

## SECTION-BY-SECTION ANALYSIS

### A TREATY ON COPYRIGHT EXCEPTIONS AND LIMITATIONS FOR EDUCATIONAL AND RESEARCH ACTIVITIES (TERA)

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This paper describes the objectives and purposes of each clause of the civil society proposed Treaty on Copyright Exceptions and Limitations for Educational and Research Activities (TERA). The Treaty was adopted at the Global Congress on Intellectual Property and the Public Interest on September 27, 2018. The draft is the result of extensive consultation with numerous Member States and stakeholders in the education and research field, including multiple workshops where the draft text was closely reviewed.<sup>2</sup>

#### Background

TERA was adopted by civil society organizations for consideration by delegates to the World Intellectual Property Organization (“WIPO”) Standing Committee on Copyright and Related Rights (“SCCR”) in its deliberations on the agenda item on limitations and exceptions for education and research.

The SCCR agenda item on education and research is part of a long history of WIPO norm setting promoting the value of copyright exceptions and limitations for education and research purposes.

- The 1971 Paris Act of the Berne Convention contains in Article 10(1) a mandatory exception for quotations. Furthermore, the Paris Act provides that it shall be a matter for legislation in the countries of the Union, and for special agreements between them, to permit the utilization of artistic and literary works by way of illustration for teaching in publications, broadcasts, or sound or visual recordings.
- The Tunis Model Law on Copyright for Developing Countries, released by WIPO in 1976, permitted “the utilization of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching...or the communication for teaching purposes of the work broadcast for use in schools, education, universities and professional training.”

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<sup>2</sup> Consultations on TERA included: Research Workshop on Creation and User Rights in the Digital Economy, Rio de Janeiro, Brazil (April 4, 2017); WIPO Delegate Workshop on Copyright and Access to Education, South Centre, Geneva (May 1, 2017); CopyCamp Research Workshop, Poland (September 29, 2017); Copyright & Education in the Digital Environment: Challenges & Opportunities, WIPO SCCR, Geneva (November 13, 2017); Education Treaty workshop, KEI, Washington DC (February 23, 2018); Education Treaty Workshop, South Centre, Geneva (April 14, 2018); Friends of Education and Research Delegate Workshop, South Centre, Geneva (July 6, 2018); User Rights Network Pre-Congress Workshop - International Copyright Law, American University, Washington DC (September 25, 2018).

- In November 2005, Chile proposed that SCCR undertake work in the area of copyright exceptions and limitations (SCCR/13/5). This work would lead to “agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors.”
- In March 2008, Brazil, Chile, Nicaragua, and Uruguay proposed a work plan for SCCR on exceptions and limitations, including for educational activities (SCCR/16/2). The work plan called for “formal recognition of, and commitment to creating mandatory minimum exceptions and limitations....”
- In June 2011, the African Group proposed a WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (SCCR/22/12).
- In December 2013, the SCCR Secretariat prepared a 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 (SCCR/26/4 Prov.).
- In 2014, the United States proposed Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions (SCCR/27/8).
- In November 2016, Professor Daniel Seng presented to SCCR/33 his Study on Copyright Limitations and Exceptions for Educational Activities (SCCR/33/6). This study updated and consolidated five regional studies on educational activities prepared for WIPO in 2009. The Seng Study referred to the “axiomatic importance of education in any society.” It notes that the UN Universal Declaration of Human Rights asserts that “everyone has the right to education.” It observed that the first modern copyright legislation, the Statute of Anne of 1709, was entitled “An Act for the Encouragement of Learning.” The Seng Study also noted that Article 10(2) of the Berne Convention enables Berne Union members to permit the utilization of works by way of illustration for teaching.” He concluded that his study “shows quite a variegated collection of limitations and exceptions provisions for educational activities.”
- In November 2017, Professor Seng presented to SCCR/35 an Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities (SCCR/35/5 Rev.).

The Treaty on Copyright Exceptions and Limitations for Education and Research Activities (“TERA”) takes the next step in this progression. It incorporates the concepts articulated in these previous SCCR documents into a treaty that would establish minimum standards for exceptions for educational and research purposes, while at the same time affording Contracting Parties significant flexibility in how to implement their obligations.

## **Objectives – Promoting Harmonization of User Rights in the Public Interest**

Despite the permissibility of the current international treaty architecture, and the promotion of educational and research exceptions at WIPO, there remains a great disparity in WIPO member states on the adequacy of exceptions for education and research activities. This disparity inhibits the full exercise of education and research rights and prevents the cross border sharing of educational and research materials.

In too many countries, and especially in developing countries, copyright exceptions have not been updated apply to the full scope of works and activities that are needed for education and research in the digital age.<sup>3</sup> For example, in many countries, restrictions within education or research exceptions on the types of work, user, activity or purpose of the use fail to enable common educational and research activities like streaming a video off the Internet to a class or research group or sharing reading material over a digital network.<sup>4</sup> The lack of digital exceptions locks learners and researchers in many countries in an analog world.<sup>5</sup>

The disparity in exceptions between countries creates barriers to cross-border sharing of educational and research materials. A compilation or reading or research materials that is lawfully produced in one country may not be lawfully consumed in another because of the different exceptions environments. This fact creates a particular barrier for the international dissemination of open educational resources. Open educational resources are created with the intention of allowing free use and adaptation by users, which makes them a perfect way to facilitate harmonization of educational standards while permitting tailoring to local language, culture and context. But open educational resources rely on copyright exceptions for the quotation or other use of copyrighted works within them and thus can face copyright problems when shared between jurisdictions.<sup>6</sup>

### **What is in TERA?**

The 2016 Seng Study identified eight categories of educational limitations and exceptions: private or personal use; quotations; reproduction; anthologies; performances; broadcasts; compulsory licenses for reproduction or translation; educational exceptions relating to technological protection measures. The 2017 updated study further considered restrictions on the liability of educational institutions; the overriding of contractual restrictions on exceptions; and digital copying and dissemination under the Berne Appendix. TERA reflects all these categories.

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<sup>3</sup> See SEAN FLYNN AND MIKE PALMEDO, THE USER RIGHTS DATABASE: MEASURING THE IMPACT OF COPYRIGHT BALANCE (DECEMBER 4, 2017) <http://dx.doi.org/10.2139/ssrn.3082371> (describing developing countries as approximately 30 years behind wealthy countries in the adopting copyright exceptions that are open to digital works and activities).

<sup>4</sup> See TERESA NOBRE, COPYRIGHT AND EDUCATION IN EUROPE: 15 EVERYDAY CASES IN 15 COUNTRIES (April 2017) (mapping disparities in EU exceptions).

<sup>5</sup> Cf. SEAN FLYNN AND MIKE PALMEDO, THE USER RIGHTS DATABASE: MEASURING THE IMPACT OF COPYRIGHT BALANCE (DECEMBER 4, 2017) <http://dx.doi.org/10.2139/ssrn.3082371> (finding that countries with exceptions that are open to more digital uses produce more works of cited scholarship).

<sup>6</sup> See Teresa Nobre, *Educational Resources Development: Mapping Copyright Exceptions and Limitations in Europe - Working Paper* (July 2014).

Significantly, like the Seng Studies, TERA addresses educational and research *activities*, not just educational and research *institutions*. The African Group treaty proposal (SCCR/22/12) and the Provisional Working Document (SCCR/26/4 Prov.) focused on educational and research institutions. An important insight of the Seng Studies is that it “recognizes and acknowledges the private and self-actualization aspect of education and research as an individually-driven and self-education process.” Thus, exceptions must extend beyond institutions to students, researchers and the creators of educational materials.

## **Section-By-Section Analysis**

This part provides an in depth section-by-section analysis of the proposed treaty. The drafters of the treaty made every effort to base its provisions on other provisions of international law, to the studies conducted in SCCR to date, and to the previous documents reflecting country views. The current draft of the treaty contains footnotes that indicate the models that were used in each section. This document provides those footnotes with additional analysis of the intention for each section.

As indicated above, the Treaty is the product of a broad consultation process with education and research organizations and reflects both their views on the intention of the treaty and our counsel as to the legal crafting of the provisions to meet their intents.

**Preamble.** The Preamble is based in part on the preamble contained in the 2011 draft treaty proposed by the African Group.<sup>7</sup> It stresses that education is a human right, and connects this treaty to the United Nations’ Sustainable Development Goals and WIPO’s Development Agenda.

## **I. General Provisions**

**Article 1: Relationship with Other International Instruments.** Article I explains that nothing in this treaty reduces the limitations and exceptions permitted by other international instruments, including the Berne Convention, the WIPO Copyright Treaty (“WCT”), the WIPO Performances and Phonograms Treaty (“WPPT”), and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), among other. For example, the WCT provides that “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.”<sup>8</sup>

**Article 2: Beneficiaries and Scope of Protection.** Paragraph 1 of Article 2 provides each Contracting Party shall accord the protection provided under the treaty to any natural or legal person engaged in an education or research activity within its territory. Thus, the treaty’s scope is not limited to institutions engaged in education and research.

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<sup>7</sup> 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).

<sup>8</sup> WCT, Agreed Statement concerning Art. 10 (footnote 9), Dec. 20, 1996.

Paragraph 2 of Article 2 states that the treaty's provisions apply to published and unpublished works in any format (*e.g.*, both analog and digital).

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

**Article 3: Adoption of National Exceptions.** Paragraph 1 of Article 3 provides that Contracting Parties shall take all appropriate measures to respect, protect, fulfill the right to receive education and conduct research through appropriate exceptions, as specified in greater detail in Article 5.

Paragraph 2 of Article 3 states that Contracting Parties may fulfill their rights in obligations under this Treaty through specific exceptions for educational or research purposes; more general exceptions; or a combination of the two. Paragraph 2 is based on Article 10(3) of the Marrakesh Treaty.

**Article 4: Guiding Principles.** Article 4 sets forth guiding principles for Contracting Parties when fulfilling their rights and obligations under TERA. These include recognizing the valuable contributions of authors and publishers in the creation and dissemination of works that benefit the educational community and the public overall; the necessity of exceptions at all levels of education; and the importance of extending exceptions to the digital environment. These principles are based on Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions, submitted by the United States,<sup>9</sup> as well as the Preamble to the WCT.<sup>10</sup>

**Article 5. Permitted Uses.** Article 5 addresses in detail the uses Contracting Practices must permit. As such, it is the core of the treaty. Paragraph 1 states that it shall be permissible to use a work for educational or research purposes to the extent justified by the purpose, provided that such utilization is compatible with fair practice. This formulation is derived from Article 10(2) of the Berne Convention, which permits “utilization, to the extent justified by the purpose of literary works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”<sup>11</sup>

Paragraph 2 of Article 5 then provides a non-exhaustive list of uses that fall within the scope of paragraph 1. It is understood that these uses are subject to the requirements of Paragraph 1; that is, a use is permitted only to the extent justified by the educational or research purpose, and only provided that the use is compatible with fair practice.

Paragraph 2 identifies four categories of uses: uses in the course of teaching activities; uses in the course of learning activities; use in the course of creating educational materials; and uses in the

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<sup>9</sup> WIPO Doc. SCCR/27/8 (May 26, 2014).

<sup>10</sup> WCT, 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”).

<sup>11</sup> See 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”).

course of research activities. Within each category, TERA further identifies examples of permitted uses.

- Use in the course of teaching activities include uses such as: making private copies in preparation of a course of instruction;<sup>12</sup> performing a work by way of illustration in the course of instruction;<sup>13</sup> and making and distributing multiple copies for use in a course of instruction.<sup>14</sup>

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<sup>12</sup> See Study on Copyright Limitations and Exceptions for Educational Activities (Prepared by Professor Daniel Seng), WIPO Doc. SCCR/33/6 *passim* (Nov. 9, 2016).

<sup>13</sup> 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”; 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”); 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 6, *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”); and Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention], Art. 10(2), Sept. 9, 1886, as revised Jul. 24, 1971 (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”).

<sup>14</sup> SCCR/33/6, *supra* note 6, *passim*; SCCR/35/5 Rev., *supra* note 7, *passim*; SCCR/26/4 Prov. (“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”) The United States expressly allows “multiple copies” for various educational purposes under fair use. 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 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

- Uses in the course of learning activities include uses such as: private copies for purposes of study;<sup>15</sup> including images and quotations in assignments;<sup>16</sup> translating works for use in assignments;<sup>17</sup> and performing a work in an educational context.<sup>18</sup>
- Uses in the course of creating educational materials include uses such as: using works by way of illustration in publications; including short works and excerpts of longer works in anthologies;<sup>19</sup> translating works when they are not available in languages required by

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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).

<sup>15</sup> See SCCR/33/6, *supra* note 6, *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”).

<sup>16</sup> See Berne Convention, Art. 10(1) (“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...”).

<sup>17</sup> 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 7 (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”).

<sup>18</sup> See Proposal from Brazil in SCCR/26/4 Prov., *supra* note 7 (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 7 (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 7 *passim*; SCCR/33/6, *supra* note 6, *passim*; Beijing Treaty, *supra* note 7, 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 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”).

<sup>19</sup> See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 7 (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 6, *passim*.

users;<sup>20</sup> using orphan works;<sup>21</sup> making accessible format copies;<sup>22</sup> importing lawfully made copies;<sup>23</sup> and providing Internet access and hosting services.<sup>24</sup>

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<sup>20</sup> Cf. Topic 11 in SCCR/33/Chart on Libraries and Archives, *supra* note 10; Proposal from the African Group in SCCR/26/4 Prov., *supra* note 7 (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”).

<sup>21</sup> See Topic 7 in SCCR/33/Chart on Libraries and Archives, *supra* note 11 (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 6, *passim*; SCCR/35/5 Rev., *supra* note 7, *passim*.

<sup>22</sup> See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 7 (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”).

<sup>23</sup> See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 7 (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”).

<sup>24</sup> 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 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”).



- Uses in the course of research activities include uses such as: making private copies for research purposes;<sup>25</sup> making quotations of a work for the purpose of illustration or comment;<sup>26</sup> translating works for research purposes;<sup>27</sup> and using a work for text and data-mining.

**Article 6. Cross Border Uses.** Article 6 provides that exceptions adopted pursuant to Articles 3 and 5 shall permit cross-border uses. To accomplish this result, Contracting Parties shall provide that if educational or research material is made under a limitation or exception or otherwise pursuant to operation of law, that material may be distributed or made available in other Contracting Parties. This provision is based on Article 5(1) of the Marrakesh Treaty.<sup>28</sup>

**Article 7: Uses Subject to Remuneration.** Article 7 permits a Contracting Party to authorize uses beyond those permitted under Articles 3 and 5, *e.g.*, uses that exceed fair practice, subject to adequate remuneration.

**Article 8: Respecting Exceptions to Copyright.** Article 8 renders unenforceable contractual provisions that restrict the exercise of exceptions adopted under Article 3 or 5. This is based on a proposal of the African Group.<sup>29</sup>

**Article 9: Obligations Concerning Technological Protection Measures.** Article 9 requires Contracting Parties to ensure that prohibitions on circumvention of technological measures do not prevent the uses provided by exceptions adopted pursuant to Article 3 or 5. This is based on Article 7 of the Marrakesh Treaty.<sup>30</sup>

**Article 10: Limitation on Liability.** Article 10 limits the liability of a person using a work in good faith for educational or research purposes.<sup>31</sup>

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<sup>25</sup> SCCR/33/6, *supra* note 6, *passim*.

<sup>26</sup> SCCR/33/6, *supra* note 6, *passim*; Proposal from Brazil in SCCR/26/4 Prov., *supra* note 7; Berne Convention, *supra* note 7, Art. 10(1).

<sup>27</sup> See Topic 11 in SCCR/33/Chart on Libraries and Archives, *supra* note 11 (“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 7.

<sup>28</sup> Marrakesh VIP Treaty, *supra* note 16, Art. 5(1) (“if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party”) and Art. 9(1) (“Contracting Parties shall endeavor to foster the cross-border exchange of accessible format copies...”).

<sup>29</sup> See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 7 (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”); see also SCCR/33/6, *supra* note 6, *passim*.

<sup>30</sup> Marrakesh VIP Treaty, *supra* note 16, Art. 7. See Proposal from the African Group in SCCR/26/4 Prov., *supra* note 7 (“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...”); see also SCCR/33/6, *supra* note 6, *passim*.

<sup>31</sup> See Topic 8 in SCCR/33/Chart on Libraries and Archives, *supra* note 11 (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”).

**Article 11: Interpretation of Three Step Test.** Article 11 states that nothing prevents a Contracting Party from applying the three step test under the Berne Convention, the WCT, and WPPT in a manner that respects: legitimate interests deriving from educational and research needs; other human rights and fundamental freedoms; and public interests such as the need to achieve scientific progress and cultural, social, and economic development. Furthermore, the legitimate interests of the rightholder under the three step test shall not extend to any use that has no substantial effect upon the intended market for the work. Article 11 is based on a proposal from Ecuador, Peru, and Uruguay.<sup>32</sup>

**Article 12: Updating Exceptions.** Article 12 directs Contracting Parties to extend into the digital environment existing exceptions and limitations which have been considered acceptable under the Berne Convention, particularly pursuant to Articles 10(1) (quotations) and 10(2)(illustration for teaching). Further, Contracting Parties shall devise new exceptions and limitations appropriate to the digital environment to protect educational and research activities. This article is based on a proposal from Ecuador, Peru, and Uruguay.<sup>33</sup>

#### **IV. Administrative and Final Clauses.**

The remaining provisions in the treaty are taken directly from the Marrakesh Treaty.

- Article 13 requires the Contracting Parties to have an Assembly, and describes how the Assembly is to operate.
- Article 14 directs the WIPO International Bureau to perform administrative tasks concerning the treaty.
- Article 15 contains the rules for eligibility for becoming a party to the treaty.
- Article 16 provides that each Contracting Party shall enjoy all the rights and assume all of the obligations under the treaty.
- Article 17 provides a fixed time period for signing the treaty.
- Article 18 states that the treaty shall enter into force after 20 instruments of accession or ratification have been deposited with the WIPO Director General.
- Article 19 establishes the effective date for a state and the European Union to become a party to the treaty.
- Article 20 sets forth the procedure for denunciation of the treaty.
- Article 21 identifies the languages of the treaty as English, Arabic, Chinese, French, Russian, and Spanish.
- Article 22 provides that the WIPO Director General is the depositary of the treaty.

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and archives except when carried out knowingly or with reasonable grounds to know that they constitute infringement activities”); SCCR/35/5 Rev., *supra* note 7, *passim*

<sup>32</sup> Proposal from Ecuador, Peru and Uruguay in SCCR/26/4 Prov., *supra* note 7. *See also* Marrakesh VIP Treaty, *supra* note 16, 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”).

<sup>33</sup> Proposal from Ecuador, Peru and Uruguay in SCCR/26/4 Prov., *supra* note 7.