

# **Copyright Reform and the Library and Patron Use of Non-text or Mixed-Text Grey Literature**

**A Comparative Analysis of Approaches and  
Opportunities for Change**

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# Current Climate

- ▶ Kenneth D. Crews, Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (June 14, 2015, SCCR/30/3)
  - ▶ “Of the 188 member countries, 156 of them have at least one statutory library exception, and most of the countries have multiple statutory provisions addressing a variety of library issues.”
  - ▶ “Of the 188 countries, 32 have no library exception in their domestic copyright statutes.” *Id.* at 6 (approximately 17%; some provisions are very limited)
- ▶ Benjamin Gibert, The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitation in Copyright Growth, Jobs and Prosperity (revised May 2015)
  - ▶ The United States received a top index score of 8.13, indicating the positive correlations between a flexible system of copyright exceptions and “higher rates of growth in value-added output throughout their economy.”

Table 1. The Scope and Flexibility of Exceptions to Exclusive Rights Country Ranking



Rank	Country	SFEER SCORE
1	US	8.13
2	UK	7.19
3	Germany	5.94
4	Sweden	5.94
5	Spain	5.63
6	Netherlands	5.31
7	Japan	5.31
8	France	4.38

## Key findings

Main findings from the econometric analysis:

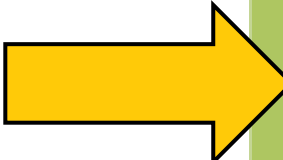
- 1) The growth rate of value-added output is positively correlated with greater flexibility of exceptions to copyright law for the following industries in the country sample:
  - a) The entire market economy as well as the information and communications technology (ICT) goods and services industry group
  - b) More specifically, the publishing, audiovisual and broadcasting industries as well as the information-technology and other information-services industries
- 2) Greater scope and flexibility of exceptions to exclusive rights is also positively correlated with labour compensation for the following industries in the country sample:
  - a) The entire market economy as well as the ICT goods and services industry group
  - b) More specifically, the consumer manufacturing industries
- 3) More evidence-based research is needed to establish the balance between protection of information goods and access to them that will help foster growth of the creative industries in digital economies.

The implications for copyright policy:

- 1) Digital technologies have fundamentally changed the way we experience, engage with and extract value from information goods.
- 2) Copyright reform must be informed by detailed policy analysis – not steered by sectional interests – in order to achieve its function in the digital age.
- 3) Greater scope and flexibility of exceptions to copyright have valuable positive externalities including the promotion of education, independent research, free-speech, user-generated content and text and data mining.
- 4) Policymakers often perceive the positive externalities associated with exceptions to copyright as a trade off against the economic growth stimulated by strong intellectual property protection. Instead, the evidence suggests broad and flexible exceptions to copyright embedded within a strong intellectual property framework may achieve both simultaneously.

Table 8. The Scope and Flexibility of Exceptions to Exclusive Rights – Country Scores<sup>65</sup>

CRITERIA		US	UK	DE	JP	FR	NL	ES	SE
Berne 3-step Test	Exclusive right of owner to authorise reproduction	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	Reproduction permitted without authorisation in special cases	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	Audio or visual recording defined as reproduction	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
Scope of Exceptions and Limitations (for public use)	Criticism, comment and review	1.0	1.0	1.0	1.0	1.0	0.5	1.0	1.0
	Parody	1.0	0.0	1.0	0.0	1.0	0.0	1.0	1.0
	Reporting of current events	0.5	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	Education (classroom use, non-commercial)	1.0	0.5	0.5	1.0	0.0	1.0	0.0	0.5
	Scholarship (research, non-commercial)	1.0	1.0	0.5	0.0	0.0	0.5	0.0	0.5
	Libraries and archives	1.0	1.0	0.0	1.0	0.0	0.5	1.0	1.0
	Parliamentary or judicial proceedings	0.5	1.0	1.0	1.0	0.0	1.0	1.0	1.0
	Incidental inclusion	0.5	1.0	1.0	0.0	0.0	0.0	0.0	0.0
	Temporary copy during transmission	0.5	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Scope of Exceptions and Limitations (for private use)	Private copy	1.0	0.5	0.5	0.5	1.0	1.0	1.0	0.5
	Time-shifting	1.0	0.5	0.0	0.0	0.0	0.0	0.0	0.0
	Format-shifting	1.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Private copying compensation (levy system)	Levies on private copying equipment and blank media	0.0	1.0	0.0	0.0	0.0	0.0	0.0	0.0
	<b>TOTALS</b>	13.0	11.5	9.5	8.5	7.0	8.5	9.0	9.5
<b>TRANSFORMED</b>		8.13	7.19	5.94	5.31	4.38	5.31	5.63	5.94



# Research Methodology

## ▶ Sample of Copyright Laws

- ▶ Attendees of GL-12 through GL-16
- ▶ Added: South Africa and the United Kingdom

## ▶ Data Collection

- ▶ 2015 Crews Report, WIPO Lex, government websites

## ▶ Limitations

- ▶ No copyright law
- ▶ Text not available in English or poorly translated
- ▶ Peculiar phrasing and assumptions of meaning

# Discussion and Analysis

- ▶ Categories of use rights
- ▶ Word cloud of common terms
- ▶ Digitization and reproduction of works
- ▶ Digitization of non-text works: reproduction and ILL
- ▶ Other memory institutions
- ▶ Reproduction limited to certain purposes
- ▶ Commercial availability

# Application of Select SCCR Criteria and IFLA Proposal to Sample

Country	Library Lending	Reproduction	Preservation	Cross-Border	Contract Override	TPM Override
Algeria	X	X	X	?		
Australia	X	X	X	X		
Cameroon	X	X				
Canada	X	X	X	X		
Czech Republic	X		X			
Greece	X	X	X	X		
Iceland	X	X	X	X		
India	X	X	X	X		
Japan	X	X	X	X		
Norway	X	X	X			
Poland	X	X	X			
Russia	X	X	X	X		
Slovakia	X	X	X			
Slovenia	X	X	X			
South Africa	X	X	X	X	X	X
Switzerland	X	X	X			
U.K.	X	X	X	X	X	
U.S.	X	X	X	X		

# Summary of Results

- ▶ Most have ILL, preservation, or reproduction; over half have Cross-Border (or no restriction)
- ▶ Memory institutions
- ▶ Digitization rights often limited to premises
- ▶ Application to non-text or mixed works
- ▶ No library reproduction provision
  - ▶ Cameroon (“official archives” only)
- ▶ Contractual override provision
  - ▶ United Kingdom: ILL, replacement, and copying for patrons
  - ▶ South Africa (pending per South Africa Copyright Amendment Bill, No. 646 (July 27, 2015)): very broad; any lawful use
  - ▶ Technical Protection Measures override provision
  - ▶ South Africa (pending, see above): array of public interest rights articulated in specific sections

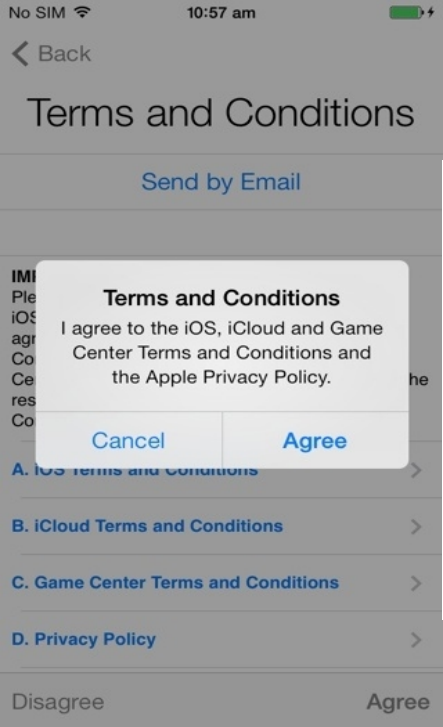


# Technological Protection Measures

- ▶ 112 countries have some form of TPM provision.
  - ▶ Almost four dozen have a general exception, often for non-infringing uses. About two dozen have a specific library provision, often for collective development decision making purposes. Kenneth D. Crews, Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (June 14, 2015, SCCR/30/3).
- ▶ Without an exception for lawful, non-infringing uses, the exceptions that libraries do have become ineffective, undermining the goal of balance that the copyright law seeks to achieve.

I Agree

I Have No Idea  
What This Says



By clicking the "I Agree" button I acknowledge that I have read and accept the terms of the above agreement.

I Agree

Cancel



# International Developments

- ▶ **WIPO Standing Committee on Copyright and Related Rights**
  - ▶ SCCR/26/8, Objectives and Principles for Exceptions and Limitations for Libraries and Archives (U.S., December 2013)
  - ▶ SCCR/29/4, Consolidation of Proposed Texts Contained in Document SCCR/26/3 (African Group, Brazil, Ecuador, India and Uruguay, December 2014)
  - ▶ SCCR/32, December 7-11, 2015
- ▶ **Top priorities for IFLA**
  - ▶ Reproduction and preservation, ILL including cross-border, freedom from TPMs, no contractual override
- ▶ **New topic: Content or Data Mining**

# Grey Literature: Recommendations

- ▶ Mass digitization and access tools as fair use.
  - ▶ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014): facilitating full-text search to identify specific page reference and providing access by users “with certified print disabilities” are fair use.
  - ▶ *Authors Guild, Inc. v. Google, Inc.*, Dkt. No. 13-4829-cv (2d Cir, Oct. 16, 2015): “If the library had created its own digital copy to enable its provision of fair use digital searches, the making of the digital copy would not have been infringement.” *Id.* at 44.
- ▶ Few countries have a fair use provision: a robust library exception is needed.
- ▶ Preservation of all works and all formats. including new/mixed media and born-digital works.
  - ▶ Analog » Digital and Digital » Digital
  - ▶ Remote or web-based access: physical-digital and digital-virtual
  - ▶ “Preserve” use rights: contract and TPM