote continued from previous page]

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).

⁷ European Union Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, art. 5(3)(n), OJ L 167 of 22 June 2001, 10 ff.

⁸ The following text regarding the duty of care was taken from the Toolkit on Preservation beginning at page 10. See Rina Elster Pantalony, Kenneth D. Crews, and David Sutton, *WIPO Toolkit on Preservation for Cultural Heritage Institutions: Libraries, Archives, Museums* (Geneva: World Intellectual Property Organization, 2024), available at <https://www.wipo.int/documents/d/copyright/docs-en-toolkit-on-preservation.pdf>, accessed April 12, 2026.

⁹ For example, the International Council on Museums (ICOM) has recently updated its definition of museum to include elements consistent with a “trusted institution.” See <https://icom.museum/en/resources/standards-guidelines/museum-definition/>, accessed April 8, 2026. It is important to note that an institution does not become a library, an archive or a museum simply by using one of those words in its title. Definitions of “trusted institutions” will of necessity vary from member state to member state, but should specify required credentials and professional standards, organizational mission and will typically include a reference to non-commercial operation.

¹⁰ 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>, accessed April 12, 2026.

¹¹ See for example, the *Collections Management Policy* of the Metropolitan Museum of Art, New York, approved by its Board of Trustees, on May 9, 2023, <https://www.metmuseum.org/about-the-met/policies>, accessed April 12, 2026.

¹² For example, the cover of the policy from the Metropolitan Museum of Art states that it was adopted by the trustees. See *Collections*, *supra* note 11.

¹³ International Council of Museums (ICOM), *Code of Ethics for Museums*, see <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>, accessed April 12, 2026.

¹⁴ ICOM, *supra* note 13, at page 18 (Principle III).

¹⁵ International Federation of Library Associations and Institutions (IFLA), *Libraries Safeguarding Cultural Heritage* (May 10, 2017), see <https://www.ifla.org/news/libraries-safeguarding-cultural-heritage/>, accessed April 12, 2026.

¹⁶ See https://www.ica.org/app/uploads/2023/12/ICA_Access-principles_EN.pdf, accessed April 12, 2026.

¹⁷ International Council on Archives (ICA), *Principles of Access to Archives* (August 24, 2012), Principle 1 at page 8, see https://www.ica.org/app/uploads/2023/12/ICA_Access-principles_EN.pdf, accessed April 12, 2026.

¹⁸ Columbia University Libraries was awarded a grant to digitize and then accession digital surrogates of important at risk and rare published and unpublished materials into Columbia’s collection with originals remaining in India. See <https://icls.columbia.edu/news/columbia-university-libraries-awarded-grant-to-support-anticaste-archives-project/>, accessed August 20, 2025.

¹⁹ See <https://datamanagement.hms.harvard.edu/share-publish/data-repositories>, accessed April 12, 2026.

²⁰ Crews, Kenneth D., *Study on Copyright Limitations and Exceptions for Libraries and Archives updated and Revised (2017 Edition)*, World Intellectual Property Organization, SCCR 35/6, at https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_6.pdf, accessed April 12, 2026.

²¹ The concepts of “risk,” “risk management,” or “risk mitigation” are ones that are in common use when addressing the question of how users and providers of copyright material should take care to ensure that the use of the works in their control does not infringe or facilitate the infringement of copyright in the works. The use of these concepts, including as relates to “legal risk”, is particularly prevalent in the practices of cultural heritage institutions and at the core of their duty of care, as also illustrated in the *Toolkit on Preservation*. See *Toolkit on Preservation*, *supra* note 8, at p. 14. See further in this regard, Maher, William J., *An Archivist’s Guide to Copyright: Navigating Risk Management*, forthcoming, Bloomsbury Publishing, 2026; and generally, Holger Kienle, et al., “Managing legal risks associated with intellectual property on the web,” *International Journal of Business Information Systems* 3(1) 86-106 (2008), available at DOI: 10.1504/IJBIS.2008.016055, accessed April 12, 2026.

²² Council on Library and Information Resources (CLIR), for example, requires grant recipients to include, as part of their grant applications for digitization, an intellectual property plan demonstrating how they intend to manage risk. See <https://www.clir.org> accessed August 9, 2025.

²³ See *Toolkit on Preservation*, *supra* note 8, at p. 10.

[Endnote continued on next page]

[Endnote continued from previous page]

²⁴ Member States may also wish to consider whether due diligence standards are developing within a particular market to address the issue of orphan works of published or publicly released works and assess whether existing due diligence practices provide a greater understanding of potential but realistic criteria.

²⁵ Archival records of early children's works by José Reis at the Casa de Oswaldo Cruz (Fiocruz) lack key publication metadata, including a standardized publication date ("sem data" / s.d.) and an identifiable publisher; one work is described as a "manuscript prepared by the author at the age of 11" and as a "book supposedly published by Garnier Livreiro Editor," illustrating an unverified publication context typical of orphan works. See https://josereis.coc.fiocruz.br/wp-content/uploads/2018/06/miolo_jose_reis_caixeiro_ciencia_web.pdf, accessed April 12, 2026.

²⁶ Fair dealing and fair use are concepts in copyright law found mostly in common law jurisdictions and are distinct from each other. An in-depth comparative analysis is beyond the scope of this toolkit.

²⁷ For example, US Copyright Act, 17 USC, §107, s.29, Copyright Act of Canada, RSC, 1985 c-42, as amended, s.40(2), The *Copyright Act 1968* (Cth) (Australia) provide a non-exhaustive list of copyright statutes that include a fair use or fair dealing provision

²⁸ This is more so in the case of fair use, as the cases constituting fair dealing are often considered to be more certain and better defined. See in this regard inputs from the Australian Law Reform Commission, available at <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/6-the-new-fair-dealing-exception/advantages-of-fair-use-over-fair-dealing/>, accessed April 12, 2026.

²⁹ According to a WIPO study from 2017, copyright exceptions applicable to the services and activities of libraries and archives, and thus reducing their liability risks, exist in the copyright laws of at least 161 Member States. See Crews, *supra* note 20.

³⁰ See for example, s.38.1(1) of Canadian Copyright Act, RSC 1985 c. C-42 as amended, which provides that statutory damages for noncommercial uses are limited from \$100 to \$5000 at the discretion of the court. See [https://laws-lois.justice.gc.ca/eng/acts/c-42/section_38.1.html#:~:text=38.1%20\(1\)%20Subject%20to%20this,infringement%20of%20subsection%2027\(2.3\)](https://laws-lois.justice.gc.ca/eng/acts/c-42/section_38.1.html#:~:text=38.1%20(1)%20Subject%20to%20this,infringement%20of%20subsection%2027(2.3),), accessed April 12, 2026.

³¹ Where it becomes necessary in the end for the work concerned to be reproduced in a publication additional permissions may be required by the cultural heritage institution.

³² Safe harbor provisions were made a part of the European Union law with the Electronic Commerce Directive of 2000. See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), art. 14, O.J. L 178, 17 July 2000. Other countries, including the United States and the United Kingdom have adopted similar legal procedures to reduce or eliminate liability, as has South Africa. With respect to South Africa, see section 77 of the Electronic Communications and Transactions Act 25 of 2002, https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf, accessed April 11, 2026.

³³ For example, New Zealand has incorporated elements of traditional knowledge and traditional cultural expressions into the intellectual property laws, specifically trademarks and patent statutes. See <https://www.iponz.govt.nz/get-ip/maori-ip/>, accessed April 8, 2026.

³⁴ Creative Commons licenses and so-called WTFPL licences (in the case of software) are often seen as being an equivalent to the public domain as they ensure that newly-created works are made available for use by the public with limited restrictions.

³⁵ See UNESCO, *Domaine public payant* (Paris, May 27, 1949), available at <https://unesdoc.unesco.org/ark:/48223/pf0000143960>, accessed April 12, 2026. See also *Notes on the meanings of the term "Public Domain"...* (Geneva: World Intellectual Property Organization, 2010), available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=149213, accessed April 12, 2026.

³⁶ The Bangui Agreement is the founding agreement of the African Intellectual Property Organization (OAPI), comprised of some seventeen (17) Francophone African countries. The agreement was recently revised in 2015 and contains provisions relating to the paying public domain in article 68 thereof. See <https://www.wipo.int/wipolex/en/text/582620>, accessed April 11, 2026.

³⁷ See <https://www.cinema.ucla.edu/>, accessed April 12, 2026. "UCLA" is the familiar name for the University of California, Los Angeles.

³⁸ For example, UCLA Library provides broad streaming access to licensed film for teaching and research purposes. See <https://guides.library.ucla.edu/videocollections/streaming>, accessed April 8, 2026.

[Endnote continued on next page]

[Endnote continued from previous page]

³⁹ This is the case, for example, with film and video archives, such as the UCLA Film and Television Archive, a unit of UCLA Library. See <https://www.cinema.ucla.edu/>, accessed April 12, 2026.

⁴⁰ See <https://creativecommons.org/about/arts-culture/open-culture-resources/>, accessed May 27, 2026.

⁴¹ See for the example of an open access policy one posted on the website of the Royal Museums Greenwich, available at <https://www.rmg.co.uk/policies/collections-information-access-policy>, and one posted on the website of the Metropolitan Museum of Art in New York, available at <https://www.metmuseum.org/about-the-met/policies-and-documents/open-access>, both accessed April 12, 2026. An example of "terms of use" that support broad open access for specific public interest and educational purposes, can be found at the Menil Collection in Houston, Texas, available at <https://www.menil.org/terms-and-conditions>, accessed April 12, 2026.

⁴² See *Collective Management of Text and Image-Based Works*, pages 32 *et seq.* (Geneva: World Intellectual Property Organization, 2023), available at <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-924-2023-en-collective-management-of-text-and-image-based-works.pdf>, accessed April 12, 2026. Also available at DOI: 10.34667/tind.47985, accessed April 12, 2026.

⁴³ As an example, Nordic countries use collective management organizations in this way to manage specific rights in copyright for specific purposes. This is true throughout the Nordic region in Europe where they manage licensing, royalty collection and distribution. See, for example, KODA in Denmark, TEOSTO in Finland, TONO in Norway, and STIM in Sweden. See in this regard Rán Tryggvadóttir, "Facilitating Transactions and Lawful Availability of Works of Authorship: Online Access to the Cultural Heritage and Extended Collective Licenses," *Columbia Journal of Law & the Arts* 41(23), (2018), pp. 515-531, available at <https://doi.org/10.7916/jla.v41i3.2027>, accessed April 12, 2026.

⁴⁴ The European Union directive addressing ECLs, makes clear the ability of rightsholders to exclude their works. See European Union Directive 2019/790/EC of the European Parliament and of the Council on copyright and related rights in the Digital Single Market, art. 3(c), OJ L 130/92 of 17 April 2019, available at <https://www.wipo.int/wipolex/en/legislation/details/18927>, accessed April 12, 2026.

⁴⁵ See for example, Tryggvadóttir, *supra* note 43.

⁴⁶ For further details and examples of how collective licensing plays an important role, see *WIPO Good Practice Toolkit for Collective Management Organizations*, available at <https://www.wipo.int/publications/en/details.jsp?id=4773#:~:text=The%20WIPO%20Good%20Practice%20Toolkit%20for%20Collective%20Management,area%20of%20collective%20management%20from%20around%20the%20world>, accessed April 12, 2026.

⁴⁷ See <https://www.louisarmstronghouse.org/>, accessed April 12, 2026.

⁴⁸ See <https://tvnews.vanderbilt.edu/>, accessed April 12, 2026.

⁴⁹ See Charles M. Dollar "Archivists and Records Managers in the Information Age." *Archivaria* 36 (Fall 1993), pp. 37–52.

⁵⁰ See *Toolkit on Preservation*, *supra* note 8, at p. 17.

⁵¹ Association of Art Museum Directors, *Updated Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums*, November 24, 2024, available at https://cms.aamd.org/sites/default/files/document/AAMD_Updated_Copyright_Guidelines2024.pdf, accessed April 12, 2026.

⁵² [https://www.wipo.int/amc/en/center/specific-sectors/art/#:~:text=Financial%20Reporting%20Oversight-,WIPO%20Alternative%20Dispute%20Resolution%20\(ADR\)%20of%20Art%20and%20Cultural%20Heritage,the%20need%20for%20court%20litigation](https://www.wipo.int/amc/en/center/specific-sectors/art/#:~:text=Financial%20Reporting%20Oversight-,WIPO%20Alternative%20Dispute%20Resolution%20(ADR)%20of%20Art%20and%20Cultural%20Heritage,the%20need%20for%20court%20litigation), accessed April 12, 2026.

⁵³ The International Council of Museums (ICOM) recently modernized its museum definition to include requirements of what constitutes a trusted institution: "A museum is a not-for-profit, permanent institution in the service of society that researches, collects, conserves, interprets and exhibits tangible and intangible heritage. Open to the public, accessible and inclusive, museums foster diversity and sustainability. They operate and communicate ethically, professionally and with the participation of communities, offering varied experiences for education, enjoyment, reflection and knowledge sharing." See <https://icom.museum/en/resources/standards-guidelines/museum-definition/>, accessed April 10, 2026.

⁵⁴ See for example, standard protocols for using Rights Statements, available at <https://rightsstatements.org/page/1.0/?language=en>, accessed April 12, 2026.

⁵⁵ See for example, TK Notices at <https://localcontexts.org/notice/tk-notice/> and TK Labels at <https://localcontexts.org/labels/traditional-knowledge-labels/>, both accessed April 9, 2026.

⁵⁶ *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.

[Endnote continued on next page]

[Endnote continued from previous page]

⁵⁷ Rina Elster Pantalony, *Managing Intellectual Property for Museums* (Geneva: World Intellectual Property Organization, 2013) <https://www.wipo.int/publications/en/details.jsp?id=166>, accessed April 12, 2026.

⁵⁸ See *Toolkit on Preservation*, *supra* note 8.

⁵⁹ *Technische Universität Darmstadt*, Court of Justice, European Union, 11 September 2014, case C-117/13.

[End of document]

