



Balancing the Global Copyright System in the Public Interest: An Analysis of the African Group's Proposed Instrument on Limitations and Exceptions*

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ABSTRACT

The establishment of an international instrument on copyright limitations and exceptions (L&Es) is essential to achieve an appropriate balance between exclusive rights and the overarching public interest in access to copyrighted works and related subject matter. Current international copyright instruments, including the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, fail to adequately address L&Es for education, research, equitable access for persons with disabilities, and the operations of educational, research, and cultural heritage institutions such as libraries, archives, and museums. The proposed instrument on L&Es by the African Group seeks to establish mandatory minimum L&Es to support education, research, and access to information within the international copyright system, thereby promoting global harmonization and ensuring that copyright law supports, not impedes, development objectives and human rights obligations. This policy brief offers a thorough analysis of the proposed instrument, examining its substantive provisions and potential benefits, and proposes some improvements.

KEYWORDS: Copyright Limitations and Exceptions (L&Es); Copyright Balance; Public Interest; Education; Research; People with Disabilities; Cultural Heritage Institutions; Cross-border Uses; Sustainable Development Goals (SDGs); Human Rights

La mise en place d'un instrument international sur les limitations et exceptions au droit d'auteur est essentielle pour établir un équilibre approprié entre les droits exclusifs et l'intérêt public supérieur que représente l'accès aux œuvres protégées par le droit d'auteur et aux objets voisins. Les instruments internationaux actuels en matière de droit d'auteur, y compris le Traité de Marrakech visant à faciliter l'accès aux œuvres publiées pour les personnes aveugles, malvoyantes ou ayant d'autres difficultés de lecture des textes imprimés, ne traitent pas de manière adéquate les limitations et exceptions en matière d'éducation, de recherche, d'accès équitable pour les personnes handicapées, ainsi que le fonctionnement des institutions éducatives, de recherche et du patrimoine culturel telles que les bibliothèques, les archives et les musées. L'instrument proposé par le Groupe africain sur les limitations et exceptions vise à établir des exceptions et limitations minimales obligatoires afin de soutenir l'éducation, la recherche et l'accès à l'information au sein du système international du droit d'auteur, favorisant ainsi l'harmonisation mondiale et garantissant que le droit d'auteur soutienne, et n'entrave pas, les objectifs de développement et les obligations en matière de droits de l'homme. Ce rapport sur les politiques propose une analyse approfondie de l'instrument proposé, examine ses dispositions de fond et ses avantages potentiels, et suggère certaines améliorations.

MOTS-CLÉS: Limitations et exceptions au droit d'auteur (L&E) ; équilibre du droit d'auteur ; intérêt public ; éducation ; recherche ; personnes handicapées ; institutions chargées du patrimoine culturel ; utilisations transfrontalières ; objectifs de développement durable (ODD) ; droits de l'homme

* This paper was supported by the Geneva Centre on Knowledge Governance. The Geneva Centre on Knowledge Governance is a project of the American University Washington College of Law's Program on Information Justice and Intellectual Property (PIJIP) and the Geneva Graduate Institute of International and Development Studies with the support of the Arcadia Fund.

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KEY MESSAGES

- The African Group seeks to make mandatory L&Es a more integral part of the global copyright system.
- The draft Instrument provides a solid foundation for revitalizing text-based negotiations on L&Es for education, research, cultural heritage institutions, and persons with disabilities.
- Countries must retain the policy flexibility they have under international copyright law to adopt L&Es that are not subject to remuneration.

La creación de un instrumento internacional sobre limitaciones y excepciones al derecho de autor es esencial para lograr un equilibrio adecuado entre los derechos exclusivos y el interés público general en el acceso a las obras protegidas por el derecho de autor y a los objetos afines. Los actuales instrumentos internacionales de derechos de autor, incluido el Tratado de Marrakech para facilitar el acceso a las obras publicadas a las personas ciegas, con discapacidad visual o con otras dificultades para acceder a los textos impresos, no abordan adecuadamente las L&E en materia de educación, investigación, acceso equitativo para las personas con discapacidad y el funcionamiento de instituciones educativas, de investigación y del patrimonio cultural, como bibliotecas, archivos y museos. El instrumento propuesto por el Grupo Africano sobre excepciones y adaptaciones (L&E) tiene por objeto establecer excepciones y adaptaciones mínimas obligatorias para apoyar la educación, la investigación y el acceso a la información dentro del sistema internacional de derechos de autor, promoviendo así la armonización mundial y garantizando que la legislación sobre derechos de autor respalde, y no obstaculice, los objetivos de desarrollo y las obligaciones en materia de derechos humanos. Este informe sobre políticas ofrece un análisis detallado del instrumento propuesto, examina sus disposiciones sustantivas y sus posibles beneficios, y propone algunas mejoras.

PALABRAS CLAVES: Limitaciones y excepciones al derecho de autor (L&E); Equilibrio del derecho de autor; Interés público; Educación; Investigación; Personas con discapacidad; Instituciones del patrimonio cultural; Usos transfronterizos; Objetivos de Desarrollo Sostenible (ODS); Derechos humanos

制定一项关于版权限制与例外 (L&Es) 的国际文书, 对于在专有权利与公众获取受版权保护的作品及相关客体的整体公共利益之间实现适当平衡至关重要。现行国际版权文书, 包括《关于为盲人、视力障碍者或其他印刷品阅读障碍者获得已出版作品提供便利的马拉喀什条约》, 未能充分解决教育、研究、残疾人公平获取, 以及图书馆、档案馆和博物馆等教育、研究和文化遗产机构的运营所涉及的版权限制与例外问题。非洲集团提出的关于限制与例外的拟议文书, 旨在确立强制性的最低合理使用与例外标准, 以支持国际版权体系内的教育、研究及信息获取, 从而促进全球协调, 并确保版权法能够支持而非阻碍发展目标和人权义务的实现。本政策简报对该拟议文书进行了全面分析, 审视了其实质性条款及潜在效益, 并提出了一些改进建议。

关键词: 版权限制与例外 (L&Es); 版权平衡; 公共利益; 教育; 研究; 残障人士; 文化遗产机构; 跨境使用; 可持续发展目标 (SDGs); 人权

I. Introduction

The issue of limitations and exceptions (L&Es) to copyright and related rights has been on the agenda of the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) since 2004.¹ It remains a pressing issue even after the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty), as the Treaty only covers blind, visually impaired, and otherwise print disabled disabilities, that do not include other disabilities or L&Es for education and research. Since the conclusion of the Marrakesh Treaty, African countries and other developing nations have been working towards a new legal instrument to address these unresolved issues of L&Es necessary to maintain a proper balance between the rights of authors and the larger public interest within the global copyright system.² To advance this goal, the African Group, a coalition of African nations, has submitted a new document as a contribution to the desired text-based negotiations on L&Es ahead of the SCCR's 47th session, where the issue of L&Es remains on the agenda.³ The document, titled *Draft Instrument on Limitations and Exceptions for Libraries, Archives, Museums, Education and Research Institutions and People with Disabilities*,⁴ seeks to impose treaty-like obligations regarding the adoption of L&Es in national copyright systems and includes a set of mandatory minimum L&Es.

Developing countries seek to make mandatory L&Es a more integral part of the global copyright system, aiming to ensure the system supports not only the development goals of developed nations but also those of developing countries. Education, research, and access to information are essential for development and for unlocking various aspects of sustainable development in developing countries.⁵ The Draft Instrument on L&Es is therefore a crucial norm-setting tool required to guide the global copyright system towards promoting sustainable development in developing countries, rather than hindering it. It is therefore unsurprising that the proposed Instrument is grounded in the United Nations (UN) Sustainable Goals (SDGs) and emphasizes the significance of the “production of and access to education, research, and cultural heritage materials,”⁶ which can be supported by L&Es, in realizing the SDGs. The Draft Instrument on L&Es also adopts a human rights framework, recognizing that access to education, research, and cultural heritage materials is not only a development priority but also essential for the full realization of various human rights and fundamental freedoms, including the right to education, freedom of expression, and cultural participation.⁷

1 Faith O. Majekolagbe, “The Case for a New International Instrument on Copyright Limitations and Exceptions”, *Cardozo Arts & Entertainment Law Journal*, vol. 43, No. 1 (2025), pp. 83-94.

2 *Ibid.*

3 WIPO, Standing Committee on Copyright and Related Rights, *Forty-Seventh Session Draft Agenda* (November 6, 2025), WIPO Doc. SCCR/47/1 PROV.2.

4 WIPO, Proposal on Limitations and Exceptions (Prepared by the African Group) (October 7, 2025), WIPO Doc. SCCR/47/5 3-45.

5 See Faith O. Majekolagbe, “Unlocking the Potential of Copyright Limitations and Exceptions (L&Es)”, Policy Brief, No. 127 (Geneva, South Centre, 2024), pp. 1-12. Available from <https://www.southcentre.int/policy-brief-127-17-april-2024/>.

6 Preamble, paragraph 2.

7 Preamble, paragraphs 2, 5 & 6.

This policy brief examines the provisions of the Draft Instrument on L&Es, highlighting their benefits and limitations where applicable, to provide negotiators with an informed understanding of the Instrument and propose recommendations to improve the text.

II. Review of the Draft Instrument on Limitations and Exceptions

A. Objectives

The Preamble outlines the objectives of the Draft Instrument. It aims to address the need to balance authors' copyrights and related rights with the broader public interest, especially in education, research, and access to information, as emphasized in the preambles of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).⁸ The WCT and WPPT do not include provisions to balance exclusive rights against the public interest in these areas, leaving a gap in the international copyright framework that this Instrument aims to fill. The Draft Instrument importantly highlights that the copyright system should not be author-centric but balanced, reflecting and protecting the broader public interest.

Additionally, the Draft Instrument seeks to ensure that WIPO Member States, as UN Member States, uphold their duties to promote access to education, research, and information, in line with the UN SDGs—particularly SDG4 (quality education)—and international human rights instruments, which obligate states to guarantee rights such as education, cultural participation, and the sharing of arts and sciences, along with freedom of expression and information.⁹ The Draft Instrument highlights the 2007 WIPO Development Agenda, which advocates for development considerations to be central to WIPO's norm-setting activities.¹⁰ Consequently, the Draft Instrument underscores the importance of balancing the global copyright system within the contexts of development and human rights. It promotes establishing a set of mandatory minimum copyright L&Es to secure and advance global equality in education, research, and access to information, and thereby supporting development goals and human rights.

Stating the objectives of the Draft Instrument is highly important, given that it uses broad, flexible language to describe the scope of minimum L&Es to be recognized by Member States in their domestic copyright systems. The objectives can therefore become helpful in interpreting the scope of international obligations regarding L&Es set out in the Draft Instrument. However, to enhance the usefulness of the objectives, especially in determining the range of specific L&Es included within the general L&Es recognized by the Instrument, they should also be incorporated into the main text rather than only in the preamble, as in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).¹¹

⁸ Preamble, paragraph 1.

⁹ Preamble, paragraphs 2 & 3.

¹⁰ Preamble, paragraph 4.

¹¹ See TRIPS Agreement, article 7.

B. Relationship with Other International Instruments

Article 1 of the Draft Instrument addresses its relations with other international instruments containing L&Es. It clarifies that the Draft Instrument does not limit the L&Es permitted under other international agreements, including the TRIPS Agreement and all WIPO-administered treaties on copyright and related rights. This is another provision that could help determine the scope of L&Es required under the Draft Instrument.

C. State Obligations

To achieve its objectives, Article 3.2 of the Draft Instrument imposes an obligation on Member States to “provide an appropriate balance in their copyright and related rights system through limitations and exceptions for the public interest, including for education; research; freedom of expression ...; access to information and news reporting; preservation of cultural heritage; and to facilitate access for persons with disabilities.” The Draft Instrument therefore centers L&Es as a necessary mechanism for achieving a balanced copyright system and emphasizes that copyright balance is in the public interest. In Articles 4-11 (excluding Article 8), the Draft Instrument outlines specific L&Es provisions that Contracting Parties must, at a minimum, implement in their national copyright systems to fulfill their obligation.

Notably, the Draft Instrument also requires states 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”.¹² This again emphasizes that the Draft Instrument is based on a human rights framework and highlights that copyright users have rights under other legal frameworks, which must be recognized and respected by the global copyright system.

Article 3.3 of the Draft Instrument requires Contracting Parties to update, carry forward, and appropriately extend into the digital environment the L&Es in their national laws that have been considered acceptable under the Berne Convention, and to develop new L&Es that are suitable for protecting educational and research activities in the digital environment. This reiterates and builds on the Agreed Statement concerning Article 10 of the WCT. Article 4 of the Draft Instrument mandates the inclusion of specific L&Es tailored for the digital environment. These include permitting the use of works in online education and wireless communications for teaching purposes, enabling computational research, and facilitating interoperability. Article 5.2 of the Instrument expressly requires states to provide a limitation or exception to the “right of making available”. Article 7.1 acknowledges the borderless realities of the digital environment by requiring states to ensure that adopted L&Es also permit “cross-border uses”. Furthermore, Article 2 of the Draft Instrument states that its provisions “apply to works or other subject matter, in any format”. Taken together, these provisions require states to adopt L&Es that promote education, research and access to information in ways consistent with the uses of copyrighted works in the digital environment.

The Draft Instrument gives Contracting Parties considerable latitude in how they fulfill their obligations. Parties can fulfill their obli-

¹² Article 3.1.

gations through a general limitation or exception like fair use or fair dealing, or through a set of L&Es that allow the use of works for specific purposes, such as teaching, preservation, or accessibility, or a combination of both general and specific L&Es.¹³In addition to revising their national copyright laws, states may also adopt other measures, such as “judicial, administrative, or regulatory determinations as to fair practices, uses, or dealings”.¹⁴At a fundamental level, however, each Contracting Party must ensure that its national copyright law includes the necessary L&Es to meet its obligations. Incorporating L&Es, whether general, specific, or a combination of both, into national copyright systems primarily through legislation is essential to ensure that copyright users have the L&Es provided for in the Draft Instrument.

D. Scope of Mandatory Limitations and Exceptions

The Draft Instrument requires Contracting Parties to ensure that their national copyright systems recognize certain L&Es to copyrights and related rights over published and unpublished works or other subject matter in any format. The mandatory L&Es are outlined in Articles 4 to 7, which form the core of the Draft Instrument’s substantive provisions on L&Es. Articles 4 to 7 include mandatory L&Es for education and research, preservation of cultural heritage and access to preserved cultural heritage, people with disabilities, and cross-border uses, respectively.

Additionally, the Draft Instrument includes key provisions in Articles 9 and 10 to safeguard these L&Es from contractual and technological overreach, ensuring users truly benefit from and enjoy the L&Es mandated by the Instrument, especially when digital works are involved. The use of technological protection measures (TPMs) and restrictive contractual terms has become a standard way for copyright owners to control access to and use of digital works, including lawful uses.¹⁵ Article 9 responds to the prevalent use of contracts to undermine L&Es and provides that, “Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions provided by the Contracting Parties consistent with this Instrument shall be unenforceable.”¹⁶

Article 10 states that “Contracting Parties shall ensure that legal remedies against the circumvention of effective technological protection measures do not prohibit or prevent the uses enabled by the limitations and exceptions provided by the Contracting Parties consistent with this Instrument.” It acknowledges that TPMs can restrict lawful uses of copyrighted works permitted under the Draft Instrument, and that provisions prohibiting circumvention of TPMs in national copyright laws may create barriers to lawful uses of protected works. By including the obligation in Article 10, the Draft Instrument recognizes the need for legal rules that prevent the circumvention of TPMs, while ensuring that these rules do not block uses that the mandatory L&Es would otherwise enable.

¹³ Article 3.4.

¹⁴ Article 3.4.

¹⁵ Dave Hansen *et al.*, “Contractual Override: How Private Contracts Undermine the Goals of the Copyright Act for Libraries and Researchers, and What We Can Do About It”, *Journal of the Copyright Society U.S.A.* (forthcoming). Available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5393510.

¹⁶ Article 9.1.

A comprehensive review of the Draft Instrument’s provisions on mandatory L&Es (Articles 4-7) is provided below, along with suggestions for specific improvements.

i. Education and Research

Article 4 provides for uses of copyrighted works that must be permitted in national copyright systems for education and research. Article 4 adopts an approach that balances the flexibility of a general exception with the certainty of specific exceptions. Article 4.1 contains a general copyright exception for education and research and provides that: “It shall be permissible to use a work or other subject matter for educational or research purposes to the extent justified by the purpose and provided such utilization is compatible with fair practice.” Article 4.2 then provides an illustrative list of uses that Contracting Parties must consider as covered by the general exception, meaning uses that are clearly and definitively compatible with fair practice.

The broad, open-ended approach in Article 4.1 allows it to accommodate educational and research practices that an exhaustive list of permitted uses might not cover. It offers educators, learners, researchers, and their supporting institutions a flexible exception that is essential in a world of rapid, disruptive technological advances that affect how we access and use protected works for education and research. This open-ended approach also allows states to adopt L&Es for education and research that can adapt to new and varied circumstances without the need for constant statutory amendments to their copyright laws. This is especially beneficial to developing countries, because the time and expense that would have been involved in constant legislative amendments can be directed towards other development needs. The wording of Article 4.1 also starts from the premise that all uses of a work or other subject matter for educational or research purposes are permitted under this exception without requiring a license from the rightsholder, provided they are consistent with fair practice.

The downside of an open-ended approach is that it does not necessarily provide the legal certainty that a specific use would be deemed permissible, given the contextual nature of the required fairness assessment. However, Article 4.2, which lists specific uses considered within the scope of Article 4.1, reduces the ambiguity that may arise from “fair practice” and provides countries with limited judicial, legislative, and technical capacities in copyright law with an illustrative list of uses that can be referenced as constituting fair practices. The non-exhaustive nature of the list is clearly indicated by the opening phrase: “Uses within the scope of paragraph 1 shall include, but not be limited to” that precedes the list. This approach avoids the rigidity of a list of mandatory uses while retaining the advantages of legal certainty and reliability. The list offers copyright users clear guidance on acceptable uses of protected works for educational and research purposes, without giving lawmakers or judges in Contracting States any discretion to deviate from it. This list also may provide users with a clear catalogue of uses for education and research that, at a minimum, will be available in the Contracting States, since L&Es for these purposes in

all Contracting States must be interpreted as encompassing the uses listed in Article 4.2.

The scope of the specific uses outlined in Article 4.2 matters, especially for developing countries, as it may serve as their primary or sole reference point for permitted educational and research uses under the international copyright L&Es framework. While an exhaustive list is neither required nor desirable, a comprehensive list is necessary and desirable for this purpose.

The scope of specific uses for education is broad and includes activities in the course of teaching and learning, as well as the creation and translation of educational materials.¹⁷ However, this is not the case for research uses. The enumerated list of uses for research is limited to “Uses in the course of scientific research activities”.¹⁸ The term “scientific research” is defined as covering “both the natural sciences and the human sciences, including research performed by public or non-profit research organizations.”¹⁹ Although the definition of scientific research is likely broad enough to cover every field of inquiry, the term “scientific” is limiting and suggests systematic research. The scope of research uses for which copyrighted works are necessary for development purposes is not so limited. Most developing countries would benefit from a broader list of uses for research activities. Some of the uses in the list, such as making, modifying, and translating copies of works, and enabling the interconnection and interoperability of products, are activities that Contracting Parties should not be given the impression are limited to scientific research. They are necessary uses for research more broadly. The term “research” rather than “scientific research” should be adopted, and research should be given a large and liberal interpretation in the curation of the illustrative list.²⁰ Developing countries might also choose not to limit research activities covered by a global research exception solely to those carried out by public or non-profit research organizations or affiliated individuals. There are valid reasons why such countries may prefer to also use a research exception to build local research and development within their industrial sectors.

ii. Cultural Heritage

Article 5 establishes mandatory L&Es allowing a cultural heritage institution (CHI)—defined in the Instrument as a publicly accessible library, museum, archive, or film or audio heritage institution—to create preservation copies of works permanently in its collections and to grant public access to these copies. The preservation exception allows CHIs to make copies of any work or subject matter, in any format or medium necessary for preservation. The Draft Instrument recognizes copyrighted materials in CHIs’ collections as part of the public’s cultural heritage, with the institutions serving as custodians and stewards of that heritage, committed to preserving it in the public interest. Wi-

¹⁷ Article 4.2(a)-(c).

¹⁸ Article 4.2(d).

¹⁹ Article 4.3.

²⁰ In Canada, the Supreme Court has emphasized that “‘Research’ must be given a large and liberal interpretation in order to ensure that users’ rights [i.e., limitations and exceptions] are not unduly constrained ... [and] research is not limited to non-commercial or private contexts”. See *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, at paragraph 51.

thout a limitation or exception like in Article 5, copyright and related rights will create significant obstacles to the public interest in preserving cultural heritage. Article 5, therefore, empowers CHIs to preserve the materials in their permanent collections, some of which might be deteriorating or in formats susceptible to loss from fire and flood, which are increasing in a climate-changing, volatile world.

To promote access to the preserved works, Article 5.2 requires states to provide for L&Es that allow CHIs to offer onsite access and copies, in any format or medium (including digital copies), to persons for the purpose of private study, scholarship, or research. Where the preserved work is out of commerce, CHIs must also be permitted to reproduce the work and make it available to the public, for example, by uploading it on their website without any access restrictions.²¹ This encourages greater public access to cultural heritage materials that would otherwise be unavailable, beyond the preserved copies housed in CHIs’ collections.

Despite the notable exceptions in Article 5, the Draft Instrument does not go far enough in establishing mandatory L&Es for CHIs. The language is too restrictive, limiting it to only preservation and preservation copies. An instrument on L&Es for libraries, archives, and museums should not focus solely on preservation-related L&Es since these institutions require a wider range of L&Es to fulfill their public-interest roles.

Importantly, there are no provisions addressing situations where libraries must reproduce and format-shift a work from their permanent collection—not for preservation, but for e-lending. E-lending is essential for expanding public access to copyrighted materials in the digital age and can help bridge knowledge gaps that occur when access to library collections is limited to those who can physically visit a library. While rightsholders do not control physical lending, e-lending involves reproduction and adaptation, which bring it within the scope of exclusive rights. To extend libraries’ freedom to lend, which is outside copyright control in the physical environment, into the digital environment, it is essential to provide mandatory L&Es for e-lending by CHIs. This would allow CHIs to continue lending without copyright barriers in the digital age. Having such a limitation or exception, working in tandem with the cross-border uses exception in Article 7 of the Draft Instrument, can also facilitate cross-border inter-library lending for education and research purposes.

Educators, learners, and researchers rely on libraries and similar institutions to access copies of works for educational and research purposes. Therefore, having L&Es for education and research without empowering libraries with the L&Es necessary to take the required actions for lawful access limits these individuals’ opportunities to access works for their educational and research needs. To address this important gap in the scope of mandatory L&Es for CHIs, the Draft Instrument should be updated to require Contracting Parties to allow CHIs to do anything on behalf of a person that the person may do personally under the L&Es for education and research outlined in Article 4. Additionally, CHIs should be permitted to create and provide their

²¹ Article 5.2(c).

users with a copy of a work or part of a work, in any format or medium, from their permanent or licensed collection for private study, education, or research.

Lastly, the definition of a CHI in the Act should be expanded to include a library, archive or museum that forms part of an educational institution. This is important because a library, archive, or museum within an educational institution may not be accessible to the general public, yet it undoubtedly serves public-interest functions even when open only to those affiliated with the institution. They also require preservation L&Es and other L&Es that may be available to publicly accessible cultural heritage institutions to support education, research, and access to information.

iii. Persons with Disabilities

The Marrakesh Treaty provides for mandatory L&Es for the benefit of individuals with print and other visual disabilities.²² The Draft Instrument expands this by promoting equitable access to protected works for people with any disability, ensuring that copyright does not hinder access for those not covered by the Marrakesh Treaty. Article 6 of the Draft Instrument states: “It shall be permissible to produce, distribute, and make available accessible format copies of works for the benefit of people with any disability that requires such format to enjoy the work on an equitable basis with others”. The language in Article 6 guarantees that persons with disabilities and their representatives can create and distribute accessible format copies of works to facilitate access for individuals with disabilities.

iv. Cross-Border Uses

Article 7.1 of the Draft Instrument recognizes that in the digital environment, educational and research activities, including information dissemination, are becoming increasingly borderless. It requires Contracting Parties to ensure that the L&Es adopted under the Instrument allow for cross-border uses of protected works. Without this provision, Articles 4 to 6 may have limited effectiveness in supporting education, research, and access to information within the digital, borderless online environment where educational, research, and cultural heritage institutions, along with their users, operate.

Article 7.2 further allows cross-border exchange of copies of works made using L&Es for the purposes for which they were created in the originating country. This provision works in conjunction with Articles 4 to 6 to enhance global access to copies made for education, research, accessibility for persons with disabilities, and cultural preservation. It addresses the issue where, for example, a library is permitted to make a copy of a work in its collection for educational purposes but cannot share the copy with another library in a different country that might require access to the same work for its users. Article 7.2 can allow lawful access to copies of works for public interest reasons, such as education and research, for users in countries where those works would otherwise be unavailable. Such cross-border

²² Marrakesh Treaty, Articles 4-6.

exchange, carried out through the distribution of physical or digital copies, can promote the global diffusion of knowledge and support equality of opportunity in education, research, and access to information among users in countries at different developmental levels.

E. Non-Mandatory Limitations and Exceptions

Article 8 states that: “A Contracting Party may authorize uses for purposes beyond those promoted by this Instrument where such uses are subject to adequate remuneration, such as through statutory licenses or limitations of remedies for infringement.” This shows that the Draft Instrument is not intended to establish a maximum list of L&Es to be included in national copyright systems, but rather that states may implement additional L&Es beyond those required in the instrument. If states adopt additional L&Es, it will enhance the availability and access to protected works for various public interest purposes, such as creativity, innovation, competition, and environmental protection.

Article 8 is, however, both restrictive and freeing. It limits the scope of L&Es not subject to remuneration that countries may adopt to those for education, research, cultural heritage preservation, and accessibility for persons with disabilities, effectively establishing a ceiling on free or unremunerated uses of protected works. In other words, a Contracting Party wishing to establish L&Es for purposes like promoting creativity, innovation, competition, or environmental protection may only do so if those L&Es include the payment of remuneration, even if such payment is not required to balance these public interests with rightsholders’ interests. This can restrict the policy flexibility available to developing and other countries in creating L&Es and does not take into account the economic situation and special needs of different countries. For developmental reasons, a country might prefer to establish L&Es for other purposes without requiring remuneration for the permitted uses. Countries must retain the flexibility and policy space to develop national L&Es without a remuneration requirement under international copyright law. Countries should be allowed to decide whether certain L&Es should be subject to remuneration, considering their national public interests in protected works, as well as developmental needs, conditions, and priorities. The three-step test in current international intellectual property agreements places strict conditions on the adoption of L&Es, which already restrict the policy options for developing countries to implement L&Es that meet their needs; adding extra restrictions is neither necessary to protect the public interest nor to ensure a fair copyright balance.

Additionally, the use of the word “promoted” for the L&Es contained in the Draft Instrument is misleading and inaccurate, as the Draft Instrument aims to establish mandatory L&Es and not simply promote L&Es.

Article 8 should be redrafted as follows:

Other Limitations and Exceptions

A Contracting Party may authorize uses for purposes beyond those required by this Instrument, having regard to the Contracting Party's development level, economic situation, and its social and cultural needs. It shall be a matter of national law to determine whether limitations and exceptions under this Article are subject to remuneration.

Redrafting the provision as recommended indicates to states that the Draft Instrument is meant to establish a minimum, not a maximum, framework for L&Es needed to balance copyright systems globally and to support development and human rights. It clarifies that the enumerated L&Es are the minimum required by states, not the maximum, and that other non-mandatory L&Es, including those for purposes not required in the Draft Instrument, may be included in national copyright systems and that countries have the flexibility to determine whether to subject the L&Es to remuneration.

F. Limitation on Liability

Article 11.1 of the Draft Instrument creates a "safe harbor" for conscientious copyright users who unwittingly engage in unlawful uses of protected works for education, research and access to information. It provides that, "Any person using a work or other subject matter for a purpose promoted by this Instrument shall be protected from claims for damages and from criminal liability when the action is performed in good faith in the belief, and where there are reasonable grounds for believing, that the use is permitted by law or by an applicable license." This provision can alleviate anxiety about using copyrighted works, which often deters users from exercising their rights under L&Es and has chilling effects on education, research, and access to information. When users realize that an honest but mistaken assumption that a limitation or exception applies to their use of a work will not lead to financial or criminal liabilities, they may be more inclined to rely on L&Es. This provision thus ensures that the intended beneficiaries of the L&Es under the Draft Instrument, in fact, use them by offering a safe harbor for honest mistakes.

Furthermore, Article 11.2 mandates that Contracting Parties exempt educational, research, and cultural heritage institutions from secondary liability for their users' actions. This exemption allows these institutions to concentrate on their public-interest roles instead of being concerned about their users' activities.

G. Interpretation of Three-Step Test

Article 12 of the Draft Instrument aims to clarify the interpretation of the restrictive three-step test by emphasizing that nothing prevents Contracting Parties from applying the test in a manner that considers the legitimate interests of non-copyright owners, including those stemming from educational and research needs, human rights, development needs, and other public interests. Article 12 also states that: "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 or other subject

matter."

The three-step test has restricted the use of L&Es to balance the interests of rightsholders with the broader public interest, particularly in developing countries, partly because the test does not explicitly require countries to consider the legitimate interests of the public in protected works when implementing L&Es. An instrument clarifying that the three-step test can, in fact, be applied in a way that respects the legitimate interests of the public could provide developing countries with a stronger normative basis for interpreting their flexibility within international copyright law as including the ability to enact L&Es that serve their legitimate interests in education and research, human rights protection, and sustainable development, despite the constraints of the three-step test.

The Draft Instrument should also specify that the application of the three-step test permits the adoption of the minimum L&Es outlined in the Instrument within national copyright systems. Such clarification would offer greater clarity to developing countries regarding the relationship between the Instrument's provisions and the three-step test.

III. Conclusion

The Draft Instrument on L&Es outlines many key provisions that establish obligations to recognize and adopt, at a minimum, a set of L&Es within national copyright systems that serve the public interest in education, research, and access to information, including educational, research, and cultural institutions. The Instrument has the potential to effectively realign the international copyright system towards the necessary balance between exclusive rights and the larger public interest in protected works. If adopted, it could make L&Es a more integral part of the structure and functioning of the international copyright system. Its adoption would also constitute a pivotal step toward aligning the global copyright framework with the imperatives of sustainable development and equitable access to knowledge articulated in the UN Sustainable Development Goals and international human rights instruments, respectively.

The Instrument thus provides a solid foundation for revitalizing text-based negotiations on L&Es for education, research, cultural heritage institutions, and persons with disabilities. However, some key modifications are needed to enhance the Instrument's capacity to support education, research, and access to information, as well as to provide countries with greater policy flexibility to develop other L&Es that, although not explicitly mandated by the Instrument, remain crucial for advancing their local development priorities and needs.

IV. Recommendations

1. Adopt a Large and Liberal Interpretation of "Research": The list of specific L&Es for research should not be limited to scientific research.

2. **Expand the Definition of Cultural Heritage Institutions:** The definition of CHIs should include libraries, archives, and museums in educational institutions.

3. **Expand the Scope of Mandatory L&Es for Cultural Heritage Institutions:** The list of mandatory L&Es for CHIs must include e-lending, making, and providing users with a copy or part of a work for private study, education, or research.

4. **Retain Policy Flexibility in Adopting Other Limitations and Exceptions:** Countries must retain the policy flexibility they have under international copyright law to adopt L&Es that are not subject to remuneration.

5. **Include Objectives in the Main Text of the Instrument:** A statement on the objectives of the instrument should be included in the main text of the instrument.

6. **Provide Greater Clarity on the Three-Step Test:** Specify that the application of the three-step test allows for the adoption of the minimum L&Es outlined in the Instrument within national copyright systems.

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