

Standing Committee on Copyright and Related Rights

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PROPOSAL ON LIMITATIONS AND EXCEPTIONS

Prepared by the African Group

Introductory Note

The issue of limitations and exceptions to copyrighted works has been on the agenda of the World Intellectual Property Organization since 2004. L&Es came on the SCCR agenda during discussions at WIPO for a Development Agenda (the WIPO Development Agenda was adopted in 2007).

The African Group are historically the demandeurs for L&Es, together with other major developing countries (such as India, Pakistan, Iran, Indonesia, Brazil). For example, the Group submitted the first full treaty proposals on L&Es for libraries and archives, education and people with disabilities ([SCCR/20/11](#) and [SCCR/22/12](#)), and were drivers of the Marrakesh Treaty for persons with print disabilities, adopted in 2013. After Marrakesh, work at SCCR turned to L&Es for other beneficiaries – libraries and archives, education and research, and ‘other disabilities’ – not covered by Marrakesh.

The basis for continued work on L&Es was a 2012 recommendation from the General Assembly to ‘*continue discussion to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms)*’ for libraries and archives, education and research institutions, and other disabilities. ([WO/GA/41/14](#)).

In 2022, the African Group made a proposal for a Work Program on L&Es to speed up the discussions. In 2023, it was adopted by the Committee ([SCCR/43/8 REV.](#)), which states:

- “At the twentieth session of the Standing Committee on Copyright and Related Rights (SCCR), the African Group proposed a Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers. The African Group is of the view that SCCR should continue building on the work carried out to date, and move towards a fair and balanced copyright system that supports creativity and advances the public interest including by promoting digital access to education and research, as well as to cultural heritage. The African Group submits this draft work program as a contribution to the work of the SCCR in the area of exceptions and limitations”.
- It reaffirms the 2021 GA mandate: “*On this basis, the below proposed Work Program sets out concrete and practical steps that the Committee can take both in order to provide guidance and support to Member States in the short term, while also allowing it to work towards the adoption of an appropriate international legal instrument or instruments on exceptions and limitations*”.

In November 2023, the African Group presented a ‘*Draft Proposal for the Implementation of the Work Program on Exceptions and Limitations, Adopted at the 43rd Session of the WIPO SCCR*’ setting out a detailed process and methodology for implementation, including specific proposals for the creation of working groups of member states to meet inter-sessionally on the priority issues to develop textual proposals ([SCCR/44/6](#)).

This Draft Instrument is a contribution towards text-based negotiations on L&Es.

Draft
Instrument on Limitations and Exceptions for Libraries, Archives, Museums, Education and
Research Institutions and People with Disabilities

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Explanatory Notes on the Preamble

0.01 The *Preamble* sets forth the objective of the Instrument. It draws upon the preamble statements in the Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives WIPO Doc. SCCR/22/12 (Jun. 3, 2011).

0.02 The *first paragraph* recognizes the need to balance the rights of authors and the larger public interest, particularly education, research and access to information, reflecting the language of the Preamble of the WIPO Copyright Treaty.

0.03 The *second paragraph* acknowledges the duties to promote the production of and access to education, research and cultural heritage flowing from the United Nations Sustainable Development Goals, the International Covenant on Social and Cultural rights and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

[Explanatory Notes on the Preamble continue, page 6]

PREAMBLE

The Contracting Parties,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information;

Acknowledging duties to promote the production of and access to education, research and cultural heritage materials that flow from:

- United Nations Sustainable Development Goals, particularly Goal 4 Quality Education, Goal 5 Gender Equality, Goal 9 Industry, Innovation, and Infrastructure and Goal 10 Reduced Inequalities;
- the right to education directed to the full development of the human personality to enable all persons to participate effectively in a free society;
- the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;

[Preamble continues, Page 7]

0.04 The *third paragraph* reminds that the United Nations recognizes quality education, innovation and reduced inequalities as sustainable development goals.

0.05 The *fourth paragraph* recalls the importance of the Development Agenda Recommendations which aim to ensure that development considerations form an integral part of the organization's work.

0.06 The *fifth paragraph* acknowledges that human rights obligations impose duties on States and international to act affirmatives to protect, respect and fulfill their mandates, including through binding international instruments.

0.07 The *sixth paragraph* highlights that human rights duties to safeguard the right to the protection of the moral and material interests resulting from one's scientific, literary and artistic productions have to be balanced with other human rights such as the right to education, free expression and to participate in cultural life.

[Explanatory Notes on the Preamble continue, page 8]

- the right freely to participate in the cultural life of the community, including to enjoy the arts and to share in scientific advancement and its benefits; and

- the objectives of intellectual property rights to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Aware of the United Nations' recognition of quality education, innovation, and reduced inequalities as sustainable development goals;

Recalling the importance of the Development Agenda recommendations, adopted in 2007 by the General Assembly of the World Intellectual Property Organization (WIPO), which aim to ensure that development considerations form an integral part of the Organization's work;

Acknowledging that human rights obligations impose duties on states and international organizations to act affirmatively through legislative and other measures to respect, protect and fulfil their mandates, including through binding international instruments;

Affirming that human rights duties to safeguard the right to the protection of the moral and material interests resulting from one's scientific, literary and artistic productions is subject to limitations and must be balanced with other human rights, including the rights to education, to free expression, and to participate in cultural life;

[Preamble continues, page 9]

0.08 The *seventh paragraph* recognizes the need for a global approach to copyright exceptions and limitations and that a minimum level of international harmonization of limitations and exceptions is necessary to securing effective and unhindered flow of information essential for global equality of access to research, ideas and innovation.

0.09 *Paragraph (8)* recognizes that copyright exceptions and limitations advance knowledge by preserving and providing access to the world's cultural, artistic and scientific heritage.

0.10 *Paragraph (9)* acknowledges that the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled does not apply to people with other disabilities.

[End of Explanatory Notes on the Preamble]

Recognizing the need for a global approach to copyright exceptions and limitations and a minimum level of international harmonization of limitations and exceptions to secure the effective and unhindered flow of information essential for global equality of access to research, ideas and innovation;

Recognizing that copyright exceptions and limitations advance knowledge by preserving and providing access to the world's cultural, artistic, and scientific heritage;

Acknowledging that the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled does not apply to people with other disabilities;

Hereby agree as follows:

[End of Preamble]

Explanatory Notes on Article 1

1.01 The provisions of *Article 1* relate to the nature of the Instrument and define its relation to limitations and exceptions permitted, where appropriate, by instruments, including, the Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Bern Convention); the WIPO Copyright Treaty, 1996 (WCT); the International Convention for the Protection of performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention); the WIPO Performances and Phonograms Treaty, 1996 (WPPT); the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement); the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty); and the WIPO Beijing Treaty on Audiovisual Performances, 2012 (Beijing Treaty).

[End of Explanatory Notes on Article 1]

ARTICLE 1
RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

1. Nothing in this Instrument reduces the limitations and exceptions permitted, where appropriate, by international instruments, including in particular:

a) the Berne Convention for the Protection of Literary and Artistic Works, 1886 as amended (Berne Convention);

b) the WIPO Copyright Treaty, 1996 (WCT);

c) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention);

d) the WIPO Performances and Phonograms Treaty, 1996 (WPPT);

e) the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement);

f) the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty); and

g) the WIPO Beijing Treaty on Audiovisual Performances, 2012 (Beijing Treaty).

[End of Article 1]

Explanatory Notes on Article 2

2.01 *Article 2* specifies works which are to be affected by the Instrument. It applies to uses of published and unpublished works or other subject matter, in any format.

2.02 The provision of *Article 2* applying to “works and other subject matter” echoes Directive (EU) 2019/790, Articles 3 to 8, and is intended to clarify application of the provisions to material protected by copyright or related rights, including literary and artistic works, phonograms, fixations of performances, fixations of films, fixations of broadcasts, databases and computer programs.

[End of Explanatory Notes on Article 2]

ARTICLE 2

SCOPE OF PROTECTION

The provisions in this Instrument shall apply to uses of published and unpublished works or other subject matter, in any format.

[End of Article 2]

Explanatory Notes on Article 3

3.01 The provisions of *Article 3* are formulated and organized in such a way that the scope of application (Adoption of National Exceptions) is explicit and unambiguous.

3.02 The *First Paragraph* obligates members to ensure the realization of the right to receive education and conduct research through appropriate exceptions and limitations in their national laws, consistent with their international obligations, maintaining the balance between the rights of authors and the public interest.

3.03 The *Second Paragraph* frames a general duty to promote balance in copyright law through the use of adequate limitations and exceptions. Such a duty is included in plurilateral trade agreements including in the Regional Comprehensive Economic Partnership, Art. 11.18.3, which states that “Each Party shall endeavour to provide an appropriate balance in its copyright and related rights system, among other things by means of limitations and exceptions consistent with paragraph 1, for legitimate purposes, which may include education, research, criticism, comment, news reporting, and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.”

3.04 The *Third Paragraph* follows, *mutatis mutandis*, the proposal from Ecuador, Peru and Uruguay in SCCR/26/4 Prov on obligations/Proposals to update exceptions, and WCT Agreed Statement to Article 10 (footnote 9).

[Explanatory Notes on Article 3 continues, page 16]

Article 3

Adoption of National Exceptions

1. Contracting Parties shall take all appropriate measures to respect, protect and fulfill the right to receive education and conduct research through appropriate exceptions and limitations in their national laws, consistent with their international obligations, maintaining the balance between the rights of authors and the larger public interest.

2. Member States shall provide an appropriate balance in their copyright and related rights system through limitations and exceptions for the public interest, including for education; research; freedom of expression uses such as for quotation, comment, criticism, review, caricature, parody and pastiche; access to information and news reporting; preservation of cultural heritage; and to facilitate access for persons with disabilities.

3. Contracting Parties shall update, carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention, especially under article 10(1) and 10(2), and devise new exceptions and limitations that are appropriate in the digital environment to protect educational and research activities.

[Article 3 continues, page 17]

3.05 The *Fourth Paragraph* clarifies that countries may implement the norms of the Instrument through either general flexible exceptions, such as fair use and fair dealing provisions, or specific exceptions. The language is drawn from documents SCCR/44/5, Updated version of the document “Objectives and principles for exceptions and limitations for libraries and archives” (SCCR/26/8) prepared by the Delegation of the United States of America. It also follows the Marrakesh Treaty, Article 10 (“contracting Parties may fulfill their rights and obligations under this Treaty through ... judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses”); and RCEP, Art. 11.18.4. (For greater certainty, a Party may adopt or maintain limitations or exceptions to the rights referred to in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in paragraph 1.)

[End of Explanatory Notes on Article 3]

4. Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions for specific purposes; other limitations or exceptions; or a combination thereof, within their national legal systems and practice. These may include judicial, administrative, or regulatory determinations as to fair practices, uses, or dealings to meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, and other international treaties.

[End of Article 3]

Explanatory Notes on Article 4

4.01 The provisions of *Article 4* addresses Permitted Uses for Education and Research. The Article is informed by the Civil Society Proposed Treaty on Copyright Exceptions and Limitation For Educational and Research Activities (TERA). [...]. <https://infojustice.org/wp-content/uploads/2018/11/TERA-11272018.pdf>.

4.02 The *first paragraph* provides a general principle that limitations and exceptions should permit research and education uses “to the extent justified by the purpose and provided such utilization is compatible with fair practice.” The concept “fair practice” is defined in the WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, WIPO Publication No. 615(E) (1978) at 58-59, which explains that the concept of fair practice “implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales and circulation, etc”.

4.03 The provisions of the *second paragraph* are specific examples of permitted uses in the course of: (a) teaching activities; (b) learning activities; (c) creating educational materials; and (d) scientific and research purposes.

4.04 Uses such as making private copies, as indicated in *item (a)(i)* are defined as common exceptions for research and education in the Study on Copyright Limitations and Exceptions for Educational Activities (Prepared by Professor Daniel Seng), WIPO Doc. SCCR/33/6 *passim* (Nov. 9, 2016).

4.05 *Item (a)(ii)* is based on Proposal from Brazil in Provisional Working Document Towards an Appropriate International Legal Instrument (in Whatever Form) on Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons with other Disabilities Containing Comments and Textual Suggestions, WIPO Doc. SCCR/26/4 Prov. (Apr. 15, 2013) (stating “the following shall not constitute violation of copyright: the performance, recitation and exhibition of a work, as applicable, for teaching purposes in educational institutions in the context of educational or research activities, to the extent justified by the non-commercial purpose to be achieved, provided that the source, including the author’s name is indicated, unless this turns out to be impossible”); Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities (Prepared by Professor Daniel Seng), WIPO Doc. SCCR/35/5 Rev. *passim* (Nov. 10, 2017); SCCR/33/6; Beijing Treaty on Audiovisual Performances [hereinafter Beijing Treaty], Preamble, Jun. 24, 2012 (“recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information”).

[Explanatory Notes on Article 4 continue, page 20]

ARTICLE 4

PERMITTED USES FOR EDUCATION AND RESEARCH

1. It shall be permissible to use a work or other subject matter for educational or research purposes to the extent justified by the purpose and provided such utilization is compatible with fair practice.

2. Uses within the scope of paragraph 1 shall include, but need not be limited to:

a) Uses in the course of teaching activities, such as:

- i. making private copies, including in preparation of a course of instruction;
- ii. performing or communicating by way of illustration, or for comment, criticism, or review, in the course of instruction, including in online education;

[Article 4 continues, page 21]

4.06 *Item (a)(iii)* follows Proposal from Brazil in Provisional Working Document Towards an Appropriate International Legal Instrument (in Whatever Form) on Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons with other Disabilities Containing Comments and Textual Suggestions, WIPO Doc. SCCR/26/4 Prov. (Apr. 15, 2013) (stating “the following shall not constitute violation of copyright: the performance, recitation and exhibition of a work, as applicable, for teaching purposes in educational institutions in the context of educational or research activities, to the extent justified by the non-commercial purpose to be achieved, provided that the source, including the author’s name is indicated, unless this turns out to be impossible”); Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities (Prepared by Professor Daniel Seng), WIPO Doc. SCCR/35/5 Rev. *passim* (Nov. 10, 2017); SCCR/33/6; Beijing Treaty on Audiovisual Performances [hereinafter Beijing Treaty], Preamble, Jun. 24, 2012 (“recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information”).

4.07 *Item (a)(iv)* provides examples of permitted uses for making and administering examinations, which is based on the provisions of many laws.

4.08 *Item (b)(i)* follows SCCR/33/6, which finds “332 provisions from 189 member states relate to private and personal use” and concludes “the significant number of provisions that relate to private and personal use confirms their relevance as they sanction the self-edification and personal instruction perspective of education”.

4.09 *Item (b)(ii)* provides examples of permitted uses in assignments and in response to examinations

4.10 *Item (b)(iii)* follows the Chair’s Informal Chart on Limitations and Exceptions for Libraries and Archives, Topic 11, WIPO Doc. SCCR/33/Chart on Libraries and Archives (Nov. 24, 2016); Proposal from the African Group in SCCR/26/4 Prov., (permitting unauthorized “uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes...for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible”) (permitting “educational institution[s] or research organization[s] domiciled in the territory of a Contracting Party” to “for purposes of teaching, personal study or research” to “make a translation of a work into any language and publish the translation in printed or analogous forms of reproduction; and reproduce and publish the translated work”).

[Explanatory Notes on Article 4 continue, page 22]

- iii. making and distributing copies or excerpts for use in a course of instruction;
and
 - iv. making and administering examinations, including the drafting of questions
and communicating the questions to students;
- b) Uses in the course of learning activities, such as:
- i. making private copies for purposes of study;
 - ii. including works of visual arts, short works and other subject matter, and
excerpts of longer works or other subject matter in assignments and in
responses to examinations;
 - iii. translating or otherwise adapting for use in assignments and examinations;
and

[Article 4 continues, page 23]

4.11 *Item (b)(iv)* is based on the proposal from Brazil in SCCR/26/4 Prov. (exempting from copyright infringement “the performance, recitation and exhibition of a work, as applicable, for teaching purposes in educational institutions in the context of educational or research activities, to the extent justified by the non-commercial purpose to be achieved, provided that the source, including the author’s name is indicated, unless this turns out to be impossible”); *see also* Proposal from the African Group in SCCR/26/4 Prov. (permitting “without the authorization of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to persons with disabilities by any means, including by non-commercial lending or electronic communication by wire or wireless means...,” subject to certain conditions); SCCR/35/5 Rev., *passim*; SCCR/33/6; Beijing Treaty, Preamble (“recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information”); WIPO Performances and Phonograms Treaty, Preamble, Dec. 20, 1996 (“recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information”).

4.12 *Item (c)(i)* follows the Tunis Model Law on Copyright, Section 7 (permitting “the utilization of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching, to the extent justified by the purpose”).

4.13 *Item (c)(ii)* follows the Proposal from the African Group in SCCR/26/4 Prov. (providing “any educational institution or research organization domiciled in the territory of a Contracting Party” the right to “include excerpts of copyrighted material in educational resources created and distributed for educational purposes”); SCCR/33/6, *passim*.

[Explanatory Notes on Article 4 continue, page 24]

- iv. performing or otherwise communicating in an educational context,
including by wire or wireless means;
- c) Uses in the course of creating educational materials, such as:
 - i. using by way of illustration or for comment, criticism, or review in
publications, broadcasts, audiovisual works, or sound recordings;
 - ii. including works of visual arts, short works and other subject matter, and
excerpts of longer works or other subject matter, in anthologies and other
compilations;

[Article 4 continues, page 25]

4.14 *Item (c)(iii)* is based on discussions on Topic 11 in SCCR/33/Chart on Libraries and Archives; Proposal from the African Group in SCCR/26/4 Prov., (permitting unauthorized “uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes...for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible”) (permitting “educational institution[s] or research organization[s] domiciled in the territory of a Contracting Party” to “for purposes of teaching, personal study or research” to “make a translation of a work into any language and publish the translation in printed or analogous forms of reproduction; and reproduce and publish the translated work”).

4.15 *Item (c)(iv)* follows the discussions on Topic 7 in SCCR/33/Chart on Libraries and Archives (stating “the use of orphan works should be assured for the benefit of libraries and archives to achieve their public service mission under certain conditions in order not to deprive users of access to valuable information”; suggesting “provisions to adequately compensate rightholders, either directly or through collective management, once they are identified should be included” and “these limitations and exceptions should not entail the liability of activities undertaken in good faith after the reasonable diligent search prior to the use of the work”); SCCR/33/6, *passim*; SCCR/35/5 Rev., *passim*.

4.16 *Item (c)(v)* follows Proposal from the African Group in SCCR/26/4 Prov. (stating “consistent with the Berne Appendix, an educational institution, library, research organization or student that is the owner of a lawfully acquired copy of a work or subject of related rights who is domiciled in the territory of a Contracting Party, shall be entitled, without the authority of the owner(s) of copyright or related rights, to sell, import, export or otherwise dispose of that copy or subject of related rights”) (providing educational institutions or research organizations the right to “make the work available in an accessible format to persons with a disability that are members of the institution or organization”); see *also* Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled [hereinafter Marrakesh VIP Treaty], Preamble, Jun. 27, 2013 (“mindful of the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities, which limit their freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research”) and Art. 6 (permitting Contracting Parties “to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder”).

4.17 *Item (d)(i)* follows SCCR/33/6, *passim*; See Topic 11 in SCCR/33/Chart on Libraries and Archives (“translating works in special circumstances for archiving reasons and to reach indigenous or native languages, or for research purposes, is a need that has been described”); Proposal from the African Group in SCCR/26/4 Prov.

4.18 *Item (d)(ii)* follows SCCR/33/6; Proposal from Brazil in SCCR/26/4 Prov. Berne Convention Art. 10(1).

- iii. translating works when they are not available in languages required by users;
 - iv. adapting, altering or arranging for use in a course of instruction;
 - v. reproducing and making available works or other subject matter for which the author or other right holder cannot be identified or located after reasonable inquiry;
 - vi. making and providing accessible format copies of works to teachers, students, or researchers with disabilities, including by import and export;
 - vii. importing lawfully made copies;
 - viii. archiving course materials for subsequent teacher or learner uses.
- d) Uses in the course of scientific research activities, such as:
- i. making, modifying and translating private copies for research purposes;
 - ii. making quotations or translating excerpts for the purpose of illustration or for comment, criticism or review;
 - iii. for scientific study and analysis, including search, organization and analysis of data, and computational research;

[Article 4 continues, page 27]

4.19 *Item (d)(iv)* outlines permitted uses in scientific research to include use for testing, reverse engineering, and enabling interconnection and interoperability of products lawfully possessed by the user.

4.20 *Paragraph (3)* of this article defines the term “scientific research”. The provision follows closely Directive (EU) 2019/790, recital 12 (“Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. The term ‘scientific research’ within the meaning of this Directive should be understood to cover both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover, in addition to universities or other higher education institutions and their libraries, also entities such as research institutes and hospitals that carry out research. Despite different legal forms and structures, research organisations in the Member States generally have in common that they act either on a not-for-profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission could, for example, be reflected through public funding or through provisions in national laws or public contracts. Conversely, organisations upon which commercial undertakings have a decisive influence allowing such undertakings to exercise control because of structural situations, such as through their quality of shareholder or member, which could result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.”).

[End of Explanatory Notes on Article 4]

iv. for testing, reverse engineering, and enabling interconnection and interoperability of products lawfully possessed by the user.

3. For the purposes of this Instrument, the term 'scientific research' should be understood to cover both the natural sciences and the human sciences, including research performed by public or non-profit research organizations.

[End of Article 4]

Explanatory Notes on Article 5

5.01 The provisions of this article address permission uses related to cultural heritage. It closely follows the International Federation of Library Associations and Institutions (IFLA), Electronic Information for Libraries (EIFL), International Council on Archives (ICA). Draft Preservation Treaty: A treaty on preservation of Cultural Heritage (2019)
<https://repository.ifla.org/items/6f90d862-139a-449d-a921-f0f0626efe76>.

5.02 The *first paragraph* emphasizes that cultural institutions need a limitation or exception to the right of reproduction so that they make copies of any works or other subject matter that are permanently in their collections for the purposes of preservation.

5.03 The *second paragraph* provides for limitations and exceptions to the right of reproduction, the right of distribution, and the right of making available.

5.04 *Item (a)* indicates that an institution can provide on its premises any access to copies in any format or medium.

5.05 *Item (b)* obliges parties to permit cultural institutions to provide copies for private study, scholarship or research.

5.06 *Item (c)* cultural institutions are permitted to reproduce and make available to the public works which are out of commerce, where suitable licences covering the needs of cultural institutions are not easily available on the market. This provision closely follows Directive (EU) 2019/790, Article 5(2), which states that “Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter ... to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.”

[Explanatory Notes on Article 5 continue, page 30]

ARTICLE 5

CULTURAL HERITAGE

1. Contracting Parties shall provide for a limitation or exception to the right of reproduction in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for the purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.

2. Contracting Parties shall provide for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available in order to allow cultural heritage institutions to provide access to preserved works and other subject matter in their collections as follows:

- a. Cultural heritage institutions shall be permitted to provide on the premises access to copies in any format or medium.
- b. Cultural heritage institutions shall be permitted to provide copies in any format or medium to persons for the purpose of private study, scholarship, or research.
- c. Cultural heritage institutions shall be permitted to reproduce and make available to the public any work or other subject matter which is out of commerce, where no suitable licences covering the needs and specificities of cultural heritage institutions are easily available on the market.

[Article 5 continues, page 31]

5.07 The *third paragraph* defines a “cultural heritage institution” according to Directive (EU) 2019/790, Article 2(3), which provides that “‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution”.

[End of Explanatory Notes on Article 5]

3. For purposes of this Instrument, “cultural heritage institution” means a publicly accessible library or museum, an archive, or a film or audio heritage institution.

[End of Article 5]

Explanatory Notes on Article 6

6.01 *Article 6* defines obligations relating to permissible uses relating to people with disabilities.

6.02 *Article 6* obligates members to produce, distribute and make available accessible copies of works for the benefit of people with disabilities who require such formats to enjoy the work on an equitable basis with others.

[End of Explanatory Notes on Article 6]

ARTICLE 6

PEOPLE WITH DISABILITIES

It shall be permissible to produce, distribute, and make available accessible format copies of works for the benefit of people with any disability that requires such format to enjoy the work on an equitable basis with others.

[End of Article 6]

Explanatory Notes on Article 7

7.01 The provisions of *Article 7* address permissible exceptions and limitations for cross-border uses. It closely follows Topic 6 in SCCR/33/Chart on Libraries and Archives (stating “libraries and archives should be able to import, export and exchange works and copies of works across borders, particularly for research and similar purposes, in order to achieve the public service mission through cooperation especially in developing and least developed countries”).

7.02 *Paragraph (2)* provides that all limitations and exceptions arising from this instrument also apply to cross-border uses.

7.02 *Paragraph 2* clarifies further that a lawfully acquired copy can be a subject of cross-border exchange. This provision follows SCCR 33/4, Proposal Concerning Limitations And Exceptions For Libraries And Archives And Limitations and Exceptions For Educational and Research Institutions and for Persons with Other Disabilities, document presented by Argentina (“Where performed in accordance with the exceptions and limitations set forth in this agreement, the reproduction or making available of a work shall be governed by the law of the country in which the reproduction or making available occur, without precluding the reproduced work from being delivered to or used by a person or institution benefitting from exceptions and limitations located in another Member State, provided that such delivery or use is consistent with the terms and conditions set forth in this agreement”); Marrakesh Treaty, art. 5(1) (“Cross-Border Exchange of Accessible Format Copies. 1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party”).

[End of Explanatory Notes on Article 7]

ARTICLE 7

CROSS – BORDER USES

1. Limitations and exceptions adopted pursuant to this Instrument shall permit cross-border uses.

2. Contracting Parties shall provide that if a copy is lawfully made under a limitation or exception, that copy may be distributed or made available to or from another Contracting Party for the same purposes for which the copy was lawfully made.

[End of Article 7]

Explanatory Notes on Article 8

8.01 *Article 8* provides for uses which are subject to adequate remuneration, such as through statutory licenses or limitations for remedies for infringement.

[End of Explanatory Notes on Article 8]

ARTICLE 8
USES SUBJECT TO REMUNERATION

A Contracting Party may authorize uses for purposes beyond those promoted by this Instrument where such uses are subject to adequate remuneration, such as through statutory licenses or limitations of remedies for infringement.

[End of Article 8]

Explanatory Notes on Article 9

9.01 *Article 9* provides for protection of limitations and exceptions from contractual interference.

9.02 The *first paragraph* follows SCCR/35/5 Rev; and Proposal from the African Group in SCCR/26/4 Prov (stating “contracts attempting to override the legitimate exercise of the provisions in Articles 2-5 shall be null and void as against the public policy justifying copyright and shall be deemed inconsistent with the goals and objectives of the international copyright system”).

9.03 The *second paragraph* follows Regulation (EC) No 593/2008, Article 9(1) (“Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”)

[End of Explanatory Notes on Article 9]

ARTICLE 9

PROTECTION FROM CONTRACTUAL INTERFERENCE

1. Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions provided by the Contracting Parties consistent with this Instrument shall be unenforceable.

2. The respect for the limitations and exceptions provided by the Contracting Parties consistent with this Instrument is regarded as crucial by the Contracting Parties for safeguarding their public interests, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.

[End of Article 9]

Explanatory Notes on Articles 10

10.01 *Article 10* seeks to ensure that technological protection measures do not prohibit or prevent the use of limitations and exceptions. The provision follows SCCR/33/6; and Proposal from the African Group in SCCR/26/4 Prov. (“notwithstanding the provisions of any international agreement, it shall be lawful for any educational institution, research organization, or student domiciled in the territory of a Contracting Party to circumvent any effective technological protection measures and access the content protected by such technological protection measures for” purposes including “private non-commercial use”; “private study or research”; and “translation, teaching, testing, classroom study or scientific research...”).

[End of Explanatory Notes on Article 10]

ARTICLE 10

OBLIGATIONS CONCERNING TECHNOLOGICAL PROTECTION MEASURES

Contracting Parties shall ensure that legal remedies against the circumvention of effective technological protection measures do not prohibit or prevent the uses enabled by the limitations and exceptions provided by the Contracting Parties consistent with this Instrument.

[End of Article 10]

Explanatory Notes on Article 11

11.01 The provisions of *Article 11* set limits on liability, reflecting, for example, Marrakesh VIP Treaty Preamble (“reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments”).

11.02 *Paragraph (1)* protects from liability a person who acts in good faith in the belief, and where there are reasonable grounds for believing, that the use is permitted by law or by an applicable license.

11.03 *Paragraph (2)* exempts institutions from liability for actions of their users, where the Contracting Party provides for secondary liability.

[End of Explanatory Notes on Article 11]

ARTICLE 11

LIMITATION ON LIABILITY

1. Any person using a work or other subject matter for a purpose promoted by this Instrument shall be protected from claims for damages and from criminal liability when the action is performed in good faith in the belief, and where there are reasonable grounds for believing, that the use is permitted by law or by an applicable license.

2. When a Contracting Party provides for secondary liability regimes, educational, research and cultural heritage institutions shall be exempt from liability for the actions of their users.

[End of Article 11]

Explanatory Notes on Article 12

12.01 The *Article* provides for the interpretation of the Three Step Test, based on the proposal from Ecuador, Peru and Uruguay in SCCR/26/4 Prov.

12.02 *Article 1* provides for a public interest approach in applying the Three-Step Test. It closely follows e.g., Marrakesh VIP Treaty Preamble (“reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments”).

12.03 *Finally*, “legitimate interests” of rightholders does not extend to any use that does not have substantial effect upon the intended market for a work or other subject matter.

[End of Explanatory Notes on Article 12]

ARTICLE 12

INTERPRETATION OF THREE STEP TEST

1. When applying Article 9(2) of the Berne Convention, Article 10 of the WIPO Copyright Treaty, Article 16 of the WIPO Performances and Phonograms Treaty, or the Article 13 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, nothing prevents Contracting Parties interpreting the three-step test in a manner that respects the legitimate interests, including of third parties, deriving from educational and research needs, and other human rights and fundamental freedoms; and other public interests, such as the need to achieve scientific progress and cultural, educational, social, or economic development, and the protection of competition and secondary markets.

2. The legitimate interests of a right holder shall not extend to any use that has no substantial effect upon the intended market for a work or other subject matter.

[End of document]