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Core library exceptions checklist

**DOES YOUR COPYRIGHT LAW SUPPORT
LIBRARY ACTIVITIES AND SERVICES?**

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ABOUT EIFL

EIFL (Electronic Information for Libraries) is a not-for-profit organization that works with libraries to enable access to knowledge in developing and transition economy countries in Africa, Asia Pacific, Europe and Latin America. In a highly networked digital world our activities help people access and use information for education, learning, research and sustainable community development. We build capacity, advocate for access to knowledge nationally and internationally, encourage knowledge sharing, and initiate pilot projects for innovative library services through programmes on Licensing, Copyright and Libraries, Open Access and Public Library Innovation.

ABOUT COPYRIGHT AND LIBRARIES (EIFL-IP)

The goal of the Copyright and Libraries programme (EIFL-IP) is to protect and promote the interests of libraries in copyright issues in EIFL partner countries. Our vision is that librarians are advocates for a fair copyright system and leaders in promoting access to knowledge in the digital age. We have established a network of copyright librarians in partner countries, we advocate for national and international copyright law reform, and we develop useful resources on copyright issues.

www.eifl.net

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FEEDBACK

Comments and feedback are always welcome. Please email info@eifl.net.

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Preface

The EIFL Core Library Exceptions Checklist sets out provisions that every copyright law should have to support library activities and services in the twenty first century.

The checklist is a handy way to evaluate your copyright law, identify gaps or see where the law is doing well. It is a starting point for policy advocacy, or to propose amendments if the copyright law in your country is being updated.

The first part of the checklist features library activities and services. The second part deals with cross-cutting issues that affect the scope and efficacy of the exceptions. Each question is accompanied by a short explanatory note and a model provision.

There is also a scorecard to ‘rate my copyright law’, and a poster to promote awareness.

The checklist focuses on core library uses. Other important uses, such as exceptions for teaching purposes or private study can be found in the *EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and their Users* (2016). Another excellent resource is the *WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives* (2015).

We hope that the checklist is a practical tool that will benefit libraries and their users, and will result in improved copyright laws everywhere.

Teresa Hackett
June 2016

Core library exceptions checklist

Library activities & services

COLLECTION DEVELOPMENT

- May a library buy lawfully produced books and other materials from another country for inclusion in its collection?
- May a library lend a physical book/CD/DVD to a library user, or to another library (known as inter-library loan)?
- May a library by law lend an e-book to a library user?

SUPPORT FOR EDUCATION AND RESEARCH

- May a library supply a copy of a work, such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library (known as inter-library document supply)?
- May a library send and receive such copies across borders?
- May a library create databases of collection materials, including e-resources managed by the library, to facilitate text and data mining by researchers?
- May a library provide copies of collection materials for use in virtual learning environments to facilitate distance learning?
- May a library digitize orphan works in its collection, and make them available online?

PRESERVATION AND REPLACEMENT

- May a library make copies of works in its collection in any format for preservation purposes or back-up, and provide access to these copies?
- May a library procure from another library the missing parts of any works in its collection?
- May a library web archive, i.e. preserve publicly accessible websites?

PERSONS WITH DISABILITIES

- May a library make an accessible format copy of a work and provide it to a person with a disability? Examples of accessible formats include Braille, large print, DAISY digital format.
- May a library send and receive accessible format copies to and from other countries?

Cross-cutting issues

FORMAT NEUTRAL

- May a library make copies in any format, including digital copies?

SAFEGUARDING EXCEPTIONS IN THE DIGITAL ENVIRONMENT

- Are the exceptions granted to libraries in copyright law safeguarded from override by licence terms?
- Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?

LIMITATION ON LIABILITY

- Does the law protect librarians from being sued in the course of their duties?

A FLEXIBLE EXCEPTION

- In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?

See also ‘Rate my copyright law’, a scorecard to measure how your copyright law supports library activities and services.

Library activities & services

COLLECTION DEVELOPMENT

May a library buy lawfully produced books and other materials from another country for inclusion in its collection?

A library may wish to acquire a work from another country for a variety of reasons, e.g. it is not available for sale on the local market, or not in a reasonable time or at a reasonable price; the format of the foreign edition is better suited to library use, such as a hard copy version; the content of the imported edition differs from the locally available edition. In some cases, researchers may even require all the editions.

Libraries and archives shall be permitted to buy, import, or otherwise acquire copyright works that are legally available in any country.

(EIFL Draft Law Art 12(8))

May a library lend a physical book/CD/DVD to a library user, or to another library (known as inter-library loan)?

A basic function of a library is to lend books and other materials to users.

The right of distribution is usually exhausted after the first sale or other transfer of ownership. The principle of exhaustion (also known as the first sale doctrine) is the mechanism that enables a library to legally lend physical materials without having to ask permission from the rightsholder.

A library or archive may lend copyright works incorporated in tangible media to a user, or to another library.

(EIFL Draft Law Art 12(9))

For countries that have adopted a Public Lending Right (PLR), it is essential that a legal mechanism, such as an exception or a compulsory licensing scheme, is in place to permit lending by libraries.

May a library by law lend an e-book to a library user?

Since the right of distribution applies to tangible objects only, the legal situation regarding electronic materials is less straightforward than for print material.

First, just because an e-book is available on the market, doesn't mean that the publisher will sell the title to a library. Publishers can, and some do, refuse to license e-books to libraries. Second, use of the e-book, including for lending, is subject to the terms & conditions of the licence between the library and each publisher.

Library groups around the world are advocating for a statutory right to buy and lend e-books without the authorization of the rightsholder, and for fair terms & conditions in licences.

A library or archive may provide temporary access to copyright works in digital or other intangible media, to which it has lawful access, to a user, or to another library, for consumptive use.

(EIFL Draft Law Art 12(10))

SUPPORT FOR EDUCATION AND RESEARCH

May a library supply a copy of a work, such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library (known as inter-library document supply)?

May a library send and receive such copies across borders?

The ability of a librarian to copy material for a library patron is fundamental to support on-the-spot and online library reference services, education, research, and private study.

A library may supply to another library a copy of a work whether by post, fax or email. A copy may be supplied by the receiving library to a user of such library for their research and or private use.

(EIFL Draft Law Art 11A)

When specific resources are not available in the user's home institution, they are requested from another library. The system of non-commercial resource-sharing between libraries, such as academic libraries or public libraries in collaboration with educational institutions, is known as inter-library document supply. International requests are made to libraries in other countries when the requested material is not available locally.

May a library create databases of collection materials, including e-resources managed by the library, to facilitate text and data mining by researchers?

Text and data mining (TDM) is described as the new frontier for science and research. TDM works by copying multiple datasets e.g. raw research data, published research results or digitized analogue material, then extracting the data, and re-combining it to identify patterns. Text and data mining is already generating new discoveries in areas such as biological science and particle physics, and is increasingly used in social sciences and the digital humanities.

(1) A person who has lawful access to a work does not infringe copyright in the work by making copies of the work, or by making derivative works of that work, provided that the copies or derivative works are made in order that the person may carry out a computational analysis of anything recorded in the work.

(2) The person in paragraph (1) may make available quotations from the work.

(EIFL Draft Law Art 17B)

May a library provide copies of collection materials for use in virtual learning environments to facilitate distance learning?

A Virtual Learning Environment (VLE) is a secure network used by institutions to structure, manage and deliver learning activities and content. Resources managed by the library are often used in VLEs. E-learning offers new opportunities for distance education, self-learning and part-time study. It supports the UN 2030 Agenda for Sustainable Development and has made further education a reality for tens of thousands in Africa. In 2015, Poland adopted a new copyright exception to enable use of material in VLEs (Art. 27.2).

A library or archive may transmit material from its collection to be used in virtual learning environments accessible only by the persons giving and receiving instruction, to the extent justified by the purpose.

(Modelled on EIFL Draft Law Art 11)

May a library digitize orphan works in its collection, and make them available online?

Orphan works are in-copyright works where the copyright holder cannot be identified or found to obtain permission to use the work. The orphan works problem is huge – the British Library estimates 40% of works in their collections are orphan. As a result, material of high social, cultural and educational value remains locked up in libraries and cannot be used. Some countries have legislated in an attempt to solve the orphan works problem.

Libraries and archives may make copies of works, and make them available, where the permission of the author or other owner of copyright cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.

(EIFL Draft Law Art 12(6))

Read more: *The European Orphan Works Directive: An EIFL Guide* (2013).

PRESERVATION AND REPLACEMENT

May a library make copies of works in its collection in any format for preservation purposes or back-up, and provide access to these copies?

May a library procure from another library the missing parts of any works in its collection?

May a library web archive, i.e. preserve publicly accessible websites?

Long-term preservation is a core library responsibility, especially for libraries with a mandate to maintain collections of national heritage or special importance. Preservation involves works in all formats, such as print and born-digital, and works of all types for example, literary and audio-visual materials.

There are three types of preservation that require the making of copies: preservation or replacement of damaged, deteriorating, or lost copies; 'preemptive' preservation of materials before they deteriorate; and preservation of transient materials such as websites.

Web archiving is the process of copying certain websites, such as those with a particular country domain, and preserving the websites in an archival format for subsequent access and use by researchers, sometimes long after the original site has disappeared. For this reason, web archiving has become a very important preservation activity.

A library or archive may make copies of works in its collection for the purpose of back-up and preservation.

A library or archive may make copies of publicly accessible websites for the purposes of preservation.

If a work or a copy of a work in an institution's collection is incomplete, such an institution may make or procure a copy of the missing parts from another institution.

Such institutions may make copies of works that are or should be available in their collections in their chosen format, if they cannot reasonably be acquired in such format through general trade or from the publisher.

(EIFL Draft Law Arts 12(2–4))

PERSONS WITH DISABILITIES

May a library make an accessible format copy of a work and provide it to a person with a disability?

Examples of accessible formats include Braille, large print, DAISY digital format.

May a library send and receive accessible format copies to and from other countries?

Access to knowledge is a human right. Yet less than 5% of published books are available in formats accessible to people who are blind or otherwise print disabled. The Marrakesh Treaty, adopted by WIPO member states in 2013, aims to solve the global problem of the 'book famine' for persons with print disabilities. The EIFL provision that implements the Marrakesh Treaty also includes persons with other disabilities, such as deaf people. Of course, any country may adopt the provision in its national law regardless of whether it has ratified the Marrakesh Treaty.

Read more: *The Marrakesh Treaty: An EIFL Guide for Libraries* (2015).

An accessible format copy of a work may be created and distributed, including by import or export, for persons who are blind, visually impaired or otherwise disabled, without authorization of its author or copyright owner.

(EIFL Draft Law Art 17)

Cross-cutting issues

FORMAT NEUTRAL

May a library make copies in any format, including digital copies?

Copyright law must enable the use of digital technologies by libraries. Exceptions must keep up-to-date with technology, and permit the making of copies in any format. Here are some ways to check the law:

- Silence implies consent. If the law is silent on format, it implies that copies may be made in any format.
- Search for the word ‘reprographic’ in the law. ‘Reprographic’ is generally understood to mean photocopying. If it appears in a definition of ‘reproduction’ (if there is one), or if it appears in the wording of the library exception itself, then it should be deleted.

A library may make a copy in accordance with Sections [x] in any format.

(Sample provision that asserts format neutrality).

SAFEGUARDING EXCEPTIONS IN THE DIGITAL ENVIRONMENT

Are the exceptions granted to libraries in copyright law safeguarded from override by licence terms?

Access to electronic content, such as databases and e-books, is regulated by a licence agreement between the institution and the publisher. In other words, contract law rather than copyright law applies. Licences for commercial e-resources can take away exceptions in national copyright law given to libraries by the legislator – a British Library analysis of 100 contracts found that 90% had terms that were more restrictive than exceptions in UK copyright law. Public policy goals, enshrined in copyright exceptions, must apply equally to digital content for the benefit of education, research and science.

Any contractual provisions contrary to Sections [x] through to [x] shall be null and void.

(EIFL Draft Law Art 21(4))

Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?

Technological measures, or digital locks, used by copyright owners to control uses or to prevent infringing uses, can prevent lawful uses of material. Libraries must be allowed to bypass such copy protection systems in order to access public domain material and to take advantage of exceptions in copyright law, for example, for the purposes of preservation or to serve persons with disabilities.

Any beneficiary of an exception or limitation under Sections [x] through to [x] shall have the means of benefiting from that exception or limitation where technological protection measures have been applied to a work, including where necessary the right to circumvent the technological protection measure so as to render the work accessible.

(EIFL Draft Law Art 22)

LIMITATION ON LIABILITY

Does the law protect librarians from being sued in the course of their duties?

In the digital environment, librarians deal with questions of copyright and licensing everyday. Librarians now need to understand and apply the law as part of their daily work, and they are often the first source of information on copyright for library users. Yet few librarians have the benefit of formal legal training, and most do not have access to specialist legal advice. A limitation on liability empowers librarians, acting in good faith, to fully utilize copyright exceptions, and to help manage risk when undertaking work such as digitization projects.

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

- In the belief, and where there are reasonable grounds for believing, that the work is being used as permitted within the scope of an exception in this Act, or in a way that is not restricted by copyright; or
- 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 licence.

Librarians and archivists shall be exempt from liability for the actions of their users.

(EIFL Draft Law Art 12(12))

A FLEXIBLE EXCEPTION

In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?

The virtue of a flexible exception such as fair use/fair dealing is that the law can enable uses of copyright-protected content that were not foreseen when the law, with whatever specific exceptions for libraries it may contain, was developed. It helps to keep the law up-to-date with technology, and with new ways of learning and sharing.

A flexible provision can assist libraries in their support for education, for example, creating access to electronic reserves (course-related material for enrolled students).

More than 40 countries around the world have a general, flexible exception in their copyright law. National laws should make clear that where particular categories of uses (e.g. by libraries) are concerned, any specific exceptions are supplemented by the general, flexible provision.

In addition to the uses specifically authorized by section 8 through 17B, fair dealing with a copyright work, including such use by reproduction in copies or phonorecords for purposes such as research, private study, scholarship, teaching, criticism, comment, parody, review, or the reporting of news or current events, does not infringe copyright in the work.

(2) For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including

(a) the nature of the work in question;

(b) the amount and substantiality of that part of the work affected by the act in relation to the whole of the work;

(c) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; and

(d) the effect of the act upon the potential market for, or the commercial value of, the work.

(EIFL Draft Law Art 17C)

The *EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and their Users* (2016) is available online at www.eifl.net/resources.

A NOTE ON THE THREE-STEP TEST

The three-step test that appears in treaties such as the Berne Convention (Article 9(2)) is a drafting tool or guideline to assist governments in determining the way in which particular exceptions and limitations are framed in national law. Since the test is not addressed at users of exceptions, and once drafted, the exceptions are deemed to comply with the test, it should not be included in national law.

EIFL works in collaboration with libraries
in 55 developing and transition countries

AFRICA Angola, Botswana, Burkina Faso, Congo, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Namibia, Senegal, South Africa, Tanzania, Uganda, Zambia, Zimbabwe **ASIA PACIFIC** Cambodia, China, Fiji, Kazakhstan, Kyrgyzstan, Laos, Maldives, Mongolia, Myanmar, Nepal, Thailand, Uzbekistan **LATIN AMERICA** Chile, Colombia **MIDDLE EAST AND NORTH AFRICA** Algeria, Palestine, Sudan, Syria **EUROPE** Armenia, Azerbaijan, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kosovo, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Serbia, Slovakia, Slovenia, Ukraine



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