

**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;
CREATIVE COMMONS INTERNATIONAL; WIKIMEDIA FOUNDATION
FUNDACIÓN KARISMA COLOMBIA; CENTRE FOR INTERNET AND SOCIETY INDIA;
CORPORACION INNOVARTE CHILE; LAPIN BRAZIL; CENTRUM CYFROWE
FOUNDATION POLAND; INTELLECTUAL PROPERTY INSTITUTE SLOVENIA; CREATIVE
COMMONS USA; UNIVERSITIES ALLIED FOR ESSENTIAL MEDICINES USA; UNIVERSITY
OF CAPE TOWN INTELLECTUAL PROPERTY UNIT; DERECHOS DIGITALES, CHILE;
RIGHT2KNOW CAMPAIGN, SOUTH AFRICA; ELECTRONIC FRONTIER FOUNDATION,
USA; MONA ICT POLICY RESEARCH CENTRE, JAMAICA; CENTRE FOR INNOVATION IN
LEARNING AND TEACHING, UNIVERSITY OF CAPE TOWN; INSTITUTE PROPRIETAS,
BRAZIL; NATIONAL COALITION OF PEOPLE LIVING WITH HIV IN INDIA; IP JUSTICE,
USA; COPYRIGHT LITERACY, UK; CENTER FOR PUBLIC INNOVATION, ROMANIA; UWC
DILIJAN, ARMENIA; OPEN ACCESS INDIA; CLEAR AA SOUTH AFRICA; R STREET
INSTITUTE, USA; CREATIVE COMMONS PERU; HIPERDERECHO, PERU; UNIVERSITIES
NZ – TE PŌKAI TARA; UNIVERSITIES AUSTRALIA; UNIVERSITY OF ARIZONA
LIBRARIES; CREATIVE COMMONS AUSTRALIA; OPEN BOOK PUBLISHERS UK;
KENNISLAND NL; ASSOCIAÇÃO D3 - DEFESA DOS DIREITOS DIGITAIS PT; OPENED
CONSULT NL; CENTRE OF INTERNATIONAL STUDIES ON INTERNET, INNOVATION AND
INTELLECTUAL PROPERTY LAW, UNIVERSIDADE FEDERAL DE MINAS GERAIS, BRAZIL**

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 the 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;

¹ Based on Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (Proposal by the African Group), WIPO Doc. SCCR/22/12 (Jun. 3, 2011).

-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;

-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;

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

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

Affirming that 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:²

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 See WIPO Copyright Treaty [hereinafter WCT], Agreed Statement concerning Art. 10 (footnote 9), Dec. 20, 1996 (stating "it is understood that the provisions of Article 10 permit Contracting Parties to 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. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment").

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 4³ 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

³ Based on Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions (Submitted by the United States of America), WIPO Doc. SCCR/27/8 (May 26, 2014); See WCT, *supra* note 2, Preamble ("recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention").

function in the digital environment as centers of creativity, research, learning and collaboration.

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.⁴

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;⁵
 - ii. performing or communicating works by way of illustration, or for comment, criticism, or review in the course of instruction, including in online education;⁶
 - iii. making and distributing multiple copies or excerpts of works for use in a course of instruction;⁷ and

⁴ WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, WIPO Publication No. 615(E) (1978) at 58-59 (explaining 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”).

⁵ See Study on Copyright Limitations and Exceptions for Educational Activities (Prepared by Professor Daniel Seng), WIPO Doc. SCCR/33/6 *passim* (Nov. 9, 2016).

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

⁷ See Proposal from Brazil in Provisional Working Document Towards an Appropriate International Legal Instrument (in Whatever Form) on Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons with other Disabilities Containing Comments and Textual Suggestions, WIPO Doc. SCCR/26/4 Prov. (Apr. 15, 2013) (stating “the following shall not constitute violation of copyright”: “the reproduction, translation and distribution of excerpts of existing works of any kind, or of entire works in the case of works of visual arts or short compositions, as a pedagogical resource for the use by teachers with the purpose of illustration in the context of educational or research activities, to the extent necessary justified by the non-commercial purpose to be achieved, provided that the source, including the author’s name is indicated, unless this turns out to be impossible”; and “the quotation in books, newspapers, magazines or in any other medium of excerpts of a work for the purposes of study, criticism or debate, to the extent justified by the purpose and in accordance with fair practice, provided that the source, including the author’s name, is indicated, unless this turns out to be impossible”); Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention], Art. 10(1), Sept. 9, 1886, as revised Jul. 24, 1971 (“it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose...”) and Art. 10(2) (permitting “the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice”). The United States expressly allows “multiple copies” for various educational purposes. See U.S. Copyright Act of 1976, 17 U.S.C. (consolidated version of Dec. 2011), §107 (“the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [§§106 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;⁸
 - 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;⁹ and
 - iv. performing or otherwise communicating works in an educational context, including by wire or wireless means;¹⁰

106A], for purposes such as criticism, comment, news reporting, teaching (including *multiple copies* for classroom use), scholarship, or research, is not an infringement of copyright”) (emphasis added). Similarly, some countries explicitly permit “multiple copies” for education-related purposes under fair use, and have in their provisions almost identical language as §107 of the U.S. Copyright Act. See, e.g., Copyright Law of the Republic of Liberia, §9.8(a) (“...the fair use of a copyright work, including such use by reproduction in copies or sound recordings or by any other means specified by [sections 9.6 and 9.7], for purposes such as parody, satire, criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright”). See also Sri Lanka, Intellectual Property Act (No. 36 of 2003), §11(1) (“...the fair use of a work, including such use by reproduction in copies or by any other means specified by [subsection (1) of section 9], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, shall not be an infringement of copyright”). Some countries use the term “reprographic copies” in their provisions concerning copyright exceptions for certain types of works and certain educational purposes, and define “reprographic process” to involve “the use of an appliance for making multiple copies.” See Antigua and Barbuda, Copyright Act 2003, §2(1) (“‘reprographic process’ means a process for making facsimile copies; or involving the use of an appliance for making multiple copies, and, in relation to a work held in electronic form, includes any copying by electronic means, but does not include the making of a film or sound recording”), §59(1) (“reprographic copies of passages from published literary, dramatic or musical works may be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or in the typographical arrangement”); accord Barbados, Copyright Act 1998 (Ch. 300)(as revised up to 2006), §§2(1), 58(1); Belize, Copyright Act (Ch. 252, Revised Edition 2000), §§3(1), 64(1); Brunei Darussalam, Emergency (Copyright) Order 1999, §§2(1), 40(1); Ireland, Copyright and Related Rights Act 2000 (No. 28 of 2000), §§2(1), 57(1); St. Vincent and the Grenadines, Copyright Act 2003 (Act No. 21 of 2003), §§2(1), 60(1); SCCR/33/6, *supra* note 5, *passim*; SCCR/35/5 Rev., *supra* note 6, *passim*.

⁸ See SCCR/33/6, *supra* note 5, *passim* (finding “332 provisions from 189 member states relate to private and personal use” and concluding “the significant number of provisions that relate to private and personal use confirms their relevance as they sanction the self-edification and personal instruction perspective of education”).

⁹ Cf. Chair’s Informal Chart on Limitations and Exceptions for Libraries and Archives, Topic 11, WIPO Doc. SCCR/33/Chart on Libraries and Archives (Nov. 24, 2016); Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (permitting unauthorized “uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes...for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible”) (permitting “educational institution[s] or research organization[s] domiciled in the territory of a Contracting Party” to “for purposes of teaching, personal study or research” to “make a translation of a work into any language and publish the translation in printed or analogous forms of reproduction; and reproduce and publish the translated work”).

¹⁰ See Proposal from Brazil in SCCR/26/4 Prov., *supra* note 6 (exempting from copyright infringement “the performance, recitation and exhibition of a work, as applicable, for teaching purposes in educational institutions in the context of educational or research activities, to the extent justified by the non-commercial purpose to be achieved, provided that the source, including the author’s name is indicated, unless this turns out to be impossible”); see also Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (permitting “without the authorization of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to persons with disabilities by any means, including by non-commercial lending or electronic communication by wire or wireless means...,” subject to certain conditions); SCCR/35/5 Rev., *supra* note 6, *passim*; SCCR/33/6, *supra* note 5, *passim*; Beijing Treaty, *supra* note 6, Preamble (“recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information”); WIPO Performances and Phonograms Treaty, Preamble, Dec. 20, 1996 (“recognizing the

- 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;¹¹
 - iii. translating works when they are not available in languages required by users;¹²
 - 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;¹³
 - vi. making and providing accessible format copies of works to teachers, students, or researchers with disabilities, including by import and export;¹⁴
 - vii. importing lawfully made copies of works;¹⁵
 - viii. Internet access and hosting services;¹⁶ and

need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information”).

¹¹ See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (providing “any educational institution or research organization domiciled in the territory of a Contracting Party” the right to “include excerpts of copyrighted material in educational resources created and distributed for educational purposes”); SCCR/33/6, *supra* note 5, *passim*.

¹² Cf. Topic 11 in SCCR/33/Chart on Libraries and Archives, *supra* note 9; Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (permitting unauthorized “uses of a work or a subject of related rights in an educational institution or research organization, or by teachers or students for research purposes...for the sole purpose of translation, testing, study or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible”) (permitting “educational institution[s] or research organization[s] domiciled in the territory of a Contracting Party” to “for purposes of teaching, personal study or research” to “make a translation of a work into any language and publish the translation in printed or analogous forms of reproduction; and reproduce and publish the translated work”).

¹³ See Topic 7 in SCCR/33/Chart on Libraries and Archives, *supra* note 9 (stating “the use of orphan works should be assured for the benefit of libraries and archives to achieve their public service mission under certain conditions in order not to deprive users of access to valuable information”; suggesting “provisions to adequately compensate rightholders, either directly or through collective management, once they are identified should be included” and “these limitations and exceptions should not entail the liability of activities undertaken in good faith after the reasonable diligent search prior to the use of the work”); SCCR/33/6, *supra* note 5, *passim*; SCCR/35/5 Rev., *supra* note 6, *passim*.

¹⁴ See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (stating “consistent with the Berne Appendix, an educational institution, library, research organization or student that is the owner of a lawfully acquired copy of a work or subject of related rights who is domiciled in the territory of a Contracting Party, shall be entitled, without the authority of the owner(s) of copyright or related rights, to sell, import, export or otherwise dispose of that copy or subject of related rights”) (providing educational institutions or research organizations the right to “make the work available in an accessible format to persons with a disability that are members of the institution or organization”); see also Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled [hereinafter Marrakesh VIP Treaty], Preamble, Jun. 27, 2013 (“mindful of the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities, which limit their freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research”) and Art. 6 (permitting Contracting Parties “to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder”).

¹⁵ See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (stating “consistent with the Berne Appendix, an educational institution, library, research organization or student that is the owner of a lawfully acquired copy of a work or subject of related rights who is domiciled in the territory of a Contracting Party, shall be entitled, without the authority of the owner(s) of copyright or related rights, to sell, import, export or otherwise dispose of that copy or subject of related rights”).

¹⁶ See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (exempting internet service providers from copyright or related rights infringement for “activities [that] are directed to facilitating access to educational materials

- ix. archiving course materials for subsequent teacher or learner uses.
- d) Uses in the course of research activities, such as:
 - i. making, modifying and translating private copies for research purposes;¹⁷
 - ii. making quotations or translating excerpts of a work for the purpose of illustration or for comment, criticism or review;¹⁸ 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.¹⁹

and use of exceptions and limitations in this Treaty...by reason of the provider's transmitting, routing, or providing connections for, educational material through a system or network controlled or operated by or for the internet service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if" certain conditions are met) (exempting internet service providers from liability "for infringement of copyright or related rights, whether directly or indirectly, by reason of the provider's: intermediate and temporary storage of material for the purposes of caching, as long as it does not modify the material or provide it in a manner inconsistent with access conditions set by the [rightholder]; storage at the direction of a user of material that resides on a system or network controlled or operated by or for the internet service provider; referring or linking to an online location containing infringing material or infringing activity, provided that in cases in which the internet service provider has the right and ability to control such activity, this exemption shall apply only if the internet service provider does not receive a financial benefit directly attributable to the infringing activity; caching of electronic documents; and transmitting of a universal resource locator or other electronic pointer that has the effect of instructing a user's browser to load electronic documents from a third party server").

¹⁷ SCCR/33/6, *supra* note 5, *passim*; See Topic 11 in SCCR/33/Chart on Libraries and Archives, *supra* note 9 ("translating works in special circumstances for archiving reasons and to reach indigenous or native languages, or for research purposes, is a need that has been described"); Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6.

¹⁸ SCCR/33/6, *supra* note 5, *passim*; Proposal from Brazil in SCCR/26/4 Prov., *supra* note 6; Berne Convention, *supra* note 6, Art. 10(1).

¹⁹ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Arts. 18.82(1)(b), (2)(b), Mar. 8, 2018 ("limitations in its law that have the effect of precluding monetary relief against Internet Service Providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf" shall include "caching carried out through an automated process"); *accord* United States-Mexico-Canada Agreement, Arts. 20.J.11(1)(b), (2)(b), Sept. 30, 2018; Canada-European Union Comprehensive Economic and Trade Agreement, Arts. 20.11(1), (2)(a)(ii), Oct. 30, 2016 ("each Party shall provide limitations or exceptions in its law regarding the liability of service providers, when acting as intermediaries, for infringements of copyright or related rights that take place on or through communication networks, in relation to the provision or use of their services", including "caching carried out through an automated process, when the service provider" meets certain conditions such as not modifying "the information other than for technical reasons"); Canada, Copyright Modernization Act (S.C. 2012, Ch. 20, An Act to amend the Copyright Act), §31.1(2) ("a person...who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter", subject to certain conditions); New Zealand, Copyright Act 1994 (reprint as at Mar. 1 2017), §92E(1) ("an internet service provider does not infringe copyright in a work by caching material if the Internet service provider" meets certain conditions such as not modifying the material); *see also* Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Amendments adopted on Sept. 12, 2018), Art. 3(1) ("Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions of works or other subject-matter to which research organisations have lawful access and made in order to carry out text and data mining for the purposes of scientific research by such organisations. Member States shall provide for educational establishments and cultural heritage institutions conducting scientific research...in such a way that the access to the results generated by the scientific research cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisations, to also be able to benefit from the exception provided for in this Article"); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Art. 5(1)(a)(b) (providing an exception to the reproduction right in Article 2 to allow "temporary acts of reproduction...which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made, and which have no independent economic significance"); United Kingdom, Copyright, Designs and Patents Act 1988 (Ch. 48, incorporating amendments up to the Digital Economy Act 2017), §29A(1)(a) ("the making of a copy of a work by a

Article 6 **Cross – Border Uses²⁰**

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.²¹

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.

III. General Obligations on Limitations and Exceptions

Article 8 **Respecting Exceptions to Copyright²²**

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.

person who has lawful access to the work does not infringe copyright in the work provided that the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose..."); Estonia, Copyright Act (consolidated text of Feb. 1, 2017), §19(3) (permitting the processing of materials protected by exclusive rights "for the purposes of text and data mining and provided that such use does not have a commercial objective"); France, Code de la Propriété Intellectuelle (consolidated version as of Sept. 7, 2018), §L122-5(10) ("when the work has been disclosed, the author may not prohibit copies or digital reproductions made from a lawful source, for the purpose of text and data mining included or associated with scientific literature for the purpose of public research, excluding any commercial purpose"), §L342-3(5) ("when a database is made available to the public by the rights holder, the latter may not prohibit copies or digital reproductions of the database made by a person who has lawful access to text and data mining included or associated with scientific literature in a research setting, excluding any commercial purpose"); Germany, Act on Copyright and Related Rights (as amended by the Act of Sept. 1, 2017), §60(d) (permitting text and data-mining for scientific research for non-commercial purposes: "in order to enable the automatic analysis of large numbers of works (source material) for scientific research, it shall be permissible to reproduce the source material, including automatically and systematically..."; this exception also covers the use of databases for text and data-mining).

²⁰ See Topic 6 in SCCR/33/Chart on Libraries and Archives, *supra* note 9 (stating "libraries and archives should be able to import, export and exchange works and copies of works across borders, particularly for research and similar purposes, in order to achieve the public service mission through cooperation especially in developing and least developed countries").

²¹ Marrakesh VIP Treaty, *supra* note 14, Arts. 5(1), 9(1) (stating "Contracting Parties shall endeavor to foster the cross-border exchange of accessible format copies...").

²² See SCCR/35/5 Rev., *supra* note 6, *passim*; see also Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (stating "contracts attempting to override the legitimate exercise of the provisions in Articles 2-5 shall be null and void as against the public policy justifying copyright and shall be deemed inconsistent with the goals and objectives of the international copyright system").

Article 9
Obligations Concerning Technological Protection Measures²³

Parties shall ensure that legal remedies against the circumvention of effective technological protection measures do not prohibit or prevent 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 Liability²⁴

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 Test²⁵

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

²³ See SCCR/33/6, *supra* note 5, *passim*; see also Proposal from the African Group in SCCR/26/4 Prov., *supra* note 6 (“notwithstanding the provisions of any international agreement, it shall be lawful for any educational institution, research organization, or student domiciled in the territory of a Contracting Party to circumvent any effective technological protection measures and access the content protected by such technological protection measures for” purposes including “private non-commercial use”; “private study or research”; and “translation, teaching, testing, classroom study or scientific research...”).

²⁴ See Topic 8 in SCCR/33/Chart on Libraries and Archives, *supra* note 9 (stating “librarians should be able to fulfil their public interest mission in a responsible and prudent way without facing legal liability for good faith activities” and suggesting the application of “limitations to liability to good faith activities carried out by libraries and archives except when carried out knowingly or with reasonable grounds to know that they constitute infringement activities”); SCCR/35/5 Rev., *supra* note 6, *passim*.

²⁵ Proposal from Ecuador, Peru and Uruguay in SCCR/26/4 Prov., *supra* note 6.

achieve scientific progress and cultural, educational, social, or economic development, and the protection of competition and secondary markets.²⁶

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 Exceptions²⁷

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 15(2) in respect of the admission of certain intergovernmental organizations 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.

²⁶ See, e.g., Marrakesh VIP Treaty, *supra* note 14, Preamble (“reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments”).

²⁷ Proposal from Ecuador, Peru and Uruguay in SCCR/26/4 Prov., *supra* note 6.

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 organization 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 organization 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 organization 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 organization 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 authorized, 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 organization 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 organization 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.