



**WIPO Standing Committee on Copyright and Related Rights
SCCR33 -- November 2016**

ICA Statement on Contractual override of statutory exceptions

Copyright is typically understood as a balance between (on one hand) promoting the public interest in the creation and dissemination of informative, intellectually enriching, works for public consumption, and (on the other hand) obtaining a just reward for creators by providing financial incentives for authorship. Archives play an essential role in serving the public interest by preserving and making such works available to the public. I remind those present that authors who use archival holdings as the raw material for new creations comprise a significant portion of the public.

In a digital world, the international flow of information between archives and libraries and from archives and libraries to their users, is especially dependent on internationally recognized exceptions and limitations to copyright. Archives in particular rely heavily on such exceptions because the majority of their holdings were not created for commercial purposes. Thus, for most material in their collections, there are no representative bodies to provide licensing, and there is little prospect of effective new licensing models.

But exceptions and limitations that are fundamental to the work of archives can be overridden by contractual agreements. For example, some archives are using private sector vendors to provide cloud storage for their digital holdings. If the vendor is in another jurisdiction, the cloud storage provider may fail to comply with the copyright and privacy laws of the repository's jurisdiction. The mere presence of boilerplate clauses establishing the choice of law that will govern an agreement may undermine the principle of territoriality that undergirds the international operation of copyright law. Contractual overrides completely nullify the purpose of the exceptions, and tip the copyright balance entirely toward the benefit of rights holders. Without effective internationally agreed upon limitations and exceptions, the copyright system risks becoming an entirely private system with little incentive to serve the public interest.

Thus, whatever instrument results from this process must include a provision that permits an archives or library to invalidate any contractual provision that prevents or restricts it from doing any act that is consistent with the limitations and exceptions provided by such an instrument.

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