

## **Standing Committee on Copyright and Related Rights**

### **Twenty-six Session Geneva, December 16 to 20, 2013**

WORKING DOCUMENT CONTAINING COMMENTS ON AND TEXTUAL SUGGESTIONS  
TOWARDS AN APPROPRIATE INTERNATIONAL LEGAL INSTRUMENT (IN WHATEVER  
FORM) ON EXCEPTIONS AND LIMITATIONS FOR LIBRARIES AND ARCHIVES

*adopted by the Committee*

## TOPIC 1: PRESERVATION

### Proposed Texts

1. Proposal from the African Group

Preservation of library and archival materials:

1. It shall be permitted to make limited copies of published and unpublished works, regardless of their format, to meet the needs of libraries and archives, without the authorization of the owner of copyright;
2. The copies of the work referred to in paragraph (a) shall be used solely to meet the needs of teaching, research, and preservation of cultural heritage;
3. The copies referred to in paragraph (a) shall be made for non-profit uses, in the general interest of the public and for human development, without conflicting with the normal exploitation of the work or unreasonably prejudicing the legitimate interests of the author; this activity may be exercised in situ or remotely.

2. Proposal from Ecuador to the proposal of the African Group

Right of Preservation of Library and Archival Materials

1. It shall be permitted for libraries and archives to reproduce works, or materials protected by related rights, for the purposes of preservation or replacement, in accordance with fair practice.
2. Copies that have been reproduced for the purposes of preservation or replacement may be used in place of the original works or material, in accordance with fair practice.

3. Proposal from India

Libraries and archives shall have the right to reproduce any work in any format for the purposes of digital preservation or replacement.

4. Principles and Objectives on the subject proposed by the United States of America

Objective:

Enable libraries and archives to carry out their public service role of preserving works.

Principles:

Exceptions and limitations can and should enable libraries and archives to carry out their public service role of preserving works that comprise the cumulative knowledge and heritage of the world's nations and peoples.

To that end, exceptions and limitations can and should enable libraries and archives to make copies of published and unpublished works for purposes of preservation and replacement, under appropriate circumstances.

The need for such preservation exists in a variety of media and formats and may include the migration of content from obsolete storage formats.

## Comments on Preservation

### 5. United Kingdom

With respect to the preservation, we note that some of the texts also cover other usage and we wonder whether a usage such as lending should be dealt with under another heading. The discussion should be focused on the ability of libraries and archives to preserve the work. It is important to look at the definition of work and also at the definition of who may enjoy these privileges and again looking at the American colleagues' suggestions. We may well look at whether or not museums should also be added to the list of libraries and archives in order to enable them to preserve their culture. Furthermore, the exception by a library or archive should be used only if it is not practical to obtain a copy from the rightholders. Finally, it is necessary to use concepts that are technology and format-neutral so there is no need to return to them when new developments occur.

### 6. Austria

Such a limitation should be based on the following elements: any work published or not should be covered, but the limitation should be restricted to the original work which is in the possession of the collection. Only a single copy of the original may be made for the use of the clients; there may be several internal acts of reproduction for the purposes of digital preservation for example. Preservation copies should not be used as an item additional to the original work in the collection but must be used instead of the original work.

### 7. Italy

As reflected in the national implementation of the European Directive, there should be three fundamental principles: Firstly, the work has to have been legally and lawfully acquired; secondly, a copy can only be made in order to preserve works that are in the collection with no other purpose than to allow the work to remain in the collection. The African proposal makes reference to teaching and research, which is something different. In accordance with our system it can only be copied in order to allow it to remain within the collection; and, thirdly, this has to be done not for profit purposes.

### 8. France

One of the conditions of the national implementation of the European Directive imposes that the exception as applied to reproduction right, cannot be used for commercial purposes. This exception is of course limited to the material contained in the collections of libraries and archives. This exception is foreseen purely for preservation purposes in order to prevent further deterioration of the work's medium. It may also be the case for a digital format which is no longer used by libraries and archives.

### 9. Greece

Reproduction shall be permissible only if an additional copy cannot be obtained in the market promptly and in reasonable terms. It may take place only if specific requirements are met: First, if it is made by a non-profit library or archiving organization; second, if the copy is made from a work that belongs to the library or archives permanent collection; and third, if the reproduction is aimed at retaining the additional copy, or at transferring it to another non-profit

library or archive. Lastly, reproduction is deemed necessary since it is not possible for the library or archive to obtain an additional copy from the market promptly and in reasonable terms.

#### 10. Germany

Under the German Copyright Act, an archive has to be acting in the public interest and to pursue no direct or indirect economic or commercial purpose with the digital copies it is making; additional requirements which apply to analogue copies have to be met likewise.

#### 11. Japan

The reproduction of works by libraries is permitted if the works have been actually damaged in a severe manner and the reproduction is necessary for their preservation.

#### 12. Mexico

In limiting the right to reproduction, it would be highly appropriate to establish conditions, particularly to define the quantity of copies, what kind of works can be reproduced, e.g. published or unpublished works. In some legislations, there are moral rights referring to disclosure, therefore the suggestion in principle is to talk about published works.

As regards to the second paragraph, more than a teaching and research purpose, it is a question of security. It has been pointed out for cases where the work is exhausted, no longer cataloged, or in danger of disappearing. This is about limiting the right of reproduction, while in the last paragraph a reference is made to the fact that consultation could be made *in situ* or remotely, which implies other rights such as the right of making available or of public communication. Lastly, we reaffirm that should be applicable only to published works.

#### 13. Spain

The national legislation which establishes copyright limitations for libraries with purposes of reproduction, lending, and consultations in specialized terminals, is drafted in such a way that the rightholders cannot oppose the reproduction when it is done for non-profit purposes by libraries, museums, public archives, cultural and scientific institutions, and as long as it is done for research or preservation purposes.

#### 14. Canada

Copying is limited to the maintenance or management of a library, archive or museum's own permanent collection, or of another library, archive or museum and so the preservation or maintenance has six specific functions or purposes. First, a copy can be made if the original is rare or unpublished and is lost or at risk of deterioration or becoming damaged or lost. Second, it is for the purpose of on-site consultation if the original cannot be viewed, handled or listened to, because of its condition or because of the atmospheric conditions at which it must be kept.

Third, a copy can be made in an alternative format if the original is currently in an obsolete format or if the technology required to use the original is unavailable. There is also the possibility of making a copy if the technology or format is becoming unavailable in order to read the material. Fourth, a copy can be made by the library, museum or archive for catalogue making. Fifth, for insurance purposes or police investigations, and sixth, if necessary for restoration. Along these six purposes, there is a limitation for the first three purposes which is that the exception does not apply where an appropriate copy is commercially available in the medium and of a quality that is appropriate for the purposes of those preservation purposes. If a person needs to make an intermediate copy to accomplish one of the purposes in the first section, that intermediate copy must be destroyed as long as it is no longer needed.

15. China

Libraries, archives and museums are institutions that can preserve their own collections by making or reproducing copies. In our regulations, we also have some rules concerning the digitalization of copies that clearly provides that libraries, museums and archives could, in conformity with law, digitalize their own collections under two conditions: one, if the original works are damaged or almost damaged or lost, or if the format is out of date. Second, if the works are not available in the market, or if they could only be obtained for a price evidently higher than the original. When such two conditions are met, libraries and archives could digitalize or reproduce some of the works of their collection.

16. United States of America

We understand the context in which Article 14 of the African Group proposal appears to be drafted. However, this article seems to encompass many other areas, such as dissemination of copies for purposes of the needs of researchers and the ways in which libraries aid and assist teaching functions and institutions. We should be very clear when we are talking about preservation because it is a distinctive function of our libraries and archives. In fact, it is a definitional function of archives throughout the world.

17. Republic of Korea

Libraries, under the national legislation, may reproduce books, documents, records, and other materials for public use, for the purpose of preserving them when necessary.

18. Azerbaijan

We have a system where, in accordance with Article 9 of the Berne Convention, makes possible without the authorization of an author or another rightholder and without any payment, to reproduce under certain circumstances, namely if it is for a non-profit purpose, if the published works have been lost, damaged or tampered with in some way; if it is to make copies at the request of other libraries and archival centers, in order to replace lost, or damaged, or unusable works that they have in their collections. What we need today is a new international standard as we enter into the digital era, where in some cases works need to be moved from one medium to another, and we need to ensure that we can have works made available to libraries in the appropriate format that they may find acceptable.

### **Written comments made to the Proposed Texts**

19. Japan

We would like to make a brief comment on reproduction for collecting Internet materials under the National Diet Library Act. In article 42 *ter* of the Japanese Copyright Law, it is permissible for the chief Librarian of the National Diet Library to record in memories used by National Diet Library such works as included in Internet materials of government and local public bodies to the extent deemed necessary for collecting such Internet materials. With regard to materials collected at the National Diet Library that have already deteriorated or have been damaged, under the current provision of the National Diet Library Act, reproduction of works at libraries is permitted if the works have been actually damaged in a severe manner, and the reproduction is necessary for the preservation of the works. Nevertheless, the National Diet Library may not sufficiently fulfill its mission of preserving materials for public use in the future even if it digitizes materials that is already deteriorated or damaged. The amendment to the Copyright Law in 2009 makes it possible to digitize collected materials at the National Diet Library immediately

after the materials are delivered in order to ensure that publications, as cultural assets, are preserved as in good condition as the condition immediately after the delivery.

## 20. Switzerland

Switzerland is of the opinion that the reproduction of the original of a work with the aim of ensuring that it is preserved is both relevant and important. Indeed, this principle is enshrined in Swiss legislation, which is broad enough to allow copies also to be made using digital technology. As to the proposal presented by the African Group: What is the definition of the needs of libraries and archives referred to in paragraph 1? Moreover, in paragraph 2, two of the purposes for which copies are authorized are teaching and research. How can this fact be reconciled with the title "Preservation?" We are not currently in a position, however, to make a more precise statement, given that the date for the agenda item on limitations and exceptions for education, teaching and research will only be set in May/June 2012 (Annex to Conclusions of the Twenty-First Session of the Standing Committee on Copyright and Related Rights (SCCR)). Finally, the two proposals focus on material which does not yet appear to be in the possession of libraries and archives. Switzerland recognizes that preservation plays a vital role in the survival of works that are often fragile, but we believe that any move to authorize libraries and archives to acquire new material that they do not already possess, even in the interests of preserving said material, would involve those institutions carrying out tasks that go beyond those they normally perform in terms of preservation.

## 21. Chile

It is important to consider an exception that allows the reproduction of works for the purposes of preservation or replacement in the event of loss or deterioration. It would also be interesting to explore digital preservation or replacement, as proposed by a number of delegations, both for one's own library, archive or museum and for other libraries, archives or museums elsewhere in the country, particularly those in remote geographical locations where access to physical copies is more difficult. The option of access to libraries, archives or museums is a tool that enables the requirements of our National Political Constitution to be satisfied, i.e. "the State shall be at the service of human beings and its purpose shall be to promote the common good, for which reason it must help to create the social conditions allowing each and every one of the members of the national community to achieve the highest possible level of spiritual and material fulfilment, with complete respect for the rights and guarantees established by this Constitution."

## 22. European Union

The term "Preservation" is understood as meaning the reproduction (including by digitization) of a work or other protected subject matter for the sole purpose of preserving and safeguarding copies. Acts of reproduction for the purpose of preservation mainly concern works or other protected subject matter that are in danger of disappearing, that are old, rare, unique or fragile as well as works and other protected subject matter that are in an obsolete format. The preservation of works in their collections is at the heart of the activities of archives, and one of the main activities of certain public libraries (in particular National Deposit Libraries). The "Information Society Directive" does not contain a provision addressing preservation explicitly. However, the Directive allows Member States to provide for exceptions or limitations to the reproduction right "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage." Thus the exempted acts must be described precisely. Within this framework, Member States may establish limitations to the reproduction

right for the purposes of preservation.<sup>1</sup> While implementation by Member States diverges, some common principles can be identified:

- The acts covered are acts of reproduction, mainly digitization, for the sole purpose of preserving and archiving copyright-protected works or other protected subject matter. This may comprise the making of a copy to replace a work where the original is damaged, lost, destroyed (e.g. United Kingdom, Estonia) or unusable (Lithuania, Estonia) in full or in part (e.g. the Finnish law refers to technical reconstruction); must be restored (e.g. Finland, the Netherlands); or requires conversion from an obsolete format (format-shifting) or to avoid further deterioration of the work's medium (anticipation). Most Member States expressly mention the use of digital copying technology and copying onto digital carriers. Many Member States have limited this exception to written texts.<sup>2</sup> Some Member States also limit the exception for preservation purposes to those cases where a new copy is not available either from the rightholders or on the market (e.g. United Kingdom, Greece and Finland).
- The reproduction itself may not be made for direct or indirect economic or commercial advantage.
- The exception normally refers to works included in the collections of the beneficiaries, i.e. the source copy must be in the collections of the library or the archive. In summary, the scope for Member States to provide a legal framework within which libraries and archives can fulfill their public interest mission to preserve material in their possession is wide. But in order to maintain a fair balance with the interests of rightholders, the exceptions themselves are limited to the specific purpose of preservation.

### 23. Singapore

We recognize that libraries and archives play an important role in preserving works relating to our nation and its people. To enable libraries and archives to fully carry out their duties they should be enabled to make copies of published and unpublished works for preservation and replacement. It may also be important to consider other issues such as the scope or source of works to be preserved, to ensure that libraries and archives would be able to handle a broad range of works relevant to their preservation role.

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<sup>1</sup> A good number of EU Member States refer explicitly to "preservation" in their legislation (e.g. Finland, France, Latvia, Estonia, Lithuania, Poland, Slovakia, Ireland, Spain), others to "conservation." (Czech Republic), or "restoration" (The Netherlands) in their laws. In some Member States (e.g. Belgium or Luxembourg) preservation is explicitly linked to the conservation of national heritage. Most Member States do not require a compensation for rightholders when copies for preservation purposes are made under an exception.

<sup>2</sup> Some of the most fragile works in libraries and archives are newspapers and magazines.

## TOPIC 2: RIGHT OF REPRODUCTION AND SAFEGUARDING COPIES<sup>34</sup>

### Proposed texts

#### 24. Proposal from the African Group

##### Supply of works

It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.

#### 25. Proposal from Brazil, Ecuador and Uruguay to the Proposal from the African Group

##### Reproduction and Distribution of Copies by Libraries and Archives

1. It shall be permitted for a library or archive to reproduce and to distribute a copy of a copyright work, or of material protected by related rights, to a library user, or to another library or archive, for purposes of:

- a. education;
- b. requests by users for research or private study;
- c. interlibrary document supply;

provided that such reproduction and distribution is in accordance with existing international obligations, among them the Berne Convention.

2. Libraries and archives shall be permitted to reproduce and distribute a copy of a copyright work or material protected related rights, to a user, in any other case where a limitation or exception in national legislation would allow the user to make such copy.

#### 26. Proposal from India

Libraries and archives shall have the right to reproduce any work in any format and to distribute or transmit it to any user including for inter-library loan.

#### 27. Principles and Objectives on the subject proposed by the United States of America

##### Objective:

Enable libraries and archives to carry out their public service role of advancing research and knowledge.

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<sup>3</sup> The Delegation of France proposed to delete the following words from the title of this Topic: "AND SAFEGUARDING COPIES."

<sup>4</sup> The Delegation of Egypt proposed to extend this topic to research institutes and universities, and to the right of translation.

Principles:

Libraries and archives advance knowledge by providing access to their collections, which together comprise the cumulative knowledge of the world's nations and peoples.

Libraries and archives are essential to the knowledge economy of the 21st century - supporting research, learning, innovation and creative activity; providing access to diverse collections; and providing information and services to the general public, including disadvantaged communities and vulnerable members of society.

Reasonable exceptions and limitations can and should establish the framework enabling libraries and archives to supply copies of copies of certain materials to researchers and other users directly or through intermediary libraries.

### **Comments on Right of Reproduction and Safeguarding Copies**

#### 28. European Union

This is an issue that has been dealt with by the Information Society Directive where community law establishes that Member States may provide for exceptions and limitations in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments, museums, and archives provided these are not in direct or indirect commercial advantage. It is not a blank permission and it clearly refers to a specific act of reproduction. It does limit the beneficiaries to those that are publicly accessible and where they have a non-profit purpose in their activities. The common characteristic of these beneficiaries is that they pursue research and/or educational goals. Member states are strictly framed by the three-step test, and they can only apply these limitations in certain special cases which do not conflict with the normal exploitation of the work or other subject matters because of course it applies to related rights and does not unreasonably prejudice the legitimate rights of the rightholders. It is altogether a framework that allows for flexibility in its implementation to Member States while being rigorous in framing it within the balance and respect of copyright. This is important and indeed reflects a reality of Member States of the European Union where there are different legal traditions and approaches as to the establishment or not of limitations to the benefit of libraries and archives as regards these activities. Of course European Union Member States remain free, in the event they opt for an exception, to remunerate authors or not. Otherwise, without exception, licensing systems take place.

29. Pakistan

With regard to the right of reproduction and safeguarding copies, one thing that we have noted is that the purpose of reproduction is something which has been highlighted in the proposal in the third column. We do believe the point raised by the delegate from Egypt is valid in the terms that it can be for education, scientific or research purposes. We also saw this from the intervention from the Delegation of the European Union that their law includes educational and scientific research purposes. We need to be more holistic in terms of having the purposes elaborated with regard to the permission where we are going to have the right of libraries of full reproduction.

30. Mexico

The last part of the text clarifies that this has to be fair practice determined in national law which could be used for education and scientific research as well. Would it be possible to clarify the meaning of the expression obtained legally? We would have to also remove rights to look at the question of digital transfer so as to comply with other types of rights that are contemplated.

31. United States of America

The question of the right of reproduction and the supply of copies is very much a question not just of the activity but of the purpose and the intent of the reproduction and the supply of copies. This is very important because the making and supplying of copies brings libraries directly into the activities we normally associate with authors and publishers. For that reason, we must craft very carefully the relationship between the two and recognize proper limits to exceptions and limitations that address this topic. The question of reproduction and the supply of copies really breaks into two types of activities that are reflected differently in the proposals in the comparative document. First, there is the occasion when a library supplies a copy to another library, and second, there is the occasion when a library supplies a copy to an end user. The African Group proposal addresses only what we might call interlibrary supply of copies, while the Ecuador, Brazil and Uruguay proposal recognizes both supply of copies to end-users and supply of copies to other libraries, which is the approach taken in American law. In the United States, there is not just the question of to whom a copy is supplied, but there is also the question of how much is supplied. With respect to the provision of all copies by libraries, we have a number of conditions that we think are important to ensure that the exception or limitation in copyright law is properly crafted. It is important that the library believe that the copy will be used for private study, scholarship or research and not for commercial purposes, direct or indirect. It is also important that the copy carry a notice of the copyright that protects the work. And it is also important that the materials become the property of the user when requested through a library, or the property of the library itself when used for other purposes, such as for preservation and replacement. Our law permits the isolated and unrelated reproduction of a single copy of the same material on separate occasions. Another factor to consider is how much of a copyrighted work is being copied. We draw a distinction between those occasions when libraries wish to send each other or provide to end-users copies of a single scholarly article from a journal, small parts of copyrighted collections, or small parts of copyrighted works such as a chapter or limited number of pages, versus when a copy of a larger work such as a book is being made, and we have different requirements for these situations. Obviously when a copy of an entire work is being made, there is the question of adverse market effects to the publishers and authors. If copying an entire work is determined to be otherwise appropriate, it is also important that this type of activity not be done in a systematic way such that it would have the purpose and effect of serving as a substitute for a subscription or purchase of a work. We recognize that the IFLA proposal addresses this question through fair practice. In contrast the Brazil, Ecuador and Uruguay proposal sets out specific limitations and refers to the three-step test of the Berne Convention. The topic of fair practice and fair use is very important. It is indeed seminal to our

U.S. exceptions and limitations and it is imperative and important for the practices of our libraries. But we would be concerned about any international standard that simply referred to fair practice without having that be a clearly developed concept in all national laws. From our perspective based on initial review of the comparative proposals, we believe that Brazil, Ecuador and Uruguay's proposal better describes international copyright law, which does not at the international level have a clear delineation of fair practice across different jurisdictions. So we would be eager to hear more as we develop this discussion on how the fair practice criteria might ensure an appropriate balance between the reproduction and supply of copies by libraries conducting good faith efforts with one another and good faith efforts to serve their users and any adverse market impacts.

### 32. India

The Berne Convention in its Article 10 clearly mentions that it shall be permissible regarding the quotation this same thing. Providing that the making is compatible with the fair practice and that extent does not exceed what is justified by the purpose. Fair practice is the purpose also there, and so the same phrase can be adopted for this purpose. Libraries and archives shall have the right to reproduce any works in any format and to distribute or transmit it to any user including for inter-library loan.

### 33. United States of America

The Delegate of India referred to the provision in Article 10 of the Berne Convention that recognizes fair practice in the context of quotation, not of reproduction of entire works. To address the comments made by the distinguished Delegate of Ecuador, we would have to think very carefully about suggesting that translation is implicit in the right of reproduction because the right of translation is a different right than the right of reproduction. For those delegations that are concerned about the protection of the author's moral rights, that is a significant concern, and we would not think that an exception crafted to address the right of reproduction and rights related to distribution automatically covers translation.

### 34. Italy

The respect of the three-step test should already be assured by the texts that we are discussing. It is not just something that should be left up to domestic legislation only. We should already accommodate its requirements in the texts we are discussing. If we look at the text of the three countries, Brazil, Ecuador and Uruguay, we see that the respect for the three-step test does not exist. When talking about reproduction and distribution, the reproduction is without any limits and the concept of distribution implies a sort of limitless dissemination to anybody. We could consider that this text is going to introduce a free-of-charge parallel market. The purpose of education is a very general and ambiguous concept because a large number of people might be interested in education. We believe that great attention should be paid to the wording of a text when talking about limits. They should be precise and there should be the respect for the three-step test.

### 35. Russian Federation

We are extremely concerned about providing exceptions to the right of translation to libraries under the Berne Convention. We agree with the opinion expressed by Italy that if we give these exceptions and limitations to libraries, we should not go to the extremes and give unlimited

possibilities to libraries to use all copyrighted material, particularly when we are talking about translations and the full use of copyrighted material, as there might be a very serious danger to the publishing market.

36. Iran (Islamic Republic of)

Is it possible to change what is suggested by the African Group as it reads: "including digital transmission, provided that such use is compatible with fair practice as determined in national law to such reproduction?" In the background paper and the Brazil, Ecuador and Uruguay proposal, it is clarified that the fair practice refers to the reproduction itself, and not to the use. We are discussing here the reproduction, not the use to solve this concern that is well-clarified by the delegation of the United States of America. We ask the African Group to clarify if possible, if the use will be changed to the reproduction itself, or not.

37. United States of America

The distinguished Delegate of Senegal has mentioned several times that she interprets this provision, Article 11 in the African Group treaty proposal, as a provision, to safeguard copies or backup copies. Our reading of the text is that it is not so limited. We would like to clarify that with the African Group. If the provision is intended only to address backup copies or safeguard copies, perhaps this could be addressed with different wording. The United States would appreciate clarification on this point.

38. Italy

In reply to the question put to us by the Brazilian Delegation, we are not acquainted with the Brazilian legislation, so our comments are limited to the text which we have before us.

39. Portugal

Our legislation follows the European Directive on copyright and it is possible for library institutions to reproduce published works. The number of copies should satisfy the internal needs of the institution and not of the public. Without any lucrative-economic implication, institutions have to pay a fair remuneration for private copies, which are negotiated with the authors and publishers. The needs of public institutions should cover the preservation of works and research purposes. Institutions may also, within their premises, allow people to have access to these works, to read them and engage in research. There is an important legal situation that is that contracts established between the rightholders and the users may not contradict the exceptions and limitations provided for by the law.

40. Chile

In Chile, reproduction for private use, just as in the United States of America, establishes a quantitative parameter and refers to fragments. However, we believe that an international standard or rule would not necessarily have to provide a precise definition of this quantity. If it is defined that the rule should be compatible with international obligations, the necessary limitations would be defined by each country in its own context. The right to reproduction should also consider the possibility of making reproductions in all formats, present or future, in which knowledge and information is transmitted. Consequently, consideration should be given to electronic or digital copies and a neutral language should be used to pave the way for future new formats. In addition, it would be interesting to explore digital or electronic transmission of works, and also remote access, for the benefit of libraries in isolated locations far from centres of knowledge, especially for geographically complex countries like ours.

#### 41. Germany

We are confronted with two different scenarios when we look at the activities of libraries and their daily workings. One is the service that a library provides to another library, and the other scenario would be services that libraries render to end-users. The solution that the German legislation found with the insertion of Section 53(a) of the Copyright Act for the second scenario was as follows: The first sentence of subsection (1) states: "It shall be permissible in response to an individual order for public libraries to reproduce and transmit by post or facsimile individual contributions released in newspapers and periodicals and also small parts of a released work so far as the exploitation by the person placing the order is permissible pursuant to Section 53." Section 53 regulates the limitations on the reproduction right in accordance with Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. Accordingly, Section 53 of the Copyright Act permits reproduction for private and other personal uses. Please note the very close link between Section 53(a) of the Copyright Act, which regulates the permissible acts by libraries, and Section 53 of the Copyright Act, which regulates permissible acts by individual users. Section 53(a) of the Copyright Act states in the second and third sentence of subsection (1): "Reproduction and transmission in other electronic form" - such as via email, for instance - "shall be permissible solely as a graphic data file and for the purpose of illustration, for teaching or for scientific research to the extent justified by the noncommercial purpose to be achieved. Reproduction and transmission in other electronic form shall moreover be permitted only where it is not made manifestly possible upon agreed contractual terms for members of the public to access these contributions or small parts of a work from a place and at a time individually chosen by them and on terms that are adequate." Publishing house offers made online have to be considered first; they have priority over the dispatch of copies by libraries. Subsection (2) of the said section states that "an equitable remuneration shall be paid to the author for the reproduction and transmission. The claim may only be asserted by a collecting society." I can only urge caution when we embark on this discussion, so as not to impose solutions on the international level that are so fine-tuned that there is no room left for Member States to find the balance that they deem appropriate.

#### 42. United States of America

Our law also is sensitive to whether or not a market copy is available at a fair and reasonable price when the entire work is being reproduced. We agree that we cannot have too precise a definition in an international norm. We are trying to craft a kind of norm that will be meaningful and useful for many jurisdictions. As to the appearance of "fair practice" in our existing international treaty obligations, it appears only in Article 10 of the Berne Convention. The term is found in Article 10.1 in relation to quotation, as we have already discussed. But it also appears in Article 10.2 in relation to use of a work "by way of illustration in publications, broadcast or sound or visual recordings for teaching." We believe that is what the Delegate from Ecuador was referring to when he said fair practice is already used for education. But, as noted, fair practice in Article 10.2 refers only to "illustration in publications, broadcast or sound or visual recordings for teaching."

#### 43. France

France has implemented an exception by transposing the Directive that provides for quite a flexible frame for European Union Members to comply with national traditions within member countries of the European Union, which has completed article L 125.5 of the intellectual property code. It provides that a rightholder cannot prevent the reproduction of a work and its representation to preserve the possibility of consultation for the purpose of research or private study by private individuals within the facilities of a library and on a dedicated terminal accessible to the public in the libraries or archive departments in so far as they do not seek to derive from this any economic or financial advantage. There is no question of networking as consultation can only be made within the library.

#### 44. Austria

Austrian Copyright Act does not explicitly express reproduction by libraries or archives for their clients. However, the general framework provided for its Sections 42, 42a and 42b and reproduction for personal or private use are of relevance for these institutions, as well. Those provisions apply to libraries and archives and lead to the results that the Austrian Copyright Act permits libraries and archives to reproduce works for their customers as long as they provide either analog copies only or they provide digital copies for non-commercial research purposes. However, the amount of copies is limited, and whole books or articles may only be reproduced for this purpose if they are out of print or not available in a sufficient number. Private copying levy applies for this use.

#### **Written comments made to the Proposed Texts**

#### 45. Japan

In our copyright law it is permissible for libraries to reproduce a work included in library materials such as books, documents and other materials held in the collection of libraries, for limited cases and purposes under some strict conditions within the allowance of three step test. The followings are the conditions for an exception to libraries in Japanese copyright law:

1. Libraries mean the national diet library as well as libraries and other establishment designated by cabinet order.
2. Reproduction shall not be for the purpose of profit making business.
3. Only libraries are allowed to reproduce works.
4. The original shall belong to the libraries.
5. Any of the further following conditions is required:
  - The reproduction shall be at a request of users who conduct survey research and be a single copy of a part of the original, but if an individual work is reproduced in a periodical already published for a considerable period of time, the reproduction of all of the original is allowed.
  - The reproduction shall be necessary for the purpose of preserving library materials.
  - The original is not available through normal trade channel at the other libraries because it is out of print.

In addition, digitalization of materials housed in National Diet Library for the purpose of avoiding damages will be permissible under the following conditions:

1. The digitizing shall be for the purpose of preventing the loss, the destruction or the damage of such original.
2. The electronic copy shall be used for the public use instead of such original.
3. The digitalizing shall be permitted to the extent of minimum necessary.

#### 46. Spain

The Spanish legislation on intellectual property provides that holders of copyright and other related rights cannot oppose to reproductions of their works or other protected subject-matter, when those are made without lucrative purpose by archives and libraries, either public or integrated in institutions of cultural or scientific character, as long as the reproduction is carried out exclusively for research purposes. Besides, archives and libraries, either public or belonging to cultural, scientific or educational non-profit entities, or to educational institutions

integrated in the Spanish education system, do not need authorization from the right holders to communicate or to make works available to individual members of the public for the purpose of research, when it is done by means of closed and internal network by specific terminals installed on their premises. The application of this exception requires that these works are part of the collections of the archives or libraries and are not subject to purchase or license terms. Thus, licensing systems and limitations, both in order to increase the dissemination of works preserved in the archives and libraries, coexist in Spanish legislation. If the limit is applied, the right holders are entitled to receive an equitable remuneration.

#### 47. Switzerland

The ability of libraries to make works already in their possession available to the public is an important element in the dissemination of knowledge. We believe that there is delicate balance between access to culture and the interests of right holders that must be maintained. As to the African draft: Reference is made to "fair practice." What approach should be taken concerning those countries with no background in terms of "fair practice?" As to the proposal made by Brazil, Ecuador and Uruguay: As pointed out above (the section on preservation), we are not currently in a position to make a more precise statement, given that the exceptions and limitations for education, teaching and research will not be on the agenda until May/June 2012 (Annex to the Conclusions of the twenty-first-session of the Standing Committee on Copyright and Related Rights). How can paragraph 2 of said draft text be reconciled with the three-step test?

#### 48. Chile

We are in favor of discussing the possibility of remote access to a work through digital transmission. In countries such as Chile, the vast geographical area gives rise to certain technical difficulties and this reduces actual possibilities for people in isolated places to access physical copies of certain works (increased costs owing to high distribution expenses, the impossibility of providing material owing to the remote and inaccessible nature of certain places, etc.).

#### 49. European Union

As noted under section I above, the "Information Society Directive" allows Member States to provide for exceptions or limitations to the reproduction right "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage." Beyond the making of copies for preservation and safeguarding purposes, there are only a limited number of further circumstances that can be envisaged in which libraries and archives may need to make reproductions of works or other protected subject matter in their possession. Some examples of specific acts of reproduction for which Member States provide an exemption include: reproduction for non-commercial purposes in connection with a public exhibition or for the purpose of documentation of a collection (e.g. Germany), reproduction for on-site consultation (e.g. France); and reproduction for the purpose of replacing lost or stolen works when the work cannot be purchased (e.g. Ireland). A number of principles apply. As explained above, the "Information Society Directive" provides (i) that Member States must specify those acts which may benefit from the exemption; (ii) that the act may not be for direct commercial or non-commercial advantage; and (iii) that any exception must be applied in conformity with the three-step-test. Many Member States have also implemented specific exceptions in such a way as to limit the total number of copies that can be made. The exception to the reproduction right for the benefit of libraries and archives covers use of material held in their collections for the benefit of the institutions themselves. Both reprography and private copying (for private use)

are in general subject to distinct provisions.<sup>5</sup> Therefore the general reproduction of material for the benefit of library and archive users for their private use is not implicated here. Although acts of reprography may involve collections of library material or be undertaken on the premises of a library, any such copying is usually permitted by virtue of exceptions for the benefit of users themselves. Equally, the reproduction of material for the sole purpose of illustration for teaching or scientific research is covered by a separate, and specific, set of provisions.<sup>6</sup> Other reproductions of the material held by public libraries and archives would normally require authorization in the form of a licence from the rightholder(s). Besides limitations to the reproduction right, the "Information Society Directive" also contains a limitation for the benefit of libraries and archives for certain acts of communication/making available of works and other protected subject matter on their premises and under specific conditions.<sup>7</sup>

#### 50. Singapore

We agree that libraries and archives should be permitted to carry out appropriate reproduction and distribution of library materials for the purposes of education, research or interlibrary loans. Nonetheless we acknowledge that due consideration must be given to rights-holders. In particular, the quantity that is to be supplied and the quality of copies supplied are issues that may require further discussion.

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<sup>5</sup> "Information Society Directive", Article 5(2) (a) and (b)

<sup>6</sup> "Information Society Directive", Article 5(3) (a)

<sup>7</sup> "Information Society Directive", Article 5(3)(n)

### TOPIC 3: LEGAL DEPOSIT

#### Proposed Texts

51. Proposal from the African Group

Contracting Parties may determine that specific libraries and archives or any other institution shall serve as designated repositories in which at least one copy of every work published in the country are to be deposited and permanently retained.

A designated deposit repository or repositories shall demand the deposit of copies of published copyright works, or copies of published material protected by copyright or related rights.

It shall be permitted for the designated deposit repository or repositories to reproduce for purposes of retention, at least one record of publicly available content and demand the deposit of reproductions of copyright works or works protected by related rights, which have been communicated to the public or have been made available to the public.

52. Proposal from India

Member States shall have the freedom to decide the manner in which legal deposit is implemented taking note of different approaches followed.

53. Principles and Objectives on the subject proposed by the United States of America

Objective:

Encourage the adoption of national legal deposit laws and systems.

Principles:

Legal deposit systems help develop national collections and may help in preservation efforts, particularly if they include many categories of works published in multiple formats.

Libraries and archives also serve the public by maintaining essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve, and disseminate government works.

#### Comments on Legal Deposit

54. Mexico

We would simply like to sketch out a number of items that have to be looked at, such as to identify what was the obligation when it comes to making available to a library or libraries different materials, the time frame during which the material is to be made available, the time of production, the time of publishing, who is responsible for the preservation or custody of these materials, and then also move toward an obligation when it comes to providing publicity or making available information on this type of material.

## 55. Spain

The legal deposit regime in Spain goes back to 1617, but some legal modifications have been made this year. The main objective is that the sound, visual and audiovisual material is to be available to the citizens, complying with the intellectual property law in force in Spain. The objectives pursued by this law are to recompile and conserve in public administrations different copies of works, gather information to be able to generate statistics and also make available access and consultation to the works in the installations where the works are kept, or through databases used for restricted use.

## 56. Czech Republic

As far as legal deposit is concerned there is a special law regulating obligations of publishers, books, journals, magazines, newspapers and so on. In that area, there is an obligation to send a number of copies of work published by them to the number of the most important public libraries, for example the National Library and some other most important libraries, and also, by the way, the Special Library for the visually impaired. Moreover, publishers are obliged to offer a number of copies to some other public libraries listed in the law for acquisition or purchase. Now, there are discussions going on in the Czech Republic concerning a possibility to extend this obligation also for digital-born materials, not fixed on a medium. There are also specific rules established by special legislation concerning archiving of audiovisual works. According these rules a producer of a Czech audiovisual work has a duty to offer in writing the National Film Archive to buy two new undamaged copies of the Czech audiovisual work which have a quality of the original recording, including written and promoting materials related to this work by 60 days from the day it was published. If the National Film Archive expresses its interest, the producer of the Czech audiovisual work has a duty to offer the Archive to buy one duplicating copy and one copy of the Czech audiovisual work, including written and promoting materials related to this work. Moreover, a producer of the Czech audiovisual work which was produced with the support provided by the Czech Film Fund has a duty to offer to the Archive for free a perfect, undamaged copy of the Czech audiovisual work or its copy having the same quality as an original recording for the purpose of archiving.

## 57. United States of America

An objective of copyright exceptions and limitations for libraries and archives should be to encourage the adoption of national legal deposit laws and systems. Our first principle on this subject in the principles and objectives document is that legal deposit systems help develop national collections and may help in preservation efforts, particularly if they include many categories of works published in multiple formats. Legal deposit systems are particularly important for those works which a nation identifies as important for its own cultural heritage. United States law provides for deposit of copyrighted works published in the United States in the Library of Congress. While these deposits are frequently made as part of the United States' copyright registration system, the two systems are technically separate. We should emphasize that this is not a formality in the copyright system, and copyright protection does not turn on the deposit, which would not be permissible under the Berne Convention. We ask publishers to deposit two copies of the best edition as determined by the Librarian of Congress, and if those best editions are not deposited, the Register of Copyrights is authorized to demand their deposit. Deposit systems are now faced with the acknowledged challenge of how to deal with digital works, including web pages and all types of Internet copyrighted works. The question of how legal deposit systems develop and respond to the digital environment is one that many of our countries are now facing. Our second principle under legal deposit is that libraries and archives also serve the public by maintaining essential government information. Copyright restrictions on government materials should not limit the ability of libraries and archives to receive, preserve, and disseminate government works. This principle addresses copyright restrictions in

government materials, which we acknowledge exist in some countries, although they do not exist in the United States. We believe that copyright restrictions on government materials should not limit the ability of libraries and archives who are serving a deposit function to receive, preserve, and disseminate those government works as widely as possible.

#### 58. Malaysia

About the proposal of the United States of America on legal deposit, the major issue would be the concrete text of the actual limitation and exception. It is clear that the United States of America are encouraging the national deposit, which is also positive from an international perspective. Malaysia has in its ordinary national law on deposit of the publication such provisions. It also shares the views expressed by the Czech Republic and Argentina, that the role of the libraries and archives should be fostered.

#### 59. Japan

The National Diet Library collects Japanese governmental publications as well as private publications in an exhaustive manner under the book delivery system based on the National Diet Library Act.

#### 60. India

India has a separate Act for the legal deposit not linked to the Copyright Act of 1957. Legal deposit act is titled as the delivery of books and newspapers to public libraries Act of 1954, existing before the Copyright Act and being independent of it. As per this each copy of book needs to be given to the four major libraries. Any failure of the publisher to provide a copy is punishable minimum punishment of \$1. Now the Ministry of Culture is amending this Act in order to extend it to digital works as well.

#### 61. Canada

In Canada, libraries and archives protect the cultural heritage of the country made available to all citizens. It includes the publication of archives, sound recordings, among others, in cooperation with other libraries and archives. It can also manage certain administrative and federal documents in accordance with the law. Canadian publishers under the law have to send a copy of their work in the week following the publication, the numbers vary according to the numbers published and then a description is added of each work to the database, that is accessible throughout Canada and the world. It does not matter what the media is. It could be books, audiovisual recordings or microformats. The legal deposit of these works is not official registration under copyright, which is under a separate law. Since 2007, these regulations also cover online maps and publications and it involves all editors, associations and federal instances and ministries and the publishers of commercial reviews and so on. Choice is offered of different types of access to publications and free access, which means that everybody can consult and download these publications of Internet or restricted access via certain terminals without the possibility of downloading or printing or transferring the files.

#### 62. United Kingdom

The United Kingdom legal deposit has been in effect since 1662. There is a specific act from 2003 which deals with legal deposit. In our legal deposit system six copies of every publication put into circulation in the United Kingdom must be deposited: one for the British library, one for the National Library of Scotland, one for the National Library of Wales, and the others remains for the leading universities. The definition of publication is very wide and broad, including as an example: books, publications, magazines, newspaper, maps, charts, plans, etc. The United Kingdom is also looking at how we can update the legal deposit so that it takes account of those

publications which are only produced electronically, as well as the vast wealth of cultural and social information which is now found on websites and nowhere else and how these websites can be preserved for future heritage.

#### 63. Jamaica

On the subject of legal deposits, Jamaica does have a National Legal Deposits Act from 2002, which as recently as last month was the subject of a national campaign to draw awareness to this due to the experience particularly in cultural preservation matters. Importantly Section 6 allows for the copying including downloading to reformat or refresh for preservation. The Legal Deposits Act is subject to our Copyright Act.

#### 64. Germany

In Germany, the earliest regulation was enacted in 1663 and provided for a rule on a deposit in the Royal Bavarian Library. Today, the regulations on legal deposit in the Federal Republic of Germany can be found in the Law on the National German Library. The law spells out what has to be deposited, i.e. which materials. With the most recent amendment of the law, Germany has opened up the scope of application to born digital materials, which today, as in the United Kingdom, will cover a whole range of materials. The Law on the National Library also determines who is under the obligation to make a legal deposit, and it also determines the procedure that then applies. The Law on the German National Library does not contain any provisions allowing the use of a work relevant in the sense of the Copyright Act. Every kind of usage that constitutes a form of making use of copyright-protected material in the legal sense is being dealt with exclusively in the Copyright Act. The Law on the National Library regulates only the obligations of the library and its functions, including legal deposit.

#### 65. Austria

Legal Deposit is governed by the Austrian Media Act. It concerns mainly works of literature. However, in the framework of the recently introduced legal deposit of initially digital works, there is some rather limited connection with copyright. Depending on the way digital works are delivered, acts of reproduction are necessary and have to be permitted. As the receiving institution, which is the Austrian national library itself, makes the copy of the delivered work, the distribution right does not exhaust with regard to these copies and a clarification in this regard seemed necessary to us.

#### 66. France

In France, the institutions in charge with the legal deposit benefit from an exception in order to fulfill their public interest missions. Namely, those institutions are: the French national library, the French national Centre of cinematography and the French national audiovisual Institute. These institutions can, to some extent, reproduce and/or make available to the public this material that has come from legal deposit. This exception does not make part of the intellectual property code, and is to be found in the code on national heritage. Article L 132-4 permits consultation within those institutions only for accredited researchers on dedicated terminals.

#### 67. Switzerland

Swiss Copyright Act does not require legal deposit. The reason for this lies in the rationale for copyright, as it is not so much considered an incentive for creation and instrument for access but rather seen as a natural consequence of the act of creation.

68. Chile

In Chile the deposit of works is considered in the framework of the process of registration, which in our case is voluntary. Registration is undertaken at the Department of Intellectual Property Rights (DDI) and serves, inter alia, as a means of proof in any legal proceedings concerning intellectual ownership of the work. Since registration of the work is voluntary, legal deposit does not exist for all created works; it only exists for those which are registered, whether published or not. However, for published works, deposit at the National Library is obligatory.

69. Greece

Greece also has a legal deposit system not linked to copyright. This system aims at creating a national collection of works, including audiovisual works and various sorts of electronic and digital works and aims at preserving the culture, heritage of Greece. It does not form a requirement for copyright protection.

70. United States of America

In the United States works that are deposited in the national library are available to users at that national library and then under a variety of circumstances through various lending arrangements. The deposit requirement is enforced through a system of fines and penalties if works are not deposited by copyright owners or publishers in compliance with the law. Under a domestic law called the Depository Library Act, the Government deposits government documents and publications in over 1,200 libraries throughout the country, making these materials available to citizens.

71. United States of America

Legal deposit involves two aspects. One is the required legal deposit from private publishers and authors when they publish a work in the United States. The second aspect is a legal deposit system that seeks dissemination of government works. The second one does not involve copyright issues because the United States does not claim copyright in works generated by our government. This policy is based on the belief that a robust democracy requires the people to have full and unfettered access to government materials, subject to restrictions for national security, privacy, and other non-copyright issues. There are, however, many jurisdictions that claim copyright over government works. In this situation, we believe there nonetheless should be a deposit system for government documents and that libraries should have special arrangements, including, if necessary, copyright exceptions and limitations, to disseminate those government works to the people to promote robust democratic discourse.

**Written comments made to the Proposed Texts**

72. Switzerland

Although legal systems which do not adhere to the “incentive theory” make no provision for the mechanism of legal deposit, we understand that such deposit is a requirement under other national systems. It would therefore be advisable to include a provision, drafted in a manner sufficiently flexible to allow for the application of different systems.

73. Chile

In the same way as in many WIPO member countries, Chilean legislation already contains specific regulations on this subject. With regard to the relevant existing proposal, it is suggested

to include a reference to the fact that “State agencies which receive, for legal deposit, digital copies or reproductions of works or productions, as established by the law, may, without the need to obtain prior authorization of the respective holder of copyright or related rights:

- (a) reproduce such materials, by any means or procedure, including reprography and computer processing only for preservation purposes, and
- (b) adapt or transform such works or productions in order to change the format for the purpose of making them interoperable and preventing the technological obsolescence that impedes access to such contents.”

#### 74. European Union

“Legal deposit” refers to a statutory obligation requiring a publisher to deposit a copy of their publications with a recognized national institution, usually the national library (National Deposit Libraries). A publication can be a book or a periodical such as a newsletter or annual report; a newspaper or a piece of sheet music; a map, plan, chart or table; a program, catalogue, brochure or pamphlet. The purpose of legal deposit is to assure the acquisition, the recording, the preservation and the availability of a nation’s published heritage. The European Union copyright framework does not cover the issue of legal deposit. Legislation on legal deposits exists in many European Union Member States (e.g. France, the United Kingdom and Denmark). Others Member States have legal deposit schemes based on voluntary arrangements (e.g. in the Netherlands the system is based on individual agreements with publishers under the auspices of the national publishers association. In this context, most Dutch printed material is deposited with the National Library). The sole purpose of a legal deposit is the preservation of national cultural heritage. Legal deposit collections include material enjoying different types of copyright protection. In general, legal deposit schemes are not established as a limitation on copyright and related rights. National schemes vary in terms of the scope of material subject to deposit obligations. In summary, there is a wide range of possible approaches to legal deposit, in terms of the scope of the material subject to deposit, and the procedures for such deposit.

#### 75. Singapore

Our libraries and archives currently have laws and systems for legal deposit in order to develop national collections. The scope of materials which may be deposited spans many categories of works in multiple formats. In acknowledgement of the increasing prevalence of electronic materials and other forms of digital content, an area that could be considered is the inclusion of electronic works and digital content to the scope of works to be deposited.

## TOPIC 4: LIBRARY LENDING

### Proposed Texts

76. Proposal from the African Group

Supply of works

It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.

77. Proposal from Brazil, Ecuador and Uruguay to the Proposal from the African Group

Library Lending

1. It shall be permitted for a library to lend copyright works, or materials protected by related rights, to a user, or to another library.
2. Notwithstanding the provisions of paragraph (1), any Contracting Party/Member State which expressly provides for a public lending right, may keep such right.

78. Proposal from India

Libraries and archives shall have the right to lend any work without authorization.

79. Principles and Objectives on the subject proposed by the United States of America

Objective:

Enable libraries and archives to carry out their public service role of advancing research and knowledge.

Principles:

Libraries and archives advance knowledge by providing access to their collections, which together comprise the cumulative knowledge of the world's nations and peoples.

Libraries and archives are essential to the knowledge economy of the 21st century -- supporting research, learning, innovation and creative activity; providing access to diverse collections; and providing information and services to the general public, including disadvantaged communities and vulnerable members of society.

Reasonable exceptions and limitations can and should establish the framework enabling libraries and archives to supply copies of copies of certain materials to researchers and other users directly or through intermediary libraries.

## Comments on Library Lending

### 80. European Union

We do have since 1992 an exclusive right as far as the lending of the works of authors and the other subject matter protected by neighboring rights. There is a degree of flexibility allowed for in the European Union framework; if there are derogations from the exclusivity of the right, there should be at least be the possibility for a remuneration, which is required, at least for authors. The flexibility for Member States allows to consider that in certain cases, say, films or phonograms, there is an exclusive right and in other cases, say, in the instance of books, there is a possibility to establish a remuneration right. The community framework is to be interpreted in a narrow manner. Member States can exempt certain category of establishment including certain libraries from payment of the remuneration, but you should be aware of the fact that the European Court of Justice has been very strict and has reminded on a couple occasions to Member States that they cannot just provide for a general possibility for libraries to lend works and other subject matter without prior authorization or remuneration. The implementation is diverse and I'm sure some of European Union Member States will intervene to explain their specific systems, but we have a system that works well, that allows public libraries to fulfill their mission and allow public libraries to be used by happy users but a balance has also been achieved in terms of a respect of the rights of right holders, in particular when an exception from the public lending right will be detrimental to the exploitation of the works and also ensuring remuneration. Inter-library loans is not regulated in the rental and lending directive, it is left for Member States to deal with obviously within the respect of their international and community obligations.

### 81. Italy

In Italy when it comes to library lending, we apply the relevant Community Directive in this area, that is the one just referred to by the European Commission, speaking on behalf of the European Union. We make it possible for libraries to lend works in a particular way. These provisions relate to print works, phonograms and videograms. When it comes to phonograms and videograms, they have to be works that were distributed at least 18 months prior to the first instance of lending, in order to ensure that the works have been used in such way as to allow rightholders to enjoy their benefits, and then they can be lent.

### 82. India

In the Indian Copyright Act of 1957, there is no express provision for library lending but it is an implied exception. Under the Department of Higher Education of the Ministry of Human Resources Development an Information Library Network Center has created for the benefit of universities. This center is vital in the creation of the infrastructure for sharing information resources among all the universities and institutions in India which are members of the center. Private sector has setup a Development Library Network, which covers interlibrary loan in about 500 universities in India. Due to the paucity of funding some libraries are not able to buy certain books and when researchers request them, they have to lend them other library. In that sense, providing an exception is very important for the interlibrary loan, as there is an urgent need to introduce this in the international level so that the member countries can adopt this system. The IFLA document which has been presented in the former background paper by Brazil, takes care of the traditional lending right, which exists in most of the European countries and some others. However most of the WIPO Member States do not include this right in their national legislations. With respect to such system, they have provided in paragraph two of the Lending Right Article: "Any contracting party which at the time of ratification or access expressly provides libraries limitation or exception to a public lending right of authors." They keep such provision and establish that notification is deposited within WIPO's Director General at the time of ratification of the treaty, for which the contracting party may withdraw the notification at any time, what I think

it is a perfect alternative provided. Libraries and archives shall have the right to lend any work without authorization.

#### 83. Czech Republic

In brief our legislation concerning public lending, as far as public lending of books and other printed materials and as far as libraries are concerned, it has been generally accepted. Only in 1990 an explicit exception to the exclusive right of public lending was enacted. According to it, libraries and also archives, galleries, museums and schools, have been allowed to lend physical copies of published works. In 2006, there was an amendment to the Copyright Act, which adopted a remuneration for authors with regards to public lending of works by libraries and other institutions before mentioned. This remuneration is paid from the State's budget to the collecting societies representing relevant national and foreign authors, through their reciprocal agreements. Libraries and other organizations are obliged at the request of collecting societies to submit information on the number of loans as well as all the information they may need to be able to allocate this remuneration. Authors are not entitled to remuneration if the published works are lent on the spot and also in the case of lending by schools and by some sorts of libraries listed in the Copyright Act. According to this exception, libraries can also lend on the spot phonograms and audio visual recordings. Libraries and other institutions usually provide as well special facilities with the necessary technical equipment. Moreover, in accordance with the relevant European Directive libraries and other institutions mentioned above are allowed to make works available to members of the public by dedicated terminals located on its premises (on the spot) subject to several conditions: works must constitute a part of their collections, the use thereof is not subject to purchase or licensing terms, such works are being made available exclusively for the purposes of research or private study of such members of the public and such members of the public are prevented from making reproductions of the works. Institutions are allowed to make printed reproductions of these works according to the relevant provisions of the Copyright Act (reproductions made for personal use by a natural person or for a legal person's or a sole trader's own internal use provided remuneration is being paid to the relevant collecting society).

#### 84. Austria

The Austrian Copyright Act provides for a lending right subject to remuneration in line with the European Union legislation that the representative of the European Union described before. This right is specifically formulated with regards to the non-commercial lending activities of libraries, for which we do not see a space for limitations and exceptions here. In our view, the question can only be if a state decides to have such a right or not. However, I do not believe that we intend to discuss about a new lending right in this framework.

#### 85. France

In 2003, we adopted legislation in this area in the form of a legal license, and there are four aims that this legislation seeks to achieve. Firstly, to ensure that copyright guarantees authors' legitimate remuneration when their works are subject to library lending in accordance with the European Union Directive which has been described by my colleague from the European Union. The second objective is the consolidating access for the general public to works by ensuring that the user does not have to pay lending rights and also ensuring that it is not possible for an author to be paid several times over for the same thing. Thirdly, we try to ensure we are striking the right balance within the whole supply chain for books and we are thinking particularly about the financial situation of authors, that is to say, remuneration for lending and bearing in mind also the economic situation of libraries. Fourthly, we are trying to upgrade partnerships between libraries and bookshops. The purpose here is to ensure that we have a range of works as diverse as possible, in order to enrich cultural life at local and regional level. The legislation in specific terms makes it possible for remuneration to be paid when a work is lent and also allows

lending to take place through licensing, not through an exception. Now, if you have a license granted, you have to ensure that there is a payment made and this payment involves double financing or double funding. Firstly, there is a first annual fixed sum paid by the state and, secondly, there is a second part of payment which is determined in accordance with a percentage of the public price for works to be purchased by a library that will then lend those works. This remuneration system is managed by SOFIA (the French Society tasked with defending the interests of authors and publishers for the lending right), which is the body that collects remuneration and then divides it among authors and other appropriate rightholders. There is another important point: when this remuneration is paid, some of the funding is used to pay into a kind of additional or complementary pension or welfare fund for authors.

#### 86. United States of America

Like India, the United States does not have an express provision addressing lending by libraries. The capacity of our libraries to lend materials is implicit in our right of distribution and the description of what we call the first sale doctrine in Section 109 of our Copyright Act. There are, however, in our law, as in other countries' laws, limitations on the capacity of third parties to lend software and sound recordings. In the United States we have some very carefully crafted exceptions to that right of software owners and sound recording owners so that in proper circumstances nonprofit libraries can engage in the lending of those materials. Regarding the submission made by Brazil, Uruguay and Ecuador in their library lending proposal, we do not have a public lending right and as we understand it the public lending right only exists as to a loan between a library and an end-user, although we are certainly ready to be corrected on that. We think that the Brazilian, Uruguayan and Ecuadorian submission generally describes the lending capacity of libraries and archives in a neutral way.

#### 87. Germany

Library lending in Germany is a very important part of cultural life and it is long-established on the basis of the Copyright Act. It was established even before adoption of the corresponding European Directive 92/100/EEC of 19 November 1992 on the rental right and the lending right and on certain rights related to copyright in the field of intellectual property. Very much in line with the Directive, there is also in Germany no limitation on, or exception to, library lending; but section 27 of the German Copyright Act defines the authors' rights with regard to renting or lending of works or other protected subject matter. Section 27 Copyright Act reads as follows:

“(1) Where the author has granted rental rights (Section 17) in respect of a video or audio recording to the producer of the audio recording or of a film, the lessor shall nevertheless pay the author an equitable remuneration for the rental. The claim for remuneration may not be waived. It may be assigned in advance only to a collecting society.

(2) The author shall be paid an equitable remuneration for the lending of those originals or copies of a work whose dissemination is permissible according to Section 17 (2) if the originals or copies are lent through a publicly accessible institution (library, collection of video or audio recordings or other originals or copies thereof). Lending within the meaning of the first sentence is the time-limited transfer for use which neither directly nor indirectly serves profit-making purposes; Section 17 (3), second sentence, shall apply *mutatis mutandis*.

(3) The claims for remuneration under subsections (1) and (2) may be asserted only through a collecting society.”

#### 88. Mexico

With respect to the issue of library lending, what we note here is a limitation to the right of distribution on copies of works that have already been set out in other types of support. Here we

are talking about material support and I think this is an issue that will need to be analyzed and examined. In Mexico, we have not defined a system on public lending. Nonetheless, when we discuss provision for material support for consultation purposes, we understand that a copy cannot be obtained and what we consider to be important in the regulation of library lending is to establish whether we have monitoring means and whether we can actually recognize the source of the library that is providing the loan, in order to oversee the whole chain.

### **Written comments made to the Proposed Texts**

#### **89. Spain**

Spain, pursuant to Directive 2001/29/EC, provides in its copyright legislation an exception that allows the archives and libraries, either public or belonging to cultural, scientific or educational non-profit entities, or to educational institutions integrated in the Spanish education system, to lend the works in their collections with no need of requesting authorization of the holders of intellectual property rights. The general rule states that archives and libraries should pay a remuneration to the right holders, through intellectual property rights management entities. However, this obligation of remuneration does not apply to public archives and libraries that provide service to municipalities of less than 5,000 inhabitants, as well as to the libraries of educational institutions integrated into the Spanish education system. This system has worked successfully in Spain, since it allows it to lend works without authorization from the right holder, but maintains a remuneration, except for libraries in small towns or which belong to educational institutions. Spanish regulations are thus searching for the right balance between the protection of intellectual property rights and the right of citizens to access culture.

#### **90. Switzerland**

Switzerland is of the opinion that the right to lend is an essential element in the dissemination of knowledge and culture within an ever-changing technological environment. We firmly believe that efforts to adapt to technological developments should be carried out within a framework designed to ensure that a solution is found that balances the interests of right holders with those of libraries in terms of the dissemination of knowledge and culture.

#### **91. Japan**

In Japan, the reproduction of the works in the library lending system is allowed to the extent permitted under Article 31 of the Copyright Law of Japan, or in the case there is an agreement between stakeholders.

#### **92. Chile**

Chile has special relevant regulation such as the standards relating to libraries, archives and museums, in particular DFL 5200 of 1929, which establishes the Directorate of Libraries, Archives and Museums (DIBAM), and the regulations thereunder contained in Decree No. 6234 of 1930. These recognize that libraries, archives and museums have similar functions and common goals, since they collect, store, classify and present items for research and dissemination of culture, and that these services overall constitute the official core of a nation's cumulative knowledge. Accordingly, these bodies have an obligation to open their doors to the public. However, a clear exception must be established in order not to affect the social role played by libraries in different countries.

### 93. European Union

“Lending” is understood as the "making available of a work or other protected subject matter for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public."<sup>8</sup> It represents the main purpose and activity of the majority of public libraries. The "Rental and Lending Directive" sets out a comprehensive legal framework for the lending of material by public libraries and archives.<sup>9</sup> It provides for an exclusive "lending right" for both authors and related rightholders<sup>10</sup> i.e. granting rightholders the right to authorize or prohibit the lending of their work or other protected subject matter for a limited period of time and not for direct or indirect economic or commercial advantage.<sup>11</sup> At the same time, the Directive does allow Member States to provide derogations from the exclusive lending right<sup>12</sup>, and some Member States have implemented such derogation. This derogation may be implemented on condition that authors, at least, are granted a right to remuneration. Member States may determine this remuneration taking account of their cultural promotion objectives. Furthermore, certain categories of establishment may be exempted from the payment of remuneration altogether (e.g. in Belgium institutions for the deaf and visually impaired; in Spain libraries in municipalities of fewer than 5.000 inhabitants). Implementation by Member States, together with case law by the Court of Justice of the European Union (CJEU), provides clear guidance on the necessary balance between copyright protection and the fulfillment of libraries' public interest missions:

- The CJEU has confirmed that while cultural promotion is an objective in the general interest, any derogation from the main objective of the Directive, i.e. guaranteeing adequate remuneration for rightholders, must be interpreted strictly.<sup>13</sup> Thus, for example, exempting almost all, if not all, of the categories of establishments normally subject to the obligation to pay remuneration, is not consistent with the main objective of the Directive (and hence not permissible).
- Equally, with regard to the level of remuneration of authors, while the CJEU has recognized that Member States may determine the level of remuneration in accordance with their own cultural promotion objectives, a number of principles must nevertheless be adhered to. Remuneration must be regarded as "recompense for the harm suffered by the author" and the level at which it is fixed must be capable of allowing authors to receive an adequate income. Its amount cannot be purely symbolic. The level of remuneration must therefore take account of the extent of the harm to the author. This means, in practice, that the level of remuneration must take account of, for example, the number of works made available, the size of the public lending library, and the number of registered borrowers.<sup>14</sup>

In summary, while firmly supporting the role of public libraries and archives in achieving their public interest mission of promoting culture, the legal framework of the European Union and its Member States includes clear and enforceable safeguards to ensure the adequate protection of works and other protected subject matter.

### 94. Singapore

<sup>8</sup> "Rental and Lending Directive", Article 1(3)

<sup>9</sup> It recognizes that adequate copyright protection is of fundamental importance for the EU's economic and cultural development, and its main objective is to guarantee the income and investments of rightholders through adequate legal protection (Rental and Lending Directive, Recitals 5 and 7).

<sup>10</sup> Rental and Lending Directive, Article 2(1).

<sup>11</sup> "Not for direct or indirect commercial advantage" means that "*where lending by an establishment accessible to the public gives rise to a payment, the amount does not go beyond what is necessary to cover the operating costs of the establishment.*" "Rental and Lending Directive", Recital 14

<sup>12</sup> "Rental and Lending Directive", Article 5.

<sup>13</sup> Case C36/05 *Commission vs. Spain* §29, Case C-476/01 *Kapper*, § 72, and Case C-53/05 *Commission v Portugal*, § 22

<sup>14</sup> Case C-271/10 (*VEWA v Belgische Staat*).

Our libraries currently engage in the provision of library information services and also the libraries participate in inter-library loan schemes. This is in line with our objectives of facilitating access to library materials.

## TOPIC 5: PARALLEL IMPORTATIONS

### Proposed Texts

95. Proposal from the African Group

Purchase of works

It shall be permissible for libraries and archives to purchase and import legally published works to be incorporated into their collections in cases where a Contracting Party does not provide for international exhaustion of the importation right after the first sale, or other transfer of ownership of a work.

96. Proposal from Ecuador to the Proposal from the African Group

Right to Parallel Importation

Even in cases where the respective Contracting Party does not provide for international exhaustion of the distribution or importation or exportation rights after the first sale or other transfer of ownership of such work or material, libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works or materials protected by related rights that are legally available in any country.

97. Proposal from India

Libraries and archives shall have the right to buy, import or otherwise acquire copies of any work published in any other Member State with the permission of the author of that work.

### Comments on Parallel Importations

98. European Union

It is indeed not very clear the link between parallel imports and distribution rights and the specific necessities for limitations for the benefits of libraries and archives and it would seem rather difficult to provide for specific types of distribution rights and limited them to specific beneficiaries. We should also remember that in international treaties the issue remains within the freedom of the contracting parties and the dangers associated with this type of proposals in terms of creating some sort of a parallel different market need to be carefully considered. There is not such an equivalent provision under the legislation of the European Union, although we do have a system of exhaustion of the regional distribution rights. It is difficult at this stage to assess the exact impact of such measures if they became widely applicable at international level. In any case, the worldwide generalisation of parallel importation will put an end to the control by the rightholders on the aftermarket. Furthermore, the potential impact of this measure has to be carefully assessed in view of the fact that other exceptions in favor of libraries and in relation to reproduction right and cross border uses are also being assessed."

99. India

According to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is for developing countries to tell whether they want international exhaustion in their domestic laws. Same basis has been taken in the IFLA document as it is almost similar to the Article 6 of the WIPO Copyright Treaty, which respects the TRIPS flexibility. It is for countries to decide whether they want international exhaustion or national exhaustion. If the books are provided because of the advantages of parallel imports, if the same work is provided at a cheaper rate, libraries can do their public service function of making works available for the education and research in a better way. Libraries and archives shall have the right to buy, import, or otherwise acquire copies of any work published in any other Member State with the permission of the author of that work.

#### 100. Austria

In accordance with the European Union legislation, Austria applies to principles of regional exhaustion of the distribution right within the European Union. We do not apply for any exception to this principle. Furthermore, we do not understand the suggestion as a library which buys a work does not distribute the work anyway. It would be the seller who infringes to the distribution.

#### 101. Mexico

When we talk about acquiring and legally importing works, what type of works are we referring to? Are they published? Are they unedited? Are they disseminated? Can we establish the characteristics or features of these works?

#### 102. Mexico

I think it would also be very important to define how many works can be acquired for import and export.

#### 103. Italy

Like the European Union, in Italy we have a number of difficulties with this provision. In our minds this is not an exception to copyright for bookshops or libraries, but it has to be seen as something rather different, something that is a supplementary vision to the rules on the exhaustion of rights which are decided upon by each and every Member State. In other words, this goes well beyond copyright as such, but it implies the general system that has been selected by a given country to apply.

#### 104. Germany

As in Austria, we also see in Germany that regional exhaustion applies, very much in line with the legal situation in all European Member States. There is no exception to, or limitation in German copyright law of, parallel importations. With regard to the proposal of the African Group, the following aspect deserves a thorough analysis: the proposal states that it shall be permissible for libraries and archives to purchase and import legally published works to be incorporated into their collections. However, up until now, international copyright law has approached harmonization from a completely different angle: International copyright law has harmonized the exclusive rights of authors, i.e. their capacity to assign *inter alia* the right of distribution. The African proposal is not addressing the right of distribution, but quite to the contrary, the acquisition of protected works by institutions such as libraries. So far, the very act of acquiring a work has never been the subject of copyright, nor have limitations been transformed into rights. It seems appropriate to study the question as to how a potential harmonization of limitations relates to the existing harmonization of authors' exclusive rights and

as to how it can be reconciled with the obligations entered into by Member States in international copyright treaties.

105. Mexico

We understand that parallel importation is because within the country that is going to import there is a specific market, and what libraries will be trying to do is acquire specific works for their collections. We just have a concern: It is valid for a library to take part in public auctions outside of their country, for instance on a manuscript? If we are not dealing with published works, they would not then fall into this category of parallel importation?

**Written comments made to the Proposed Texts**

106. Switzerland

The principle of international exhaustion applies in Switzerland. We are uncertain as to the appropriateness of a provision obliging States to provide for international exhaustion that would have a negative effect on harmonization, given that it only applies to libraries and archives, thus rendering copyright protection more and more fragmented.

107. Chile

Copyright and related rights legislation envisages the national and international exhaustion of distribution rights after the first sale of the work. Plentiful case law of the competition authorities in Chile allows a product purchased abroad to be marketed by its lawful producer and any event, act or agreement to the contrary shall constitute an infringement of free competition. The respective owner of the copyright or related rights may not oppose the import and subsequent marketing of the works or intellectual productions in question, provided that such works or productions are genuine products, i.e. they have been acquired or come from their lawful producer or the persons duly authorized for such purposes.

## TOPIC 6: CROSS-BORDER USES

### Proposed Texts

108. Proposal from the African Group

Cross-border uses of works and materials reproduced under an exception or limitation

It shall be permissible for libraries and archives located in the territory of a Contracting Party to send, receive or to exchange a copy of work, or material protected by related rights, legally made in the territory of another Contracting Party including copies of works and materials protected by related rights made in accordance with this Treaty.

109. Proposal from Ecuador to the Proposal from the African Group

Right to Cross-Border Uses

To the extent that it is necessary for the exercise of a limitation or exception provided for in this Treaty, cross-border uses shall be permitted.

110. Proposal from India

Libraries and archives shall have the right to share resources in any format available with them to libraries and archives located in another Member State.

### Comments on Cross-Border Uses

111. Austria

We would only add two sentences to the issue of cross-border uses. In our view, this issue is already covered by the cluster of reproduction and distribution of copies to the clients of libraries and archives as well, and the restrictions in national copyright law to reproduction and distribution activities of said institutions apply to the addressed cross-border uses as well.

## TOPIC 7: ORPHAN WORKS, RETRACTED AND WITHDRAWN WORKS, AND WORKS OUT OF COMMERCE

### Proposed Texts

#### 112. Proposal from the African Group

##### Orphaned works

1. It shall be permitted for the beneficiaries provided for in (specify) to reproduce and use a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry.
2. It shall be a matter for national law to determine whether certain commercial use of a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry would require payment of remuneration.

##### Retracted, Withdrawn and Inaccessible Works (Right to Access Retracted, Withdrawn and Inaccessible Works)

Principle: The right to reproduce helps to achieve the goal of permanent access and preservation.

Except as otherwise provided by national law or through the decision of the court in relation to a specified work, it shall be permitted for libraries and archives to reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work, or material protected by copyright or related rights, which has become inaccessible, but which has previously been communicated to the public or made available to the public by the author or other rightholder.

Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph [ ]

(a) only in respect of certain uses, or

(b) that it will limit their application in some other way, or that it will not apply these provisions at all.

#### 113. Proposal from Ecuador to the Proposal from the African Group

##### Right to Use of Orphan Works and Materials Protected by Related Rights

1. Libraries and archives shall be permitted to reproduce, make available to the public and otherwise use any work, or material protected by related rights, for which the author or other rightholder cannot be identified or located after reasonable inquiry.
2. Contracting Parties may provide that, should the author or other rightholder subsequently identify him or herself to the library or archive that used the copyright work or material protected by related rights, he or she shall be entitled to claim equitable remuneration for future use, or require termination of the use.

## Right to Access Retracted and Withdrawn Works

1. It shall be permitted for libraries and archives to reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work, or material protected by related rights, which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the author or other rightholder.

2. Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

### 114. Proposal from India

Libraries and archives shall have the right to reproduce, preserve and make available in any format or retracted any withdrawn works from public access or orphaned work.

## **Comments on Orphan Works, Retracted and Withdrawn Works, and Works Out of Commerce**

### 115. India

Orphan works are copyrighted works for which the right owner is not available, right owner may be the publisher or author. In this case, Indian copyright answers by the way of compulsory licenses. There is an authorized entity called the Copyright Board. Any publisher who would like to publish such works again has to go and file an application, seek a compulsory license, then he has to follow a due diligence process for that he has to publish an advertisement in the national daily English and Hindi newspaper. If it is a regional language work, he has to publish an advertisement in the regional language newspaper giving some time limit. Within that time limit if no right owner emerges then he has the right to seek a compulsory license from the Copyright Board and after examination of the case, it awards the compulsory license. The person seeking the compulsory license needs to deposit the remuneration fixed by the board because if tomorrow the legal heir of the right owner emerges and seeks that injustice has been done to them, the money will be given, otherwise the money will be used for the development purpose of the government. But in this case, it is difficult for the library to go and seek a compulsory license, so exception could be given. The distinguished delegate of Argentina also mentioned a very important and relevant issue of when rightholders are available but the book is out of print thus not profitable to them. But there are clients, students and researchers using that book, there is a demand for the book in the library and in such situations, there is exception to be given to the library to make that work available to the client. Libraries and archives shall have the right to reproduce, preserve and make available in any format or retracted any withdrawn works from public access or orphaned work.

### 116. United States of America

The problem of orphan works is one that is very important to the copyright system and many of our jurisdictions have been working on this problem. Canada and Japan have systems for dealing with orphaned works that address more than the needs of libraries and archives. The United States has considered and may consider further legislation in this area and we know our colleagues in the European Union are also working on legislation. The question of orphan works expands beyond the needs of libraries and archives, although we recognize that the orphan works problem is particularly important to libraries and archives. Article 21 of the Africa

Group proposal says: "It shall be a matter for national law to determine whether certain commercial use of a work for which the author cannot be identified after reasonable inquiry would require payment or remuneration." The commercial use of a work is not incorporated into the U.S. library exception. Library and archives exceptions covering preservation, distribution, and uses that are reasonably necessary, such as research and private uses by patrons, apply equally to all copyrighted works, whether orphaned or not, so they do not require a determination of whether a work is an orphan.

#### 117. European Union

We concur with the remarks made by the delegates of Kenya and Senegal as regards this issue being an issue which is developing, and at best it is unclear, and at worst it is very controversial. There is a tendency which is that on the label "orphan works", whenever we start talking about something that seems very reasonable, which is how can we ensure that when there is no rightholder that can be identified or located after a diligent search, the work can be used and very quickly, this type of discussion turns into a discussions on mass digitization, use of works out of commerce, use of works that have never been published and where maybe the author of the work never wanted the communication of such works. These are all very different matters and they are extremely delicate. The limited legislation in place follows different approaches and the same applies for texts that have been discussed in the past or are being discussed. There are proposals based on a license granted by a government. We are having discussions in the European Union as to whether other forms of licenses could be used. The United States of America at a time was considering a limitation on liability of more traditional forms of limits and exceptions. We are at the stage where there is very little precedent, where the link to limitations and exceptions for libraries and archives is not necessarily established, and where we think that caution needs to be exercised. The delegate from India approached me to ask what was the situation in the moment in the context of the European Union and referred to a Memorandum of Understanding that had been developed in 2008, which was very specific on a very crucial issue in order to in good faith declare a work an orphan, as to what steps are needed to be taken before you can declare a work an orphan? What is the diligent search you need to undertake? It is very different if it is a potential or suspected orphan book, or if it is a newspaper or an audiovisual work or another type of work. In some cases, we have had lengthy discussions, as regards to photography where the problems are extremely serious and the risk of mistakenly orphanizing works are very high. The European Commission has put on the table a proposal of a Directive on permitted use of orphan works, which is currently under discussion with Member States, in the earliest stages of negotiations with the European Parliament and in parallel, we have been discussing solutions for out-of-commerce books based on voluntary agreement of rightholders, voluntary mandates to collecting societies and licenses granted by collecting societies. It is very important not to put together a number of different issues. We need to look for mechanisms that help facilitation of making available of works that otherwise may be forgotten in libraries and archives but that is not necessarily passed by a limitation to the right of others.

#### 118. India

We would like to draw attention to the comments made by the delegate of the United States of America, as he has pointed out perfectly the right things about the commercial and non-commercial purposes of the use of orphans' works. The due diligence follows strictly the due diligence clauses when books are republished, and often works are published with commercial purposes. In this case, the work of libraries is for non-profit or non-commercial purposes, as they lend these books either for education, research, or entertainment. I would like to draw your attention to a recently published work by Neil Netanel "Copyright's Paradox", published by Oxford University Press. He mentions two reasons for the significant increase in copyrighted works that are often published: one is the recent increase in the extension of the protection term of copyrighted works, and the second reason is the lack of formalities for registration of

copyrighted works. He says there is a lack of incentive for publishers or right-owners to republish these books again. Because of this, libraries are suffering, as they are not able to satisfy their clients. In light of this, there is a need for an exception for non-profit libraries.

119. Italy

We fully agree with everything that was stated by the European Union. We have great number of doubts vis-à-vis the possibility of regulating orphan works and leaving the concept of diligent search to be regulated by national legislations. For example, perhaps in a specific country there is a work which is foreign in nature with a foreign editor and published for the first time in another country. Now, where does the research needs to be conducted so as to state whether the work is orphaned or not? It is certainly not in the country where the library will use that work as an orphan work. We would need to go to the country where the work was published for the first time or indeed where the author lives, his place of residence or where the editor published the work. So this is something extremely complicated. We cannot have a criterion which varies from country to country. We cannot say I will conduct research where the work was published for the first time or it is enough for me to carry out research in my own country or it is enough for me to carry out research in the country where the rightholder lives. We need a criterion which is across the board for all countries so there is a need to set out several principles in an international instrument. The issue of orphan works is extremely complex. We cannot settle it in a very straightforward simple fashion. We cannot state that orphan works can be used by libraries. There again we have a problem of competition. Now, what is the reason for works to be used by libraries if they are orphaned works? And why can not they be used by editors? For instance, that is a question we need to look at, so they can be used economically. There are a many great problems that suggest we need to proceed with a great deal of caution here.

### **Written comments made to the Proposed Texts**

120. Switzerland

When addressing the issue of orphan works, there is a need to take into account the various interests involved in order to ensure optimal legal security. This question, currently the subject of some debate at the international level, is not to be taken lightly and all the necessary provisions should be put in place in this regard better to guarantee the interests both of authors and the actors responsible for disseminating culture. More detail could be provided concerning the steps to be taken in order for efforts to qualify as “reasonable inquiry” for example. As to the draft put forward by Brazil, Ecuador and Uruguay: Why do authors or right holders subsequently identifying themselves have the right only to remuneration for future use, but not for use pre-dating their decision to step forward?

121. Japan

According to the Copyright Law of Japan, when the copyright owner cannot be identified or its location cannot be certain for negotiating contracts after reasonable inquiry, the works may be used under the authority of a compulsory license issued by the Commissioner of the Agency for Cultural Affairs and upon depositing compensation the amount of which is fixed by the Commissioner and corresponds to an ordinary rate of royalties. In addition, a person who has applied for a compulsory license may use the work concerned tentatively during the application period upon depositing security money the amount of which shall be fixed by the Commissioner of the Agency for Cultural Affairs by taking into account the means of use for the work stated in said application.

122. Chile

As regards orphan works, we consider it possible to support an initiative that regulates the use of such creations in cases where it is impossible to delineate clearly the particular situation of works that belong to the public domain. This mechanism might be reinforced with the requirement to complete certain administrative formalities, such as the existence of a reasonable search (for example, publication of the search in the official gazette or in a national newspaper), procedures in which offices concerned with the registration of works (such as the DDI) could participate or collaborate. Furthermore, we support an exception which covers the scope of those materials published previously but which were usually in short supply since they have been retracted or withdrawn from circulation (removed from catalogues), while ensuring that the legitimate rights of rightholders regarding the dissemination of works are not affected. In general, an appropriate proposal would provide legal certainty in respect of such productions of the human mind, thereby facilitating their availability and effective access to protected works and productions.

### 123. European Union

An "orphan work" refers to a work or other protected subject matter whose rightholder(s) cannot be identified or, even if identified, is not located after a diligent search for the rightholder(s) has been carried out. The European Commission adopted a proposal for a Directive "on certain permitted uses of orphan works" in May 2011.<sup>15</sup> The objective of the proposal is to facilitate the digitization and making available of orphan works in the collections of, inter alia, public libraries and archives in the European Union. The proposal covers the print sector (books, journals, magazines and newspapers), audio-recordings, cinematographic and audio-visual works. It is without prejudice to existing exceptions and limitations. The proposal is currently being discussed and negotiated between the Member States in Council and the European Parliament in the course of the ordinary legislative procedure of the European Union. An "out-of-commerce work" refers to a work which is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops). Libraries are increasingly interested in digitizing and making available out of commerce works on a scale and for purposes that go beyond the specific exceptions and limitations in the European Union legal framework. The use of such works (when not in the public domain) requires the authorization of the relevant rightholders unless such use is covered by a specific exception or limitation to copyright. In order to facilitate the development of voluntary licenses to enable the digitization and making available of out-of-commerce works contained in the collections of libraries and archives, a Memorandum of Understanding (MoU) on Out-of-Commerce Works was agreed at European Union level amongst libraries, publishers, authors and their collective societies.<sup>16</sup> The MoU contains the key principles that the concerned parties will apply to future licensing agreements allowing cultural organizations to digitize out-of-commerce works and to disseminate them electronically. These voluntary licensing agreements can be managed through collecting societies representing authors and publishers and be granted on a national and multi-territorial basis. The MoU is based on the principle that rightholders shall always have the first option to digitize and make available an out-of-commerce work.

The main elements of the MoU are as follows:

- It is sector specific, providing solutions for books and learned journals.
- It is based on voluntary licensing agreements to be negotiated in the country of first publication of the works.

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<sup>15</sup> [http://ec.europa.eu/internal\\_market/copyright/orphan\\_works\\_en.htm#directive](http://ec.europa.eu/internal_market/copyright/orphan_works_en.htm#directive)

<sup>16</sup> *Memorandum of Understanding on Key Principles on the Digitization and Making Available of Out-of-Commerce Works*, 20 September 2011  
[http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm#mou](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#mou)

- The determination of the out-of-commerce status will be decided in the country of first publication according to criteria defined by the parties.
- Without prejudice to existing exceptions and limitations, the authorized uses of the works, commercial or non-commercial, and the remuneration, will be agreed by the parties in each licensing agreement.
- Licenses for works that are out-of-commerce may be granted by collective management organizations. Rightholders have the right to opt out of and to withdraw all or parts of their works from the license scheme resulting from any agreement with public libraries or archives.

Discussions are now underway at Member State level to achieve the practical implementation of the MoU on the basis of agreements between relevant parties.

#### 124. Singapore

We recognize that the issue of orphan works is a complex one. However, it is a live issue as libraries and archives are recipients of orphan works through public transfers or private donations. Problems in locating the authors of the works would include, for packaged audiovisual products in particular, the identification of copyright status for third party material that was used in the audiovisual productions. The concept of due-diligence is also important and should be an element in any provision on orphan works.

## TOPIC 8: LIMITATIONS ON LIABILITY OF<sup>17</sup> LIBRARIES AND ARCHIVES

### Proposed Texts

#### 125. Proposal from the African Group

##### Limitation on Liability for Libraries and Archives

Principle: Beneficiaries must be responsible in their exercise of limitations and exceptions

A librarian or archivist acting within the scope of his or her duties shall not be liable for copyright infringement, when the alleged action is performed in good faith, in the belief that:

- (a) there are reasonable grounds for the applicability of an exception or limitation granted under this Treaty, or other international or national provisions applicable to the beneficiaries of this Treaty; or
- (b) the work, or material that is the subject of the act is in the public domain or under an open content license.

When a Contracting Party/Member State provides for secondary liability regimes, libraries and archives shall be exempt from liability for the actions of their users.

#### 126. Proposal from Brazil, Ecuador and Uruguay to the Proposal from the African Group

##### Limitation on Liability for Libraries and Archives

A librarian or archivist acting within the scope of his or her duties, shall/should be protected from claims for damages, from criminal liability, and from copyright infringement, when the action is performed in good faith:

- a. in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is being used as permitted within the scope of a limitation or exception in this instrument, or in a way that is not restricted by copyright; or
- b. in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is in the public domain or under an open content license.

When a Contracting Party/Member State provides for secondary liability regimes, libraries and archives shall/should be exempt from liability for the actions of their users.

#### 127. Proposal from India

Any person working in any library or archive shall be protected for any action performed in good faith against claims for damages and criminal liabilities.

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<sup>17</sup> The Delegation of the United States of America proposed to replace the word "OF" with the word "FOR".

128. Principles and Objectives on the subject proposed by the United States of America

National copyright laws may recognize limitations on liability for libraries and archives and their employees and agents. National copyright laws may also limit certain types of damages with respect to libraries and archives and their employees and agents that act in good faith, believing or having reasonable grounds to believe that they have acted in accordance with copyright law.

### **Comments on Limitations on Liability of the Libraries and Archives**

129. United States of America

US law embodies the concept of limitation of liability for libraries in a number of ways. As the United States suggested in its Statement of Objectives and Principles, libraries and archives, and their employees and agents, should not be liable for copyright infringement where they act in good faith, believing or having reasonable grounds to believe that they have acted in accordance with copyright law. The US Copyright Act provides limitations on liability for copyright infringement for libraries and archives and their employees and agents in a variety of situations:

- 17 U.S.C. § 504 (c)(2), which sets forth remedies for copyright infringement, provides that libraries, archives, and their employees and agents acting in the scope of their employment are not liable for statutory damages for the reproduction of works or phonorecords if they “believed and had reasonable grounds for believing” that their action was a fair use under Section 107 of the Copyright Act.
- In 17 U.S.C. § 1201(d), under certain circumstances, the Digital Millennium Copyright Act (DMCA) includes an exemption from the prohibition on circumventing a technological measure that effectively controls access to a copyrighted work for a nonprofit library or archive that gains access to a commercially exploited copyrighted work solely to make a good faith determination of whether to acquire a copy of the work to engage in conduct permitted under the DMCA.

The DMCA also contains a provision requiring courts not to impose civil damages in any case in which a nonprofit library or archive sustains the burden of proving that it was not aware of and had no reason to believe that its acts constituted a violation of Section 1201 or 1202 of the DMCA. See 17 U.S.C. § 1203(c)(5)(B). These entities are also exempt from any criminal liability for such violations regarding technological measures or the integrity of copyright management information. See 17 U.S.C. § 1204(b).

### **Written comments made to the Proposed Texts**

130. Switzerland

The principle of equality of treatment before the law needs to be considered in more depth with regard to this provision. Moreover, there should be objective criteria in terms of the liability of individuals.

131. Japan

Under the Copyright Law of Japan, there is no article dealing with the limitations of copyright liability with regard to libraries and archives.

132. Chile

It appears quite reasonable to consider a proposal of this nature, which covers a disclaimer (exemption from liability) for libraries, archives or museums, where use is made of the exceptions in the performance of the functions specific to such libraries, archives or museums. For the same reason, the location of the proposal should be considered in association with all the exceptions and not only in respect of technological protection measures, in so far as the action taken has been in conformity with the law.

133. Singapore

While we recognize the importance of exempting librarians and archivists from liabilities when they act in good faith, we agree with the principle that such exceptions should be introduced appropriately for specific circumstances.

## TOPIC 9: TECHNOLOGICAL MEASURES OF PROTECTION

### Proposed Texts

#### 134. Proposal from the African Group

##### Circumvention of technical measures

Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in (specify) have the means to enjoy the exception where technical protection measures have been applied to a work, including when necessary the right to circumvent the technical protection measure so as to make the work accessible.

#### 135. Proposal from Brazil, Ecuador and Uruguay to the Proposal from the African Group

##### Obligations Concerning Technological Protection Measures

1. Member States /Contracting parties shall ensure that libraries and archives have the means to enjoy the exceptions and limitations provided in this instrument when technological protection measures have been applied to a work or other protected matter.

#### 136. Proposal from India

Libraries and archives shall have the right to circumvent technological protection measures applied to any work for the purposes of enjoying any act permitted under this treaty and in their national legislation.

### Comments on Technological Measures of Protection

#### 137. India

We draw the attention on the agreed statements of the Article 10 of the WCT and Article 16 of the WPPT, which clearly explain or declare in fact that limitation and exceptions are similarly extended to the digital environment. It means when we are extending limitation exceptions given to the Libraries, there is a need for giving or allowing them to circumvent the technological protection measures but the care should be taken that it should not lead to piracy. Libraries and archives shall have the right to circumvent technological protection measures applied to any work for the purposes of enjoying any act permitted under this treaty and in their national legislation.

#### 138. United States of America

The United States has a provision in its law addressing the circumvention of technological protection measures by libraries. The provision describes occasions when libraries may circumvent a technological protection measure for access in order to determine if they wish to purchase a copy of a work for the library's collection. We also have a system for providing exceptions for technological protection measures through an administrative proceeding that is

conducted by the Library of Congress in coordination with part of the Department of Commerce. The Register of Copyrights, in consultation with the Assistant Secretary for Communications and Information of the Department of Commerce, undertakes a proceeding every three years to recommend to the Librarian of Congress exemptions for persons who are users of a particular class of works if such persons are or likely to be in the succeeding three-year period adversely affected by virtue of such prohibitions on circumvention in their ability to make non-infringing uses of that particular class of works. We have used this, for example, to permit the use of films in university film school classes as well as for certain cases of technologically obsolete materials or materials that are in technologically obsolete formats protected by technological protection measures. This is one place where the question of limiting the liability of librarians is very important. U.S. law also contains a provision limiting the liability of our librarians and archivists when they are not aware or have no reason to know that they were violating technological protection measures. In that case, United States law exempts them from any possibility of criminal liability.

#### 139. Italy

Thinking about technical measures, we wonder about the application of these measures to libraries. We know that there is a basic principle that applies and the basic principle is that libraries are supposed to obtain works lawfully, legally. So if works are obtained legally, then this whole question of technological protection measures does not apply. We do not see why we would need technical protection measures to be applied to libraries. It would seem that technical protection measures would not apply if the work is acquired legally and lawfully as it should be.

### **Written comments made to the Proposed Texts**

#### 140. Switzerland

Swiss law prohibits the circumvention of technical measures of protection, although an exception is made for cases in which an effective technical measure has been circumvented in order to allow lawful use. Lawful uses include the exceptions expressly provided for under the law on copyright, including exceptions for libraries and archives. Moreover, the law also makes provision for a monitoring center for technical measures of protection responsible for checking that such measures do not constitute an abuse concerning users. Thus, Switzerland has managed to achieve a delicate balance between the implementation of technical measures of protection by right holders and the beneficiaries of the exceptions enshrined in Swiss law. In this regard, the first part of the proposal put forward by the African Group constitutes an interesting step, stating, as it does, that: "Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in (specify) have the means to enjoy the exception where technical protection measures have been applied to a work." However, we are uncertain as to whether the second part of the phrase is appropriate "including when necessary the right to circumvent the technical protection measure so as to make the work accessible." Technical protection measures would be rendered obsolete by the establishment of such a right and anyone engaging in such activity would be distributing the work without the authorization of the right holder. The proposal put forward by Brazil, Ecuador and Uruguay could be a good starting point, although with one vital addition, inserted in the text in red: "Member States/Contracting parties shall ensure that libraries and archives, which obtained legally access to a work or lawfully acquired a work, have the means to enjoy the exceptions and limitations provided in this instrument when technological protection measures have been applied to a work or other protected matter."

141. Japan

In Japan, even the usage of works that is made possible by circumvention of technological protection measures is not recognized as detrimental to the benefits of the owner of copyright. The regulation of the copyright limitations such as in Article 31 of the Copyright Law of Japan, which regulates the limitations with regard to libraries, considered that it falls under the scope of the copyright limitation even in cases in which technological protection measures can be circumvented.

142. Chile

An exception, guaranteeing a balance between the rights of rightholders seeking to protect their contents through the use of this type of technical measures and where a guarantee of access is sought to such contents from libraries, archives and museums, is extremely important. Hence it is also worth emphasizing the explicit agreement reached in the recent negotiations in Beijing to the effect that nothing prevents States from adopting effective and necessary measures to ensure that limitations and exceptions can be enjoyed where technological protection measures have been applied. In addition, it was also explicitly stated that the obligation to provide legal remedies against infringements of technological protection measures is not applicable when protection under national law no longer exists.

143. Singapore

Currently, while we have encountered some instances of technological protection measures for deposited materials, we have been able to request publishers to remove or decrypt such measures. We would like to see more discussions on this issue to fully resolve the status of technological measures in light of the important role of libraries and archives.

## TOPIC 10: CONTRACTS

### Proposed Texts

#### 144. Proposal from the African Group

##### Relationship with contracts

Any contractual provisions which provide exemptions from the application of the limitations and exceptions listed in Article 2 shall be null and void.

#### 145. Proposal from Ecuador to the Proposal from the African Group

##### Obligation to Respect Exceptions to Copyright and Related Rights

Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions in copyright adopted by Contracting Parties according to the provisions of this Treaty, shall be null and void.

#### 146. Proposal from India

Member States shall provide in their national legislation that any contractual provisions prohibiting or restricting the exercise or enjoyment of rights granted under this Treaty and national legislation should be null and void.

### Comments on Contracts

#### 147. India

Many librarians have problems with contracts, and how these contracts are overriding the legitimate limitations and exceptions provided by domestic laws, so there is a need to put an end to this kind of contracts, or to put in an exception for them. As an example, when a library buys a physical book, there is no limit on the number of times it is lent to the clientele. Unfortunately, in the digital environment, contracts on digital copies allow them to lend a copy only for 20 times. The reasons given by the person who imposes the contract is that there is a wear and tear of the physical book, and you go back to the shop and buy that book again. In a digital copy there is no such thing that happens, so then there is a need for limiting the number of times a library lends it so that it will come back again, to make that same copy available to the client. There is a need for an exception to be provided, allowing the libraries to continue with the exceptions and limitations, and their functioning should be made out of this kind of problem. Member shall provide in their national legislation that any contractual provisions prohibiting or restricting the exercise or enjoyment of rights granted under this Treaty and national legislation be null and void.

#### 148. United States of America

We must address this area cautiously because we do not want to limit the freedom of libraries to enter into contractual arrangements with suppliers of materials. In general, freedom of parties to

enter into contracts is an important principle in U.S. law and we would be very hesitant to consider any international copyright norm that might interfere with this principle.

#### 149. Australia

While in Australia we have actually concerns raised by our libraries about their ability to negotiate arrangements with publishers, we still do not think that having an international norm in this area is really the appropriate way to approach this issue and as with some other challenging issues we are facing at the moment, we do think this one may be best addressed by the publishing industry, and the libraries coming together to negotiate a practical solution to this particular problem.

### **Written comments made to the Proposed Texts**

#### 150. Switzerland

Switzerland understands the concerns regarding the observation of the limitations and exceptions for libraries and archives. We are convinced that, in the medium term, an appropriate solution will be found that will satisfy the various actors involved. We would prefer an approach that allowed the adjustments considered necessary at the level of the national legal system to be made.

#### 151. Singapore

We observe that our libraries may encounter differing business practices when they obtain new material or renew subscriptions to existing databases. However we would be extremely cautious to introduce international norms for what would usually be dictated by national laws and different domestic circumstances.

## **TOPIC 11: RIGHT TO TRANSLATE WORKS**

### **Proposed Texts**

#### 152. Proposal from the African Group

Libraries and archives may, for the purpose of teaching, scholarship or research, translate works lawfully acquired or accessed when those works are not available in a language required, as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

#### 153. Proposal from India

Libraries and archives shall have the right to provide translations of any works in any format.

### **Comments on Right to Translate Works**

#### **Written comments made to the Proposed Texts**

#### 154. Switzerland

Publishers are usually responsible for the issue of the right to translate. We do not, therefore, understand why this matter would not be included in a draft instrument relating to libraries and archives.

#### 155. Japan

In Japan, the right to translate is stipulated under Article 27 of the Copyright Law of Japan, which is based on the Berne Convention. At the same time, with regard to the regulation of limitations of such right, translation and reproduction of works is allowed in the case where it is permitted to reproduce a single copy of part of a work already made public, at the request of a user and for the purpose of investigation, as stipulated under Article 31(1) (i). (Article 43 (ii)).

#### 156. European Union

Article 8 of the Berne Convention provides that authors enjoy the exclusive right of making and of authorizing the translation of their works. This right is distinct from other rights such as the right of reproduction, the right of communication to the public or the lending right. The exceptions and limitations to the reproduction, communication to the public and lending rights for the benefit of libraries and archives which are under discussion do not include or imply a limitation to the right to translate works.

157. United States of America

The right of translation is a different right than the right of reproduction. For those Delegations who are concerned about the protection of the author's moral rights, that is a significant concern, and we would not think that an exception crafted addressing the right of reproduction and rights related to distribution automatically covers translation.

## ANNEX

### Comments on Preservation

#### 158. Ecuador

The second paragraph within the stated principles that the Delegation of the United States of America has submitted is a good basis to approach the issue. We could have a norm stating that exceptions and limitations can and should enable libraries and archives to make copies of published and unpublished works for the purpose of preservation and replacement. However, the final concept: "under appropriate circumstances" is a non-legal term which might create many doubts of interpretation and, it would be easier to replace it by "under appropriate circumstances of the practice." We could use a wording of that sort which could be flexible but also could be an emphasis on the need to focus on honest practice at the international level.

#### 159. Kenya on behalf of the African Group

In relation to paragraph 2 of our Article 14, we are talking about copies being used solely for the needs of teaching or researching. It must be taken into account that the draft of this particular proposal needs to be looked in a wider context, not just limited to exceptions in relation to Libraries and Archives. It is also important to note that we are preserving the works in the archives and libraries mainly for research and teaching purposes.

#### 160. Nigeria

The context on which the text of preservation was formulated originally was broader, and despite that, this particular paragraph does not seek to expand, but rather tries to limit and redefine in a narrow manner the use to which such material would be reproduced. We agree with the possibility of re-phrasing this particular text and would welcome any suggestions from the distinguished delegate of the United States of America.

#### 161. Algeria

All legislations look at the issue of preservation of library and archival materials in such a way as to ensure that an exception is provided if the purpose of reproduction of a work is not indirectly or directly a commercial one. Some legislations have provisions relating to digitization and others, including the Algerian legislation, tend to deal with more conventional type documents, the kind we usually have in libraries and archives. The fundamental approach is the same. We are generally speaking about providing an exception for them if what they do is done not for profit purposes and if they provide a copy without the authorization of an author in order to respond to a request from another library, that is also permitted, and if a work has been damaged, lost or made unusable and therefore requires to be copied again that is provided for. In Algeria, there are two conditions to be abided for: firstly, it has to be impossible for the library or archival center in an acceptable and lawful way to acquire new copies, and, secondly, this reproduction has to be seen as a one isolated type of case.

#### 162. Senegal

The context within which the African Group elaborated its proposed provisions is to make possible to copy works in certain cases and to safeguard such copies when, for instance, there have been problems with the original being lost or damaged. What we have to bear in mind is that we are talking about something being reproduced, to be able to be consulted for teaching or research purposes.

## **Comments on Right of Reproduction and Safeguarding Copies**

### 163. Kenya on behalf of the African Group

Article 11 of the proposal of the African Group basically deals with the supply of works. One of the main reasons to elaborate that particular part was to emphasize on fair use practice as determined by national law.

### 164. Senegal

The possibility to use right of reproduction in order to provide a safeguard or backup copy is something also enshrined in the African Group proposal. In its second line we accentuate the lawful acquisition of the work, making it possible to generate copies regarding works that are protected by authors' rights. The legality is mentioned as a source of greater security for the rightholders. Libraries and archives can exchange information between each other, but only as much as this practice is compatible with what is enshrined in national legislation.

### 165. Egypt

The purpose of reproduction should not only be limited to research, but also it should meet the needs of different educational institutions such as in the framework of cooperation among libraries and in order to disseminate knowledge and information. This should not be limited only to reproduction for reference purposes, but extended to translation as well.

### 166. Ecuador

After listening to the proposal made by the delegate of Egypt regarding the inclusion of the exception of translation within the context of the exception of reproduction, it is important to point out that within the various exceptions that are provided by the Berne Convention, there are the ones recognized by the Stockholm Convention. When looking at the scope of these three exceptions, the translation is an implicit exception to the exception of reproduction, and so consequently in those cases where it is possible to have reproduction within the framework of Berne Convention, it is implicit that translation is possible. The proposal made by Egypt would be in compliance with the Berne Convention.

### 167. Senegal

The possibility of producing safeguard copy is going to be limited to the strict minimum. It is not a question of giving that permission to allow libraries and archives not only to make a safeguard copy for themselves, but also of making safeguard copies for other libraries or archives. The most important condition for being able to use this possibility is that the work is lawfully available. When a work infringes copyright, no exception or limitation can be made. We respect the principles regarding limitations to the right of reproduction. We rule out any possibility of engaging in any economic activity regarding the safeguard copy, and we insist on the fact that the mention of domestic legislation simply allows national legislation to ensure that if any remuneration is provided, then it should be effective.

### 168. Kenya on behalf of the African Group

In the elaboration of Article 11 of the African proposal, one of the reasons why this article was drafted in that particular way was taking into consideration the different traditions we have in relation to fair use, fair practice and fair dealing in the various legal systems, so we left it to the national laws.

169. Brazil

The Delegation of the United States of America is right when it has concluded that in our proposal, jointly presented with Ecuador and Uruguay, when we refer to international obligations, we are referring to the three-step test. Relating to the translation right, our legislations are not so comparable because Brazil has not implemented in its national legislation the appendix of the Berne Convention. Regarding the comments by our colleague from Italy, I was not sure if he was referring to our joint proposal with Ecuador and Uruguay, or he was referring to our legislation. If he was referring to our legislation, I would like to make clear that the three-step test is part of the Brazilian legal system. Brazilian jurisprudence has references to the three-step test. When you refer to the Brazilian legal system regarding copyright, you have to include the specific legislation, the Berne Convention, the agreements into force, and also the jurisprudence.

170. Ecuador

The joint proposal by Brazil, Ecuador and Uruguay, states that the exceptions for reproductions will be in accordance with the standards under existing international obligations subscribed by the parties of this agreement. This provision acknowledges that countries have different levels of freedom to enact exceptions and limitations to copyright and related rights, depending on the international treaties they have signed in. For example a country that has only signed the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) has more flexibility than those that have also signed WIPO WCT and WPPT. Those countries that have only signed the TRIPS Agreement and not WPPT, in the case of neighboring rights, will not be subject to the 3 step test with regard those rights, as Article 14 of the TRIPS Agreement, subjects' most neighboring rights, like those of broadcasting organizations only to Rome Convention which do not consider the three step test. Also is important to notice that in other cases, even in matters relating to copyright included in the TRIPS Agreement, the three step test will not be the standard as there is a special provision regulating the exception in the Berne Convention, like in quotations and illustration for teaching, provisions that are incorporated into TRIPS. In the case of quotations and illustration for teaching the standard is "fair practice."

171. Senegal

In response to the question that was put to us by the United States of America, it referred to a backup copy but we are talking about an exchange practice, practical exchange between libraries or archives. That is what was to be understood by our position. We are a little bit obsessed by the question of security. Everybody is talking about safeguard, but it is just an exchange, in fact, between the librarians or archivists.

172. Ecuador

There are some areas subjected to intellectual property and especially related rights, like those of the broadcasting organizations, or audiovisual performers, for which there is no international standard that makes obligatory the application of the three-step test. In no case did we say that the three-step test is not to be applied to authors' rights when it comes to broadcasting of their works. We were referring to exceptions or limitations to the related rights of the broadcasting organizations with regard their broadcast signals, which, as said earlier, are not subject to the three step test.

## **Comments on Legal Deposit**

### 173. Argentina

In Argentina, this obligation is something borne by the publisher once a work has been published. If it is to post on a nationwide scale, then the publisher has to make available three copies of that work within three months' time. And these three copies are for the National Library, the Library of Congress and the national archives of the nation. If this obligation were not complied with, then the publisher could have to pay a fine. The amount of the fine is calculated as 10 times the value of the work. Legal deposit is very important to make sure that bibliographic acquisition is maintained in our libraries.

### 174. Egypt

On the subject of legal deposit, the national law only of 2002, in Article 184 obliges publishing houses and televisions and those that provide fixed copies, to register and deposit a copy or maximum of 10 copies. These copies have to be deposited in libraries and account should be taken of the nature of these works. Legal deposit is not just a condition, and this is what article 184 of the Egyptian law on the subject says, that there should be no infringement of copyright or neighboring rights. The purpose of legal deposit should be to preserve works and should therefore take into account the interests of copyright, not only being a simple mere condition for the protection.

### 175. Kenya on behalf of the African Group

It seems like the whole issue of the legal depositors stems from the fact that the United States of America has a registration system for copyright and related works, which does not pertain to a number of countries. Legal deposit system is outside copyright law for most of the country including Kenya, which is done under the Books and Newspapers Act. I wonder where is the place of the legal deposit in relation to the exceptions and limitations regarding the libraries and whether we actually do have room for that or whether this is something that is very specific to jurisdictions that have provisions for registration of copyright, for historical reasons.

### 176. Argentina

Works destined for the national library and the Library of Congress are available to the public wishing to consult them.

## **Comments on Library Lending**

### 177. Kenya on behalf of the African Group

The main focus of having this particular provision is to ensure that libraries can interchange works, lending the works or supplying the works to other libraries for the users within the acceptable limits of the law.

### 178. Senegal

The African Group position on this issue is fairly balanced. If we look at the content of the proposal, focusing on the last part of the last sentence, reference is made to fair practices determined in national law. That means the right of library lending is a right which can be regulated on the basis of the provisions of any future instrument that will come into being but also a right that can be implemented in accordance with national law and this really is a

guarantee of the fact that we are trying to strike a proper balance among the interests of all rightholders in this area.

#### 179. Egypt

As far as the library lending is concerned, there is no doubt that expanding this as an absolute right for the author will create destabilization of the balance between the authors and the public. If the library or archive cannot lend unless there is the agreement of the author, this would lead to certain delays in teaching and research.

#### 180. Ecuador

The aim of this proposal is to ensure that libraries can comply with an essential function, which is to lend the works to users through any means, for which we believe that it is essential that countries recognize and acknowledge the right of lending to users, and there must be an exception that protects libraries when they carry out that particular function. Given the fact that the Berne Convention and other Treaties do not provide such a right to any rightholder, this is a case where multinational law does not impose the application of the three-step, because exceptions to the lending right are based on national legislations. Furthermore, our Delegation is aware that there are countries that grant a right of remuneration or compensation to rightholders to lend their works. We feel, alongside with Brazil and Uruguay, that this right can be maintained, as it provides sufficient flexibility to all parties.

### **Comments on Parallel Importations**

#### 181. Kenya on behalf of the African Group

The main purpose of this particular article was, taking into account the various laws that ordinarily do not allow for parallel importation of copyright works, to ensure that libraries and archives are able to buy or get the books, within the provisions of the law, without breaking the law. It applies to works that are not available within the country and when there is the need to incorporate them in their collections.

#### 182. Egypt

Article 6 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) states that the member countries or the contracting parties will determine the type of exhaustion of rights, whether it will be international, national or regional. This right has been mentioned in several other treaties, therefore, I find that this subject must be maintained with all its aspects. We must strongly adhere to it and maintain it in the forthcoming treaty considering its vital importance to libraries, especially in many developing countries.

#### 183. Ecuador

Uruguay, Ecuador and Brazil have not put forward a joint proposal on this issue, but we support the African Group proposal in that libraries should not be hampered by the right to import and export in order to acquire in any part of the world legally the works they require for their collections. This is fully compatible with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) standards and WIPO.

#### 184. Senegal

The African proposal is not intended to allow libraries or archives to start doing the work of booksellers or book distributors. The proposal does make the context quite clear, it is only

within certain conditions that it would be possible and permissible, under certain parameters for libraries and archives to receive and exchange works. If you are talking about importation of works, it is because domestically it is not possible to lawfully obtain the work from those who have the responsibility of making it available. Parallel importation is not just an open license to say you can do whatever you like. We are saying that we can go abroad to get works only under certain conditions.

#### 185. Ecuador

We wish to make two comments with respect to the African Group proposal which deals with the possibility and the right for libraries to purchase and import legally published acquired abroad. This makes significant legal sense because we may find ourselves in the situation whereby the standards of the distribution and exhaustion of distribution of acquisition in a country, may imply that it is prohibited to export these works to the author. This would mean we would be able to import without the actual agreement of the author. So looking at the African Group proposal, then, regardless of the exhaustion, the libraries will have the freedom to be able to purchase and import works for their collections. It is not that the library would become a bookshop that will be selling books, but it will purchase and import for their use in their collections. On the other hand, we see there is no limit established or number of works that may be acquired. We do not think it would be appropriate to put a limit on the number of works or books to be acquired because this may not be compatible with national legislations.

#### 186. Kenya on behalf of the African Group

Following up on the intervention by the distinguished Delegation of Ecuador, and in an attempt to answer the question posed by the distinguished Delegation of Germany, I do not think this particular article is talking about the right of acquisition because there is no such right. We are looking at the issue of importation because most libraries and archives especially in the developing countries, basically lack a lot on books, for which they get their materials from outside their countries. Most of them are not allowed to parallel importation of copyrighted works. This is just a way to allow them to bring books without necessarily infringing copyright. To answer the Delegation of Mexico, we cannot quite refer to the limits of the importation. For instance, if it is the Kenyan National Libraries which has let's say 36 branches in Kenya, and they want a couple of books within their collection. They would have the permission to be able to bring those books specifically for their collections to be used within the library, not for them to start selling in any commercial activities.

### **Comments on Cross-Border Uses**

#### 187. Kenya on behalf of the African Group

On the issue of cross-border uses, the main reason for drafting this particular provision was to allow for interlibrary exchange across the borders, and this particular provision just says: "It shall be permissible for libraries located in a territory of a contracting party to send, receive or exchange a copy of a work or material protected by related works legally made in a territory of another contracting party, including copies of works and materials protected by related rights made in accordance with this treaty."

## **Comments on Orphan Works, Retracted and Withdrawn Works, and Works Out of Commerce**

### 188. Kenya on behalf of the African Group

This is quite a controversial issue and we take cognizance of that particular fact, as the whole issue of orphan works is still developing within the copyright field but it has become more and more important with the development of the Internet. The main reason for having this is just to provide a progressive provision. Our proposal reads: "It shall be permitted for the beneficiaries provided for to reproduce and use a work and materials protected by related rights for which the author or rightholder cannot be identified or located after reasonable inquiry." The whole issue of reasonable inquiry or due diligence, is something that is quite subjective, probably to be set up by national laws, which would need to decide how far they will go in terms of this. "It shall be a matter of national law to determine whether certain commercial use and works protected by which the author cannot be identified or located after reasonable inquiry would require payment or remuneration". Also this is subject to modification because here we are only talking about the use by libraries and archives. The second paragraph is not something that is applicable for purposes of libraries and archives, for which we will just concentrate on the first paragraph.

### 189. Argentina

Argentina proposes to add a reference to exhausted works that are no longer available on the market, works that for instance have not been republished. This is actually something we are looking at domestically, as we are studying limitations and exceptions for copying works under those circumstances. Following discussion on this issue, we may consider that limitations or exceptions for preservation already cover this issue. We have also seen there are certain provisions on exhausted works in the legislations of Finland, Austria, Mexico and others, and all of them refer to the preservation section. We would like to request the inclusion of exhausted works under cluster 7. We are still thinking about the best possible legislative framework but right now we would like to keep that reference under cluster 7.

### 190. Senegal

We are very much aware of the fact that these works are very delicate in nature. After all if you are going to declare a work as being an orphan work it is very important that you respect a proper procedure before you do so and you must not be hasty in declaring that a work is orphan. It was important to think about cases where a rightholder might appear at some future stage after a work has been declared an orphan work. The rightholder may reappear at some future stage. And simply because a work has been declared to be an orphan work, should the rightholder be forced to suffer from that? We have to think about the legal consequences of that and think about that possible scenario and how we would deal with it. Further, we would like to raise a question to Argentina. The concept of exhausted works is something rather different. If you talk about exhaustion of rights in terms of protection, that means protection has expired, the original copyright period or post-mortem period, and the work would be in the public domain. However, we also understand that Argentina was talking about something different, a work no longer available on the market, but we would like to be absolutely clear on what exactly they mean by "exhausted works". Do they mean a work that is simply out of print, not available on the market? Or a work for which the rights are already exhausted, where copyright has already run out?

### 191. Argentina

Senegal was asking on the interpretation given by Argentina to the term "exhausted works". It seems to exist some confusion about what this means in legal terms. We were talking about works no longer available on the market, or that were out of print, simply because publishing

houses decided no longer to print or to produce them. We were not talking about exhaustion of rights when we talked about exhausted works. We were simply saying that the works were no longer available, that the work itself had run out in terms of stocks available on the market.

#### 192. Kenya on behalf of the African Group

I just wanted to respond to the distinguished delegate of the United States of America on the issue of orphan works. When referring to the second paragraph, I made it clear that it was based on the holistic approach the African Group; so the paragraph that was relevant in terms of orphan works for libraries was paragraph 1 only. We take cognizance of the comments with regard to the orphaned works and also I mentioned earlier this is an area still developing so we are still open. This is not something that is not cast in stone and many jurisdictions are still trying to figure out how to deal with the issue of orphaned works.

#### 193. Brazil

Just to say we agree with the Delegation of Argentina that we should also look at the issue of out of print work. Noting the intervention made by the distinguished Indian Delegation in the sense that commercial viability or viability of the exploration of works should not prevent library users to have access to it. We agree with the discussion of this topic under this work we are making here.

#### 194. Ecuador

We wanted to state the interest that our Delegation has vis-à-vis the presentation on orphan works, as we feel that there are many cases in which traditional exceptions are not exercisable for libraries and they need to comply with their function. This means that if there is no rightholder requesting a license, the library should have a provision that protects it to properly use an orphan work. We would also like to state that our Delegation considers it is very important to follow the discussion on retracted and withdrawn works.

#### 195. Senegal

After all, before you can talk about a work, you have to start off with something written by an author and then edited by an editor and then it is going to be published by a publisher. That is a work in physical terms. When we talk about something out of stock we must bear in mind we are talking about booksellers and even publishers running the risk of their livelihood coming to an end if they have nothing to sell. There is an obligation that should be borne by publishers when a book is out-of-stock to proceed to republish that book and such clause is frequently included within publishing contracts. It may happen that sometimes an author can turn around and say, look, you have allowed my work to be sold out so it is no longer lawfully available on the market. You have not fulfilled your contractual obligation to republish the book, so you have not properly abided by the contract. The contract is null and void and I, the author, will ensure they publish enough books to make them available in the market. I think we have to be very careful.

#### 196. Egypt

There is no doubt that orphan works is one of the main issues dealt with by libraries because the libraries have to know how to deal with them. The problem arises when these works are no longer orphaned, we should provide for certain steps before declaring a work to be orphan. The African proposal referred to the fact that is stated after carrying out what is called reasonable inquiry, but the question remains on what are the criteria for the fact that this is reasonable inquiry. Therefore, it is left to the national law criteria.

197. Kenya on behalf of the African Group

We just needed to clarify that second paragraph is not applicable in relation to libraries and archives.

### **Comments on Limitations on Liability of the Libraries and Archives**

198. Ecuador

The obligation to protect technological measures of protection which stem from Article 11 of WIPO Treaty on copyright, expressly flags that the obligation to provide protection to technological protection measures is against acts non-authorized use by the rightholder or a use which are not permitted by the law. Very clearly the WIPO treaty is allowing or providing flexibility to countries so that through their legislation they can establish limitations to technological measures of protection to permit the exercise of exceptions and limitations to copyright. The joint proposal is there to flag that libraries, when carrying out their function, should be in a position to circumvent technological protection measures to exercise the exceptions and limitations to copyright that are provided under the law.

199. Brazil

This provision aims at excluding the liability of employees of libraries and archives when doing and performing their daily duties in good faith there is any infringement that occurs without their consent and without their participation. Our national libraries also are demanding this from the Brazilian authorities, as they would like to have some legal certainty on the tasks they perform, while they contribute to the dissemination of culture and knowledge. This is increasingly relevant now that we are approaching a new digital era and many of the materials are not in the traditional print format.

### **Comments on Technological Measures of Protection**

200. Kenya on behalf of the African Group

On the technical circumvention of technological protection measures, there are a number of provisions in copyright laws that make circumvention of technological protections illegal so we crafted this to take into account there are certain users that ordinarily would fall under exceptions and limitations so this particular provision would allow those who would otherwise be entitled to the exceptions and limitation to be able to access the works in the digital environment.

201. Brazil

We consider that a provision regarding technological protection measures in this new context of digital works is meaningful and this is our first approach to a language. We understand that we may view it on this and try to capture some situations that may arise when we discuss this among the different Delegations that may have their different contributions and experience on that.

202. Ecuador

The obligation to protect technological measures of protection, which stem from Article 11 of WIPO Treaty on copyright, expressly flags that due protection operates when we are dealing with a measure which protects against a non-authorized use by the rightholder or a use which is not permitted by the law. Very clearly the WIPO Treaty is allowing or providing flexibility to

countries so that through their legislation they can establish limitations to technological measures of protection. The joint proposal is there to flag that given a specific situation, that is the exceptions by libraries, when carrying out their function, it means that they are in a position to circumvent those measures to exercise the measures provided for under law.

#### 203. Ecuador

We would like to give an example which may help to clarify the question which has just been raised, that is, what sense or meaning is there behind having a technological measures of protection allowing for circumvention by archives of libraries if these have been legally acquired or not. An archive or library may have acquired a digital collection of music, for instance, and they need to have a preservation or replacement copy. In that case, they will need to circumvent the technological measure for making the copy so that the exception can be used of the preservation or replacement copy. So that is really where the exception would come into play.

#### 204. Egypt

The danger of technological protection measures (TPMs) is in certain cases when they apply to works that have fallen in the public domain or others which are subject to exceptions in the field of education and scientific research. Here we should restrict or, rather, we should ban TPMs if it is a matter of a work that is not protected. If the work is subject to TPMs, though it has fallen in the public domain, then in fact it does not need the TPMs.

### **Comments on Contracts**

#### 205. Ecuador

As another example that may clarify this issue, it is a license which prevents from having a preservation copy. In that case the contract needs to be abided by the treaty. We feel that it is important for this issue to be duly taken into account and considered.

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