

# **CAN ARCHIVISTS CHANGE THE INTERNATIONAL COPYRIGHT CLIMATE?**

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## **ABSTRACT**

There are important changes pending in international copyright law which could bring significant benefit or harm to archives worldwide. It is essential that archivists work to have their voice heard in the international copyright policy formation process. Recent experience at the World Intellectual Property Organization indicates that archivists do not have a very straight or short path, but it is a journey that will require our sustained and patient efforts.

There can be no greater archival principle than that archives exist to be used. More than just a utilitarian imperative, this is an ethical responsibility that emanates from a fundamental dual responsibility of all humans to derive heritage, accountability, and learning from the past and allow succeeding generations to benefit from the experience and knowledge of the past. The paramount utility of the past means that all aspects of archival activities should be conducted so that use is the defining value, whether for our appraisal/selection criteria, descriptive metadata, or preservation policies.

To deliver archival content to users professionally and ethically and to ensure that users are empowered to extract maximum value from archives, archivists must balance the paramount goal of providing broad access with considerations in two areas where individual rights or laws preclude absolute or complete access. First, because archives are about people, archival documents sometimes touch on sensitive matters of a personal nature that should be kept private for a period of time. Second, because we live in societies largely based on a system of personal property and because archives overwhelmingly contain creative works, we need to understand the basics of intellectual property law so that we can manage it equitably, explain it to our users, and use our collective voice to influence its formulation at national and international levels.

Indeed, copyright is an unavoidable problem for archivists. Archives contain documents valued not just for their physical structure, such as paper, film, or digital, but also for their intellectual content, such as correspondence, narrative reports, and poetic, musical, or graphical expressions. As governed by the Berne Convention for the Protection of Literary and Artistic Works, the expressive content of our documents draws even the most far-flung repository into the orbit of international copyright. This is especially true because the monopoly rights granted by the Berne Convention, which served society well in the conventional print world, are now being extended to the digital world but without the exemptions and exceptions that exist in the analog world. So, while new technologies may allow archivists to obtain global reach, our mission is being circumscribed by ever-expanding copyright restrictions. Because today's networked environment enables, even requires, us to steward our collections for a global audience, it is critical that archivists work internationally to address those copyright policy considerations that otherwise impede the fulfillment of our mission to connect archives with the public.

Unfortunately, policy-making bodies worldwide seem to think that economies and

society will crumble unless the private monopolies of authors and their agents are protected by governmental intervention.<sup>1</sup> Copyright law, of course, is ultimately established by the laws of the nation in which one is operating. However, it is both the Berne Convention, as amended in 1979, and the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty that provide the broad outline of copyright and authors' rights. These are two international mandates to which we need to pay close attention.

Current treaties do allow nations to provide some exemptions to authors' monopoly of exclusive rights. For example, a country can pass laws to permit quotations or copies for teaching consistent with fair practice, but the areas for exceptions are relatively limited. Powerful industry lobbying has resulted in treaties that impose further limits.<sup>2</sup> For example, the 1996 WIPO Treaty requires countries to create legal prohibitions against circumventing any electronic copy-protection mechanisms that copyright holders have used on their works. These technological prohibitions make migration and preservation of electronic records very difficult.<sup>3</sup>

Beyond copyright's strictures on reproduction and distribution of works, archivists face a further challenge because of the Berne Convention's support for so-called "moral rights" that deal with the investment of an author's personality into his or her creative works. In addition to giving the author the right to claim authorship or to object to distortion or mutilation of a work, some countries have carried the "moral rights" even further by allowing an author the right to keep a work unpublished or to withdraw it. In many cases these "moral rights" continue after death and are inalienable and irrevocable. As such, they present a significant challenge to the archival mission.<sup>4</sup>

#### **THE NEED FOR AN ARCHIVAL VOICE IN ADVOCACY**

Given the broad scope of works covered by copyright, the sweeping rights granted to copyright holders, and the long duration of copyright ownership, it is inevitable that copyright affects how archivists steward their collections. Indeed, if we say that our primary responsibility is to ensure that our archives are used by researchers, students, and scholars, we must not only have a solid grasp of policies to manage copyright, but we must also be ready to be strong advocates of the particular archival dimensions of copyright.

Neither the general public nor most research users have a very good sense for how much the law, written to regulate commercial activity in a conventional print world, fails to allow them to take educational advantage of the current information environment. When I started work as an archivist, if I had said it would be possible for an archives to put a document on a machine, push a few buttons and immediately have it readable throughout the world, people would have said I was hallucinating. That is now the normal course of events, yet copyright law stands in the way of realizing the access opportunities of digital technologies and meeting the public's expectations in this regard. Unless one is willing to ignore the law, it deprives us of the most revolutionary communication tool since the printing press, and they inhibit our research users almost as much.

Nor have the public or research users shown any great understanding or readiness to do the political work necessary to change the balance away from a system that fails to serve their research needs or, indeed, the educational needs of science in general. It will take significant changes in international understandings as well as in the provisions of national laws to improve this situation. Unfortunately, as a small constituency, archivists are not in a strong position to compete with the large, well-connected commercial interests arrayed against us. If we are to be true to our core professional goal of making the past usable for the future, however, we have little choice but to exploit the moral credibility that comes from our basic mission and to advocate for changes.

Fortunately, there are some global actors with whom we can collaborate. Thanks to 2004 and 2008 initiatives by Chile, Brazil, Uruguay, and Nicaragua, there has been a call for WIPO to develop treaty language that would require member states to enact education- and development-friendly exemptions into national law.<sup>5</sup> Calls made at the ICA's 2004 Vienna Congress for the ICA to take on an advocacy role went unanswered.<sup>6</sup> More recently ICA has commissioned a copyright working group to examine these issues and recommend policy positions. It also has created a "white paper" on *Current Issues in Copyright for Archives* to identify those issues in which archivists across all national domains have in common, thus laying the foundation for coordinated advocacy. Further, ICA has appointed Tim Padfield of the UK as a representative to WIPO to monitor developments in Geneva and speak on behalf of archival concerns. By their joint work, ICA and the International Federation of Library Associations (IFLA) have given us an agenda to follow to secure appropriate exceptions to copyright's exclusive rights.

Thanks in part to efforts from IFLA, there is also the prospect of a WIPO treaty to create an international standard for all countries to enact legislation creating "library and archives" exemptions to copyright's exclusive rights. These "library and archives" rights were the subject of a special Standing Committee on Copyright and Related Rights (SCCR) meeting in Geneva in November 2011, and they are being strongly supported by IFLA. The Society of American Archivists (SAA) sent a representative as well to reinforce that support.

SCCR is the body authorized to draft language for international treaties on copyright. The agenda for its November 2011 Session included multiple days dedicated to preliminary discussions of proposals for an international treaty to provide library and archives exceptions to copyright. With funding from the Alfred P. Sloan Foundation, SAA commissioned me to attend the November meeting in Geneva to serve as an official Non-Governmental Organization (NGO) Observer of the proceedings and to provide a formal presentation to the SCCR.

The background to the SCCR's consideration of library and archives exceptions is far-reaching, the number of individuals and organizations involved in moving the issue to this point is considerable, and the array of conditions determining how SCCR's members behave is both extensive and obscure. Furthermore, the workings of SCCR are unlike those of just about any other professional, academic, or policy-making bodies. So, let me take you into a world where even what to name a document has the potential to invalidate two weeks of work.

## **ENTERING THE ALTERNATE UNIVERSE OF INTERNATIONAL POLICY-MAKING**

One might imagine that deliberations at WIPO's Geneva headquarters would include dramatic happenings on important matters. While what delegates do in Geneva is important to the treaties that WIPO member states must ultimately implement, last November's SCCR revealed that things proceed at such a glacial pace that movement on actions that matter is, to put it mildly, quite subtle. The drama lies elsewhere, but once understood is indeed important. In the SCCR deliberations, national delegates respond to the competing interests of consumers and copyright holders, as represented by content industry associations for publishers, broadcasters, and motion picture producers. This all occurs against the backdrop of differing stages of economic development throughout the world, which means that certain countries have a stronger stake in the content side while others, who have education and science needs, see their national interests as closer to those of the consumer. That there are such disparities should not be a surprise to any who have thought about the past battles between the public benefits and private interests in copyright's history.

One unique characteristic of the WIPO SCCR makes its work on policy issues a most unusual spectacle. Out of deference to the legitimacy of each national delegate, SCCR only

takes action based on a specialized meaning of the word “consensus”—nothing is adopted so long as there remains even one delegate willing to express dissatisfaction with whatever proposal is on the table. With every delegate thus holding a virtual veto, the “consensus mode” can become a recipe for endless debate leading to stalemate and inaction. Nevertheless, each SCCR is time-bound, and it must agree to a report or statement of “Conclusions” before midnight of its closing day. Unresolved disagreements over policy may resurface even when trying to produce just a list of what SCCR will discuss at its next session. Thus, merely to say that SCCR23 agreed to discuss the submission of some library- and archives-friendly proposals, as well as to allow a thorough airing of reasons for and against the proposals, and agreed to adjourn to a future SCCR represents an important achievement.

Knowing this dynamic helps to explain that the background to last November’s meeting dates back as far as 2004, when Argentina and Brazil first advanced the need for WIPO to address development concerns. Then, in 2007 its General Assembly adopted an agenda to make development needs an integral part of its work.<sup>7</sup> In 2008, it went on to commission a report examining copyright laws of 149 of WIPO’s 184 member states.<sup>8</sup> Results, not surprisingly, showed wide variations in national practices and a general lack of provisions for addressing library and archives needs. In 2010, SCCR expanded its consideration of exemptions and limitations to include provisions for visually impaired persons, libraries and archives, and education. Then, in June 2011, the 41-member Africa Group presented a draft WIPO treaty for these latter areas, based heavily on a 2010 proposal from IFLA.<sup>9</sup> Finally, IFLA itself presented its own “Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives” (TLIB) at the November 2011 meeting.<sup>10</sup> The draft was cosponsored by ICA, Electronic Information for Libraries, and a library NGO called Innovarte. Not surprisingly, considering how many years it took to get to this point, the SCCR needed to add extra days to its November meeting in order to deal with all these issues.

Thus, after seven years, exceptions for libraries and archives were the center of attention for the November 21-23 sessions when, on the first afternoon, the Chair called upon Brazil to present what became called a “Background Document” which was basically the substance of the IFLA consortium’s suggestions for treaty language. As a background document, however, it had no formal standing as draft language and by itself could not remain on the agenda of this or future SCCR meetings. After the introduction of the document, all the NGOs, ranging from publishers to archivists, were allowed to present short, typically three- to five- minute statements to the delegates. This was the sole opportunity that the ICA and SAA observers had to formally address the Committee.

After the NGO comments, a succession of Latin American and African countries then praised TLIB provisions as benefitting development in their country. The US delegate, however, argued that before either the Africa Group’s proposal or the Brazil “background document” could be discussed, the Committee needed to consider what should be the general guiding principles. The next day, the US suggested these in its “Objectives and Principles for Exceptions and Limitations for Libraries and Archives,” whose approach was to “encourage” (i.e., promote) so-called “soft-law” rather than create mandatory treaty provisions.

With four “competing” proposals—Brazil’s, IFLA’s, the US’s, and a multinational proposal—the Chair declared an agreement on the use of a 17-page comparative table showing related elements of the four proposals. In a foreshadowing of what was to come, those who wanted to forestall any movement proceeded to quibble with what was to be put in which column or cell. Eventually, the Chair set the meeting on a course to discuss and debate issue “clusters:”

1) preservation, 2) right of reproduction and supply of copies, 3) legal deposit, 4) library lending, 5) parallel importation, 6) cross-border uses, 7) retracted, withdrawn and orphan works, 8) liabilities of libraries, 9) technological protection measures (TPM), and 10) contracts. By the end of the third day, after squabbling and obstructionism from various delegates, all ten topics had been discussed, although without resolution of the most marked divisions.

The discussion of orphan works, a matter of particular interest to archivists, was troubling. Both consumer and industry sides of the exception issue discussed this only in the context of published books, with the archetype being an author writing a work, then working with an editor and a publisher. One delegate even questioned whether a work could ever truly be orphaned. Needless to say, this scenario does not reflect the kinds of orphan works that predominate in archives, but the delegates' concerns may not be surprising given the prominent place the Google Books Project plays in popular perceptions.

A further worrisome sign was that some delegates from countries with strong authors rights/moral rights provisions had great difficulty with the possibility that an orphan work could be released without the permission of its author or heirs, fearing that doing so might abridge a *droit de divulgation*. This concern came even from a developing nation that otherwise is vocally supportive of library and archives exceptions. This shows that archivists can take nothing for granted and need to mount a strong effort to keep an orphan works provision in whatever document moves forward within SCCR. Further, the perspective I gleaned from other NGO observers was that the moral rights matter could make an orphan works exception for unpublished materials too controversial, virtually a "third rail" that may have to be avoided if a library and archives treaty is to progress.

In my view, archivists should not accept this perspective. Instead, we may want to consider using our concern for orphan works as a "deal-breaker" for our participation in consortia advocating library and archives exceptions. In fact, it may be a good idea to begin a multi-faceted strategy to neutralize and reframe this issue if we do not want to find one of our most important issues thrown off the train.

When I said "Entering the World" of international treaty-making, I was not exaggerating—this is truly an alternate universe. In other deliberative bodies, giving the concluding document an official number for the next meeting's agenda would seem to be a forgone conclusion. Not so with SCCR. Assigning the document a number is politically fraught because it implies acceptance of the document as language to be modified into text for a future treaty. If a document does not become a formal agenda item for the next meeting, then it remains nothing more than a note of a one-time discussion that went nowhere. When combined with the fact that SCCR proceeds entirely by the perception of consensus rather than by actual voting, even such a minor act as assigning a number to a document becomes a high-stakes matter. Sure enough, by the end of the November session, there were still disgruntled delegates who saw the act of giving a number as a means to derail everything that had transpired over the past two weeks, and they almost succeeded. On day eight of twelve, the Deputy Secretary-General finally offered a compromise—the document with its current comments plus all those received by February 29, 2012, would be considered a "working document" for SCCR's next meeting. This temporarily allowed the committee to move on to other business.

Given the diversity of issues covered over the full two-week meeting, the near constant disagreement on the particulars of preliminary documents, and the tendency of delegates to divert debate into procedural matters as surrogates for policy disputes, it is no surprise that the closing day (December 2) offered little hope that there would be a sudden convergence on issues.

The final day of an SCCR has some peculiar features that offer a drama worthy of *Waiting for Godot*. The day is primarily for the delegates to draft, review, and agree to a closing statement called “Conclusions,” the importance of which cannot be overestimated. It reports on the issues discussed, notes any documents created, identifies documents that will be the subject of future SCCR meetings, and establishes the dates of the next meeting. All of this must happen within the limits of the clock since the meeting’s mandate and ability to conclude any business, ends at midnight. If not, in technical terms the meeting never existed and its documents would have no standing for future deliberations. Given that SCCR proceeds only by a narrow definition of “consensus,” meaning no one voices disagreement, the possibility for difficulties can continue nearly endlessly until the clock runs out.

Inauspiciously, the “morning” session did not begin until shortly after 12:00 noon, and it quickly fell into disagreements over the unrelated matter of copyright in broadcast signals. When no consensus emerged by 12:30, the Chair adjourned the meeting for lunch during which he planned to meet with various regional groups to try to work out a timetable and document.

Given the differences evident over the entire two weeks, it was not surprising that the Chair’s plan to settle matters in a half-hour meeting meant that the scheduled 3:00 p.m. reconvening did not occur until 4:30, when delegates and observers received a three-page draft “Conclusions.” The draft offered something to celebrate—it indicated that discussion of library and archives exceptions would be carried forward to the next SCCR, meaning that the November 2011 SCCR could not be dismissed as “never having existed.”

Unfortunately, the Chair’s backroom magic had not been enough to settle all issues and one point proved very controversial: a four-word modifier—“on an international instrument”—had been included in square brackets in the draft of the title of the document to be carried forward. Appearing as it did in the pivotal item on “next steps,” this seemingly trivial phrase then dogged the meeting late into the evening.

As it happens, the document actually showed that considerable ground had been given by those objecting to library and archives exceptions since the draft conclusion called for the earlier “compilation document” to constitute an actual Committee document. Thus, the matter of library and archives exceptions lived to see another day even if there was opposition to some of its provisions. This was a major victory for the initiative’s advocates, including ICA and SAA. There remained, of course, the not inconsequential dispute over the document’s title.

In short, those delegates who had argued for “soft law,” i.e., that binding treaty language was neither desirable nor necessary, objected to the words “an international instrument” because that would appear to concede too much ground to a process they wanted to stop. On the other hand, treaty advocates saw the phrase as essentially consistent with the 2007 WIPO development mandate. Thus, process again became the stalking horse for fundamental political divisions.

Over the next four hours, despite multiple efforts by a cornucopia of delegates to craft compromise language, every reasonable suggestion was rejected by the contending parties. The Chair tried tactic after tactic, including a recess for the partisans to meet with their compatriots. Eventually, after the translators had gone home, which normally would shut everything down, the delegation that had been resisting movement on a treaty put forward compromise language that, fortunately, the treaty proponents accepted. In the context of the day, it was a tremendous achievement for those seeking the exceptions, although the prolixity of the result would hardly seem dramatic. The final wording of the paragraph was:

<b>Originally Proposed Wording</b>	<b>Final Wording</b>
<p>¶4. This compilation, including any further comment or correction on any of the above 11 topics sent by delegations to the WIPO Secretariat by February 29, 2012, will constitute a Committee document titled “Provisional working document [on an international instrument] <i>{square brackets in the original}</i> on limitations and exceptions for libraries and archives,” identified as document SCCR/23/8 Prov. This document will constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24<sup>th</sup> session.</p>	<p>¶4. This compilation, including any further legal, textual or other comment or correction, on any of the above 11 topics sent by delegations to the WIPO Secretariat by February 29, 2012, will constitute a Committee document titled “Provisional working document containing comments on and textual suggestions towards an appropriate international legal instrument (in whatever form) on exceptions and limitations for libraries and archives,” identified as document SCCR/23/8 Prov. This document will constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24th session.<sup>11</sup></p>

### **OBSERVATIONS AND LESSONS FOR FUTURE WORK**

To the outsider, two weeks to arrive at only an agreement to continue discussing a “provisional working document” toward an “appropriate” instrument “in whatever form” may not seem terribly significant. However, in the context of the world of WIPO SCCR, this was an amazing step forward. It ensured that the issue of which exceptions are necessary to advance archival and library needs in the digital era will remain before the international body that has the ability to set these provisions into a treaty to create international uniformity and facilitate access via today’s technology.

At the same time, a sober look reveals the significant challenges ahead. First, there is clearly entrenched opposition to any formal treaty requirements. Second, the document for the July 2012 SCCR was merely a compilation of sometimes conflicting provisions. Nevertheless, the substantial need for library and archives exceptions has received official recognition. Through the work of NGO observers from the library and archives communities and collaboration with delegates of friendly countries and regional groupings, these concerns are finally being taken seriously. Indeed, the NGOs represent a key mechanism for providing technical support to those national delegations wishing to move the cause forward.

Archivists seeking to influence international copyright policy and understand what it means to be involved in advocacy can draw several lessons from the SCCR 23 experience:

1. Orphan Works. Progress on orphan works at the international level faces particular challenges because of the possibility that moral rights/*droits d'auteur* can be used to pre-empt inclusion of orphan works in any set of library and archives exceptions, especially by those from countries treating moral rights as inalienable and perpetual. Archivists should not acquiesce to this as an unassailable barrier. Given the vast quantities in archives of unique unpublished material that have not otherwise seen the light of day, archivists have a strong case for making release of such material the subject of an exception. This is especially true for the vast majority of items where there is no effect on the market for such works, but there is a positive value to their usefulness to education and cultural preservation.

Importantly, the *droit de divulgation*, or right of first release to the public, which is often mentioned as a barrier, is not one of the moral rights supported by the Berne Convention Article 6bis or TRIPS.<sup>12</sup> Furthermore, if archivists can provide the right examples and suggest professional standards for respecting authors' rights, the case for release of unpublished orphan works can be made very compelling.<sup>13</sup> Nevertheless, it will be incumbent on archivists to be vocal advocates on this issue since it is one that many of the NGO representatives at SCCR 23 seemed to regard as insoluble and thus something they might be willing to forfeit as deliberations proceed.

Perhaps the most powerful argument we can use to keep this issue on the table with both WIPO and library groups in general is that the information world is becoming rather like archives. That is, the fusty old world where expressive content is harvested, warehoused, and metered out via a managed publication and production marketplace is quickly being overwhelmed by vast quantities of text, images, and sounds released on networks where the identities and coordinates of the authors and owners disappear at the rate of the half-life of the Statute of Anne's copyright term. In other words, we are the canaries in the coal mine—the problem that archivists face with orphan works will quickly become everyone's problem. Admittedly, the case might not be grasped as readily by the publishers and their associations, but it should resonate very well with those SCCR delegates driven by the WIPO development agenda.

2. Other Library /Archives Issues that TLIB Would Benefit: Any treaty developed along the lines of the documents presented at SCCR23 would facilitate putting more material online because it would provide uniformity across international borders. For archivists, this is absolutely essential given the borderless nature of the internet, which is the primary vehicle we have to expand education from and access to our collections. Such a treaty would also support archivists' need to circumvent technological protection measures so that they can access and preserve digital files. Archivists must remain vigilant at SCCR to ensure that favorable elements are not negotiated out of treaty language, just as could happen with orphan works.

3. Differing Librarian/Archivist Priorities: We owe an enormous debt to library organizations for their initiative and persistence on the issue of copyright exceptions. However, there are differences in our two professions, the materials with which we work, and the kinds of policy problems we face to meet our constituencies' needs. Only a specific archival advocacy can make the case for our issues in an unqualified way to the national delegates at SCCR. Thus, instead of deferring representation of our issues to the admittedly quite accomplished library community, we need to leverage our identity as the "archives" part of the sought-after "library

and archives” exceptions to secure a seat at the table and a place in the advocacy network.

4. Effectiveness of IFLA: The success that IFLA and EIFL have had at WIPO is something that has taken time to develop by their long-time presence both at and between SCCR meetings. Although they have had the good fortune of substantial foundation funding, their success has really depended on having clear goals, a strong network of experts to develop policy, and a readiness to build relations with sympathetic delegates by being responsive to the interests of those nations. Especially important has been their facility at articulating the impact that any particular policy or treaty provisions could have for the needs of those nations. At present, archivists lack the network to build these relations, but we can start if we have clear goals, modest foundation support, and a partnership between ICA and SAA.

5. Solid Foundation Built by ICA and SAA: The work that the ICA and SAA have done to articulate policy positions on intellectual property issues is a substantial sustained effort that supports our credibility in national and international forums, especially to the extent that we have built on a trio of principles: to respect the interests of rights holders, to support user access to collections, and to utilize technology to preserve materials and advance education and cultural heritage. The white papers and position statements are key tools in archivists being credible agents both to the SCCR delegates and to our fellow NGO observers.

6. Collaboration of Organizational Leadership: To have an effective presence at an international body such as WIPO, hundreds or thousands of miles away from our organization’s elected officers and executive secretaries, there need to be very strong and active communications between the representative to WIPO and the organization’s leadership. Limited but sufficient authority must be given to the representative to speak on the organization’s behalf and make tactical decisions as the needs and opportunities arise in Geneva.

In conclusion, while SCCR 23 demonstrated significant progress, more work is going to be needed to shape a treaty document that can garner the votes of enough countries to move it forward and adopt it. The obstacles are significant and the challenges may seem intimidating, but as archivists, we have nothing to lose by advocating for amendments to advance learning and science, and everything to gain. Even if not immediately effective, arguing the case will remind the current and future generations of archivists of the important role we play in society.

## ENDNOTES

1. For example, see WIPO Director General Francis Gurry's recent comments on the 2012 Global Innovation Index (GII) contains a clearly coded message supporting policy for strong intellectual property rights: "The GI is a timely reminder that policies to promote innovation are critical to the debate on spurring sustainable economic growth. . . .The downward pressure on investment in innovation exerted by the current crisis must be resisted. Otherwise we risk durable damage to countries' productive capacities. This is the time for forward-looking policies to lay the foundations for future prosperity." [http://www.wipo.int/pressroom/en/articles/2012/article\\_0014.html](http://www.wipo.int/pressroom/en/articles/2012/article_0014.html)
2. For the latest text of the Berne Convention see: [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)  
Overall, exemptions provided by national legislation are supposed to meet a "three-step-test" derived from Article 13 of the World Trade Organization's 1994 TRIPS agreement, which states that "Members shall confine limitations and exceptions to exclusive rights to *certain special cases* which do not conflict with a *normal exploitation* of the work and do *not unreasonably prejudice* the legitimate interests of the rights holder." Cf., Berne 9.2.
3. WIPO 11.0, and 12.1 for strictures on interference with rights management information.
4. Berne 6bis.1, and Berne 14ter.1., provide the droit de suite with allows profit from the future sale of original manuscripts and art of writers and composers.
5. Brazil, Chile, Nicaragua, and Uruguay in 2008 (SCCR/16/2) called for a formal recognition by WIPO's Standing Committee on Copyright and Related Rights (SCCR) of minimum, mandatory exceptions and limitations. available at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_16/sccr\\_16\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf) .]
6. William J. Maher, "Les effets du droit d'auteur international sur la pratique archivistique," *Archives: Association des Archivists du Québec*, 38:1 (2006-07): 101-114.
7. <http://www.wipo.int/ip-development/en/agenda/>
8. Kenneth Crews, *Study of Copyright Limitations and Exceptions for Libraries and Archives*, [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf).
9. [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_12.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf)
10. Available at: <http://www.ifla.org/en/node/5856> .
11. The full text of the final agreed upon Conclusions can be found at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_23/sccr\\_23\\_ref\\_conclusions.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf)
12. While the Berne treaty provides a qualified recognition of some of the "moral rights" it does not include the *droit de divulgation*. ( See *Berne Convention for the Protection of Literary and Artistic Works*, Article 6bis: "Moral Rights": 1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author's death; 3. Means of redress." Available at: [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf) . See also: *Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)*, Article 9, Paragraph 1. Available at: [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm))
13. For example, the SAA's Intellectual Property Working Group (IPWG) statement on orphan works already provides a clear provision for respecting the rights of reappearing authors of orphan works, acknowledging their rights to withdraw the work or at least receive some compensation. (See: Reply Comment 5 in "Reply Comments by the Society of American Archivists to the Comments on Inquiry Concerning Orphan Works," May 6, 2005. Available at: <http://www2.archivists.org/statements/response-to-statement-on-orphan-works-pdf> )