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THE CASE FOR A TREATY ON EXCEPTIONS AND LIMITATIONS FOR LIBRARIES AND ARCHIVES: BACKGROUND PAPER BY IFLA, ICA, EIFL AND INNOVARTE

Document presented by Brazil

1. BACKGROUND

This paper offers a brief explanation of the Treaty proposal drafted by the International Federation of Library Associations and Institutions (IFLA), the International Council on Archives (ICA), Electronic Information for Libraries (EIFL) and Innovarte, a library NGO.

1.1 What are 'libraries and archives'?

Libraries and archives are long-established institutions that play a unique role in collecting, preserving and providing access to knowledge. The ability to produce and use knowledge has become a major factor in development and critical to a nation's comparative advantage¹. Libraries and archives have a major role in helping people meet their work, study, research, and leisure needs. They support important public policy goals such as literacy, education, research, employability, and health awareness. Libraries and archives enable and encourage creativity and innovation, a major goal of WIPO. Without adequate access to information, authors and creators would not be able to create new works, innovate and expand local and global knowledge.

Libraries are usually supported by public funds and are commonly grouped into five categories: academic and research libraries; national libraries; public libraries; school libraries; and special libraries. Academic and research libraries are essential for the support of higher education and research. They contain collections in specific academic disciplines, offer students new perspectives, and facilitate innovative research projects. National libraries are funded by national governments to maintain comprehensive collections of the written documentary resources of the nation and thus contribute to its culture and heritage. Most national libraries serve as legal depositories. Public libraries enrich communities' quality of life by helping people to learn new things and stay connected. They support the development of literacy skills, and provide access to books, journals, films and music, and other material. School libraries offer a full range of learning resources to serve the information needs of students and the curriculum needs of teachers and staff. Special libraries provide vital information services to people in support of their work, such as government policy makers, doctors and clinicians, as well as the non-profit, private and corporate sectors. The scope of the collection is usually limited to the interests of the host organization.

Archives hold print and digital collections including manuscripts, print text, maps, photographs and moving images. They effectively preserve and manage documents, and as such are an irreplaceable witness to past events, underpinning democracy, the identity of individuals and communities, and human rights. Archivists ensure that an authentic record of knowledge created and accumulated by past and present generations be selected, preserved and made available. With this record, citizens and researchers may understand what governments and other bodies have done on their behalf and may construct a new body of knowledge to build an informed and better future for the world at large.

1.2 Towards copyright balance for libraries and archives

To fulfill their public interest mission, and their statutory mandates, libraries and archives need adequate limitations and exceptions in national copyright law. Limitations and exceptions are legal flexibilities in copyright that provide balance in a copyright system between users and creators of protected works. They enable libraries and archives to preserve their collections,

¹ <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTEDUCATION/0,,contentMDK:20161496~menuPK:540092~pagePK:148956~piPK:216618~theSitePK:282386,00.html>

support education and research, lend materials and help people with disabilities exercise their right to access content. Limitations and exceptions are fundamental for access to knowledge and for human, social and economic development. Limitations and exceptions ensure that copyright works both for creators and users.

A recent WIPO study shows that libraries and archives work under a patchwork of provisions that differ in scope and effect from country to country². 21 countries worldwide have no specific copyright exception for libraries and archives; 27 countries have only a general exception. The provisions increasingly fail to address the legal and policy challenges of the global digital environment. Current national and international systems of copyright limitations and exceptions for libraries and archives have not been updated for the digital environment, particularly with respect to digital archiving and virtual learning environments. An updated system is needed to enable libraries and archives to provide users with both traditional and new services made possible by technological change, including sharing resources across national borders.

1.3 What problems need to be addressed?

Here are some examples of the problems libraries and archives are facing:

- The absence in many countries of exceptions to copyright for preservation, replacement, even for print materials, means that documentary heritage will disappear and may not be available to future generations. For example, libraries and archives contain a wide variety of print material often not available anywhere else in the world but which are of important historical, political and cultural value e.g. newspaper collections. Without an appropriate exception, a library or archive cannot copy or digitize the newspaper in order to preserve it.
- Exceptions to copyright which enabled libraries and archives to preserve and make available works in the print era have not been updated to the digital age. For example, libraries and archives now provide access to large quantities of 'born digital' works that are not available in print format. Without the legal certainty to preserve this material for future access, the world faces a digital 'black hole' of 21st century material.
- Imposed licences for the provision of digital information such as electronic journals are often used to undermine limitations and exceptions to copyright designed to support education, learning and creativity. In a study of 100 contracts offered to the British Library by commercial vendors, well over ninety percent undermined the public interest as expressed by limitations and exceptions in UK copyright law, particularly as regards fair dealing, archiving and access by the visually impaired³.
- Technological Protection Measures (TPM) are used by rights holders to control access and use of content, such as to restrict copying. This can conflict with the right of libraries and archives to undertake activities permitted by national copyright law. If libraries and archives cannot circumvent TPM they will be unable to preserve, archive and make permitted use of lawfully acquired digital content. Libraries and archives must not be prevented from exercising their lawful rights under national copyright law.

² http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192

³ <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=130>

- The internet has opened up new opportunities for information and communication. The discoverability of published material has become easier and collaboration between researchers, students and citizens is increasingly global. Established practices of resource-sharing among libraries to advance knowledge are increasingly cross-border and multi-jurisdictional. Yet these practices are not always reflected in current copyright law. If libraries are unable to provide access to materials that are only available internationally through another library, education and scholarship will be impaired. This would be especially harmful for developing countries and for those living in rural or remote areas.
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2. PROPOSED TREATY FOR LIBRARIES AND ARCHIVES

To resolve those major problems IFLA, ICA, EIFL, and Innovarte have proposed a legally binding international instrument - the 'Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives'. In accordance with the agreed limitations and exceptions agenda of the WIPO Standing Committee on Copyright and Related Rights it would provide both a mandate to update exceptions for libraries and archives worldwide, and guidelines on the issues that have to be addressed to protect adequately library and archive functions as well as legitimate copyright interests.

2.1 Aims of the Treaty proposal

This Treaty proposal aims to create a basic foundation of exceptions and limitations for all countries, and sets out a framework for national copyright laws that is consistent with international law. It seeks to implement the Agreed Statement concerning Article 10 of the WIPO Copyright Treaty, which was an attempt by WIPO Member States to accommodate future needs⁴. Fifteen years later, however, this general statement expressing an intention is inadequate.

The Treaty proposal does not seek to impose harmonization or a 'one size fits all' approach. It has been designed to accommodate common needs, as well as differences in the level of development and priorities of Member States. Although it is mandatory to address certain key issues, in most cases there is flexibility for implementation, using the international standard of 'fair practice' as set out in the Berne Convention. In addition it allows 'grandfathering' of current legislation, whereby an old rule can continue to apply to an existing situation, while a new rule will apply to all future situations. Furthermore it allows the possibility for a Member State to make a reservation.

2.2 Who are the beneficiaries of the Treaty proposal?

The beneficiaries are libraries and archives, their users and society at large. Over one billion registered library users turn regularly to their library to borrow books, music and films, participate in events, or learn new skills⁵. In many developing countries, the library is the only source of information for those engaged in educational or training programs. Limitations and exceptions benefit society as they safeguard fundamental individual user rights, including freedom of access to information and freedom of expression as required in the UN Declaration on Human Rights. The Treaty proposal also promotes commerce, competition, creativity and innovation by promoting the dissemination of knowledge.

⁴ http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885

⁵ <http://www5.oclc.org/downloads/community/librariesstackup.pdf>

2.3 What does the Treaty proposal cover?

This Treaty proposal governs the use of all copyright works and also of all materials protected by related rights, according to national law. It applies to materials in any format, digital and non-digital.

2.4 Which limitations and exceptions are being proposed?

All the proposed limitations and exceptions in the Treaty proposal apply to non-commercial uses only, while some are subject to further conditions such as the international standard of fair practice. The Treaty proposal would create limited exceptions to the exclusive rights of authors under copyright, in order to enable:

- Preservation of materials for posterity, with the flexibility to access cultural works in copy-protected formats;
- Support of education, research, and private study;
- Making or receiving of copies of works lawfully acquired by a library or archive for personal and private purposes;
- Supply of copies of works in response to requests from individual users;
- Provision or lending of lawfully acquired content on a not-for-profit basis;
- Support of people with disabilities in the exercise of their right to access content;
- Circumvention of TPM for the purpose of permitting a non-infringing use of a work;
- Limiting of the risk of liability to libraries and archives with respect to orphan works.

2.5 What will the Treaty achieve that collaboration with rights holders will not?

Libraries spend nearly \$24 billion a year on published material⁶. Collaboration with rights holders is very important and necessary, but without a mandate for a balanced copyright law, libraries and archives cannot perform their mission of providing access for users. There is an imbalance in copyright laws, which only a treaty can solve.

A treaty is the only instrument that would bind Member States to provide limitations and exceptions in their national laws to protect specific library and archive activities. By contrast, a 'soft norm', such as a recommendation or a resolution, would not bind countries to adopt the required copyright limitations and exceptions. At best, it would be a 'suggestion' for what could be done by a country with regard to exceptions for libraries and archives, and it would not be self-executing or obligatory. Many countries have difficulty in adopting legal flexibilities into their national copyright laws for various reasons, including the lack of resources for changing laws, implementation problems, bi-lateral trade agreements and the need to address pressing socio-economic issues. A treaty would provide the ideal framework for facilitating and promoting change in national laws.

2.6 Consistency with international law

The Treaty proposal sets out the relationship with other agreements, and is consistent with the major international copyright treaties. It is set out as a special agreement within the meaning of Article 20 of the Berne Convention.

⁶ <http://www.outsellinc.com/store/products/974-2010-library-market-size-share-forecast-report>

Importantly, the international standard of fair practice 'as determined in national law' is adopted from Article 10 of the Berne Convention, which provides countries with the flexibility to set out the appropriate standard in their national law. Article 10 give countries the option of maintaining existing national provisions e.g. for remuneration, public lending right, and fair use/fair dealing. It also allows countries to retain any limitations and exceptions that go beyond the requirements and, subject to certain conditions, to create new limitations and exceptions.

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