



## SCCR33, ITEM 6: LIMITATIONS AND EXCEPTION FOR LIBRARIES AND ARCHIVES: Contract Override

### The Principle

The goals and policies expressed through exceptions and limitations are important statements of national principle and public policy goals and should not be varied by private contracts.

### The Problem

In the digital environment, libraries access materials via a licence from a publisher or an aggregator, rather than buying them outright. As such, licensing terms can be used to prevent activities permitted under copyright law, or can require the payment of a fee on certain uses of materials that would otherwise be free under an exception.

A 2008 British Library study of over 100 library contracts for electronic resources found that over 90% of contracts had terms that were **more restrictive than exceptions** in the copyright law<sup>1</sup> e.g. lending, reproduction for education, research, and private use, for preservation, for the benefit of persons with disabilities.

As Advocate General Szpunar of the Court of Justice of the European Union noted in his opinion, without effective exceptions and limitations, the work of libraries is subject solely to the rules of the market, which does not provide adequate protection for the interests of them and their users.

The examples in the annex shows that most licences refer to laws outside of the library's own jurisdiction, which raises questions on whether contractual solutions to cross-border access are *equitable and fair* to library users.

Contracts (or licences) for the purchase of access to electronic resources **should not be permitted to override exceptions and limitations** in national copyright law.

### The Solution

As previously suggested by Ecuador and the African Group, a solution would be an obligation to respect Exceptions to Copyright and Related Rights.

This obligation would lead to annulment of any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions to copyright for libraries, archives and museums. Such a step will offer greater legal certainty and ensure that the will of legislators cannot be side-stepped.

This is not a new or uncommon measure. Within the EU, British, Irish, Portuguese and Irish law all include provisions protecting exceptions and limitations to copyright. EU law itself also protects users' rights to open up software or extract information from databases in the same way.

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<sup>1</sup> The British Library, Analysis of 100 Contracts Offered to the British Library, <http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaID=316> and <http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=691>



## Talking Points

- In the digital environment, libraries access digital materials via a licence from a publisher or an aggregator. However, the licensing terms can prevent uses permitted under copyright law, and this creates unnecessary obstacles for the end-user.
- The goals and policies expressed through exceptions and limitations are important statements of national principle and public policy goals and should not be varied by private contracts. Preventing this will offer greater legal certainty to libraries, archives and museums and their users.
- While freedom of contract is an important principle, it is by no means universal. Many countries, notably in Europe, include provisions in law which annul the effect of contract terms which override exceptions and limitations to copyright.