

**CIVIL SOCIETY PROPOSED TREATY
ON
COPYRIGHT EXCEPTIONS AND LIMITATION FOR EDUCATIONAL AND
RESEARCH ACTIVITIES
(TERA)**

**EDUCATION INTERNATIONAL; ELECTRONIC INFORMATION FOR LIBRARIES;
COMMUNIA; GLOBAL EXPERT NETWORK ON COPYRIGHT USER RIGHTS;
KNOWLEDGE ECOLOGY INTERNATIONAL; MEDICINE OPEN ACCESS
INITIATIVE INTERNATIONAL
FUNDACIÓN KARMISMA COLOMBIA; CENTRE FOR INTERNET AND SOCIETY
INDIA; CORPORACION INNOVARTE CHILE; LAPIN BRAZIL; CENTRUM
CYFROWE FOUNDATION POLAND; INTELLECTUAL PROPERTY INSTITUTE
SLOVENIA; CREATIVE COMMONS USA; NATIONAL LAW UNIVERSITY INDIA;
UNIVERSITIES ALLIED FOR ESSENTIAL MEDICINES USA**

Endorse at <https://form.jotform.com/pijip/endorse-TERA>

Preamble¹

The Contracting Parties,

Affirming that adopting policies to promote production of and access to affordable and quality education and research materials - for education institutions, teachers, students, education support personnel and researchers -- is a core duty of Members States and of the World Intellectual Property Organization as a Specialized United Nations Agency.

Acknowledging duties to promote production of and access to affordable and quality education and research materials that flow from:

- United Nations' Sustainable Development Goals, particularly Goal 4 Quality Education, Goal 5 Gender Equality, Goal 9 Industry, Innovation, and Infrastructure and Goal 10 Reduced Inequalities;

- the right to education directed to the full development of the human personality to enable all persons to participate effectively in a free society;

- the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;

¹ Based on SCCR/22/12 (African Group Proposal for a Draft WIPO Treaty on Exceptions and Limitations for the Persons With Disabilities, Educational and Research Institutions, Libraries and Archives)

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

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

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

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

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

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

Reaffirming obligations under the existing international treaties on the protection of copyright and the importance of the exceptions for quotations and illustration for teaching in Articles 10(1) and 10(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international agreements.

Hereby agree as follows:

I. General Provisions

Article 1 Relationship with Other International Instruments

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

- a) the Berne Convention for the Protection of Literary and Artistic Works, 1886 as amended (Berne Convention);
- b) the WIPO Copyright Treaty, 1996 (WCT);

- c) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention);
- d) the WIPO Performances and Phonograms Treaty, 1996 (WPPT);
- e) the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement);
- f) the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty); and
- g) the WIPO Beijing Treaty on Audiovisual Performances, 2012 (Beijing Treaty).

2. Contracting Parties agree that, to the extent that this Treaty applies in part to literary and artistic works as defined in the Berne Convention, this Treaty is a special agreement within the meaning of Articles 10(2) and 20 of that Convention (as regards Contracting Parties that are Member States of the Union established by that Convention).

3. Contracting Parties agree that, to the extent that this Treaty applies in part to performances, phonograms, and broadcasts as defined in the Rome Convention, this Treaty is a special agreement within the meaning of Article 22 of that Convention (as regards Contracting Parties that are signatories of that Convention).

4. Contracting Parties agree that treaties entered into subsequent to this Treaty do not limit this Treaty's provisions unless such treaties expressly limit this Treaty's applicability.

Article 2 **Beneficiaries and Scope of Protection**

Under this Treaty:

- 1. Contracting Parties shall accord the protection provided under this Treaty to any natural or legal person engaged in an educational or research activity within the territory of any Contracting Party.
- 2. The provisions in this Treaty shall apply to educational and research uses of published and unpublished works, in any format.

II. National Law Limitations and Exceptions Regarding Educational and Research Uses

Article 3 **Adoption of National Exceptions**

- 1. Contracting Parties shall take all appropriate measures to respect, protect and fulfill the right to receive education and conduct research through appropriate exceptions and limitations in their

national laws, consistent with their international obligations, maintaining the balance between the rights of authors and the larger public interest, as specified in Article 5.

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

Article 4² **Guiding Principles**

In fulfilling their rights and obligations under this Treaty, Contracting Parties shall recognize that:

- a) Both affirmative protections for authors and exceptions and limitations, including those for educational and research activities, are vital to achieving the copyright system's goals of encouraging creativity, innovation, and learning.
- b) Exceptions and limitations for education and research support the core functions of educational institutions at all levels, by facilitating access to and dissemination of knowledge for teaching and learning.
- c) Exceptions and limitations for education and research also further societal goals by helping individuals to achieve their potential and to participate meaningfully in public life.
- d) Exceptions and limitations for education and research should take into account the valuable contributions of authors and publishers in the creation and dissemination of works that benefit the educational community and the public overall.
- e) Because digital and mobile technologies enable educational and research institutions to obtain and provide access to online content, limitations and exceptions should be appropriately extended so that educational and research institutions can properly function in the digital environment as centres of creativity, research, learning and collaboration.

² Based on SCCR/27/8 ("Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions" submitted by the United States).

Article 5 **Permitted Uses**

1. It shall be permissible to use a work for educational or research purposes to the extent justified by the purpose and provided such utilization is compatible with fair practice.³

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

- a) Uses in the course of teaching activities, such as:
 - i. making private copies, including in preparation of a course of instruction;⁴
 - ii. performing or otherwise communicating works by way of illustration or for comment, criticism, or review in the course of instruction, including in online education;⁵
 - iii. making and distributing multiple copies of works for use in a course of instruction;⁶ and
 - iv. making and administering examinations, including the drafting of questions and communicating the questions to students;

- b) Uses in the course of learning activities, such as:
 - i. making private copies for purposes of study;⁷
 - ii. including images, short works, and excerpts of longer works in assignments and in responses to examinations;
 - iii. translating or otherwise adapting works for use in assignments and examinations;⁸ and
 - iv. performing or otherwise communicating works in an educational context, including by wire or wireless means;⁹

- c) Uses in the course of creating educational materials, such as:
 - i. using works by way of illustration or for comment, criticism, or review in publications, broadcasts, audiovisual works, or sound recordings;
 - ii. including images, short works and excerpts of longer works in anthologies and other compilations;¹⁰
 - iii. translating works when they are not available in languages required by users;¹¹

³ The WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) explains that the concept of fair practice “implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales and circulation, etc.”

⁴ See SCCR/33/6 (Seng Study).

⁵ See Proposal from Brazil, SCCR/26/4 Prov. and SCCR/33/6.

⁶ See SCCR/33/6.

⁷ See SCCR/33/6.

⁸ See SCCR/33/Chart on Libraries Topic 11 and Proposal from African Group, SCCR/26/4 Prov.

⁹ See Proposal from Brazil, SCCR/26/4 Prov. and SCCR/33/6.

¹⁰ See Proposal from African Group, SCCR/26/4 Prov. and SCCR/33/6.

¹¹ See SCCR/33/Chart on Libraries Topic 11 and Proposal from African Group, SCCR/26/4 Prov.

- iv. adapting, altering or arranging works for use in a course of instruction;
 - v. reproducing and making available works for which the author or other rightholder cannot be identified or located after reasonable inquiry;¹²
 - vi. making and providing accessible format copies of works to teachers, students, or researchers with disabilities, including by import and export;¹³
 - vii. importing lawfully made copies of works;¹⁴
 - viii. Internet access and hosting services;¹⁵ and
 - ix. archiving course materials for subsequent teacher or learner uses.
- d) Uses in the course of research activities, such as:
- i. making and modifying private copies for research purposes;¹⁶
 - ii. making quotations of a work for the purpose of illustration or for comment, criticism or review;¹⁷ and
 - iii. using a work for computational or other uses that do not themselves express or communicate the work to the public, including indexing and text and data-mining.

Article 6

Cross – Border Uses¹⁸

Limitations and exceptions adopted pursuant to Articles 3 and 5 shall permit cross-border uses.

Contracting Parties shall provide that if an educational or research material is made under a limitation or exception or pursuant to operation of law, that material may be distributed or made available in another Contracting Party.¹⁹

Article 7

Uses Subject to Remuneration

A Contracting Party may authorize uses for educational or research purposes beyond those permitted under Articles 4 and 5 where such uses are subject to adequate remuneration, such as through statutory licenses or limitations of remedies for infringement.

¹² See SCCR/33/Chart on Libraries Topic 7 and SCCR/35/5 Rev.

¹³ See Proposal from African Group, SCCR/26/4 Prov.

¹⁴ See Proposal from African Group, SCCR/26/4 Prov.

¹⁵ See Proposal from African Group, SCCR/26/4 Prov.

¹⁶ See SCCR/33/6.

¹⁷ See SCCR/33/6; Proposal from Brazil, SCCR/26/4 Prov.; Berne Convention art. 10(1).

¹⁸ See SCCR/33/Chart on Libraries Topic 6 and SCCR/35/5 Rev.

¹⁹ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled Art. 5(1).

III. General Obligations on Limitations and Exceptions

Article 8 Respecting Exceptions to Copyright²⁰

Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions provided by the Contracting Parties consistent with Articles 3 or 5 shall be unenforceable.

Article 9 Obligations Concerning Technological Protection Measures²¹

Parties shall ensure that legal remedies against the circumvention of effective technological protection measures do not prohibit or prevent the the educational and research uses enabled by the limitations and exceptions provided by the Contracting Parties consistent with Articles 3 or 5.

Article 10 Limitation on Liability²²

1. Any person using a work for an educational or research purpose shall be protected from claims for damages and from criminal liability when the action is performed in good faith:

a) in the belief, and where there are reasonable grounds for believing, that the work is being used as permitted within the scope of a limitation or exception in the law of a state, in this Treaty, or as protected by human rights or fundamental guarantees recognized in the state or under international law; or

b) where there are reasonable grounds for believing that the work is permitted by license or law.

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

Article 11 Interpretation of Three Step Test²³

When applying Article 9(2) of the Berne Convention, Article 10 of the WIPO Copyright Treaty, Article 16 of the WIPO Performances and Phonograms Treaty, or the Article 13 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, nothing prevents

²⁰ See SCCR/35/5 Rev. and Proposal from the African Group, SCCR/26/4 Prov.

²¹ See SCCR/33/6.

²² See SCCR/33/Chart on Libraries Topic 8 and SCCR/35/5 Rev.

²³ Proposal from Ecuador, Peru and Uruguay, SCCR/26/4 Prov.

Contracting Parties interpreting the three-step test in a manner that respects the legitimate interests, including of third parties, deriving from educational and research needs, and other human rights and fundamental freedoms; and other public interests, such as the need to achieve scientific progress and cultural, educational, social, or economic development, and the protection of competition and secondary markets.

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

Article 12 **Updating Exceptions²⁴**

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

IV. Administrative and Final Clauses

Article 13 **Assembly**

1.
 - a) The Contracting Parties shall have an Assembly.
 - b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
 - c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
2.
 - a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
 - b) The Assembly shall perform the function allocated to it under Article xx in respect of the admission of certain intergovernmental organisations to become party to this Treaty.
 - c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

²⁴ Proposal from Ecuador, Peru and Uruguay, SCCR/26/4 Prov.

3. a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

b) Any Contracting Party that is an intergovernmental organisation may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organisation shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.
4. The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.
5. The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 14 **International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty. These shall include the commissioning of regular studies on the implementation of the Treaty and the organisation of technical assistance to developing and transition nations to enable them to fully implement the provisions of this Treaty.

Article 15 **Eligibility for Becoming Party to the Treaty**

1. Any Member State of WIPO may become party to this Treaty.
2. The Assembly may decide to admit any intergovernmental organisation to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorised, in accordance with its internal procedures, to become party to this Treaty.
3. The European Union, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 16 **Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 17
Signature of the Treaty

This Treaty shall be open for signature until December _____, by any Member State of WIPO and by the European Community.

Article 18
Entry into Force of the Treaty

This Treaty shall enter into force three months after 20 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 19
Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- a) the 20 States referred to in Article 15 from the date on which this Treaty has entered into force;
- b) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- c) the European Union, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 25, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- d) any other intergovernmental organisation that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 20
Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 21
Languages of the Treaty

1. This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

2. An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organisation that may become party to this Treaty, if one of its official languages is involved.

Article 22
Depositary

The Director General of WIPO is the depositary of this Treaty.