



ASSOCIATION OF
RESEARCH LIBRARIES



COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON THE DRAFT COMPILATION ON LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES

The Library Copyright Alliance (LCA) appreciates the leadership demonstrated by the United States in advancing in the World Intellectual Property Organization discussion of the issue of exceptions and limitations for libraries and archives. In particular, LCA is grateful for the document presented in SCCR 23 by the United States on Objectives and Principles for Exceptions and Limitations for Libraries and Archives, SCCR/23/4. Below, LCA provides comments on the statements attributed to the United States in the “Draft Compilation on Limitations and Exceptions for Libraries and Archives.”

Fair Practice

In paragraphs 34, 37, and 51, the United States raises questions about the use of the term “fair practice” in the IFLA draft. The United States concedes that this term does appear in the Berne Convention, but stresses that the use is limited to the exceptions to the reproduction right in Article 10.

Although the Berne Convention’s use of the term is limited, this use provides a solid foundation for further employment in other instruments. In Article 10(1), the phrase “compatible with fair practice” appears in conjunction with phrase “their extent does not exceed that justified by the purpose” of quotation. Likewise, in Article 10(2), the phrase “compatible with fair practice” appears in conjunction with phrase “to the extent justified by the purpose” of illustration for teaching. In other words, compatibility with fair practice turns on the purpose and character of the use, and whether the amount used is justified by the purpose of the use. This, of course, is very similar to the first and third factors of the fair use doctrine in the U.S. Copyright Act, 17 U.S.C. § 107.¹

LCA is a strong proponent of fair use, and has long supported the inclusion of fair use-like provisions in international agreements to which the United States is a party.

¹ The explanation of “fair practice” in the WIPO Guide to the Berne Convention underscores its similarity to fair use: “It implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales, circulation, etc.” World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)(Geneva: World Intellectual Property Organization, 1978), 58–59.

However, the term “fair use” is identified with U.S. copyright law, while the term “fair dealing” is associated with Commonwealth legal systems. The association of these terms with specific national systems inhibits their adoption in international instruments. The term “fair practice,” in contrast, is not associated with a particular legal framework, other than the Berne Convention. But, as demonstrated above, it is completely consistent with the principles of fair use. Thus, the United States should encourage the broader use of the term “fair practice” in WIPO and elsewhere.

Library Lending

The U.S. draft Principles and Objectives addresses library lending only by implication through references to “access to information.” The encouragement of library lending should be elevated to a principle accomplished by the adoption of exceptions such as the first sale doctrine that allow the lending of lawfully purchased copies.

In paragraph 93, the United States should clearly express opposition to the adoption of a “public lending right” by countries that have not yet enacted one. A public lending right is a tax on libraries, and thus harms the public interest.

In this context, LCA strongly urges the United States government to undertake a thorough review of the erosion of the first sale doctrine through cases such as *Vernor v. Autodesk*, *Wiley v. Kirtsaeng*, and *Costco v. Omega*.

Orphan Works

The United States is correct in stating in paragraph 127 that the orphan works problem is not exclusively a problem for libraries and archives, and that exceptions for libraries and archives covering preservation and distribution would apply to both orphaned and non-orphaned works. Nonetheless, the orphan works problem is particularly acute in the library and archives setting because these institutions possess large numbers of such works in their collections and desire to make many of them accessible. Moreover, even though library exceptions apply to both orphaned and non-orphaned works, libraries should have enhanced flexibilities with respect to orphan works. Congress recognized this in the Shawn Bentley Orphan Works Act, which contained additional protections for nonprofit educational institutions, museums, libraries, archives, and public broadcasting entities. Accordingly, the special interest of libraries and archives in addressing the orphan should be addressed.

Liability of Libraries and Archives

The U.S. draft principles and objectives commendably state “national copyright laws may recognize limitations on the liability of certain types of damages applicable to libraries and their employees....” In this allusion to the limitations on damages in 17 U.S.C. §§ 504(c)(2) and 1203(c)(5)(B), the word “may” should be strengthened the “can and should.”

Additionally, although we agree that librarians should not necessarily be exempt from all *civil* liability from copyright infringement, it is worth considering whether they should be exempt from *criminal* liability. Libraries and other nonprofit institutions already are exempt from criminal liability under 17 U.S.C. § 1204(b). Consideration should be given to expanding this exemption to 17 U.S.C. § 506. As we stated in a recent letter to Congress expressing concerns with Title II of the Stop Online Piracy Act (SOPA), in the current environment where libraries are being sued with increasing frequency, “the criminal prosecution of a library for copyright infringement is no longer beyond the realm of possibility.”

Contracts

In paragraph 159, the United States asserts that “the experience in the United States is that our libraries are quite effective in dealing with publishers, in demanding improved arrangements and we would be very hesitant to adopt or to think[] about any type of norm which would limit the capacity of libraries to negotiate the best deal possible for the most materials in their collections.” Unfortunately, in large measure because of the enormous consolidation of the academic journal market, the ability of libraries to negotiate effectively with publishers has decreased while prices have increased significantly. Additionally, more journals are distributed in electronic format under licenses that prohibit reproduction for preservation and inter-library lending purposes. Decisions such as *Vernor v. Autodesk*, which allow publishers to declare unilaterally that they are “licensing” resources and thereby extinguishing first sale rights, exacerbate the situation.

Because of the encroachment of the private law of contracts on the public law of copyright, LCA members sought to include in the Uniform Computer Information Transactions Act (UCITA) a specific provision invalidating license terms inconsistent with the exceptions provided in the Copyright Act. When the publishers refused to agree to such a provision, LCA members worked successfully with other stakeholders to defeat the adoption of UCITA beyond Maryland and Virginia. It should be noted that the EU Software Directive prohibits the enforcement of license terms that limit exceptions provided under the Directive.

A new problem which may be even more significant is a publisher’s refusal altogether to license materials in electronic form to libraries. Penguin, for example, recently announced that it would not license its ebook titles to Overdrive, thus preventing public libraries from Penguin ebook titles. This refusal to license raises very serious public policy question concerning equal access to information in our society.

February 14, 2012