



InterPARES 2 Project

International Research on Permanent Authentic Records in Electronic Systems

Copyright Policy Annotated Bibliography

Draft version 4

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Table of Contents

1. National Legislation and Implementation Guidelines	2
1.1 Australia	2
1.2 Belgium	6
1.3 Canada	10
1.4 France	14
1.5 Hong Kong	16
1.6 Singapore	18
1.7 United Kingdom	20
1.8 United States	22
2. Case Law	26
2.1 Kahle v. Gonzales	26
2.2 Eldred v. Ashcroft	30
3. International Agreements: Language and Rationale for Impeding Legislation	40
3.1 WIPO	40
3.2 European Directives	54
3.3 UNESCO	69
3.3 WTO	71
IV. Institutional Policies and Literature	73
V. Other Sources (listed alphabetically by author)	74

1. NATIONAL LEGISLATION AND IMPLEMENTATION GUIDELINES

1.1 Australia

Bibliographic Information:

Author:	Parliament of Australia. Parliamentary Library.
Title:	“Bills Digest No. 71 2004–05. Copyright Legislation Amendment Bill 2004”
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.aph.gov.au/library/pubs/bd/2004-05/05bd071.htm (Retrieved 8 January 2006)

Abstract:

This digest discusses a Bill introduced in November 2004 called the Copyright Legislation Amendment Bill 2004. This Bill introduces changes to make Australian Copyright Legislation more compatible with U.S. Legislation to suit a free trade agreement. The Bill has items concerning temporary reproductions that are created incidentally when a digital message is transformed into a useable form. The Bill would alter the current exception in Australian law for temporary reproductions by limiting the creation of reproductions to only those necessary in the technical process of use.

Annotation:

This Bill demonstrates the influence of trade on aligning Copyright restrictions in different countries. It raises the question of whether archives will be able to accept reproductions of copyrighted work that have been made in the technical process of use but have been kept beyond initial ‘temporary’ needs.

Specifically, this bill proscribes a tightly focused exception for temporary reproduction. The author of the digest notes that the language of these provisions (1-8) of the Bill was composed in order to allow the lawful use DVD discs, the watching of which currently requires the temporary reproduction of the disc’s data in the DVD player’s memory. The provisions mandate that the exception from infringement for these copies “would only apply to **temporary** reproductions made as a **necessary** part of a technical process of use.” [Emphasis in original.]

The author of the digest comments that these provisions “make it more likely that people will be found to have infringed copyright.” [From Comment on 1-8.]

Yet, the author subsequently notes that “[t]he addition of the word ‘necessary’ through items 2 and 6 could pose interpretative problems.” [Ibid.]

Annotator:	A. Torrance and Luke Meagher
Date of Annotation:	December 2004 and January 2006

Other Notes:	Temporary user access: Temporary reproductions are also allowed when they are created incidentally as part of using the work, but this exception is limited by the Bill described above. (III.3.43B).
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Bibliographic Information:

Author:	Australian Copyright Council.
Title:	"Information Sheet G65. Digital Agenda Amendments: an overview."
Journal or Book:	
Editor(s):	
Publication Details:	July 2003.
Page Numbers:	
Web Source:	http://www.copyright.org.au/PDF/InfoSheets/G065.pdf (Retrieved 8 January, 2005)

Abstract:

The information sheet summarizes the changes made to the 1968 Copyright Act by the passing of the Copyright Amendment (Digital Agenda) Act 2000. The major areas of change are described as follows: a “broad-based technology-neutral” right of communication to the public is introduced, which both subsumes and extends the pre-existing broadcast and the cable right; special exceptions for libraries and educational institutions in light of the digital environment are extended; provisions dealing with the circumvention of technological protection measures and broadcast decoder devices are introduced; copyright owners can take action in relation to the tampering with rights electronic management information (in some cases, criminal offences are created); a statutory licence requiring payment of equitable remuneration for the retransmission of free-to-air broadcasts is introduced; and specific provisions now deal with when Internet Service Providers and telecommunications carriers will be liable for infringement of copyright” (1). The sheet also indicates that the definition of reproduction was changed to include digitized versions (3).

Annotation:

The description of the special exceptions for libraries and educational institutions does not cover preservation. Explanations of technological protection measures and rights management information are very brief. It is a useful document to indicate specifically changes that a country has made to suit the digital agenda.

Indeed, the exceptions do not cover preservation per se. However, the paper does comment upon the circumvention of technological measures:
“There are criminal penalties and civil remedies for making, importing and commercially dealing in devices and services which circumvent technological copyright protection measures (such as decryption software). There is an exception if the device or service is going to be used for various “permitted purposes”. A “permitted purpose” includes certain activities by libraries, educational institutions, governments, and decompilers of

software. Organisations wishing to take advantage of these exceptions need to make a written declaration that the device or service is only to be used for the relevant purpose.”

Libraries and archives appear reasonably well-protected here, but under its agreement with the United States, Australia is required to replace the above “permitted purposes” with “more limited exceptions” by 1 January 2007.

Finally, this paper notes that “other changes” caused by the adoption of the Digital Agenda is the inclusion of “amendments to the special exceptions relating to computer programs. *These allow copying of computer programs for ‘normal use’, studying the ideas behind a computer program, making interoperable products, correcting errors, testing security and making backup copies.*”

These provisions as a whole, but especially interoperability (i.e. *over time*), provide at least a veneer of protection for digital preservation institutions.

Annotator:	A. Torrance and L. Meagher
Date of Annotation:	December 2004 and January 2006
Other Notes:	

Bibliographic Information:

Author:	Government of Australia. Attorney-General’s Department.
Title:	<i>Copyright Act 1968</i>
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://scaleplus.law.gov.au/html/pasteact/0/244/top.htm (Retrieved 8 January 2006)

Subjects:	
Class Descriptor:	

Abstract:

The 1968 Copyright Act with Digital Agenda Amendments from 2000 grants authors moral and economic rights. Applicable restrictions include: exclusive rights for copyright owners to reproduce, adapt and communicate their work to the public (III.1.31.1.a); moral rights (IX.4); and circumvention of technological protection measures and alteration of digital rights management information (V.2A). Applicable exceptions include: fair dealing (III.3.40); temporary reproduction or adaptation as part of the technical process of making or receiving a communication (III.3.43A); backup copies and copies for interoperability (III.3.47C-F); and copies made by Archives for replacement or preservation purposes, for administrative purposes, and for the purpose of making it available on a computer terminal in the archives as long as electronic reproduction of that copy is not possible (III.5.51A). Preservation copies are not considered to be infringements on moral rights (IX.6.5).

Annotation:

The exceptions for Archives in the 1968 Act seem to be liberal enough to allow for preservation copies. However, there are also provisions against circumventing technological protection measures and removing or altering digital rights management information that could prevent cultural institutions from making those copies.

Copyright Act of 1968, with Digital Agenda Amendments from 2000, Section IX.6.195AT(5):

“Anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of the work.”

Annotator:	A. Torrance and L. Meagher
Date of Annotation:	December 2004 and January 2006
Other Notes:	<p>Backup: Licensees or owners of computer programs can make copies so that they may "use the reproduction in lieu of the original copy" and store the original, or instead of the original if the original has been stolen or lost, or rendered unstable. (III.47C.1). The licensee or owner of copyrighted computer programs or "any work or other subject-matter held together with the program on the same computer system" can make reproductions for as "part of the normal back-up copying of data for security purposes" (III.47C.2). Archives may be permitted to make backup copies under the section that allows them to make a copy for administrative purposes (III.5.51A).</p> <p>Processing: Archives are allowed to make a copy for administrative purposes (III.5.51A). They can also make working copies to protect the originals (III.5.51AA). For licensees or regular users, temporary reproduction or adaptation as part of the technical process of making or receiving a communication is allowed (III.3.43A).</p> <p>Migration: The justification for making preservation copies is described in the interpretation of the applicable section as follows: reproduction for the purpose of preserving the work against loss or deterioration (III.5.51A).</p> <p>Temporary user access: Published material received by archives can be made available in electronic form within the archives as long as users cannot make electronic copies or communicate the work (III.5.49). Temporary reproductions are also allowed when they are created incidentally as part of using the work, but, pending the enactment of the above-mentioned Bill, this exception will likely be limited.</p>

	<p>(III.3.43B).</p> <p>Different treatment of use: Legislation has fair dealing provisions for research purposes, i.e. non-commercial use. Works can be altered for purposes that are consistent with the original purpose that the work was licensed for, i.e. correction of errors (III.3.47C-F).</p> <p>Time delay until unlimited access: The term is fifty years after the end of the calendar year when the author dies or after the first publication. (III.1.33-34).</p> <p>Moral rights endure until the copyright term expires except in the case of cinematograph film, where moral rights end at the author's death (IX.5)</p>
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1.2 Belgium

Bibliographic Information:

Author:	Belgium
Title:	22 MAI 2005 - Loi transposant en droit belge la Directive européenne 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	Juridat database: http://www.juridat.be/cgi_loi/legislation.pl

Abstract:

This law modifies Belgian copyright law to implement the European Union Directive on Copyright in the Information Society (2001/29/CE). The law introduces exceptions bearing on preservation and dissemination for non-profit archives, libraries and museums.

Annotation:

The specific exemption for the Royal Belgian Film Archive was replaced by a more general exemption for archives and publicly accessible libraries and museums. These institutions may make reproductions necessary for preservation. The reproductions may not be made to obtain a direct or indirect economic or commercial advantage and may not conflict with the normal exploitation of the work by the rightholder or unreasonably prejudice the legitimate interests of the rightholder. The reproductions are property of the institution that made them. The rightholder has a right to access the preserved reproduction insofar as this doesn't interfere with preservation and provided the institution is justly compensated for its preservation efforts.

A new exemption permits these institutions to make its collection available to the public subject to stringent conditions. The exemption only covers materials that are not available on the market. The dissemination may not be aimed at obtaining a direct or indirect economic or commercial advantage, nor may it conflict with the normal exploitation of the work by the rightholder or unreasonably prejudice the legitimate interests of the rightholder. The dissemination may only occur on site through terminals made available to individuals who access the material for the purpose of private study or research.

Annotator:	H. Dekeyser (?)
Date of Annotation:	September 2005
Other Notes:	See also European Union Directive on Copyright in the Information Society (2001/29/CE)

Bibliographic Information:

Author:	Belgium
Title:	12 MAI 2003 - Loi concernant la protection juridique des services à accès conditionnel et des services d'accès conditionnel relatifs aux services de la société de l'information
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	Juridat database: http://www.juridat.be/cgi_loi/legislation.pl

Abstract:

This law states that it is illegal to use, sell, import, etc. devices to gain access to protected services.

Annotation:

The restriction is broad but the implication of this law is that circumventing protection measures is prohibited.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	Belgium
Title:	30 JUIN 1994 - Loi relative au droit d'auteur et aux droits voisins. (Copyright Law)
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	Juridat database: http://www.juridat.be/cgi_loi/legislation.pl

Abstract:

The Belgian copyright law grants authors economic and moral rights. The moral rights are attached to the person of the creator and cannot be transferred, nor relinquished. The creator can promise not to exercise these rights, subject to certain limitations. Belgian copyright law grants authors exclusive rights of reproduction (including distribution) and communication to the public. These economic rights can be transferred freely. There is only one section in the law that refers to exceptions for archives. The Royal Belgian Film Archive can make copies in an effort to preserve and restore films subject to the condition that such copies do not interfere with the dissemination of the work and that the creator's interests are not harmed (Article 22, 8).

Annotation:

This is the Belgian law before digital agenda amendments are put into place or the European Union Directive has been implemented. There are no exceptions bearing on preservation, but there are exceptions for instruction and scientific research.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	<p>Backup, Processing, Migration: Belgian archival legislation does not go into details about archival functions. It generally states what public records need to be transferred, when they need to be transferred, and who is responsible.</p> <p>Different treatment of use: The act discusses the difference between private use and use for commercial purposes. It allows for free and private communication of a work within the family circle, for example (Article 22, 3). As discussed above, it also allows for copying of work for scientific research and instructional purposes. There is no discussion of how users may access works in an archives (i.e. Temporary user access versus unlimited user access versus user re-use).</p> <p>Time delay until unlimited access: Copyright expires 70 years after the death of the creator.</p>

	("Article 2)
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Bibliographic Information:

Author:	Belgium
Title:	30 JUIN 1994 - Loi transposant en droit belge la directive européenne du 14 mai 1991 concernant la protection juridique des programmes d'ordinateur (Software Copyright Law)
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	Juridat database: http://www.juridat.be/cgi_loi/legislation.pl

Abstract:

This law covers copyright as it applies to software or computer programs. They are considered to be literary works in the sense of the Berne Convention. Authors are granted moral and economic rights. Users are allowed to copy programs in a limited way as long as it necessary for the use of the product (i.e. – the correction of errors, back-up copies, interoperability).

Annotation:

The law allows for copies generated for purposes consistent with the legal use of the programs. It does not consider long-term preservation.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	Backup: The law allows backup reproduction as long as it is necessary for the use of the program.

Bibliographic Information:

Author:	Belgium
Title:	8 AVRIL 1965 - Loi instituant le dépôt légal à la Bibliothèque royale de Belgique. (Law on obligatory deposit of publications in the Royal Library of Belgium).
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	Juridat database: http://www.juridat.be/cgi_loi/legislation.pl

Abstract:

The law prescribes that a copy of all publications (excluding films) created by an person living in Belgium or that are released in Belgium must be submitted to the Royal Library.

Annotation:

Dekeyser (see below) writes that: "As the law does not distinguish according to the form of the publication, it applies to digital works...The obligation to deposit a copy in the Royal Library could be used as leverage in negotiating with rights-holders to procure a copy of their works for archival, preferably unencumbered by technical protection measures." (Dekeyser, 6).
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Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

1.3 Canada

Bibliographic Information:

Author:	Government of Canada. Justice Canada.
Title:	<i>Copyright Act. Chapter C-42.</i>
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://laws.justice.gc.ca/en/c-42/text.html (Retrieved February 26, 2005)

Abstract:

The Canadian Act grants authors moral and economic rights. The Act does not explicitly refer to digital records beyond computer programs. It distinguishes instead between published and unpublished work, and fixed and unfixed work. A typical definition is that of a photograph: "'photograph' includes photo-lithograph and any work expressed by any process analogous to photography" (Interpretation, Section 2). In this case, it seems likely that digital photography would be considered a process analogous to photography. The Act does not touch on issues that are part of the Digital Agenda (i.e.- circumvention of technological protection measures.) Libraries, archives and museums are permitted under the Act to make preservation and replacement copies. (III.30.1)

Annotation:

It appears that the Canadian Copyright Act will allow for the kind of copying required for long term preservation. The Act seems to aim for technology-neutral definitions.

The following section of the law allows libraries and archives to make preservation and replacement copies at discretion of the institution (or individual archivist or librarian):

<p>“30.1 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether</p>
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published or unpublished, in its permanent collection

- (a) if the original is rare or unpublished and is
 - (i) deteriorating, damaged or lost, or
 - (ii) at risk of deterioration or becoming damaged or lost;
- (b) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;
- (c) in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable;
- (d) for the purposes of internal record-keeping and cataloguing;
- (e) for insurance purposes or police investigations; or
- (f) if necessary for restoration.

Limitation

(2) Paragraphs (1)(a) to (c) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).

Destruction of intermediate copies

(3) If a person must make an intermediate copy in order to make a copy under subsection (1), the person must destroy the intermediate copy as soon as it is no longer needed.

Regulations

(4) The Governor in Council may make regulations with respect to the procedure for making copies under subsection (1).

1997, c. 24, s. 18; 1999, c. 31, s. 59(E).”

Furthermore, Section **30.21** governs copying specifically done by archives:

“(1) It is not an infringement of copyright for an archive to make a copy, in accordance with subsection (3), of an unpublished work that is deposited in the archive.

Notice

(2) When a person deposits a work in an archive, *the archive must give the person notice* that it may copy the work in accordance with this section.

Conditions for copying of works

(3) *The archive may only copy the work if*

- (a) the person who deposited the work, if a copyright owner, did not, at the time the work was deposited, prohibit its copying;
- (b) copying has not been prohibited by any other owner of copyright in the work; and
- (c) the archive is satisfied that the person for whom it is made will use the copy only for purposes of research or private study and makes only one copy for that person.

Regulations

(4) The Governor in Council may prescribe the manner and form in which the conditions in subsection (3) may be met.”

3(b) may bring into play underlying rights, but could also refer to simply a shared copyright, which is not necessarily the same thing.

Other parts of the Act note that ownership of copyright is to be assumed if the name of the person claiming ownership of the work is attached to or located upon the work in

question. Otherwise, evidence of ownership of copyright is the registration record in the Registrar of Copyright's registry, if extant.

Also, III.38.1(6) guards archives against having to pay statutory damages (\$500 – 20, 000 CAD):

“(6) No statutory damages may be awarded against

(a) an educational institution or a person acting under its authority that has committed an act referred to in section 29.6 or 29.7 and has not paid any royalties or complied with any terms and conditions fixed under this Act in relation to the commission of the act;

(b) *an educational institution, library, archive or museum* that is sued in the circumstances referred to in section 38.2; or

(c) a person who infringes copyright under paragraph 27(2)(e) or section 27.1, where the copy in question was made with the consent of the copyright owner in the country where the copy was made.”

But, III.38.2 requires that an archives or other “collective society” which is found to have infringed upon an owner's copyright must pay the owner the royalties he would have earned had the work been legally licensed to the archives.

Annotator:	A. Torrance and L. Meagher
Date of Annotation:	December 2004 and January 2006
Other Notes:	<p>Backup: This process might fall under the first basic exception. A copy can be made under the provision "for the purposes of internal record-keeping and cataloguing." (Part III, Section 30.1, d). The only explicit reference to the process of backing up is an exception made for computer programs in general that states that it is not an infringement for a person that owns a copy of a computer program that is authorized by the owner of the program's copyright to: "make a single reproduction for backup purposes of the copy...if the person proves that the reproduction for backup purposes is destroyed immediately when the person ceases to be the owner of the copy of the computer program." (Part III, Section 30.6).</p> <p>Processing: This would fall under the first basic exception. There is a provision for making a copy if the original work is rare or unpublished and is deteriorating, damaged or lost, or at risk of deterioration, becoming damaged or lost (Part III, Section 30.1, a). There is also the provision for the purposes of internal record-keeping and cataloguing (Part III, Section 30.1, d).</p> <p>Migration: This could fall under several provisions of the first basic exception. The provision for making a copy if the original work</p>

	<p>is rare or unpublished and is deteriorating, damaged or lost, or at risk of deterioration, becoming damaged or lost would apply (Part III, Section 30.1, a). There is also a provision to make a copy "in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable" (Part III, Section 30.1, c). There is also a provision that might apply: a copy can be made "if necessary for restoration" (Part III, Section 30.1, f).</p> <p>Temporary user access and unlimited user access: There is no distinction between temporary or unlimited user access as long as it is for research or private study, but the third basic exception for private study or research stipulates that an archives can only make one copy for a person (Part III, Section 30.21, c). Also, this exception states that a copy can only be made if the copyright owner, at the time of its deposit, did not prohibit its copying, and that copying has not been prohibited by any other owner of copyright in the work (Part III, Section 30.21, a and b). The second and fourth basic exceptions stipulate that copies be made by reprographic reproduction.</p> <p>User re-use: The only allusion to this is discussed in the second basic exception for making reprographic copies of published works. It explicitly says that, while you can provide a copy of such work to a patron of another library, archive or museum, this copy must not be given in digital form (Part III, Section 30.2, 5).</p> <p>Different treatment of use: The legislation contains exceptions for fair use.</p> <p>Time delay until unlimited access: The general rule for term of copyright is the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of the calendar year. (Part I, Section 6). However, there are many provisions for situations of joint authorship, anonymous works, posthumous works and of authors that are nationals of other countries (Part I, Sections 6, 7, 9).</p>
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Bibliographic Information:

Author:	Standing Committee on Cultural Heritage.
Title:	<i>Interim Report on Copyright Reform</i>
Journal or Book:	
Editor(s):	
Publication Details:	May 2004.

Page Numbers:	
Web Source:	http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf (Retrieved February 26, 2005)

Abstract:

This is a report submitted to Canadian Parliament on the work of the Standing Committee on Cultural Heritage in its review of the 1998 Copyright Act. The Committee recommends the ratification of WIPO and WPPT. The report also gives recommendations concerning changes to the copyright act in the light of new technologies in the digital environment. It recommends the licensing of electronic delivery of copyrighted material to library patrons as opposed to amending the Act to allow cultural institutions "equipped with the appropriate technological safeguards" to provide digital copies to patrons (20-21).

Annotation:

This report shows how the Canadian government is considering amending the Copyright Act to cover issues relating to the digital agenda. It does not cover long term preservation, but focuses on the provision of access to digital material.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

1.4 France**Bibliographic Information:**

Author:	Legifrance.gouv.fr
Title:	"Loi relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle." English Translation.
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm (Retrieved February 26, 2005)

Abstract:

French copyright legislation guarantees the economic, intellectual and moral rights of an author. Moral rights are inalienable except upon death of the author where they may be transferred. (Article L121-2). The legislation applies to works in all formats, including presumably electronic works. (Article L112-2). "Reproduction is defined as the physical

fixation of a work by any process permitting it to be communicated to the public in an indirect way" (Article L122-3). Archives are not given any special exceptions under the law. It has not been amended to include provisions relevant to the Digital agenda, such as those preventing the circumvention of digital protection measures.

Annotation:

It appears that registration is required for patent application, but that at least the moral copyrights exist upon creation or fixation of the work itself..

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	<p>Backup: A person does have a right to create back-up copies when necessary to ensure the use of the software (Article L122-6-1).</p> <p>Processing: There is no mention of archival or preservation processing, but some allowance is given for reproduction to permit use (Article L122-6-1).</p> <p>Migration: Exceptions to copyright that allow a person to reproduce software coding in order to ensure interoperability might apply (Article L122-6-1).</p> <p>Temporary user access and unlimited user access: The distinction is made between temporary and permanent reproduction and use, but they are only described concerning the right of an author to authorize the temporary or permanent use of software. (Article L122-6).</p> <p>User re-use: The producer of a database has the right to restrict the permanent or temporary transfer of all or a substantial part, qualitatively or quantitatively, of the contents of a database. The author also has a right to prohibit re-use or the repeated or systematic extraction of contents of a database if these go beyond the conditions of normal use of the database (Articles L342-1 and L342-2).</p> <p>Different treatment of use: There is a distinction between private use and public communication. There is also some right to alter or use a work for a purpose that is consistent with the original purpose stipulated in a contract (i.e. reproduction of code in software to make it error-free).</p>

	<p>Time delay until unlimited access: The term of copyright is 70 years after the death of the author starting from the end of the calendar year in which the author dies (Article L123-1). The term of copyright for a database that has been made available to the public is 15 years from the first January 1st after the day it was made available to the public (Article L342-5).</p>
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1.5 Hong Kong

Bibliographic Information:

Author:	Bilingual Laws Information System
Title:	<i>Copyright Ordinance (Cap. 528.)</i>
Journal or Book:	
Editor(s):	
Publication Details:	27 June 1997
Page Numbers:	
Web Source:	http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc?OpenView&Start=528&Count=30&Expand=528.1#528.1 (Retrieved 8 January 2006)

Abstract:

<p>Hong Kong legislation describes copyright as a property right. Lawful owners have economic rights. The legislation also covers moral rights. There is a distinction made between primary and secondary infringement. Archives and libraries are given special exceptions to copyright under the law. Moral rights do not cover computer programs or computer-generated works. Archives and libraries may make a copy of a work in their collection for replacement or preservation purposes, and may make a preservation or replacement copy for other libraries and archives for their collections, if it is not practicable to purchase another copy (Section 51).</p>

Annotation:

<p>The legislation has not been adapted to comply with the digital agenda. The law does not give any rationale for why the moral rights of having work attributed and to object to derogatory treatment do not extend to computer programs or computer-generated works (Sections 91 and 93).</p>
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Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	<p>Backup: Lawful users of computer programs may make backup copies for the purposes of lawful use. (Section 60).</p> <p>Processing:</p>

	<p>Archives appear to be only allowed to make copies for replacement or preservation purposes, not as part of processing or for administrative purposes.</p> <p>Migration: The moral right that restricts the derogatory treatment of works does not apply to computer programs or computer-generated works so any alteration that may take place due to migration would likely not be considered an infringement (Section 93).</p> <p>Temporary user access, unlimited user access and user re-use: The legislation does not distinguish between temporary and unlimited use and re-use.</p> <p>Different treatment of use: There is a fair dealing principle that permits reproduction for research and private study, etc (Sections 38-39). There is also an underlying principle of consistent purposes that allows for adaption or alteration for purposes that are consistent with the lawful usage of the work (Section 61).</p> <p>Time delay until unlimited access: The term for copyright is generally fifty years from the end of the calendar year in which the author dies. (Section 17). Moral rights endure as long as copyright subsists in the work (Section 97).</p>
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Bibliographic Information:

Author:	Ho, Kenneth.
Title:	"A Study into the Problem of Software Piracy in Hong Kong and China."
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.ipd.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_copyrt/piracy_hk_china_c.htm#1.1 (Retrieved March 11, 2005)

Abstract:

The dissertation examines the various factors which affect software piracy in Hong Kong and China, with the aim of hoping to understand the reasons behind such activities, and attempts to suggest ways of tackling the problem. The first section describes the history of Copyright Law in Hong Kong. The 1956 United Kingdom Copyright Law was extended to Hong Kong. The UK Copyright (Computer Software) Amendment Act 1985 was also extended to Hong Kong in 1988. This latter legislation ensured that computer

programs were given copyright protection as established in the Berne Convention. However, the 1985 Act was considered an intermediate measure as it does not cover the extent of protection, making backup copies, etc. The most recent United Kingdom copyright legislation passed in 1988 was never extended to Hong Kong (N.pag, section 1.1).

Annotation:

The dissertation is concerned with addressing software piracy as a criminal issue. It puts copyright legislation in a historical context, but does not address legitimate needs for making copies of copyrighted materials (i.e. exceptions for preservation institutions).

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

1.6 Singapore

Bibliographic Information:

Author:	Singapore Statutes Online.
Title:	<i>Copyright Act (Chapter 63)</i>
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://statutes.agc.gov.sg/ (Retrieved 8 January 2006)

Abstract:

In Singapore, copyright owners have the exclusive right to reproduction and control of commercial exploitation of their works. The legislation also covers some aspects of moral rights (false attribution), but not others (derogatory treatment). There is a distinction made between primary and secondary infringement. Archives and libraries are given special exceptions to copyright under the law. The digital agenda is covered to: digital rights management information cannot be removed or altered (Section 260) and technological protection measures cannot be circumvented (Section 261).

Annotation:

Although Singapore has added provisions to make its legislation compliant with the digital agenda, it is unclear how these prohibitions against removing digital rights management information and against circumventing technological protection measures bear on those exceptions granted to archives.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	Backup: Back-up copying of computer programs is permitted if the copy

	<p>will be used "in lieu of the original copy in the event that the original copy is lost, destroyed or rendered unusable (Section 39). Archives and libraries can also make a single copy of works beyond those made for preservation or replacement purposes (Section 48).</p> <p>Processing: Archives and libraries can also make a single copy of works beyond those made for preservation or replacement purposes (Section 48). Also, the creation of transient copies on a network system is not considered infringement (Section 193E).</p> <p>Migration: Archives and libraries may make a copy of an original work for preservation purposes (Section 48). There is no restriction on the derogatory treatment of works, so any alterations made for migration purposes would not likely be seen as an infringement.</p> <p>Temporary user access, unlimited user access, user re-use: The legislation does not distinguish between temporary and unlimited use and re-use.</p> <p>Different treatment of use: The law covers fair dealing exceptions for non-commercial uses such as research or private study (Section 35). There is also exceptions for incidental copies that are created when works are being used in a network environment (Section 193B).</p> <p>Time delay until unlimited access: Copyright subsists until 70 years after the expiration of the calendar year in which the author of the work died or after the work was first communicated to the public (Section 28).</p>
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Bibliographic Information:

Author:	Intellectual Property Office of Singapore.
Title:	"Copyright: Copyright, Internet and Software Program."
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.ipos.gov.sg/main/aboutip/copyright/copynetsoftware.html (Retrieved 8 January 2006)

Abstract:

This is an information sheet covering copyright and material on the internet, email, software programs, and the liability of network service providers. It gives examples of

what may or may not be considered an infringement of copyright. The first paragraph reads “Copyright materials sent over the Internet or stored on web servers are treated in the same manner as copyright material in other media. The fact that they are made available on the Internet does not constitute a waiver of copyright nor does it carry any implied license for anyone to download or reproduce the material without the permission of the copyright owner” (N.pag.)

Annotation:

The site gives interpretations of the law which shed more light on what may or may not infringe copyright. For example, with regards to copyright and web pages the site states: “It is possible for a web page to be protected as a compilation, which is a sub-category of literary works. A web page will qualify for protection if the selection or arrangement of the materials in the web page constitutes an intellectual creation. The protection conferred is on the web page as a whole. The individual materials have independent and concurrent copyright.”

This is not an interpretation that has arisen elsewhere, to our knowledge [LM]. It is unique in that it asserts the protection of web pages under the same line of reasoning that databases are protected in Europe. That rubric specifies that if the selection and arrangement of a database’s data (i.e. its “architecture” or “design”) are original, then the work is protected.

Annotator:	A. Torrance and L. Meagher
Date of Annotation:	December 2004 and January 2006
Other Notes:	

1.7 United Kingdom

Bibliographic Information:

Author:	United Kingdom. Her Majesty's Stationery Service.
Title:	<i>Copyright, Designs and Patents Act 1988.</i>
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.hmso.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm#end (Retrieved March 11, 2005)

Abstract:

The United Kingdom's Copyright Act covers copyright as a property right and covers the moral rights of authors. There is a distinction made between primary and secondary infringement, where secondary infringement is the use of material that infringes on copyright (I.2.22). Archives can make copies under specific and limited exceptions (I.3.37-44). A computer program and a database are considered literary works, but moral rights do not apply to computer programs or any computer-generated work. (I.4.79.2 and

81.2). Digital agenda provisions are included in the legislation. For example, there is a prohibition against anti-circumvention of technological protection measures (VII.296.1-2).

Annotation:

The legislation does not provide an explanation for why computer programs and computer-generated work is not protected under moral rights. It also does not reconcile digital agenda prohibitions with exceptions given to archives for the preservation of works.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	<p>Backup: There is no explicit mention of backup copies.</p> <p>Processing: There are several sections that may apply to the processing of electronic records. As mentioned above, archivists are allowed to make a copy for preservation purposes (I.3.42.1-2). However, making electronic copies in relation to any description of work, including the making of copies which are transient or are incidental to some other use of the work can be considered infringement if it does not fall into the exceptions (I.2.17.6).</p> <p>Migration: Migration might be exempted under the preservation purposes exception. Also, because the derogatory treatment restriction does not apply to computer programs or computer-generated works, migration might not be a problem. However, the making of an adaptation (including 'translations') of the work is an act restricted by the copyright in a literary, dramatic or musical work. (I.2.21.1). In relation to a computer program a "translation" includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program (I.2.21.4).</p> <p>Temporary user access, unlimited user access and user re-use: There are no distinctions made between temporary user access, unlimited user access and user re-use. However, there is mention of 'transient copies' with respect to copying "in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work (I.2.17.6).</p> <p>Different treatment of use:</p>

	<p>The legislation includes an exception for fair dealing for research and private study. Archives are required to have customers sign a declaration, which would mean that that customer becomes liable for any copyright infringements (I.3.37.3). There are also exceptions for education, certain public administration and other purposes or uses. (I.3).</p> <p>Time delay until unlimited access: The term of copyright is 50 years from the end of the calendar year in which the author dies (i.e. December 31). However, if the work is computer-generated, copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made. (I.1.12). It is unclear what "computer-generated" means.</p>
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1.8 United States

Bibliographic Information:

Author:	United States Copyright Office
Title:	<i>Orphan Works.</i>
Journal or Book:	
Editor(s):	
Publication Details:	Federal Register: January 26, 2005 (Volume 70, Number 16)
Page Numbers:	
Web Source:	http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1434.htm (Retrieved April 20, 2005)

Abstract:

This is a discussion paper meant to address orphan works and solicit comments on “whether there are compelling concerns raised by orphan works that merit a legislative, regulatory or other solution, and what type of solution could effectively address these concerns without conflicting with the legitimate interests of authors and right holders” (n.pag., Summary section). The paper gives background information, such as description of the problems encountered by people who wish to make use of orphan works, or, two examples of legislation that addresses orphan works from Canada and the UK. The paper concludes by identifying six sets of questions organized by issue that it is seeking answers for: 1) Nature of the Problems Faced by Subsequent Creators and Users; 2) Nature of “Orphan works”: Identification and Designation; 3) Nature of “Orphan Works”: Age; 4) Nature of “Orphan Works”: Publication Status; 5) Effect of a Work Being Designated “Orphaned”; and, 6) International Implications.

Annotation:

This paper focuses primarily on the needs of subsequent creators or users that want to use orphan works in their work. It does not address the problems from the point of view of

archives that must manage material that may have been orphaned.

Annotator:	A. Torrance
Date of Annotation:	April 20, 2005
Other Notes:	

Bibliographic Information:

Author:	
Title:	<i>Preservation and Restoration of Orphan Works for Use in Scholarship and Education (PRO-USE) Act of 2005</i>
Journal or Book:	
Editor(s):	
Publication Details:	January 4, 2005
Page Numbers:	
Web Source:	http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h24ih.txt.pdf (Retrieved April 12, 2005)

Abstract:

<p>The Act amends section 108(i), title 17 to extend the orphaned works exception (h) to musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work. The Act also amends several sections of the National Film Preservation Act of 1996 to permit the Librarian of Congress and National Film Preservation Board to undertake the activities called for in the 1996 Act in the face of technological advances and to incorporate the idea that films may be born digital. The Act further amends the United States Code to reauthorize and amend the duties of the National Film Preservation Foundation, including a stipulation that the corporation support cooperative national film preservation and access initiatives.</p>

Annotation:

<p>The Act seems to enable the Librarian of Congress, the National Film Preservation Board, the National Film Preservation Foundation, and some joint-ventures that can apply for financial support to undertake preservation work of copyrighted work. However, it does not clarify why the orphaned status of certain works puts them in limbo. There is no clear statement explaining why the rights of copyright owners may impact on preservation.</p>

Annotator:	A. Torrance
Date of Annotation:	April 12, 2005
Other Notes:	

Bibliographic Information:

Author:	United States of America.
Title:	<i>Circular 92. Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code</i>
Journal or Book:	

Editor(s):	
Publication Details:	June 2003.
Page Numbers:	
Web Source:	http://www.copyright.gov/title17/circ92.pdf (Retrieved March 25, 2005)

Abstract:

Section 102 of the US Copyright Act states that copyright protection is for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (Section 102). The Copyright Act is format neutral and incorporates the amendments derived from the Digital Millennium Copyright Act (DMCA). It covers economic and moral rights. Archival institutions are allowed to make 3 copies for preservation and replacement purposes, and 1 copy for researchers upon request. Digital copies must be viewed on site. Published and unpublished works are considered separately in the legislation. For example, archives and libraries may distribute, display or perform in facsimile or digital form a copy or phonorecord of copyrighted published work in the last 20 years of its copyright term for the purposes of preservation, scholarship or research provided that the work is not subject to continuing commercial exploitation, that no copy can be obtained at reasonable price, and that the copyright owner has not provided notice to the Register of Copyrights about the first two provisos (Section 108, h). Also, the exceptions for archives and libraries do not extend to musical works, pictorial, graphic or sculptural work, or a motion picture or other audiovisual work that are not part of news or adjuncts to work that is otherwise covered in the exception (Section 108, i). Copies must include a copyright warning (Section 108). The institution must also place prominent copyright warnings at the place where orders are accepted and on order forms (Section 108, e). The Act also prohibits the use and distribution of certain copying devices that do not conform with Serial Copy Management Systems, prohibits the circumvention of copyright protection systems and the alteration of copyright management information (Sections 1002, 1201 and 1201).

Annotation:

The legislation is not clear on whether preservation institutions can bypass copyright protection systems or alter copyright management information. The definition of publication leaves room for interpretation with respect to web records. Also, the specific limit on the number of copies that an archives or library can make does not adapt well to the electronic environment.

Annotator:	S. Gutman and A. Torrance
Date of Annotation:	December 2004
Other Notes:	Backup, Processing, and Migration These could fall under the exceptions "for the purposes of preservation or security" (Section 108) as in the case of non-profit, non-commercial uses by libraries and archives, and also for private study, educational and research purposes. Migration for preservation purposes is further explained as being permissible

	<p>when the original format is becoming obsolete. A format is "considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace" (Section 108).</p> <p>A copy may be made of a computer program where an authorized copy exists and that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful. Copies of computer programs may also be made for the purposes of machine maintenance and repair (Section 117)</p> <p>Temporary user access and unlimited user access: Archives and their employees may make one copy for purposes noted above, and are not held liable for copies made on the equipment by those who violate the copyright law provided that the proper explicit notices of copyright law have been posted in areas where reproducing equipment is located. Users are legally responsible for observing the law when making their own copies. There is also a specific limitation given regarding digital copies. The Act says that "any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy" (Section 108).</p> <p>Time delay until unlimited access: Currently, for works created after January 1, 1978 it is generally the life of the author plus 70 years. However, the term varies depending on the nature of the work (i.e., form, published or unpublished) and the copyright law that was applicable at its creation. There are also complications resulting from the process of copyright renewal which required filing a renewal with the Copyright Office before the term expired. For reasons of brevity, no analysis of the duration of copyright for particular works has been done here, but these are analyzed extensively by various universities and other legal sources. Stanford University for example at their website, http://fairuse.stanford.edu/.</p>
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Bibliographic Information:

Author:	United States Copyright Office
Title:	<i>Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary</i>

Journal or Book:	
Editor(s):	
Publication Details:	December 1998
Page Numbers:	
Web Source:	http://www.copyright.gov/legislation/dmca.pdf (Retrieved March 25, 2005)

Abstract:

The Act implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. This summary gives brief explanations of the six sections of the DMCA. It explains how DMCA amends the Copyright Act to prevent circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information. It further explains when circumvention is permitted if it is consistent with fair use.

Annotation:

This report gives clear, brief explanations of the distinction between circumventing protection measures against unauthorized access and the circumvention of measures that protect from copying. Most importantly, it mentions that libraries and archives are allowed to circumvent measures that protect against unauthorized access; but, this exception is limited because it only allows institutions to access these protected works for the sake of making a judgment on whether to try an attain authorized access (5). So, this exception does not help in cases of orphaned works.

Annotator:	S. Gutman and A. Torrance
Date of Annotation:	December 2004
Other Notes:	

2. CASE LAW**2.1 Kahle v. Gonzales****Bibliographic Information**

Author:	Jennifer Stisa Granick et. al.: attorney for Brewster Kahle, Internet Archive, Richard Prelinger and Prelinger Associates, Inc. (Appellants/Plaintiffs)
Title:	Appellants' Opening Brief
Journal or Book:	
Editor(s):	
Publication Details:	Filed January 19, 2005
Page Numbers:	Changes in Technology (Section I): 10-16 (17-23 in PDF) Changes in Law (Section II): 16-27 (23-34 in PDF) Summary of Argument: 28 (36 in PDF). 21 (28 in PDF): notes harm to mission of Appellants

	Argument: 31-51 (38 in PDF)
Web Source:	PDF of Brief available from: http://cyberlaw.stanford.edu/blogs/sprigman/archives/Amended%20AOB%20-%20Kahle.pdf Stanford Law School Center for Internet and Society. “Cases and Projects.” Internet: Available from: http://cyberlaw.stanford.edu/about/cases/kahle_v_ashcroft.shtml (Accessed 25 April 2005)

Abstract:

This brief argues on behalf of the appellants/plaintiffs that the “opt-out” copyright system legislated by Congress in the Copyright Renewal Act of 1992 (“CRA”) and the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”) is a deviation from traditional copyright law (i.e. it alters the “traditional contour[s] of copyright”), thereby requiring First Amendment review by the courts as decided in *Eldred v. Reno*.

Annotation:

The introductory portion of Changes in Technology (Section I): 10-16 (17-23 in PDF) provides an adequate and brief overview of the functions of the Internet Archive and Prelinger Associates, Inc. The rest of this section explains and summarizes the technological changes that both catalyzed the mission of these appellants and makes their work possible.

Changes in Law (Section II): 16-27 (23-34 in PDF) notes the changes in copyright law that have evolved chronologically parallel to the above changes in technology. Part A of this section, The History of Copyright Regulation, (p.16 [23 in PDF]) traces how copyright law between 1790 and 1978 was essentially an opt-in system while the period from 1978 to present is an opt-out system, which has exponentially increased the number of orphaned works.

Pages 20-24 (27-31 in PDF) are especially relevant to the discussion of orphaned works, as the plaintiffs illustrate through examples (of hypothetical functions of the Internet Archive) the prohibitive costs of tracing ownership of materials potentially under copyright.

Page 21 (28 in PDF) specifically notes potential harm to the mission of the appellants.

Summary of Argument, 28 (36 in PDF):

“The central question raised by this appeal is whether the absolutely fundamental change from an opt-in to an opt-out system of copyright qualifies as a change in a ‘traditional contour of copyright.’” Plaintiffs argue that such a change does indeed qualify as a change in a traditional contour of copyright.

Argument: 31-51 (38 in PDF): This section provides a comprehensive and detailed review of copyright law in the U.S. from 1790 to the present. It is concerned with arguing

what the “traditional contours of copyright” are, as the plaintiffs strongly disagree with the government’s characterization of such. The request for First Amendment review is supported by the plaintiffs’ argument that the current opt-out system (with “virtually unlimited” terms) is inconsistent with the Framers’ intentions of promoting progress via the limited protection of creators.

Annotator:	Luke Meagher
Date of Annotation:	April 25, 2005
Other Notes:	This brief makes note of the Internet Archive’s use of migration as a technique for digital preservation.

Bibliographic Information:

Author:	Peter D. Keisler (Assistant Attorney General), Kevin V. Ryan (United States Attorney) on behalf of the Appellee/Defendant
Title:	Brief for the Appellee (Kahle v. Gonzales [formerly Kahle v Ashcroft])
Journal or Book:	
Editor(s):	
Publication Details:	Ca. December 2004 – January 2005
Page Numbers:	
Web Source:	http://cyberlaw.stanford.edu/blogs/sprigman/archives/gov't%209c%20ir%20opp%20brief.pdf

Abstract:

This brief argues on behalf of the appellee (Gonzales) that the argument of the appellants (Kahle, et. al) constitutes an unreasonable challenge to policy determinations that the Constitution authorizes Congress to make, and that *Eldred v. Ashcroft* set the precedent “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” The government argues that neither the 1992 Act nor the CTEA (Copyright Term Extension Act) alters the “traditional contours of copyright” protection. The appellee also argues that the appellants’ argument is merely a re-litigation of issues raised and decided upon in *Eldred*, and that “in reality [the plaintiffs] object to Congress’s exercise of its broad power to draw lines and to establish the parameters of copyright coverage under the Intellectual Property Clause.”

Annotation:

This brief presents the government’s views on the historical and more recent development of copyright law. This brief is useful in learning the arguments used against Kahle and the Internet Archive, the party towards which the archival community would (presumably) be biased.

On page 19-20 (21-22 in PDF), the appellee argues that current copyright terms cannot be considered ‘perpetual,’ as argued by appellants:

“In any event, the term set by the CTEA plainly meets the requirement that the copyright

term be limited. The Supreme Court defines the Intellectual Property Clause's term "limited" as "confine[d] within certain bounds, restrain[ed], or circumscribe[d]." *Id.* at 199 (internal quotations omitted). This definition conforms to dictionary definitions from the time of the framing and from contemporary dictionaries. *Id.* By the Court's definition, or any other, the CTEA's term is for a limited period because it ends. *Id.*"

Also, (page 20; 22 in PDF):

"Plaintiffs' contention is based solely on the erroneous legal theory that a copyright term is measured as a matter of law by the *economic value* of a work after the copyright term expires, not by the *time* it takes for the term to expire....The Supreme Court rejected this theory in *Eldred*.." [Emphasis in original.]

While the appellee endorses (and cites) the ruling of the Court that "[i]t is doubtful [] that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar"(Court Opinion, *Eldred* [p.20; 21 in PDF]), they also note that "[i]n fact, by offering an economic incentive, 'the Framers intended copyright itself to be the engine of free expression [p.26; 27 in PDF].'" *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *Eldred*, 537 U.S. at 219 (holding that "copyright's purpose is to *promote* the creation and publication of free expression")." [Emphasis in original.]

Did the Framers have in mind the calculator or the calendar in their drafting of copyright law? The answer seems to be: *both*; which would mean that at some point, given the extension of terms in subsequent legislation, the protection of creators' economic rights was given priority over the rapidity with which progress in science (and "free expression" [p.26; 27 in PDF]) was to be promoted. If one accepts this historical imbalance of priorities, such lends credence to the appellants' argument and endorsement of Justice Breyer's dissenting opinion in *Eldred*, which considered the possibility that the copyright laws passed in 1976, 1909, and 1831 could be constitutionally suspect. The appellee notes the Court's specific rejection of Breyer's proposal of suspicion on page 21 (22 in PDF).

Page 28 (29 in PDF):

"[CTEA] allows libraries and archives to "reproduce" and "distribute" copies of certain published works "**during the last 20 years of any term of copyright . . . for purposes of preservation** [sic] scholarship, or research," if the work is not already being exploited commercially or further copies are unavailable at a reasonable price. *Id.* (quoting 17 U.S.C. § 108(h))" [emphasis added]. "...Thus, *Eldred* concluded that the CTEA does not alter the "traditional contours of copyright protection" because "it protects authors' original expression from unrestricted exploitation." *Id.* at 221." [Emphasis added.]

The emphasized phrase above seems to reveal the government's ignorance of preservation as it relates to digital materials.

Pages 29-35 (30-36 in PDF) The government argues that the "traditional contours of

copyright” include “fair use” and the “idea/expression dichotomy,” as they have been identified by the Supreme Court. The government concedes that there may indeed be more tenets to the “traditional contours of copyright” but do not assert that the Supreme Court has identified any others “with particularity.” It rejects the idea (see above) that copyright terms have been rendered virtually perpetual and on such grounds rejects that the CTEA violates the “limited times” provision. Furthermore, the government argues that the change from an opt-in to an opt-out copyright system is merely a change in traditional “formalities” of copyright and that such a change does not necessarily mean that the “traditional contours of copyright” are affected.

Annotator:	Luke Meagher
Date of Annotation:	April 26, 2005
Other Notes:	

2.2 Eldred v. Ashcroft

Bibliographic Information:

Author:	Supreme Court of the United States
Title:	Opinion of the Court, Eric Eldred, et. Al., Petitioners v. John D. Ashcroft, Attorney General; delivered by Justice Ginsburg; Justices Stevens and Breyer dissenting
Journal or Book:	
Editor(s):	
Publication Details:	Decided January 15, 2003.
Page Numbers:	
Web Source:	http://www.supremecourtus.gov/opinions/02pdf/01-618.pdf

Abstract:

This opinion of the Supreme Court upholds the rulings of the Court of Appeals in finding that the CTEA’s extension of existing copyrights does not exceed Congress’ power under the Copyright Clause and that that same act’s extension of existing and future copyrights does not violate the First Amendment. Justices Stevens and Breyer dissent.

Annotation:

The Supreme Court finds merit in the government’s arguments and upholds the rulings of the previous court. The majority opinion essentially repeats these arguments and rulings.

The dissents quite critically disagree with the majority’s ruling and, speaking more to the issues that may concern the preservation of works and the legal issues that may bear a favourable ruling in future legal cases, are worth quoting in some detail.

From Stevens’ dissent:

“Because the majority’s contrary conclusion rests on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors,

inventors and their successors, I respectfully dissent.” (from 1st paragraphs of Stevens’ Dissent)

The *quid pro quo* of the Copyright Clause:

“The issuance of a patent is appropriately regarded as a *quid pro quo*—the grant of a limited right for the inventor’s disclosure and subsequent contribution to the public domain. See, e.g., *Pfaff v. Wells Electronics, Inc.*, 525 U. S. 55, 63 (1998) [p.4 of Stevens’ Dissent; p. 42 of PDF] [...]. Those same considerations should protect members of the public who make plans to exploit an invention as soon as it enters the public domain from a retroactive modification of the bargain that extends the term of the patent monopoly. [...] [Q]uite plainly, the limitations “implicit in the Patent Clause itself,” 489 U. S., at 151, adequately explain why neither a State nor Congress may “extend the life of a patent beyond its expiration date,” *Sears, Roebuck & Co.*, 376 U. S., at 231.³ [p.5 of Stevens’ Dissent; p. 43 of PDF]

[...]The fact that Congress cannot change the bargain between the public and the patentee in a way that disadvantages the patentee is, of course, fully consistent with the view that it cannot enlarge the patent monopoly to the detriment of the public after a patent has issued. [p. 19 of Stevens’ Dissent; p. 57 of PDF]

[...] [A]s our cases repeatedly and consistently emphasize, *ultimate public access is the overriding purpose of the constitutional provision*. See, e.g., *Sony Corp.*, 464 U. S., at 429. *Ex post facto* extensions of existing copyrights, unsupported by any consideration of the public interest, *frustrate the central purpose of the Clause*.” [p. 21 of Stevens’ Dissent; p. 59 of PDF; emphasis added.]

Stevens vehemently disagrees with the majority’s ‘substantial deferral’ to Congressional authority on copyright:

“Because the majority’s contrary conclusion rests on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors, inventors and their successors, I respectfully dissent. [as above][...] Respondent argues that that historical practice effectively establishes the constitutionality of retroactive extensions of unexpired copyrights. Of course, the practice buttresses the presumption of validity that attaches to every Act of Congress. But, as our decision in *INS v. Chadha*, 462 U. S. 919 (1983), demonstrates, *the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case*.” [p. 15 of Stevens’ Dissent; p.53 of PDF; emphasis added.]

The history of Congressional action on copyright, Stevens argues,

“is replete with actions that were unquestionably unconstitutional. Though relevant, the history is not dispositive of the constitutionality of Sonny Bono Act.” [p. 17 of Stevens’ Dissent; p.55 of PDF]

Section V of Stevens' dissent argues that the government's arguments that the CTEA promotes preservation is not well-grounded:

“For at least three reasons, the interest in preserving perishable copies of old copyrighted films does not justify a wholesale extension of existing copyrights. First, such restoration and preservation will not even arguably promote any new works by authors or inventors. And, of course, any original expression in the restoration and preservation of movies will receive new copyright protection. Second, however strong the justification for preserving such works may be, that justification applies equally to works whose copyrights have already expired. Yet no one seriously contends that the Copyright/Patent Clause would authorize the grant of monopoly privileges for works already in the public domain solely to encourage their restoration. Finally, even if this concern with aging movies would permit congressional protection, the remedy offered—a blanket extension of all copyrights—simply bears no relationship to the alleged harm.” [pp. 19-20 of Stevens' dissent; pp. 57-58 of PDF; emphasis added.]

Justice Breyer's dissent foreshadows plaintiff's arguments in *Kahle v Ashcroft*:

“The economic effect of this 20-year extension [of the CTEA]—the longest blanket extension since the Nation's founding—is to make the copy-right term not limited, but virtually perpetual. [...] And most importantly, its practical effect is not to promote, but to inhibit, the progress of “Science”—by which word the Framers meant learning or knowledge.” [p. 1 of Breyer's Dissent; p. 61 of PDF; emphasis added.]

On copyright and new technology:

“The permissions requirement [of copyright] can inhibit [potential users'] ability to [make the past accessible for their own use or for that of others]. Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope.” [p. 9 of Breyer's Dissent; p. 69 of PDF.]

On preservation:

“[T]he Motion Picture Association of America [...] finds my concerns overstated, at least with respect to films, because the extension will sometimes make it profitable to reissue old films, saving them from extinction. Brief for Motion Picture Association of America, Inc., as Amicus Curiae 14–24. Other film preservationists note, however, that only a small minority of the many films, particularly silent films, from the 1920's and 1930's have been preserved. 1 Report of the Librarian of Congress, Film Preservation 1993, pp. 3–4 (Half of all pre-1950 feature films and more than 80% of all such pre-1929 films have already been lost); cf. Brief for Hal Roach Studios et al. as Amici Curiae 18 (Out of 1,200 Twenties Era silent films still under copyright, 63 are now available on digital video disc). They seek to preserve the remainder. See, e.g., Brief for Internet Archive et al. as Amici Curiae 22 (Nonprofit database digitized 1,001 public-domain films, releasing them online without charge); 1 Film Preservation 1993, supra, at 23 (reporting well over 200,000 titles held in public archives). And they tell us that copy-

right extension will impede preservation by forbidding the reproduction of films within their own or within other public collections. Brief for Hal Roach Studios et al. as Amici Curiae 10–21; see also Brief for Internet Archive et al. as Amici Curiae 16–29; Brief for American Association of Law Libraries et al. as Amici Curiae 26–27. [...] [W]ith respect to films as with respect to other works, *extension does cause substantial harm to efforts to preserve and to disseminate works that were created long ago.*” [p. 12 of Breyer’s Dissent; p. 72 of PDF; emphasis added.]

And he notes that the CTEA is antithetical to the original intent of the Copyright Clause in that

“[i]t assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence.” [p. 19 of Breyer’s Dissent; p. 79 of PDF; emphasis in original.]

He concludes:

“This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. *It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children.*” [pp. 25-26 of Breyer’s Dissent; pp. 84-85 of PDF; emphasis added.]

Annotator:	Luke Meagher
Date of Annotation:	May 16, 2005
Other Notes:	

Bibliographic Information:

Author:	Jason Schultz, Mark Lemley, Deirdre K. Mulligan (Attorneys for Amicus Curiae)
Title:	Brief of <i>Amicus Curiae</i> The Internet Archive in Support of the Petitioners
Journal or Book:	
Editor(s):	
Publication Details:	Ca. May 20, 2002
Page Numbers:	20 pp.
Web Source:	http://cyber.law.harvard.edu/openlaw/eldredvashcroft/cert/archive-amicus.html

Abstract:

This *amicus curiae* filed by The Internet Archive in support of Eric Eldred (plaintiff, *Eldred v. Ashcroft*) argues that the Copyright Term Extension Act of 1998 (CTEA), a law in question in *Eldred*, frustrates the Internet Archive’s goals of preservation and universal access thereby denying the public its rightful access to public domain works. As the authors note, the purpose of the brief is “to increase the Court’s understanding of

the true cost of the CTEA to our cultural heritage.” The Argument of the *amicus* is three pronged: Section One (I) states that the public domain is an essential and historical part of American Intellectual Property Law, and Section Two (II) argues that the repeated extension of copyright terms (as done in CTEA) comes at the expense of the public domain. The Third Section of the *amicus*’ Argument goes on to argue that the technology of digital archives “constitute the difference between a nominal public domain and a real, robust public domain.”

Annotation:

This brief makes an impassioned and convincing argument for the damage done to the public domain, digital archives, and the preservation of cultural heritage objects. Most of the issues and concepts addressed will be easily understood to archivists and librarian with some knowledge of preservation.

The argument of the *amicus* is structured as follows:

“I. The public domain is an essential and historical part of American intellectual property law

II. The CTEA prevents work that have reached the end of their proper copyright term from entering the public domain

III. Digital Archives breathe new life into the public domain

A. Digital archives allow us to preserve our cultural heritage

1. Copyright owners fail to preserve the vast majority of creative works for public access

2. Digital archives preserve copyrighted works and prevent their permanent loss

B. Digital archives promote full public access to our cultural heritage

C. Digital archives support rich and diverse use of our cultural heritage

D. Digital archives extend our cultural heritage

E. Digital archives make preservation and access more economical”
(From Table of Contents)

The *amicus* presents digitization and digital archives as a great watershed (a silver bullet?) in the preservation of cultural heritage:

“Digital technology allows us the opportunity to build a ‘universal’ library that dwarfs the collections of the Alexandria Library and even our modern Library of Congress. This library will expand our understanding of ‘public access.’ It will make information accessible in formats that uniquely support and promote creativity in the arts and sciences – allowing individuals to clip and sample millions of words, films, and music recordings with ease. At the same time digitization will greatly reduce the cost of preserving our

cultural history and eliminate deterioration caused regularly through the physical handling of cultural artifacts. Through digitization, we can inexpensively open the full contents of this new library to the public, especially to those for whom access has been a half-kept promise—the distant, the deaf, and the blind. A universally accessible archive of print, audio, and visual materials is within our grasp.

In passing the CTEA, Congress deprives the public of this universally accessible library.”(from 3rd paragraph of Summary of Argument)

Yet the challenges of digital preservation are not mentioned with any gravity. In fact, the *amicus* practically implies that no such challenges exist:

“[D]igital technology *possesses the capacity to makes [sic] flawless copies* trivial and worldwide distribution instantaneous.” (from 2nd paragraph of Summary of Argument; emphasis added)

“*Digitizing a film, a book, or a sound recording makes a perfect copy* of the work and saves that copy on a computer-compatible medium, such as a hard drive or a CD-ROM.” (from Argument, Section III, A, 2; emphasis added)

“Digital archiving is not free. Nor is it even inexpensive. Yet because we only need a single digital copy of a work *to preserve it in perfect condition for a virtually unlimited duration* and for universal use, digital archives make preservation and enhanced access realistic and cost effective.” (from Argument, Section III, E; emphasis added)

The brief is sprinkled with a few bold literary gems that well illustrate the Archive’s argument:

“The Court of Appeals stated that Congress would exceed its power under the Copyright Clause if it made copyright protection permanent. But then, with a wink and a nod, it gave Congress the go ahead to perpetually extend copyright protection as long as each ‘extension’ comes with a date certain. In holding that the introductory language of the Copyright Clause fails to impose *any* substantive limit on congressional power, and that said power is immune from First Amendment scrutiny, the Court of Appeals reduced the public domain to an illusion – a field forever tilled but never sown.

Without some check on Congressional power, it is unlikely that any of the cultural and historical works from the first half of this century will *ever* enter the public domain. Limits must be found. This Court must require Congress to respect the limitations of ‘promoting’ and ‘limited times’ or the public will never experience the value that digital archiving offers.” (from Argument, II, last paragraph)

Section I of the Argument contains the Internet Archive’s argument concerning the extension of copyright terms, with the main point being that the District Court’s ruling in *Eldred* ignored the precedents or contents of other decisions by ruling in favor of creators’ rights at the expense of the public domain. The authors cite several statements from other cases:

“[C]opyright is intended to increase and not to impede the harvest of knowledge.”

Harper & Row (from Argument, I, 3rd paragraph)

“As the *Harper & Row* Court explained, copyright ‘is intended to motivate the creative activity of authors and inventors by the provision of a special reward, *and to allow the public access to the products of their genius after the limited period of exclusive control has expired.*” (emphasis in original; *ibid.*)

“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.” *Feist.* (*ibid.*)

Annotator:	Luke Meagher
Date of Annotation:	May 9, 2005
Other Notes:	

Bibliographic Information:

Author:	United States Court of Appeals for the District of Columbia Circuit
Title:	Opinion for the Court filed by Circuit Judge Ginsburg; A statement of Circuit Judge Sentelle, joined by Circuit Judge Tatel, dissenting from the denial of rehearing en banc
Journal or Book:	
Editor(s):	
Publication Details:	Filed July 13, 2001.
Page Numbers:	6 pp.
Web Source:	http://pacer.cadc.uscourts.gov/common/opinions/200107/99-5430d.txt

Abstract:

In this opinion, the Court denies the plaintiffs’ petition for a rehearing en banc on the grounds that amici (which persuaded Judge Sentelle to dissent previously) cannot introduce new “issues” aside from those argued by the plaintiffs. Secondly, the majority finds that the plaintiffs’ argument, even if it adopted the amici’s argument, “implicates discrete terms (i.e. the preamble of the Copyright Clause) that are not otherwise at issue. Finally, even if the majority had considered the amici’s arguments, they still contend that the CTEA (Copyright Term Extension Act) “passes muster under the ‘necessary and proper review’ “ applicable to Congress’ enumerated powers. Judge Sentelle dissents on the grounds that amici can, according to the circuit court’s rules, introduce new “arguments” (but not “issues”) and that plaintiffs did in fact embrace the argument offered by the amici in question. Secondly, Judge Sentelle disagrees with the majority’s reading of case law regarding the Copyright Clause’s preamble.

Annotation:

These opinions bring into sharper focus the arguments of and within the Court. Most of the argument between the majority and dissenters regards legal technicalities such as the role of *amici* and the reading of the Copyright Clause.

The majority contends that the extension of copyright terms is beneficial to the preservation of works:

“The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. *Id.* at 379. “Preserving access to works that would otherwise disappear -- not enter the public domain but disappear -- ‘promotes Progress’ as surely as does stimulating the creation of new works.” (from penultimate paragraph of Opinion)

Judge Sentelle dissents. He believes that the grounds upon which the majority made its decision are quite shaky, and that testimony of the plaintiffs was ignored:

“Under the panel’s holding, it is now the law of this circuit that amici are precluded both from raising new issues and from raising new arguments. *If allowed to stand, this holding will effectively bar future amici from adding anything except possibly rhetorical flourish to arguments already outlined and embraced by the parties.* This is particularly the case for those amici who, true to their traditional role as “friends of the court,” operate independently to assist the Court in its determinations. *If this Court is to adopt such a rule--and I hope we do not--we should do so sitting en banc, not by a divided panel.*” (from 10th paragraph of Dissent; emphasis added)

He concludes his dissent thus:

“If Schnapper indeed precludes a panel of this Court from applying the Constitution as written, then we have yet one more reason to consider this case en banc. [...] The majority opinion in this case *dramatically narrowed the role of amici* before this Court and, in my view, *effectively erased portions of the Copyright Clause of the Constitution.* Though I believe that this Court should grant en banc review quite sparingly, either issue individually merits en banc review. Because this case presents both questions, it is particularly worthy of the full Court’s attention.” (from penultimate and ultimate paragraphs of Dissent)

Annotator:	Luke Meagher
Date of Annotation:	May 10, 2005
Other Notes:	

Bibliographic Information:

Author:	United States Court of Appeals for the District of Columbia Circuit
Title:	Opinion for the Court filed by Circuit Judge Ginsburg; Separate opinion dissenting in part filed by Circuit Judge Sentelle
Journal or Book:	
Editor(s):	
Publication Details:	Decided February 16, 2001.
Page Numbers:	16 pp.

Web Source:	http://cyber.law.harvard.edu/cc/dcaopinion.html
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Abstract:

In this opinion, the majority of the Court rejects the plaintiffs' arguments that the CTEA fails the intermediate scrutiny test required to protect freedom of expression under the First Amendment; that the retrospective term extension violates the originality requirement of copyright; and that congressional power to extend copyright protection is constrained both by the preamble of the Copyright Clause and by that clause's "limited Times" requirement. Judge Sentelle dissents in part, persuaded by plaintiff's argument and the amicus curiae of The Eagle Forum, concluding that retroactive extensions are beyond the 'outer limits' of congressional authority under the Copyright Clause.

Annotation:

The majority opinion supports the legislation (i.e. CTEA) enacted by Congress and seems to validate the rationale of the CTEA, which was to conform to the Berne Convention and thus to "better align the terms of United States copyrights with those of copyrights governed by the European Union." (Section I, background, 1st paragraph)

Judge Sentelle's dissent, regarding conformance with EU standards:

"The fact that the CTEA 'matches United States copyrights to the terms of copyrights granted by the European Union,' Maj. Op. at 13 (citing Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9), *is immaterial to the question.* Neither the European Union nor its constituent nation states are bound by the Constitution of the United States. That Union may have all sorts of laws about copyrights or any other subject which are beyond the power of our constitutionally defined central government." (last paragraph of dissent)

In his dissent, Judge Sentelle also does not defer to the discretion of Congress and finds the arguments of plaintiffs and *amicus* The Eagle Forum compelling in some aspects:

"Citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824), the Lopez Court acknowledged "that limitations on the commerce power are inherent in the very language of the Commerce Clause." 514 U.S. at 553. Just so with the Copyright Clause. What does the clause empower the Congress to do?

'To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries....'

That clause empowers the Congress to do one thing, and one thing only. That one thing is "to promote the progress of science and useful arts." How may Congress do that? "By securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress. The means by which that power is to be exercised is certainly the granting of exclusive rights -- not an elastic and open-ended use of that means, but only a securing for limited times. See *Stewart v. Abend*, 495 U.S. 207, 228 (1990) ("The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors."). The majority acknowledges that "[i]f the Congress were to make copyright protection permanent, then it surely would

exceed the power conferred upon it by the Copyright Clause." Maj. Op. at 10. However, there is no apparent substantive distinction between *permanent protection* and *permanently available authority* to extend originally limited protection. The Congress that can extend the protection of an existing work from 100 years to 120 years; can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; *and in effect can accomplish precisely what the majority admits it cannot do directly.* This, in my view, exceeds the proper understanding of enumerated powers reflected in the Lopez principle of requiring some definable stopping point." (5th through 7th paragraphs of dissent)

The majority, rejecting the argument "that the introductory language of the Copyright Clause constitutes a limit on Congressional authority (Dissent, 11th paragraph)," notes that "[t]he question whether the preamble of the Copyright Clause bars the extension of subsisting rights [...] may be revisited only by the court sitting en banc in a future case in which a party to the litigation argues the point (Conclusion, final paragraph)." The plaintiffs subsequently petitioned the DC Circuit (the same judges) for a hearing en banc. It was denied.

Annotator:	Luke Meagher
Date of Annotation:	May 10, 2005
Other Notes:	

Bibliographic Information:

Author:	June L. Green, United States District Court Judge
Title:	Memorandum (District Court Opinion); Eric Eldred v. Janet Reno
Journal or Book:	
Editor(s):	
Publication Details:	Dated: October 27, 1999
Page Numbers:	3 pp.
Web Source:	http://www.techlawjournal.com/courts/eldritch/19991027.htm

Abstract:

The Court rules in this Memorandum that the Copyright Term Extension Act (CTEA) is not unconstitutional. The District Court concludes that the Congress' extension of copyright protection is within the discretion of Congress and that the retrospective extension of copyright under CTEA does not violate the "[t]o authors" term of the copyright clause. Also, the District Court concludes that the retroactive extension of copyright protection does not violate the public trust doctrine.

Annotation:

This Opinion is useful in tracing the progress of *Eldred* and the salient features of the legal arguments for and against the CTEA, most especially the dialectic surrounding the "limited times" provision. The intent of this provision in the Copyright Clause is further argued in *Kahle v Gonzales* (currently before the court.)

Note the logic of the Court (here, quoted from footnote #7), which will be further addressed in Judge Sentelle’s dissent in the United States Court of Appeals decision:

“Within the discretion of Congress, any fixed term is a limited time because it not perpetual. If a limited time is extended for a limited time then it remains a limited time.”

Annotator:	Luke Meagher
Date of Annotation:	May 10, 2005
Other Notes:	

3. INTERNATIONAL AGREEMENTS: LANGUAGE AND RATIONALE FOR IMPEDING LEGISLATION

3.1 WIPO

Bibliographic Information:

Author:	WIPO delegations from Argentina and Brazil.
Title:	<i>Geneva Declaration on the Future of the World Intellectual Property Organization</i>
Journal or Book:	
Editor(s):	
Publication Details:	[March 4, 2005]
Page Numbers:	
Web Source:	http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf (Retrieved 9 January 2006)

Abstract:

The purpose of this declaration was to advocate for a WIPO development agenda. The authors write that the “functions of WIPO should not only be to promote efficient protection and harmonization of intellectual property laws, but to formally embrace the notions of balance, appropriateness and the stimulation of both competitive and collaborative models of creative activity within national, regional and transnational systems of innovation” (2). For example, the authors call for “a moratorium on new treaties and harmonization of standards that expand and further strengthen monopolies and restrict access to knowledge” (2). The authors offer specific proposals for reform.

Annotation:

The declaration’s argument against monopoly privileges and advocacy of generally more open access could have an impact on Copyright legislation and the ability of preservation institutions to argue that they are a means of facilitating fair use. More specifically, the language used in the declaration could be used when providing rationale for exceptions that will allow the circumvention of digital protection measures.

Annotator:	A. Torrance
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Date of Annotation:	March 27, 2005
Other Notes:	See annotation for WIPO's response to the proposal.

Bibliographic Information:

Author:	Martin Kohr
Title:	NGOs, scientists and academics call for major reform of intellectual property system
Journal or Book:	
Editor(s):	
Publication Details:	[13-14 September 2004]
Page Numbers:	
Web Source:	http://lists.essential.org/pipermail/ip-health/2004-October/007002.html (Accessed 7 January 2006)

Subjects:	
Class Descriptor:	

Abstract:

This is an article about Future of WIPO Seminar of 13-14 September 2004 in Geneva, the convening of which was catalyzed by the conference on the Future of the World Intellectual Property Organisation (WIPO) organized by the Transatlantic Consumer Dialogue (also September 2004). The article contains a summary of the criticism levied against WIPO by either delegates to the conference itself or that by participants in the seminar that followed it.

Annotation:

This article is worth quoting at some points as it provides some insight into the possible reasons for the vigorous protection of databases within developed nations (i.e. those of Europe and North America):

“Among the participants were Sir John Sulston, Nobel Prize winner and leader of the Cambridge-based scientific team that uncovered the *human genome*, Richard Stallman , a pioneer of the free software movement (which led among other things to the Linux operating system), and many academic professors specializing in IPR law.

Sulston expressed concern that *databases* containing scientific information are *increasingly placed under copyright*, making it difficult and costly for researchers to have access, and thus impeding research.

He advocates that scientific data be placed in public databases which researchers can freely use [sic]. When he completed his work on mapping the human genome, Suston's [sic] team quickly published the results in a scientific journal, making it available to all.

‘We put the details on a public database so everyone can have access and do their own research,’ he said.

He spoke against the present practice of patenting of genes, which is an [a]buse of the patent system as the gene sequences are discoveries and not inventions. He called the attempt by European governments to tighten copyright on databases as 'absolutely retrograde.'" [Emphasis added.]

Related to this contentious issue regarding databases and the patent of the human genome, "Brian Kahin of the University of Michigan said the standards for granting patents [in the U.S.] had been lowered, so many more patents are being granted.

*He added that the range of products for which patents are granted has also expanded to include, for example, **life forms, software** and business methods. As a result, many patents that are given are of questionable validity."* [Emphasis added.]

Stallman, the free software pioneer, said: "Patents granted for software only benefit very few, who are given the chance to sue, whilst the rest are threatened with potential suits. There are negative effects for software developers and computer users."

Generally:

"Several speakers stressed that they were not against intellectual property per se, but that there should be a balance between the monopoly privileges given to the patent or copyright holders, and the rights and welfare of the public."

While the author's heretofore thinly veiled bias becomes apparent, the following paragraphs do help to provide some insight into the concerns of WIPO's critics. The second and third paragraphs refer to the 'harmonisation' directives of the EU (Copyright in the Information Society, Directive 2001/29/EC and Term of Protection, Council Directive 93/98/EEC, if not the other seven European Directives) as well as the World Trade Organisation's TRIPS Agreement.

"The seminar participants were worried that the US model, which is unsuitable even for Americans, is now being exported to the developing countries, where it is even more inappropriate and will cause more harm.

*They were referring firstly to **the agreement on intellectual property in the World Trade Organisation**, and secondly to the attempts by the developed countries to create new treaties in WIPO (such as the substantive patent law treaty and **the broadcasters' rights treaty**) that would "harmonise" the developing countries' IPR laws with the laws of the US and other developed countries.*

'This harmonization attempt is immoral and the last insult [sic] to developing countries,' said Dr Graham Duffield of Queen Mary's University in Britain. 'Japan would not have developed if it had these IPR laws, and the big companies of Europe could not have taken off if they were disallowed from copying technology.'

‘In the past the IP system allowed countries to catch up as it differentiated among countries, but now the harmonization process will block developing countries from catching up.’”

Regarding the perceived bias of the author of this article and in the interest of full disclosure, this article was read and annotated from a public message board (URL listed above) upon which the author himself posted this article and a small preface:
 “Below is an article that I wrote about the Future of WIPO Seminar of 13-14 September 2004 in Geneva. Given what has happened this past week, when the Geneva Declaration was launched and the WIPO Assembly welcomed the Development Agenda, this seminar has been very significant in helping to create the climate that was conducive for the subsequent developments.
 Congrats to the organisers.

best wishes
 Martin”

Keywords: (modify as required)

Authenticity:	
	(if necessary, add quotation from text with page numbers)
Accuracy:	
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Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher
Date of Annotation:	January 2006
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	World Intellectual Property Organization. Secretariat.
Title:	<i>Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO.</i>
Journal or Book:	
Editor(s):	
Publication Details:	WIPO General Assembly. Thirty-first (15 th Extraordinary) Session. Geneva. September 27 to October 5, 2004.
Page Numbers:	

Web Source:	http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf (Retrieved March 25, 2005)
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Abstract:

The purpose of this document is to summarize the WIPO General Assembly's response to the Geneva Declaration submitted by Argentina and Brazil. The document reiterates the idea that WIPO's role is not limited to the promotion of intellectual property protection and that development concerns should be fully incorporated into all of WIPO's activities (2). The document also warns against adding new layers of intellectual property protection to the digital environment that may obstruct the free flow of information and includes the following statement: "It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States" (3). There is also a statement endorsing exploration of open collaborative projects to develop public goods.(3) Appended to the document is a list of proposals that would for the implementation of the WIPO Development Agenda.

Annotation:

The document call for generally more open access which could have an impact on Copyright legislation and the ability of preservation institutions to argue that they are a means of facilitating fair use. More specifically, the language used in the declaration could be used when providing rationale for exceptions that will allow the circumvention of digital protection measures. There are specific mentions of Creative Commons and the Open Source Software initiative which aim to make resources more available in the digital environment.

Annotator:	A. Torrance
Date of Annotation:	March 27, 2005
Other Notes:	

Bibliographic Information:

Author:	Medecins Sans Frontieres [Doctors without Borders]
Title:	Statement by Medecins Sans Frontieres at WIPO General Assembly, September 30, 2004
Journal or Book:	
Editor(s):	
Publication Details:	delivered by Ellen 't Hoen
Page Numbers:	
Web Source:	http://www.cptech.org/ip/wipo/msf09302004.html (Accessed 7 January 2006)

Subjects:	
Class Descriptor:	

Abstract:

In this statement to the General Assembly of WIPO, Ellen 't Hoen speaks on behalf of

Medecins Sans Frontieres. The main purpose of this address is to point out that the availability of medicines for treating the AIDS epidemic has been, can be, and may again become highly dependent upon the intellectual property laws (especially those on patents) of the developed countries. Medecins Sans Frontieres urges WIPO to a) Reform its technical assistance programmes to provide tools to countries and others to fully implement the Doha declaration on TRIPS and Public Health, to use to the full the flexibilities of the TRIPS agreement to promote access to medicines for all. And work with other UN agencies in this field; b) Engage in the debate how to stimulate health needs driven R&D [research and development], especially for neglected diseases, including mechanisms to make the fruits of medical innovations available to all who need them; c) Engage in exploring alternative and additional models for R&D priority setting and financing; d) Do not move ahead with patent law reform without an independent assessment of the likely affect on public health.

Annotation:

“We developed this interest when we found ourselves increasingly confronted in the field with problems of access to essential medicines. Intellectual property and specifically patents affect prices and availability of desperately needed medicines.”

The secondary purpose of this address is also worth noting, if only for implicit accusation towards pharmaceutical companies:

“Pharmaceutical innovation is skewed towards areas that promise a profitable return. This is a logical consequence of a patent driven R&D mechanism our societies rely on these days. However this system leaves huge health needs unmet. In the last 20 years of the 1300 new chemical entities registered in the world only 13 were for tropical diseases [i.e., of which citizens of the least-developed countries suffer; ed].”

MSF is one of the 500 signatories of the Geneva Declaration on the Future of the WIPO, which stands in strong support of the proposal of Brazil and Argentina.

Keywords: (modify as required)

Authenticity:	
	(if necessary, add quotation from text with page numbers)
Accuracy:	
	(if necessary, add quotation from text with page numbers)
Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher
Date of Annotation:	January 2006
Other Notes:	Backup: Processing: Migration:

	Temporary user access: Different treatment of use: Time delay until unlimited access:
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Bibliographic Information:

Author:	IFLA (International Federation of Library Associations and Institutions) Committee on Copyright and other Legal Matters (CLM)
Title:	The IFLA position on the Geneva Declaration on the Future of WIPO
Journal or Book:	
Editor(s):	
Publication Details:	September 28, 2004
Page Numbers:	
Web Source:	

Subjects:	
Class Descriptor:	

Abstract:

In this document IFLA explains in five sections why it signed the Geneva Declaration on the Future of WIPO. First, IFLA believes that the balance between the rights of author and the larger public interest has become distorted at the expense of consumers of information. Second, IFLA objects to the current monopolization of information via restrictive intellectual property rules. Further, IFLA notes its particular concern with the employment of technological protection measures which have or may potentially override permitted fair use applications, thus hampering the legitimate professional activities of libraries. IFLA's penultimate concern is the widening of the "digital divide" the perpetuation of the less-developed countries' dependence upon advanced countries. Finally, IFLA urges WIPO and the WTO to reconsider intellectual property worldwide, taking into account the different needs of developed and developing countries.

Annotation:

IFLA makes a small point for orphan works:
"Of particular concern is the ever-lengthening extension of copyright terms, which is rapidly diminishing the public domain in order to benefit the owners of a **tiny minority** of works that are still being exploited commercially." [Emphasis in original.]

From 2. Monopoly on Information: "Efforts to develop new protections for databases containing facts and other public domain material are especially troubling."
I do not know what this refers to. The EU Directive on databases notes, I believe, that the contents of databases (i.e. the data) are not covered by the database directive.

Keywords: (modify as required)

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Accuracy:	
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	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher
Date of Annotation:	January 2006
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	General Assembly of WIPO
Title:	General Assembly Decision on a Development Agenda
Journal or Book:	
Editor(s):	
Publication Details:	October 4, 2004
Page Numbers:	
Web Source:	http://www.cptech.org/ip/wipo/wipo10042004.html (Accessed 7 January 2006)

Subjects:	
Class Descriptor:	

Abstract:

In this decision, the General Assembly of WIPO welcomes and notes the proposals by Brazil and Argentina and mandates that inter-sessional intergovernmental meetings be convened to examine them. The assembly further decides to convene a joint international seminar on Intellectual Property and Development which shall be open to all stakeholders, including NGOs, civil society and academia. In conclusion, the assembly decides to include this issue (of intellectual property in developing nations) in its September 2005 session.

Annotation:

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Keywords: (modify as required)

Authenticity:	
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	(if necessary, add quotation from text with page numbers)
Accuracy:	
	(if necessary, add quotation from text with page numbers)
Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher
Date of Annotation:	January 2006
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	World Intellectual Property Organization.
Title:	<i>Survey on Implementation Provisions of the WCT and the WPPT</i>
Journal or Book:	
Editor(s):	
Publication Details:	April 25, 2003. Standing Committee on Copyright and Related Rights. Ninth Session. Geneva. June 23-27 2003.
Page Numbers:	
Web Source:	http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_6.pdf (Retrieved March 25, 2005)

Abstract:

In 2003, WIPO conducted a survey to determine Union countries had implemented the above-described treaties. The National Legislation of 39 Member States was studied. 35 States covered computer programs in their legislation, either as 'literary works' or as separate works (2). The right of making available to the public of works in such a way that members of the public might access these works from a place and at a time individually chosen by them was expressly contained in 28 of the laws reviewed. Provisions on the protection of rights management information (RMI) include remedies, sanctions and/or penalties for altering, distributing and/or removing RMI (22 of the laws reviewed contain provisions on RMI). 22 of the laws reviewed also covered the circumvention of technological protection measures. Use by libraries and archives is listed among other limitations and exceptions that appear in national legislations (3). Moral rights provisions appear in the legislation of 30 countries (4).

Annotation:

This survey indicates how language and rationale given in the WIPO treaties was

interpreted by different Member States.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	Ricketson, Sam
Title:	<i>WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment</i>
Journal or Book:	
Editor(s):	
Publication Details:	April 5, 2003. Standing Committee on Copyright and Related Rights. Ninth Session. Geneva. June 23-27 2003.
Page Numbers:	
Web Source:	http://www.wipo.int/documents/en/meetings/2003/scr/pdf/scr_9_7.pdf (Retrieved March 25, 2005)

Abstract:

The author groups the different limitations and exception provisions allowed by the various WIPO treaties and international agreements into three categories depending on the juridical and policy basis for each kind. The second category is the relevant group. The provisions in this group represent "a more limited concession that certain kinds of uses of works that are otherwise protected should be allowed: there is a public interest present here that justifies overriding the private rights of authors in their works in these particular circumstances. For the most part, they are not made mandatory, but are left as matters for the national legislation of member states to determine for themselves, albeit usually within strict boundaries that are set by the provision in question"(6). The author traces how the 'three-step test' that has been derived from Article 9.2 of the Berne Convention has become "a general template for limitations and exceptions under the TRIPS Agreement, the WCT and the WPPT" (67). The three conditions to permissible limitations and exceptions are loosely that they must: 1) be only for certain and special cases; 2) not conflict with the normal exploitation of the work; and 3) not unreasonably prejudice the legitimate interests of the author (21-27). However, the author also demonstrates how uncertainties about the meaning and scope of the steps can make interpretation difficult. The report also shows how the 'three-step test' may be applied as a means of balancing the interests of archives and right-holders - if certain clarifications are made (76).

Annotation:

The report provides useful commentary on how the exceptions given in WIPO Treaties are being interpreted. There is also explicit discussion and a proposed strategy on how the interests of right-holders and the clients of archives and libraries might be balanced.

Annotator:	A. Torrance
Date of Annotation:	December 2004

Other Notes:	
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Bibliographic Information:

Author:	World Intellectual Property Organization. International Bureau.
Title:	<i>The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)</i>
Journal or Book:	
Editor(s):	
Publication Details:	December 20, 1996
Page Numbers:	
Web Source:	http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/wct_wppt.pdf (Retrieved March 25, 2005)

Abstract:

This report describes the development of the WCT and WPPT, giving some explanation of the rationale behind the language used. It traces how WIPO and the international community treated the 'digital agenda.' For example, the report states that it was understood that the Treaties would neither extend nor reduce the scope of the limitations and exceptions permitted by the Berne Convention in consideration of the digital environment (17).

Annotation:

The report clarifies the rationale behind the wording of the treaties, but does not go into depth about the decision-making involved.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	World Intellectual Property Organization.
Title:	<i>WIPO Copyright Treaty (WCT) and Agreed statements Concerning the WIPO Copyright Treaty</i>
Journal or Book:	
Editor(s):	
Publication Details:	Adopted Geneva December 20, 1996.
Page Numbers:	
Web Source:	http://www.wipo.int/treaties/en/ip/wct/index.html (Retrieved December 2005)

Abstract:

The 1996 World Intellectual Property Organization (WIPO) Copyright Treaty applies to digital material and is meant to complement the Berne Convention. Article 4 locates computer programs within the interpretations given in the Berne Convention: "Computer programs are protected as literary works within the meaning of Article 2 of the Berne

Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression" (Article 4). Databases, the right to distribute, the right of rental and the right of communication to the public are discussed in Articles 5-8, while Article 11 sets out obligations concerning technological protection measures and Article 12 covers rights management information.

Annotation:

Language and rationale given for limitations and exceptions is nearly identical to the language and rationale given in the Berne Convention, except with the introduction of articles on technological protection measures and rights management information.

“Article 10, Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.”

Annotator:	A. Torrance and Luke Meagher
Date of Annotation:	December 2004 and December 2005
Other Notes:	

37.

Bibliographic Information:

Author:	World Intellectual Property Organization.
Title:	<i>WIPO Performances and Phonograms Treaty (WPPT)</i>
Journal or Book:	
Editor(s):	
Publication Details:	Adopted Geneva December 20, 1996.
Page Numbers:	
Web Source:	http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf (Retrieved March 25, 2005)

Abstract:

WPPT protects performers and producers of phonograms who are nationals of the signatory States. The Treaty grants performers moral rights, that, as with the WCT,

extend to the expiration of economic rights unless signatory States had prior terms specified in their national legislation (Article 5). Economic rights granted to performers include: the exclusive right to authorize communication to the public and fixation of unfixed performances; the right to reproduction of fixed performances; the right of distribution; the right of rental; and the right of making fixed performances available to the public (Articles 6-10). Producers are granted similar rights, except authorization for fixations (Article 11-14). The right to receive remuneration from broadcasts and communication to the public is also covered (Article 15). The Article covering limitations and exception grants that member states may make the same kind of provisions for limitations and exceptions concerning the protection of performers and producers of phonograms as they have made for literary and artistic works (Article 16). The term of the rights for performers is 50 years after the end of the year in which the performance was first fixed. The term for producers is 50 years after the end of the year in which the performance was first published, or, failing that, the year in which the performance was first fixed (Article 17). The treaty also covers obligations concerning technological protection measures and rights management information (Articles 18-19). The Berne Convention did not cover performers and producers rights. International standards for these rights had previously been established at the Rome Convention held in 1961.

Annotation:

This Convention does not address the issue of underlying rights as it may impact preservation institutions.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	
Title:	<i>Berne Convention for the Protection of Literary and Artistic Works. Paris Act of July 24, 1971, as amended on September 28, 1979.</i>
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.wipo.int/clea/docs/en/wo/wo001en.htm (Retrieved March 25, 2005)

Abstract:

The Berne Convention is format neutral but specifications are given for different forms of works (i.e. cinematographic, photographic, etc.). There is no mention of digital records or any issues concerned with the digital environment (the last amendments to this convention were made in 1979). The Convention only applies to signatory states, referred to in the convention as the Union. (n.pag., Preamble) The Convention only

protects published works. 'Published works' are considered to be works published with the consent of the authors, "whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work" (Article 3.3). Moral rights are also covered in the Convention. They are considered to be independent of an author's economic rights. They are the right to claim authorship and to object to any distortion (Article 6bis). The general duration for copyright was given as the life of the author and fifty years (Article 7). Recommendations for some specific mediums were given, i.e. the recommended term for photography was at least 25 years after publication (Article 7.4). Union countries that, at the time of the 1928 Rome version of the Convention, had provisions for shorter terms in their national legislation had the right to maintain those terms (Article 7.7). Countries were left to permit reproduction in "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" (Article 9.2). The convention gives no examples of 'special cases,' such as archives, but other articles describe how use of copyrighted works in news reporting or education may be permitted (Articles 10 and 10bis). The only mention of archives is given in reference to ephemeral recordings made by broadcasters as they are used for their own broadcasts. The convention allows that the "preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized" by legislation in the countries of the Union (Article 11bis.3). The Berne Convention provides a minimum standard and did not replace any greater protection which may have been granted by national legislation (Article 19).

Annotation:

The expression 'literary and artistic works' is said to include all works in the literary, scientific and artistic domain "whatever may be the mode or form of expression" (Article 1.1). This interpretation is general enough that computer programs and digital records could be added by treaties and legislation that followed. Signatory countries without moral rights provisions were supposed to ensure that moral rights endure as long as economic rights, but countries that already had some provisions, but not all, could continue to limit the term of moral rights (Article 6bis.2). The general duration for copyright was given as the life of the author and fifty years (Article 7). Recommendations for some specific mediums were given, i.e. the recommended term for photography was at least 25 years after publication (Article 7.4). Union countries that, at the time of the 1928 Rome version of the Convention, had provisions for shorter terms in their national legislation had the right to maintain those terms (Article 7.7). Much of the language in the Convention was used in national legislation and international agreements that followed. The rights of authors described in the Convention have not changed substantially over time.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

3.2 European Directives

Bibliographic Information:

Author:	The European Commission
Title:	Council Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
Journal or Book:	
Editor(s):	
Publication Details:	Done at Strasbourg 29 April 2004
Page Numbers:	Approx. 10 pages
Web Source:	http://www.europa.eu.int/urlex/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf
Subjects:	
Class Descriptor:	

Abstract:

This directive of the European Commission concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. The stated purpose of the directive is “to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.” The majority of the directive’s articles fall under Chapter II “Measures, Procedures, and Remedies,” which follows the first chapter that proscribes the scope and subject of the directive. The two following chapters are “Sanctions by Member States,” “Codes of Conduct and Administrative Cooperation.” The fifth and final chapter, “Final Provisions,” is concerned with the administration of the directive.

Annotation:

“(4),” of the preamble, acknowledges that all member states of the EU and the EU itself are bound by the TRIPS (trade-related aspects of intellectual property) Agreement. “(5)” notes that TRIPS contains provisions on the means of enforcing intellectual property rights, “which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.”

“(6)” of the preamble, continues acknowledgment of other binding IP treaties: “There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.”

“(7)” acknowledges that “despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights” and that such are “prejudicial to the proper functioning of the Internal Market [from (8)].”

“(14)” of the preamble notes that the prosecution of infringing acts generally applies to those carried out on a commercial scale and that “this would normally exclude acts carried out by end consumers in *good faith*.” [Emphasis added.]

“(19)” declares: “Since copyright exists from the creation of a work and *does not require formal registration*...” [Emphasis added.] Apparently, registration of works is not required in Europe.

This directive is meant to prevent infringement “on a commercial scale.” Reasonable evidence of infringement would be considered “a reasonable sample of a substantial number of copies of a work or any other protected object [Article 6(1)].”

Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	
Title:	<i>Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001</i>
Journal or Book:	Official Journal L 167 , 22/06/2001 P. 0010 _ 0019
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/directive_copyright_en.pdf (Retrieved March 25, 2005)

Abstract:

In the Directive, the rights-holder has three exclusive rights: 1) the right to reproduce the work. (Note that it includes temporary copies made by a computer to run a program); 2) the right to 'communicate' the work in public (Note that making a work available online is communication in public, even though point-to-point technology is used); 3) the right to distribution (of physical copies) (Articles 2, 3, 4). The Directive states that any exception to these rights must be limited in its scope in order not to conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights-holder (Article 5.5). There is only one mandatory exception to be implemented by Member States: temporary acts of reproduction necessary for transmission or lawful use of the work may be made without the rights-holder permission. Other potential exceptions are described, including an exception for specific acts of reproduction made by libraries or archives which are not for commercial advantage (Article 5.2.c). The

directive states that circumvention of effective technological measures must be restricted by national legislation. (Article 6.1) "Technological measures" prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rights-holder. (Article 6.3). Member States were due to implement the Directive into national law by December 22, 2002.

Annotation:

In the Directive, Article 7 restricts removal or alteration of rights-management information. However, in Article 11, Technical adaptations, there is notice that the Directive was amended to delete Article 7 altogether. The move to make exceptions specific and limited is evident in the Directive. As most of the exceptions are optional, it seems possible that the interpretations of the Directive by different countries might vary widely.

From Preamble: "(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching."

On achieving the balance between serving the greater good and protecting the rights-holder:

"(22) The *objective of proper support for the dissemination* of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works." [Emphasis added.]

This provision from the preamble states that the first-sale copyright doctrine does not apply in the online environment as the intellectual property is not incorporated in a material medium:

"(29) The question of exhaustion does not arise in the case of services and *on-line services in particular*. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, *every on-line service is in fact an act* which should be subject to authorisation where the copyright or related right so provides." [Emphasis added.]

From (31): "...The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.... The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market."

Re: contradictions in implementing international directives in national contexts:

"(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the *different legal traditions in Member States, while, at the same*

time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.” [Emphasis added.]

This excerpt highlights EC deferral to Member States (individual countries) regarding exceptions and limitations for libraries and archives. It is also related to the theme “contradictions in implementing international directives in national contexts”:
“(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.”

The primary purpose of the provision below is clear; it proscribes that Member States be able to legislate concerning private copying. However, the secondary purpose (and I think there is one) of this provision is unclear. The EC clearly wishes to make note of the distinction between analogue and digital private copying, but to what end? “Private copying” appears to be referring to archival or backup copying, to which users (i.e. purchasers of a copyrighted work) historically have a right. Perhaps the final sentence suggests that either DRM or national legislation should be used to limit private digital copying:

“(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. *Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.*” [Emphasis added.]

This provision proscribes the exception for libraries and archives. The last sentence appears to emphasize and endorse the cultural role of these institutions.

“(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licenses should be promoted which, without creating imbalances, favor such establishments and the disseminative purposes they serve.”

Archives are not immune to legal action by a rights-holder:

“(59) In the digital environment, in particular, the services of intermediaries (i.e. archives; ed.) may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, *right-holders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5 [the archives exemption; ed.]*. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.” [Emphasis added.]

This provision suggests that an archives or library is responsible for protecting a copyrighted work when that work is stored and made available on its network. The feasibility of such and economic effect of this provision on the cultural institutions may be worth considering.

Article 5.2.c provides an exception for archives:

“Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

[...](c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”

Article 5.3.a provides another exception:

“3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:(a) use for the sole purpose of illustration for teaching or *scientific research*, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.”

Could not digital preservation be described as scientific research? If so, this could buttress an archives' fair use argument.

The enforcement of the EC's copyright laws – the prosecution of infringement – seems to be mainly aimed at “commercial scale” infringers. This is evident in the article below, as well as the consistent referral to effects on the “internal market,” the health of which is apparently paramount.

Article 6, Section 2: “1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that *a reasonable sample of a substantial number of copies of a work* or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.” [Emphasis added.]

Annotator:	A. Torrance and Luke Meagher
Date of Annotation:	December 2004 and December 2005

Other Notes:	See also Hannelore Dekeyser’s analysis of the Directive in her report cited above under Belgium Copyright Law.
Other Notes:	<p>Backup:</p> <p>From Preamble: “(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to right-holders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.”</p> <p>See annotation above for comments on this provision.</p> <p>Processing:</p> <p>From Preamble: “(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are <i>transient or incidental reproductions, forming an integral and essential part of a technological process and carried out</i> for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.” [Emphasis added.]</p> <p>Article 5: “1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:(a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic</p>

<p>significance, shall be exempted from the reproduction right provided for in Article 2.” This may also apply to temporary user access.</p> <p>Migration: From Preamble: “(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.” This seems to advocate a vigilant and long-sighted zero-tolerance policy against the circumvention of technological measures by “private” users.</p> <p>Temporary user access: From Preamble: “(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.”</p> <p>“(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, <i>conditional access</i>, <i>access to public documents</i>, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.” [Emphasis added.]</p> <p>Exception, in Article 5.3.n for temporary user access: “(n) use by communication or making available, for the purpose of research or private study, to individual members of the public</p>
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	<p>by dedicated terminals on the premises of establishments referred to in paragraph 2(c) [libraries, archives, etc.; ed.] of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.” [Emphasis added.]</p> <p>Different treatment of use: Time delay until unlimited access:</p>
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Bibliographic Information:

Author:	The European Commission
Title:	Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on resale right for the benefit of the author of an original work of art
Journal or Book:	
Editor(s):	
Publication Details:	Done at Brussels 27 September 2001.
Page Numbers:	Approx. 5 pages
Web Source:	http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32001L0084&model=guichett

Subjects:	
Class Descriptor:	

Abstract:

This is a directive by the European Commission proscribing the resale right of an author of an original work of graphic or plastic art under European copyright law. It is stated that the directive shall apply in respect of all original works of art as defined in the directive (Article 2) which are still protected by the legislation of the member states in the field of copyright. In other words, this directive appears to be retroactive.

Annotation:

Article 2 defines the “Works of art to which the resale right relates”:
An ‘original work of art’ means “works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, and photographs, provided they are made by the artist himself or are copies considered to be original works of art.”
The second part of Article 2 pertains to copies of such works:
“Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.”

Electronic or digital works of art are not specifically mentioned in this directive, but could be imagined to fall under at least the art types “pictures,” “collages,” “drawings,” and “photographs.”

The directive discusses in detail the rights of an artist to profit from a sale (other than the first) of a piece of art. The directive delineates the rates of royalties and various exceptions and limitations.

Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	The European Commission
Title:	Council Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
Journal or Book:	
Editor(s):	
Publication Details:	Done at Strasbourg, 11 March 1996
Page Numbers:	Approx. 11 pages
Web Source:	http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996L0009&model=guichett

Subjects:	
Class Descriptor:	

Abstract:

This is a directive by the European Commission mandating the protection of databases under European copyright law. It is stated that the Member States must be in compliance with the directive by 1 January 1998.

Annotation:

Parts 9-12 of the preamble state the economic rationale for the protection of databases, which is mainly the creation of a stable environment for investment:
“(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;
(10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry *calls for investment in all the Member States* in advanced information processing systems;
(11) Whereas there is at present a *very great imbalance in the level of investment in the database sector* both as between the Member States and between the Community and the world's largest database-producing third countries;

(12) Whereas such an investment in modern information storage and processing systems will not take place within the Community *unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases[.]*”

[Emphasis added.]

(14) through (22) of the preamble discuss what can and cannot be considered a database.

(33) of the preamble discusses the “first-sale” right in the context of online distribution: “whereas, unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, *every on-line service is in fact an act* which will have to be subject to authorization where the copyright so provides [.]” [Emphasis added.]

And (34) may provide a loophole for preservation (i.e. copying for interoperability):

“Whereas, nevertheless, once the right holder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, *that lawful user must be able to access and use the database* for the purposes and in the way set out in the agreement with the right holder, *even if such access and use necessitate performance of otherwise restricted acts.*” [Emphasis added.]

Article 5 (b) states that “the author of a database shall have the exclusive right to carry out or to authorize: (b) translation, adaptation, arrangement and any other alteration,” which could be interpreted to include those copies made during or resulting from migration or emulation.

However, Article 6, which discusses exceptions to Article 5, says that the performance of such acts as that in Article 5 (i.e. translation, adaptation, etc.) “which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author.” This could be interpreted to allow for migration and/or emulation and temporary user access.

In addition, Article 6 states that Member States “shall have the option of providing limitations on the rights set out in Article 5... (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure.” Perhaps preservation could be considered an administrative procedure of a Member State.

For further discussion of the copyright protection of databases in Europe and the effect on preservation, see Hannelore Dekeyser’s excerpt “Copyright and Neighboring Rights.” It has been abstracted and annotated within this bibliography.

Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	Backup: Not mentioned. Processing: Appears to require authorization:

	<p>(44) of the preamble: “Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder.”</p> <p>Migration: See above discussion of Articles 5 and 6 in annotations. See also “Processing” above.</p> <p>Temporary user access: See above discussion of Article 6 in annotations.</p> <p>Different treatment of use: Time delay until unlimited access:</p>
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Bibliographic Information:

Author:	The European Commission
Title:	Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights
Journal or Book:	
Editor(s):	
Publication Details:	Done at Brussels 29 October 1993
Page Numbers:	
Web Source:	http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0098&model=guichett

Subjects:	
Class Descriptor:	

Abstract:

This is a directive by the European Commission harmonizing the term of protection of copyright and related rights. The directive extends the general term of protection from the life of the author plus fifty years to the life of the author plus seventy years. Exceptions and special cases of the application of this term are proscribed in the several articles of the directive. It is stated that the majority of the directive’s articles shall be brought into force by the Member States before 1 July 1995.

Annotation:

Numbers (5) and (6) of the preamble provide explanation for the extension of the term of copyright:

“(5) Whereas the minimum term of protection laid down by the Berne Convention, *namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;*

(6) Whereas certain Member States have granted a term longer than 50 years after the

death of the author *in order to offset the effects of the world wars on the exploitation of authors' works* [.] [Emphasis added.]

“(15),” of the preamble, repeals Article 8 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

“(21),” of the preamble, points out that “the harmonization brought about by this Directive does not apply to moral rights.”

“(27),” makes provisions for good faith exploitation of works:

“Whereas respect of acquired rights and legitimate expectations is part of the Community legal order; whereas Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain [.]”

Article 1 covers the duration of authors’ rights, including joint authors’ rights, the rights of anonymous and pseudonymous authors, the provisions for works of collective authorship, etc.

Article 2 discusses some “related rights” regarding cinematographic or audiovisual works. For instance, “the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.”

The second part of this article discusses the related rights more specifically:

“(2)The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.”

Article 3 further considers the related rights of (1) performers, (2) producers of phonograms, (3) producers of the first fixation of a film, (4) and broadcasting organizations.

Article 5 discusses the protection of critical and scientific publications, seeming to bring back under protection works that have come into the public domain:

“Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.”

Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	This directive is not medium-specific and is concerned with the term of protection of copyright, but not the rights of legal users of copyrighted material. The following subheadings, therefore, could

	<p>not be said to be covered. For remarks on these topics, refer to the entries for “Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs” and “Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.”</p> <p>Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:</p>
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Bibliographic Information:

Author:	The European Commission
Title:	Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
Journal or Book:	
Editor(s):	
Publication Details:	Adopted 14 May 1991
Page Numbers:	
Web Source:	http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31991L0250&model=guichett

Subjects:	
Class Descriptor:	

Abstract:

XXX

Annotation:

<p>This excerpt from the preamble could arguably be deployed in the defense of archives in their “use” of the program, i.e. An archives’ use of the computer program, an aspect of which is its preservation, may entail the reproduction of the work which may in fact be “technically necessary for the use of that program”:</p> <p>“Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer[.]”</p> <p>[This is also related to copying in processing (below);ed.]</p> <p>Yet, the following paragraph contains an explicit clarification, it seems, limiting this reproduction to copying during processing:</p> <p>“Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may</p>
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not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy[.]” [Emphasis added.]

The following paragraphs from the preamble proscribe fair use copying of computer programs. More specifically, these paragraphs would appear to allow copying for migration, as it is ostensibly performed for purposes of “interoperability”:

“Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b)** are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs;

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

Whereas an objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together [.]” [Emphasis added.]

** [“Article 4 Restricted Acts” a) and b) read as follows:

“Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize (i.e. license; ed.):

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program(.)” (Emphasis added.)]

In addition, migration and emulation appear to be covered in the Directive’s articles, notably Article 6:

“1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a

copy of a program, or on their behalf by a person authorized to do so [presumably an archive would qualify here; ed.];

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.”

Article 6, section 2 allows for the information discovered to enable interoperability to be shared with others “when necessary for the interoperability of the independently created computer program.”

Article 7 prohibits “any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program [emphasis added].”

This appears to allow for the circumvention of technological measures in a case of fair use, but may still prevent the circulation of such information. This may impose some limitation on preservation activities by archives.

Article 8 of this directive was repealed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	<p>Backup: Allowed under Article 5: “2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.”</p> <p>Processing: Allowed: “Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer[;] Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy [.]”</p> <p>Migration: See above.</p>

	Temporary user access: Different treatment of use: Time delay until unlimited access:
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3.3 UNESCO

Bibliographic Information:

Author:	National Library of Australia for UNESCO. Information Society Division.
Title:	"Managing Rights." Chapter 15 of <i>Guidelines for the Preservation of Digital Heritage</i> .
Journal or Book:	
Editor(s):	
Publication Details:	March 2003.
Page Numbers:	
Web Source:	http://unesdoc.unesco.org/images/0013/001300/130071e.pdf (Retrieved March 25, 2005)

Abstract:

Chapter 15 "Managing Rights" of the guidelines considers issues concerning copyright. The intention of the chapter is to "highlight the serious responsibility of preservation programmes to be aware of rights issues, and to provide some general suggestions on how those issues may be approached" (101). There are pertinent examples of rights and expectations considerations that must be taken into account with respect to digital preservation (101-102). The authors also give a list of the activities that institutions undertaking preservation might necessarily perform in order to preserve digital records - eg. add metadata (102). Possible obstacles to these activities are listed as well (102). The authors describe three general principles to address the challenges: awareness, advocacy, and finding workable solutions (103). In a section about "Legal and Practical Issues," common legal frameworks that would allow preservation programmes to collect digital material are listed (eg. Rights implied by voluntary submission of material to a preservation program) and some common steps in establishing a rights management program are described (eg. Identifying relevant rights owners, and other stakeholders with an influential interest in what rights are negotiated) (104). Two brief case studies are given where institutions have managed rights through some legal framework (106). There are a few Rights Management suggestions given that apply directly to copyright. Firstly, "It should be made easy for users to contact rights owners to negotiate their own permissions, such as the right to copy, where it is the user's responsibility to do so" (106). And secondly, "Encouraging creators to use open source software should help reduce complications and costs involved in negotiating rights with proprietary software developers" (106). There is also a section with recommendations for programmes with few resources (106).

Annotation:

The first sections in this chapter illuminate the possible rationale for impeding legislation in a general way, but these guidelines are mostly concerned with how institutions should manage rights issues, and do not go deeply into specific juridical contexts or issues.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	UNESCO
Title:	<i>Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI.</i>
Journal or Book:	
Editor(s):	
Publication Details:	Paris, 24 July 1971.
Page Numbers:	
Web Source:	http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html (Retrieved March 25, 2005)

Abstract:

The Convention covers published and unpublished works. (Article II.1 and II.2). There is no mention of digital records or 'digital agenda' issues (it was published in 1971). The duration of copyright is established at no less than twenty-five years after the death of the author or from first publication (Article IV.2). However, photographic or applied art is given the minimum term of ten years. (Article IV.3) In the Article concerning an author's economic rights, there is the following statement: "The provisions of this Article shall extend to works protected under this Convention either in their original form or in any form recognizably derived from the original" (Article IVbis.1). The signatory states are allowed to make "exceptions that do not conflict with the spirit and provisions of this Convention" in their national legislation. (Article IV bis.2)

Annotation:

This Convention does not impair other "international systems already in place" and seems mainly aimed at facilitating universalization of copyright principles (n.pag., preamble). The phrase 'any form recognizably derived from the original' mentioned in the abstract might be applicable to migration or any kind of preservation that requires some alterations of the original. Moral rights are not covered in this Convention. The language used in this Convention is different from language found in national laws or other international agreements, but the principles are similar.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

3.4 WTO

41.

Bibliographic Information:

Author:	World Trade Organization.
Title:	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)</i>
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (Retrieved March 25, 2005)

Abstract:

This 1994 WTO agreement calls on signatories to comply with Articles 1 through 21 of the Berne Convention except for 6bis which covers moral rights (Article 9). It requires that limitations and exceptions to be limited (Article 13). The term of protection for a work other than a photographic work or work of applied art that is calculated on a basis other than the life of a natural person must be at least 50 years (Article 12). TRIPs also emphasizes enforcement of rights. Members are obliged to create appropriate legislation that will permit "effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse" (Article 41.1). Effective 1 January 1995.

Annotation:

The treaty is concerned with the economic rights of copyright holders and this is reinforced by the emphasis on the limitation of exceptions and the enforcement or protection of rights.

Article 7, "Objectives," reads as follows:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

This is a very broad statement of goals. It would seem sufficiently pliable to allow an organization engaged in the preservation of digital records to argue (if it were so obliged) that in their limited case the "protection and enforcement of intellectual property rights" would not "contribute to the promotion of technological innovation," to the advantage of producers and users "in a manner conducive to social....welfare," nor to "a balance of rights and obligations." In other words, a fair use argument could be extracted from this

Article.

Furthermore, Article 8(1) states:

“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”

One wonders if the language “public health” and “socio-economic development” provide enough rhetorical room from within which archives could argue their fair use of protected works.

Article 9 mandates the compliance of all signatories to the Berne Convention’s Articles 1-21. However, the remainder of the article states that “Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived there-from.” Article 6bis of the Berne Convention bestows “moral rights” on authors/creators. Why TRIPS does not require signatories is not explained, but could be surmised to be indicative of the focus of the agreement itself, which is concerned with “trade-related aspects” of intellectual property, i.e. “economic rights.” This approach seems reasonable, as the granting and protection of moral rights tend to be subject to the cultural and legal traditions in which they are created. This is evidenced by the various degrees to which the moral rights of the author are recognized and protected from country to country, region to region.

Article 10(1) protects computer programs as under the Berne Convention.

Article 10(2) protects databases, while not referring to such as “databases,” in language similar to that of the European Commission Directive on the protection of databases.

Article 13 is the fair use clause:

“Members shall confine limitations or 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 right holder.”

TRIPS contains several provision on related-rights:

Article 14(1) ensures that performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance, “bootlegging.”). The fixation right covers only aural, not audiovisual fixations. Performers are also empowered to prevent the reproduction of such fixations, and prevent the communication to the public of their live performance.

Article 14(2) grants producers of phonograms an exclusive reproduction right. In addition, producers of phonograms are granted, in accordance with Article 14.4, an exclusive rental right. From the WTO-TRIPS summary:

“The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of

computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member, which on 15 April 1994, i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.”

Broadcasting organizations are granted in Article 14(3) the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

The term of protection is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organizations [Article 14(5)].

Article 14(6) provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

4. INSTITUTIONAL POLICIES AND LITERATURE

Bibliographic Information:

Author:	National Archives (UK)
Title:	<i>Copyright.</i>
Journal or Book:	
Editor(s):	
Publication Details:	2004. Leaflet. Received by authors as an attachment to an email from Mahnaz Ghaznavi. "Fwd: UK copyright and public records." October 31, 2004.
Page Numbers:	
Web Source:	

Abstract:

This leaflet describes how the National Archives of the United Kingdom understands copyright as it applies to archives. It describes when copies of copyrighted material might legitimately be made. Upon such occasions, only a single copy is allowed 'unless

noted otherwise' (6, Section 5.1.2). There is also a general statement that: "Use outside the purposes indicated, the making of further copies from the copies, or the publication of copyright material may infringe copyright"(6, Section 5.1.2). The National Archives will provide copies of Crown copyright (public records) works or out of copyright works to other museum and archival institutions, which in turn may make a single preservation copy of that copy and make hard copies for patrons. (9, Section 8.3). It is noted again that the copyright owner has the exclusive right to authorize the copying, publication, performance, broadcast, rental etc until copyright expires (9, Section 9.1). Some applicable exceptions are mentioned, including 'Fair dealing' where copyrighted materials may be used for the purposes of private study or research for a non-commercial purpose, criticism or review, or current news reporting (9, Section 9.3). 'Archival materials' is another exception of interest: "No permission is required from the copyright owner to publish or broadcast a literary, dramatic or musical work (together with any illustrations accompanying the text but not an artistic work alone), so long as: The work is open to public inspection in a library, museum, archive or similar institution"(9, Section 9.5).

Annotation:

There is no explanation of what materials might be copied more than once as described in the 'noted otherwise' clause mentioned above. The Archival materials exception might leave room for Archives to 'publish' material to the internet, thereby making digital copies available.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

5. OTHER SOURCES

Bibliographic Information:

Author:	American Association of Museums, co-authors Michael S. Shapiro, Brett I. Miller, Lewis and Bockius, LLP
Title:	
Journal or Book:	A Museum Guide to Copyright and Trademark
Editor(s):	
Publication Details:	Washington D.C.: American Association of Museums, 1999.
Page Numbers:	
Web Source:	

Abstract:

The content of this guide is intended "as practice-oriented advice for the museum professional." Through its chapters, the basics of copyright and trademark law are introduced and illustrated through hypothetical examples.

Annotation:

Chapter 5 "International Issues" is useful for IP2 researchers to the extent that it

recommends a general framework for “approaching transnational problems” posed by the “international dimension of intellectual property protection”; prior to entering into any agreement, museums are strongly encouraged to produce answers to the following three questions: a.) “in what countries does the museum seek protection?”; b.) “what protection is available under that country’s national intellectual property laws?”; and, c.) “what treaty provisions may provide protections or facilitate obtaining intellectual property rights in the absence of or as supplement to existing local laws?”(149).

“The building blocks of international protection turn out to be national legal systems linked through an increasingly intricate network of bilateral and multilateral agreements.”(150)

Annotator:	M. Ghaznavi
Date of Annotation:	August 1, 2005
Other Notes:	

Bibliographic Information:

Author:	Aufderheide, Pat and Peter Jaszi
Title:	<i>Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers</i>
Journal or Book:	
Editor(s):	
Publication Details:	Center for Social Media. November 2004.
Page Numbers:	
Web Source:	http://www.centerforsocialmedia.org/rock/finalreport.htm (Retrieved April 26, 2005)

Abstract:

This study explores the implications of the rights clearance process on documentary filmmaking, and makes recommendations to lower costs, reduce frustration, and promote creativity. It focuses on the creative experience of independent, professional documentary filmmakers. The findings are, in general, that the rights clearance process is costly and frustrating in such a way that adversely affects documentary practice and causes filmmakers to imagine a more rational rights environment. Recommendations include: the development of best practice models for fair use and legal resource centers for filmmakers; the establishment of a non-profit rights clearinghouse and endorsement of legislation that tackles orphan works; and, the building of awareness regarding filmmaker's use rights.

Annotation:

The authors provide a useful legal background to the issue of underlying rights which can give a basic understanding of the different kind of rights that can be attached to a work and the complications of ownership that may also occur. Specific testimonials from different creators are included to support the findings. However, the paper is focused on rights acquisition and the creation process rather than issues relating to the preservation or distribution of work with layers of underlying rights.

Annotator:	A. Torrance
Date of Annotation:	April 26, 2005
Other Notes:	Source identified by Mary Ide.

Bibliographic Information:

Author:	Ayre, Catherine and Adrienne Muir
Title:	"The Right to Preserve: The Rights Issues of Digital Preservation."
Journal or Book:	<i>D-Lib Magazine</i>
Editor(s):	
Publication Details:	10.3 (March 2004)
Page Numbers:	N.pag.
Web Source:	http://www.dlib.org/dlib/march04/ayre/03ayre.html (Retrieved March 27, 2005)

Abstract:

<p>This article describes the findings of the Copyright and Licensing for Digital Preservation (CLDP) project which ran from September 2002 to March 2004 from Loughborough University in the UK. "The project's aim was to investigate whether and how copyright legislation and licensed access to digital content affect the ability of libraries to provide long-term access to that content, and to suggest solutions for any problems identified" (Section 1). There is a table illustrating the copying requirements of various digital preservation strategies (Section 2). "One of the objectives of the CLDP Project was to determine whether existing copyright law, in the UK and elsewhere, allows libraries to copy digital publications to preserve them" (Section 2). The authors noted the following particular prohibitions in the UK law that could be barriers to preservation: restrictions against copying and adapting works; prohibitions against the extraction and re-utilisation of all or a substantial part of the content of a database without consent; and copyright restrictions on file format specifications that are commercially sensitive but necessary for migration or emulation. (Section 2). The authors sum up their look at UK law by writing that it was not clear what kinds of preservation copying would be allowed under the law and that "Currently, there is no relevant case law, and preservation experts are anxious not to become test cases" (Section 2). There are also brief summaries of how preservation copying is treated in legislation from the United States, Canada, Australia, the European Union and New Zealand.</p>

Annotation:

<p>As with the other Muir article, potential rights issues and potential solutions are also briefly described. The solutions provided are for published material only and may not apply to archival material.</p>

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	Bellingham, Katy and Tamara Lavrencic.
Title:	"Copyright Impediments to the Preservation of Australia's Documentary Heritage."
Journal or Book:	<i>Australian Library Review</i>
Editor(s):	
Publication Details:	12.4 (November 1995)
Page Numbers:	N.pag.
Web Source:	http://www.ifla.org/documents/infopol/copyright/kbell1.htm (Retrieved March 27, 2005)

Abstract:

<p>The authors comment on both the published and unpublished material that makes up Australia's 'Documentary Heritage.' The authors note that the current Australian law (Copyright Act 1968) does recognize the need for preservation copying in a limited way (n.pag., par. 2). They write that the aim of documentary preservation "is to ensure continued public access to information, wherever possible through preventive action" (n.pag., par.3). There are warnings about the consequences to the current logic inherent in the legislation whereby preservers must wait for a work to deteriorate before they can justify making replacement or preservation copies (n.pag., par. 18). There is description of current ways to avoid infringement of the Act (eg. limit preservation copying to material already in public domain), each of which pose potential problems (n.pag., par. 5).</p>

Annotation:

<p>The focus of this article is mostly on non-digital works, but there are sections on, for example, making back-up electronic copies. The authors are also writing from the institutional point of view of libraries, and, in a section on reformatting, for instance, suggest that the aim of preservation copying is to preserve the information content of the original (n.pag., par 21). There is some clear but brief discussion of the problems with restrictions on the number of preservation copies allowed (n.pag., par. 13) and with identifying the copyright status of hyper-linked works (n.pag., par. 30).</p>

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

46.

Bibliographic Information:

Author:	Besek, June M.
Title:	<i>Copyright Issues Relevant to the Creation of a Digital Archive: A Preliminary Assessment.</i>
Journal or Book:	<i>Australian Library Review</i>
Editor(s):	
Publication Details:	January 2003. Council on Library and Information Resources and the Library of Congress.

Page Numbers:	N.pag.
Web Source:	http://www.cllr.org/pubs/reports/pub112/contents.html (Retrieved March 27, 2005)

Abstract:

Besek discusses digital archiving issues raised by the US Library of Congress and Copyright Office. The Library of Congress is a national institution that is specifically mentioned in US copyright law. Section 4 describes the relevant exceptions to the copyright law when it comes to digital archives in general. In the US, copyright owners are required to deposit two copies of the 'best edition' of any work with the Copyright Office and the Library of Congress keeps or transfers these deposited copies (Section 6). There is no clear answer as to what should happen in scenarios where, for example, a large database is being considered and end users only receive a relevant portion of the content of the database. The author offers a list of questions raised by such complex digital material (Section 6). The author raises two possible problems for archives with respect to the Digital Millennium Copyright Act (DMCA) but also gives solutions or resolutions for these problems. Firstly, the law may prevent archives from circumventing technological access controls - but Besek points out a way that archives can seek an exception. Secondly, the law prohibits circulation of circumvention devices, so an archives would have to either develop in-house circumvention expertise or engage expert assistance (Section 9). The report also briefly breaks down the different ways that an archives may receive digital works (ie. harvesting, mandatory deposit, agreements with copyright owners) and the possible copyright implications in each case (Section 11).

Annotation:

The report contains a good description of the 'bundle of rights' that copyright encompasses (Section 3). Section 6 briefly raises the issue of what may be considered published and unpublished material on the internet as the mandatory deposit law would not apply to unpublished works. Section 7 on Copyright Ownership gives some issues relating to tracking ownership when it comes to digital material, but it does not go into detail about issues like orphaned works or underlying rights.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	Billington, James H. (Librarian of Congress)
Title:	Statement of the Librarian of Congress Relating to Section 1201 Rulemaking
Journal or Book:	
Editor(s):	
Publication Details:	Effective date: October 28, 2003
Page Numbers:	
Web Source:	http://www.copyright.gov/1201/docs/librarian_statement_01.html

Abstract:

In this statement, the Librarian of Congress issues a final rule that sets out four classes of works that will be subject to exemptions (for the next three years) from the statute's prohibition against circumvention of technology that effectively controls access to a copyrighted work. One of these four classes of works is "Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access." These exemptions will remain in effect through October 27, 2006.

Annotation:

The Librarian clarifies the difference between copy controls and access controls and how these exemptions are related:

"The purpose of the proceeding is to determine whether current technologies that control access to copyrighted works are diminishing the ability of individuals to use works in lawful, noninfringing ways. The DMCA does not forbid the act of circumventing copy controls, and therefore this rulemaking proceeding is not about technologies that control copying. Some of the people who participated in the rulemaking did not understand that and made proposals based on their dissatisfaction with copy controls. Other participants sought exemptions that would permit them to circumvent access controls on all works when they are engaging in particular noninfringing uses of those works. The law does not give me that power. The focus in this rulemaking is on whether people have been adversely affected by access controls in their ability to make noninfringing uses of particular classes of copyrighted works." [3rd paragraph.]

The Librarian concludes the statement with:

"Two of these classes of works are very similar to the two classes of works that were exempted three years ago, but they have been modified to take into account the somewhat different cases that were presented to the Register this year. *One of these two new classes of works will provide some relief to libraries and archives in their preservation activities, and the other will assist the blind and visually disabled in their ability to gain meaningful access to digital materials.*" [Final paragraph; emphasis added -- *Note*: the class in question refers to that noted in the abstract.]

The three other exempted classes are:

>> "Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email." [Number 1 in document]

>> "Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete." [Number 2 in document]

>> “Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.” [Number 4 in document]

The Librarian notes that he is required to publish this list of exemptions every three years, as required by the DMCA (Digital Millennium Copyright Act), which thus limits the possible exemptions:

“§ 1201. Circumvention of copyright protection systems

“(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES.

—(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

“(B) *The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, **adversely affected** by virtue of such prohibition in their ability to make **noninfringing uses** of that particular class of works under this title, as determined under subparagraph (C).*

“(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, **the Librarian of Congress**, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, *shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, **the Librarian shall examine—***

“(i) *the availability for use of copyrighted works;*

“(ii) *the availability for use of works for nonprofit archival, preservation, and educational purposes;*

“(iii) *the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;*

“(iv) *the effect of circumvention of technological measures on the market for or value of copyrighted works; and*

“(v) *such other factors as the Librarian considers appropriate.*

“(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply

to such users with respect to such class of works for the ensuing 3-year period.”
[Digital Millennium Copyright Act, Section 1201.]

Annotator:	Luke Meagher
Date of Annotation:	May 17, 2005
Other Notes:	

Bibliographic Information:

Author:	Bricklin, Dan.
Title:	"Copy Protection Robs The Future."
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.danbricklin.com/robfuture.htm (Retrieved May 9, 2005)

Abstract:

In this article, Bricklin gives a historical account of how different types of material have been preserved or migrated over time, and then argues that copy protected works are less likely to survive into the future because preserver's are barred from making copies necessary for migration. He gives a specific example of an early computer program, VisiCalc, that was not preserved by the rights owners.

Annotation:

This is a general article that offers a good introduction to the problem of copy protection as it prohibits copying for migration. Bricklin also gives some comments on the potential long-term effects on culture if market popularity governs what is to be preserved.

Annotator:	A. Torrance
Date of Annotation:	May 12, 2005
Other Notes:	

Bibliographic Information:

Author:	Bricklin, Dan.
Title:	"How will the artists get paid?"
Journal or Book:	
Editor(s):	
Publication Details:	14 April 2003.
Page Numbers:	
Web Source:	http://www.danbricklin.com/artistspaid.htm (Retrieved May 9, 2005)

Abstract:

This article gives a brief historical overview of how artists have been paid for their work

in the past and argues that these traditional "ecosystems" of creation and payment are still valid in today's environment. Bricklin discusses fair use within his larger concept of 'free release.' He also comments on the rigidity of Digital Rights Management systems, writing that they are "wedded to narrow, simplistic business models, dominated by large publishing businesses" (n.pag.).

Annotation:

This article discusses intellectual property on a broad scale, looking at creation and payment as parts of a larger process. Bricklin illustrates the problems of trying to adapt systems to protect copyright to a variety of creators - big business and 'amateur' individuals. The discussion of DRM is only two paragraphs.

Annotator:	A. Torrance
Date of Annotation:	May 9, 2005
Other Notes:	

Bibliographic Information:

Author:	Bricklin, Dan.
Title:	"Software That Lasts 200 Years."
Journal or Book:	
Editor(s):	
Publication Details:	14 July 2004.
Page Numbers:	
Web Source:	http://www.danbricklin.com/200yearsoftware.htm (Retrieved May 9, 2005)

Abstract:

Bricklin argues that the short-term culture of software development should change to a view of software as part of the societal infrastructure that is built to be sustainable. Bricklin introduces the term "Societal Infrastructure Software" which is the "software that forms a basis on which society and individuals build and run their lives" (n.pag.). He further gives a list of what society and individuals would need from their Societal Infrastructure Software and concludes with some thoughts on its development, noting that open source software would likely be at the heart of the solution.

Annotation:

This article is a well-written argument for the consideration of long-term preservation requirements during the development of software. Bricklin writes that "Impediments such as intellectual property restrictions and 'digital rights management' chokepoints must be avoided" (n.pag.). He does not go into further detail on intellectual property, but his idea that Societal Infrastructure Software should be open source would have an obvious impact on long-term preservation and copyright management.

Annotator:	A. Torrance
Date of Annotation:	May 9, 2005
Other Notes:	

Bibliographic Information:

Author:	Camp, L. Jean.
Title:	"DRM: Doesn't Really Mean Digital Copyright Management."
Journal or Book:	
Editor(s):	
Publication Details:	<i>Proceedings of the 9th ACM Conference on Computer and Communications Security</i> . Washington, DC, 2002. Berlin ; New York : Springer-Verlag, c2003.
Page Numbers:	78-87.
Web Source:	http://delivery.acm.org/10.1145/590000/586122/p78-camp.pdf?key1=586122&key2=8629644111&coll=GUIDE&dl=ACM&CFID=42741034&CFTOKEN=58681594 (Retrieved April 25, 2005)

Abstract:

Camp puts copyright into historical context, tracing copyright as a legal concept through economic and technological changes. Camp argues that the original intent of copyright was to ensure *copy accuracy*, a concept which he develops to include the binding of the author's reputation to a document, content integrity, document persistence, availability and archiving. Camp then evaluates three DRM systems against these "functions of the copyright system" (83). The DRM systems examined do not meet all of Camp's functional criteria.

Annotation:

The author dances around concepts that are close to the archival ideas of reliability, authenticity and authentication. The concept "copy accuracy" includes a function of archiving, meaning that users are able to trust information that has been set aside for preservation. The article does a good job in contrasting the typical features of DRM systems with what the author considers the first principles of copyright, or functions of the copyright system. However, the article was clearly not proofread and is, at times, difficult to read.

Annotator:	A. Torrance
Date of Annotation:	April 25, 2005
Other Notes:	

Bibliographic Information:

Author:	Campaign for Digital Rights
Title:	"About the Archive."
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.ukcdr.org/issues/bbc/about_the_archive.shtml (Retrieved May 20, 2005)

Abstract:

This article explains the planned creation of an archive of BBC audio-visual material on the internet. The intent is to follow the Creative Commons model of explaining how the content may be used, thereby encouraging creative reuse of the material available. The article also gives a list of requirements for the archive to be truly relevant.

Annotation:

The article gives a view of how an archives may function if a copyright system is not used in the strictest way possible to prohibit access for creative use. The requirements given are similar to those recommendations in the literature for managing copyrighted material in such a way to allow for long-term preservation. This article also, in some respects, offers a glimpse of how copyright issues may appear to a pseudo-private archives that does not have a mandate to make all records available to the public through the internet.

Annotator:	A. Torrance
Date of Annotation:	May 20, 2005
Other Notes:	See also "BBC Creative Archive licensing to be based on Creative Commons" by Simon Perry for more information on the creation of the BBC archive: http://digital-lifestyles.info/display_page.asp?section=distribution&id=1254

Bibliographic Information:

Author:	Center for the Study of the Public Domain. Duke Law School.
Title:	<i>Access to Orphan Films: submission to the Copyright Office -- March 2005.</i>
Journal or Book:	
Editor(s):	
Publication Details:	2005
Page Numbers:	
Web Source:	http://www.law.duke.edu/cspd/pdf/cspdorphanfilm.pdf (Retrieved April 26, 2005)

Abstract:

This is a short submission to the U.S. Copyright Office in response to its call for comments on the problems in access to orphan works and for suggestions about ways in which the copyright system might be adjusted to deal with these problems. The submission explains the state of deterioration of orphan films and videos, identifies a number of specific barriers to preservation and access, and gives four broad characteristics that any solution to the problems should include. The paper concludes by reiterating the Supreme Court has been clear in pointing out that the constitutional goal of copyright lies ultimately in enabling access and by further encouraging the Copyright Office to adjust the copyright system along the lines suggested.

Annotation:

This paper clearly identifies the dilemma that preservers face when attempting to care for orphan works. For example, the authors make note of the following situation: preserving institutions may invest money and time in maintaining orphan works, only to have creators deliberately wait to make themselves known until they can benefit from the restorations made. The 'characteristics' proposed include: procedures that will make it easier to search for copyright owners; immunity for institutions that are belatedly contacted by a copyright owner but desist in preservation activities once contacted; and a limit on liability for institutions that are in the midst of preservation activities and are about to provide access. The proposed characteristics seem helpful because they are specific, but it is unclear how this could or could not be interpreted into law.

Annotator:	A. Torrance
Date of Annotation:	April 26, 2005
Other Notes:	Source identified by Mary Ide.

Bibliographic Information:

Author:	Cohen, Julie E.
Title:	"A Right to Read Anonymously: A closer look at 'copyright management' in cyberspace."
Journal or Book:	<i>Connecticut Law Review</i>
Editor(s):	
Publication Details:	28.981 (1996)
Page Numbers:	
Web Source:	http://www.law.georgetown.edu/faculty/jec/read_anonymously.pdf (Retrieved May 24, 2005)

Abstract:

This article is about how copyright management technologies that allow for the monitoring of a reader's activities in cyberspace may impact on that reader's constitutional freedom of thought (US First Amendment). Among other conclusions, Cohen finds that "While the government has an obvious interest in preventing wholesale piracy of copyrighted works, that interest is not implicated, much less threatened, by the actions of individuals who seek to acquire, lawfully but anonymously, copies of such work for their personal use" (60-61). She further states that it is technologically feasible to design systems that protect user anonymity and the underlying property rights, therefore monitoring goes beyond the protection of legitimate interests and reader anonymity should be legally-protected.

Annotation:

Cohen is giving legal interpretation of the US context. The article is focused on the idea that rights owners' ability to track or monitor users should be limited, and so the issue being discussed is the right to anonymity or privacy rather than fair use or public rights such as copyright exemptions for preserving institutions. Yet, the first part of the article describes the current state and use of copyright management technology which can give an idea of what kind of system rights owners may be able to put into place; and Part II, gives legal discussion on anti-circumvention restrictions that were later made into law. These parts could be relevant because

they offer a legal discussion of copyright management systems and technologies.

Annotator:	A. Torrance
Date of Annotation:	May 24, 2005
Other Notes:	

55.

Bibliographic Information:

Author:	Cohen, Julie E.
Title:	" <i>Lochner</i> in Cyberspace: The new economic orthodoxy of 'rights management.'"
Journal or Book:	<i>Michigan Law Review</i>
Editor(s):	
Publication Details:	97.462 (1998)
Page Numbers:	(web version)1-94.
Web Source:	http://www.law.georgetown.edu/faculty/jec/Lochner.pdf (Retrieved May 24, 2005)

Abstract:

Cohen challenges the market model that new copyright legislation for the digital environment seems to be based upon by making an analogy to the <i>Lochner</i> era of legal theory which gave private companies the legal right to set contracts that were not in the public interest in the name of promoting a free market. Cohen argues that this kind of market model, as it is appearing through Copyright Management Systems, does not suit either the digital environment or the aim of protecting and encouraging creative and informational works. The idea that maximum profits for rights holders results in the greatest gain for society as a whole is challenged. She concludes by calling for the development of technical alternatives for managing rights in digital works.
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Annotation:

Cohen's argument seems to make the case for less strict legislation that would allow for copying in the public interest. Her exposition of the original intent of copyright law - to encourage 'progress' and creativity and not to maximize private wealth - could be helpful in making a case for the ability to create dark archives or other strategies to preserve copyrighted work. The writing is somewhat impenetrable to the uninitiated.
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Annotator:	A. Torrance
Date of Annotation:	May 24, 2005
Other Notes:	

Bibliographic Information:

Author:	Coyle, Karen.
Title:	"Rights Management and Digital Library Requirements."
Journal or Book:	<i>Ariadne</i>
Editor(s):	
Publication Details:	40 (30 July 2004).
Page Numbers:	N.pag.

Web Source:	http://www.ariadne.ac.uk/issue40/coyle/ (Retrieved March 27, 2005)
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Abstract:

The author begins by defining Digital Rights Management (DRM) as "the general concept of expression of terms of access and use, as well as the enforcement of those terms through technology" (n.pag., par. 4). The requirements for rights management systems currently favour commercial use of digital resources (n.pag., par. 6) and do not take into account preservation requirements. "The main requirement for these systems is security, and the systems that will achieve the required level of security are referred to as 'trusted systems'" (n.pag., par. 17). Currently, all permitted actions must be expressly granted in the machine-readable license that accompanies digital material. It is impossible to predict the new capabilities that will develop with future technology and so these "capabilities will not, of course, be explicitly granted by machine-readable licenses created in the past. This has an impact on innovation in the creator community and an impact on the ability of libraries and archives to provide long-term access to digital materials" (n.pag., par. 24). Coyle comments on the requirements that libraries and archives may specify for DRM systems. "Efforts to define requirements may begin with general principles (e.g. 'must allow archival copy to be made'), but to be effective they need to be informed by the capabilities of technology and information about the digital content market" (n.pag., par. 26). With respect to copyright, Coyle suggests the general requirement that:

any rights management must not eliminate public, educational, and library user rights that copyright law allows. There is no possibility of a true technological implementation of fair use/fair dealing; copyright law's exceptions are relative, subjective and contextual in nature, and cannot be reduced to an algorithm in a computing device. It does seem plausible, however, to require open and unlimited use within personal space, and liberal use within educational environments, if such environments can be defined for the purposes of rights management (n.pag., par. 32)

Coyle warns that "If we are to continue the archival function of libraries for digital materials, we will need exit strategies to release protected content either at the end of its copyright term, or so that new entities can take over the custodial function when previous interests decline to do so" (n.pag., par. 40).

Annotation:

This article provides a good summary of the issues arising out of the use of DRM systems. Coyle makes an argument that fair use/fair dealing exceptions cannot be incorporated into the technology of DRM systems because copyright law exceptions are relative, subjective and contextual in nature. The implied recommendation is that DRM systems should be able to change access controls based on the environment (i.e. in an archives) and not on the material within the system. Coyle does not go into detail about how this change could take place.

Annotator:	A. Torrance
Date of Annotation:	December 2004

Other Notes:	
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Bibliographic Information:

Author:	Coyle, Karen.
Title:	"The 'Rights' in Digital Rights Management."
Journal or Book:	<i>D-Lib Magazine</i>
Editor(s):	
Publication Details:	10.9 (September 2004)
Page Numbers:	N.pag.
Web Source:	http://www.dlib.org/dlib/september04/coyle/09coyle.html (Retrieved March 27, 2005)

Abstract:

This article discusses copyright as one of the rights that will need to be managed in the digital environment. Coyle points out that copyright law applies to all forms of intellectual property and that no actions are required from digital material creators in order for the law to apply (n.pag., par. 4). Coyle also comments on how these rights could possibly be attached to digital material:

Some of our information resources will arrive at the library with their own embedded rights technology, as e-books do today. Some information resources on the market will have controls that libraries find so unacceptable that they will choose not to obtain those materials. Some controls, such as further development of access control technologies, will benefit digital libraries, allowing them to provide more resources more easily to remote users (n.pag., 23).

Coyle points out the potential difficulty of encoding a concept of 'fair use' in digital material, writing "Legal languages and computer algorithms occupy distinctly different semantic spaces (n.pag., par. 8).

Annotation:

Coyle is writing about the library context and so it is not clear what preservation institutions should do when they feel that they must acquire information resources with strict access controls.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	Crawford, Tad
Title:	
Journal or Book:	Legal Guide for the Visual Artist
Editor(s):	
Publication Details:	Fourth edition. New York: Allworth Press, c2001.
Page Numbers:	
Web Source:	

Abstract:

This book is a practical guide aimed at visual artists. The first edition of this book came out in 1977. Its scope is broad and its intended audience of visual artists includes “cartoonists, craftspeople, graphic designers, illustrators, painters, photographers, printmakers, sculptors, and textile designers.”(1) Making a distinction between commercial and fine arts, it covers copyright, moral rights, protections and remedies for artists, contracts, and relations between visual artists and various entities, such as museums and publishers.

Annotation:

Chapter 7 of this work is entitled “Moral Rights.” This chapter analyses the Visual Artists Rights Act (VARA), the “landmark legislation creating moral rights for artists in the United States...enacted on December 1, 1990, as an amendment to the copyright law...[which] took effect on June 1, 1991,” and b.) two landmark court cases in the United States concerned with moral rights.

Annotator:	M. Ghaznavi
Date of Annotation:	August 1, 2005
Other Notes:	

Bibliographic Information:

Author:	Dekeyser, Hannelore
Title:	“Copyright and Neighboring Rights” (Chapter H)
Journal or Book:	[Excerpt?] [Chapter H]
Editor(s):	
Publication Details:	[2005?]
Page Numbers:	13 pages
Web Source:	n/a

Subjects:	
Class Descriptor:	

Abstract:

The purpose of this paper is to introduce and explain the guiding principles of copyright law in Belgium insofar as they are relevant to archival practice in the private sector. The paper covers copyright concepts such as: extent and scope of copyright protection; exceptions; licenses; the penal and civil sanctions of copyright infringement. In addition, the author examines the special protection of computer programs and databases under European Union and Belgian law. The author includes an illustration of the application of some of these concepts in a case study “Archiving the Company Website.”

Annotation:

This paper encompasses a succinct summary of the principles of copyright law, usefully relating the discussion to private (or business) archival practice as much as is practicable. This paper would be a good introduction to copyright terms for archivists or archival

students with little or no exposure to copyright – despite the relatively narrow geographical scope, the concepts discussed are generally found in most other national copyright traditions.

Of particular interest to the focus of this bibliography are sections 9 and 10, those concerned with the protection of computer programs and databases respectively.

In section 9.4, the author notes that “[a]s far as the copyright law on computer programs is concerned, the preservation of computer programs in an archive is only possible with the author’s consent.”

The same problem exists in the case of databases. From section 10.4: “In principle, the producer must give his/her permission.”

Keywords: (modify as required)

Authenticity:	
	(if necessary, add quotation from text with page numbers)
Accuracy:	
	(if necessary, add quotation from text with page numbers)
Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	Dekeyser, Hannelore
Title:	"Re: Policy research: InterPARES." (E-mail to Mahnaz Ghaznavi with attached PDF file in response to request for information on Belgium copyright law.)
Journal or Book:	
Editor(s):	
Publication Details:	November 4, 2004.
Page Numbers:	
Web Source:	

Abstract:

Dekeyser describes the European Union Directive 2001/29/EC on the harmonization of copyright and legislation applicable to copyright in Belgium. She writes that: "Belgium has not transposed Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society yet. According to the legal doctrine of the supremacy of EU law over national law, Belgian law must be interpreted in conformity with EU directives and regulations whenever possible." (3)

Annotation:

Dekeyser writes about the topics applicable to InterPARES's study of copyright. With respect to the exception to copyright for scientific research, she writes: "'In my opinion, archives could benefit from this exception in order to copy materials for their collection. No court cases or doctrine are available against or in favor of this interpretation....The archives could only be prosecuted on criminal charges of copyright infringement if it was committed with the intent to cause damage or to defraud. Again, in general mere preservation of a work is not done with the intent to damage the rights-holder or to defraud him of profits"(4). She also notes that "Knowingly commercializing infringing works is a criminal offence. Buying such works for the archives collection is not covered, nor is dissemination in a strictly noncommercial way" (4).

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	Dekeyser also writes that her report is based on the DAVID report "Digitale archivering: een juridische stand van zaken van uit Belgisch perspectief. Deel 2. Auteursrecht, technische beschermingsmaatregelen en wettelijk depot.", available at http://www.antwerpen.be/david/website/teksten/Rapporten/Rapport8.pdf

Bibliographic Information:

Author:	Hirtle, Peter B.
Title:	"Digital Preservation and Copyright."
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://fairuse.stanford.edu/commentary_and_analysis/2003_11_hirtle.html (Retrieved May 12, 2005)

Abstract:

This article explains how the US copyright law applies to digital material. It describes what kind of digital copying archives and libraries may undertake and further explains how the fair use provision may apply to preservation. Hirtle concludes that a strong fair use defense may protect preservation activities that are not more specifically exempt under the law.

Annotation:

Hirtle clearly shows how the law can be applied to different preservation activities for different material (e.g., web pages, material with anti-circumvention devices). He cites the Internet Archive as a specific example of an attempt to preserve the web and gives some possible legal arguments concerning copyright for and against this preservation.

Annotator:	A. Torrance
Date of Annotation:	May 12, 2005
Other Notes:	

Bibliographic Information:

Author:	Istituto centrale per il catalogo unico delle biblioteche italiane e per le informazioni bibliografiche, Università degli studi di Urbino. Introduction of Maria Guercio, Report of Lucia Lograno, Data analysis of Ave Battistelli, (English translation of Francesca Marini)
Title:	<i>Legislation, Rules and Policies for the Preservation of Digital Resources: A Survey</i>
Journal or Book:	
Editor(s):	
Publication Details:	Florence. October 2003
Page Numbers:	N.pag.
Web Source:	

Abstract:

This is the report on a survey which aimed to analyze the legislation, regulations and policies for digital heritage preservation currently implemented, at the national, regional and local level, in European countries and in some important international institutions. (n.pag., Preface, Section 1). The survey covered a varied range of forty-seven institutions in nineteen countries. Such preservation work had developed with wide differences and without the help of consistent guidelines. "Within countries, there is a fragmented legislation and regulation activity and, at the European level, not enough effort has been made towards reconciling the contradictions in the regulatory activity of European Union governing bodies" (n.pag., Preface, Section 2). The report's conclusion includes a call for cooperation and the development of shared regulations. (n.pag., Preface, section 4).

Annotation:

The report does not address copyright in detail, but only describes how it was an area of activity for the research and report. The report describes the investigation into the legal issues regarding the creation of a balance between intellectual property/copyright protection needs and permanent archival preservation needs:
 "No European Union country has consistent regulations in this sector, which has recently been regulated by the European Union in a way that has only partially taken into account user needs and the complexity of the activities necessary for digital heritage preservation. It has been repeatedly pointed out that the digital environment is going to considerably alter the balance that has been in place for centuries among the activities of acquisition,

loan and reproduction of materials. In this area, legislation and regulations—which aim exactly to re-build juridical balance, through the re-definition of reference points for records and information—are very necessary, although they require great effort.” (n.pag., Preface, section 2)

Also:

“Providing a coherent overview of digital heritage preservation national and local regulations, both current and in development, it is certainly the starting point—and not a simple one—for an ambitious and difficult process that will have to tackle diverse sectors and areas of activity and responsibility, for example:

[....]

- creation of a balance between intellectual property/copyright protection needs and permanent archival preservation needs: no European Union country has consistent regulations in this sector, which has recently been regulated by the European Union in a way that has only partially taken into account user needs and the complexity of the activities necessary for digital heritage preservation. It has been repeatedly pointed out that the digital environment is going to considerably alter the balance that has been in place for centuries among the activities of acquisition, loan and reproduction of materials. In this area, legislation and regulations—which aim exactly to re-build juridical balance, through the re-definition of reference points for records and information—are very necessary, although they require great effort.” [From Preface, p.7 of MSWord document.]

Intellectual property/copyright protection issues are raised here in the preface because they are not raised or do not arise in either the survey’s questions or its results. In other words, the effect of copyright/IP on digital preservation does not fall squarely within the purview of this study, but it is a peripheral or parallel problem whose solution requires thorough consideration.

Annotator:	A. Torrance and Luke Meagher
Date of Annotation:	December 2004 and January 2006
Other Notes:	

Bibliographic Information:

Author:	Kahle, Brewster and Macgillivray, Alexander (on behalf of The Internet Archive); Lessig, Lawrence; Seltzer, Wendy.
Title:	Re: RM 2002-4 -- 17 USC § 1201 Exemptions Notice of Inquiry
Journal or Book:	n/a
Editor(s):	n/a
Publication Details:	San Francisco, Washington DC; December 18 2002
Page Numbers:	1-14
Web Source:	http://www.bricoleur.org/archives/20021218-IA-Comment.pdf

Abstract:

This paper authored by and on behalf of The Internet Archive explains that Section 1201(a)(1) of the Digital Millennium Copyright Act is currently preventing archivists

from archiving software whose access control systems prohibit access to replicas, thereby crippling the ability of archivists to preserve and make accessible these works over time. The Internet Archive requests an exemption from Section 1201(a)(1) [an anti-circumvention provision] be granted for “Literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works,” as such an exemption does not damage copyright holders, meets each of the established criteria for the rulemaking, and protects an important non-infringing use of the works.

Annotation:

Noting that the preservation of digital objects begins at creation or at acquisition and that such is an ongoing process, the Internet Archive petitions for an exemption from Section 1201(a)(1), which, it argues, is preventing it from carrying out its entirely lawful work.

Section 1.1 notes the necessity of migrating digital works and the Internet Archive argues that such “use is a non-infringing use protected by Sections 107, 108, and 117 of the Copyright Act.... Furthermore, the proposed exemption is narrowly drawn and does not damage the market for the works.”

In footnote #2, The Internet Archive cites *Vault Corp. v. Quaid Software Limited*, 847 F. 2d 255 (1988), in which “the Fifth Circuit found that there was no copyright infringement in the distribution of software to circumvent...[original only] access controls.”

Footnote #5 notes: “This comment is not addressed towards the copy controls identified in Section 1201(b). In some cases these copy controls may prevent the preservation of a work by preventing its migration to new media. However, even when no copy control prevents preservation, access controls such as the “original-only” access controls described above prevent preservation by preventing the verification of the archival copy.”

Annotator:	Luke Meagher
Date of Annotation:	April 20, 2005
Other Notes:	

Bibliographic Information:

Author:	Library of Congress, Copyright Office
Title:	Copyright Office; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies
Journal or Book:	
Editor(s):	
Publication Details:	[Federal Register: October 31, 2003 (Volume 68, Number 241)] [Rules and Regulations] [Page 62011-62018]
Page Numbers:	
Web Source:	http://www.copyright.gov/fedreg/2003/68fr2011.html

Abstract:

In this document, the Librarian of Congress, upon the recommendation of the Register

of Copyrights, announces that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works. This notice summarizes the Register of Copyright's recommendation and publishes the regulatory text codifying the four exempted classes of works. This document also contains descriptions of the processes and legislative requirements by which the rulemaking was executed.

Annotation:

“Proponents [of an exemption] must show by a *preponderance of the evidence* that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works. *De minimis* problems, isolated harm or mere inconveniences are insufficient to provide the necessary showing. [...] [A] proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima facie case of likely adverse effects on noninfringing uses. It is also necessary to show a causal nexus between the prohibition on circumvention and the alleged harm.” [Emphasis added; Section I.C.2 “The Necessary Showing.”]

Instructions for defining a “class” of works:

“The starting point for any definition of a “particular class” of works in this rulemaking must be one of the categories of works set forth in section 102 of the Copyright Act, but those categories are only a starting point and a “class” will generally constitute some subset of a section 102 category. [...] But classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, would be beyond the scope of what “particular class of work” is intended to be.” [Section I.C.3 “Determination of ‘Class of Works.’”]

This document notes that the class of works noted under exemption #3 (“*Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access*”) was drafted “in response to a proposal by The Internet Archive.” [Section III.A.3; See “Re: RM 2002-4 - 17 USC § 1201 Exemptions Notice of Inquiry” (above), available at <http://www.bricoleur.org/archives/20021218-IA-Comment.pdf>]

Annotator:	Luke Meagher
Date of Annotation:	May 17, 2005
Other Notes:	

Bibliographic Information:

Author:	Muir, Adrienne.
Title:	"Digital preservation: awareness, responsibility and rights issues."
Journal or Book:	<i>Journal of Information Science</i>
Editor(s):	
Publication Details:	30.1 (2004)

Page Numbers:	73-92.
Web Source:	Sage Publications.

Abstract:

This article is a literature review from the point-of-view of libraries facing digital preservation problems and is based on the UK copyright context. The author discusses the difference between institutions following an 'access' model, where the institution only has the right to access copyrighted works, as opposed to 'ownership' models where the institution owns the copyrighted material (i.e. some archives). The copying involved in preservation is briefly described and preservation strategies are summarized. There is a summary chart breaking down by preservation strategy the copying action required and potential copyright conflicts (76).

Annotation:

The author also gives a description of possible solutions, mostly involving suggested changes to existing copyright legislation, but these solutions only cover publications like electronic journals and not unique records (77-78).

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	National Research Council (US).
Title:	<i>The Digital Dilemma: Intellectual Property in the Information Age</i>
Journal or Book:	
Editor(s):	
Publication Details:	Washington, D.C.: National Academy Press, 2000.
Page Numbers:	
Web Source:	http://books.nap.edu/html/digital_dilemma/ (Retrieved March 27, 2005)

Abstract:

This book is the result of a project carried out by the Committee on Intellectual Property Rights and the Emerging Information Infrastructure of the US National Research Council. In the section on archiving in Chapter 3, "Public Access to the Intellectual, Cultural, and Social Record," the authors briefly describe historical problems relating to copyright and the preservation of non-digital records. Under US copyright law, published material must be deposited with the Copyright Office that passes the material onto the Library of Congress. The authors note the problem with digital records that are unpublished and not subject to this deposit requirement (N.pag.). Beyond problems with deposit policies, there are also problems with how these records can be viewed and by whom. The authors suggest that: "Large-scale archiving of the cultural record requires resolution of two key legal issues--the ability to make copies when migrating from one storage technology to another, and the ability to reformat, thereby creating derivative

works when moving from one software technology to the next" (N.pag.) The problem of what to acquire and what mechanisms are needed, particularly with respect to copyright transfer, is also discussed as a major issue. The authors also raise the issue of the concept of 'copy' and its applicability in the digital environment.

Annotation:

The authors' discussion on the concept of copy could be pertinent to InterPARES. Restrictions on reproduction do not guard against improper use of intellectual property in the same way as they traditionally have. The authors further suggest that copies be evaluated with regards to how they may allow uses of a work that would substantially reduce an author's incentive to create. They suggest that this would require a new legal framework for operation. This idea is not explored in further detail.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	The New York Times
Title:	"The Supreme Court Docket; The Coming of Copyright Perpetuity"
Journal or Book:	
Editor(s):	
Publication Details:	Published January 16, 2003 in The New York Times, Editorial Desk
Page Numbers:	
Web Source:	

Subjects:	
Class Descriptor:	

Abstract:

This editorial argues that the decision of the Supreme Court in favor of the appellee (the U.S. Government) in *Eldred v. Ashcroft* signifies "the beginning of the end of public domain and the birth of copyright perpetuity." The article contains a brief summary of the controversy surrounding the law in question in the case, and also a brief summary of the consequences of that legislation (namely the term extensions of copyright).

Annotation:

The editorial in full follows. Please note that this article is subject to copyright restrictions.

"In 1998 Congress was the scene of a battle over public domain, the public right of common, free and unrestricted use of artistic works whose copyright has expired. Corporations like Disney, organizations like the Motion Picture Association of America,

and dead artists' families wanted to extend copyright. Advocates of public domain wanted to leave copyright protection as it was, which would have allowed many early 20th-century works, including corporate creations like Mickey Mouse, to slip into the public domain. The copyright owners won, and yesterday they won again when the Supreme Court, by a vote of 7 to 2, decided that Congress was within its constitutional rights when it extended copyright. The court's decision may make constitutional sense, but it does not serve the public well.

Under that 1998 act, copyright now extends for the life of an artist plus 70 years. Copyrights owned by corporations run for 95 years. Since the Constitution grants Congress the right to authorize copyright for "limited times," even the opponents of an extended term were not hopeful that the Supreme Court would rule otherwise. This decision almost certainly prepares the way for more bad copyright extension laws in the future. Congress has lengthened copyright 11 times in the past 40 years.

Artists naturally deserve to hold a property interest in their work, and so do the corporate owners of copyright. But the public has an equally strong interest in seeing copyright lapse after a time, returning works to the public domain -- the great democratic seedbed of artistic creation -- where they can be used without paying royalties.

In effect, the Supreme Court's decision makes it likely that we are seeing the beginning of the end of public domain and the birth of copyright perpetuity. Public domain has been a grand experiment, one that should not be allowed to die. The ability to draw freely on the entire creative output of humanity is one of the reasons we live in a time of such fruitful creative ferment."

Keywords: (modify as required)

Authenticity:	
	(if necessary, add quotation from text with page numbers)
Accuracy:	
	(if necessary, add quotation from text with page numbers)
Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	
Date of Annotation:	December 2005
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access:

Bibliographic Information:

Author:	Pham, Alex.
Title:	"Art That Goes on the Blink: When TVs burn out, videotapes age

	or wires fray in technology-based works, which is more important, the medium or the message?"
Journal or Book:	<i>Los Angeles Times</i>
Editor(s):	
Publication Details:	October 4, 2004. Home edition.
Page Numbers:	
Web Source:	

Abstract:

This article addresses the moral rights of artists as the technology used in their works becomes obsolete. The main example given in the article is "Video Flag Z," an artwork by Nam June Paik made of 84 television sets that are breaking and are no longer being manufactured. The author notes that museums have traditionally preserved the medium for as long as possible. Migration and emulation are briefly explained as possible options when this is no longer possible. With these options, the aesthetic changes and so there is an infringement on moral rights. Conservators are currently "interviewing media artists about their work while they're alive, so when they're dead, museums have some guidance on repairing or re-creating the works when things go wrong" (n.pag., par. 34). Paik, for example, gives "certificates that let you change to new technology without changing the authenticity of the work" (n.pag., par. 20). For "Video Flag Z," curators have permission to use newer televisions but they are aiming to get sets that are "aesthetically equivalent to the originals" (n.pag., par. 39).

Annotation:

The article does not discuss possible authentication of works in the case of a dead author. Copyright is not explicitly discussed. Digital records are only mentioned indirectly in the brief talk of emulation and migration.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	rightscom
Title:	"Rights Data Dictionary."
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://www.rightscom.com/Default.aspx?tabid=1172 (Retrieved March 27, 2005.)

Abstract:

This webpage describes the Rights Data Dictionary standard that was "developed to meet the needs rights owners and consumers by providing a consistent vocabulary for digital rights management...The core of the RDD is a set of clear, consistent, structured,

integrated and uniquely identified terms to express the rights that content owners may wish to grant to users" (n.pag.).

Annotation:

This dictionary and webpage might be useful when developing preservation vocabulary to be included in digital rights data.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	Roush, Wade
Title:	Who Owns XML?
Journal or Book:	
Editor(s):	
Publication Details:	Technology Review, October 26, 2005
Page Numbers:	
Web Source:	

Abstract:

This article explains the circumstances under which certain aggregations of XML code are being bought, sold, and exploited because of their copyright/patent value. Specifically, the article describes the case of a company called Scientigo, which owns two patents that cover the idea of packaging a digital object in XML metadata in order for it to be correctly displayed. This piece also contains an interview with an executive and a developer from Scientigo.

Annotation:

If these patents are exploited in the marketplace, archivists and librarians that wrap their digital objects in XML preservation metadata (or other metadata) may become dependent upon the licensing agreement held by the copyright holder. In other words, archivists, librarians, or their institutions may be obligated to pay royalties to the rights-holder. They may also become liable for damages if their use of the code is deemed to be infringing.

Annotator:	A. Torrance
Date of Annotation:	December 2004
Other Notes:	

Bibliographic Information:

Author:	The Samuelson Law, Technology & Public Policy Clinic at the University of California--Berkeley, School of Law (Boalt Hall) on behalf of the Internet Archive
Title:	Orphan Works Comments of the Internet Archive

Journal or Book:	
Editor(s):	
Publication Details:	Dated 25 January, 2005.
Page Numbers:	
Web Source:	http://www.archive.org/iathreads/post-view.php?id=31480

Abstract:

This comment authored on behalf of the Internet Archive identifies two problems that archives and libraries experience with respect to orphaned works and it recommends solutions for these problems. The first problem noted is that since the preservation of orphaned works often requires making copies of them, the act of preservation thus places libraries and archives on ambiguous legal ground. The authors believe this leads to the reluctance of institutions to risk legal liability; thereby these works are not being preserved. The Internet Archive proposes that the solution to this problem would be to permit archives and libraries to preserve orphan works using digital technology. The second problem noted is that archives and libraries providing public access to digitized orphan works are put at risk of legal liability, because the legal environment requires rights clearance, thus hampering institutions' ability to provide access. The solution proposed for this problem is that these institutions be allowed to provide access subject to specific restrictions and governed by an opt-out system for rights holders.

Annotation:

The "solution" section for "Problem #2" contains several brief explanations and descriptions of how an opt-out system holds with the regulations of the DCMA and Copyright Act, and also offers reasons as to why Creative Commons licensing is conducive to the appropriate preservation and dissemination of works.

Annotator:	Luke Meagher
Date of Annotation:	April 26, 2005
Other Notes:	

Bibliographic Information:

Author:	Save Orphan Works
Title:	Save Orphan Works
Journal or Book:	
Editor(s):	
Publication Details:	
Page Numbers:	
Web Source:	http://eldred.cc/ (Retrieved May 20, 2005)

Abstract:

This webpage links to a number of articles, blogs and postings that explain the problems encountered when trying to use orphan works.

Annotation:

The linked articles and postings present different scenarios where works may be orphaned. There is no in-depth discussion, but the examples, for the most, are concrete.

Annotator:	A. Torrance
Date of Annotation:	May 20, 2005
Other Notes:	

Bibliographic Information:

Author:	Seville, Catherine and Ellis Weinberger
Title:	"Intellectual Property Rights lessons from the CEDARS project for Digital Preservation"
Journal or Book:	
Editor(s):	
Publication Details:	Presentation to the CEDARS Conference, York, 8 December 2000
Page Numbers:	
Web Source:	http://www.cus.cam.ac.uk/~ew206/ipr.html (Retrieved April 20, 2005)

Abstract:

This article gives a basic explanation of copyright in the UK and the possible intellectual property rights infringements that may occur with digital preservation. It offers suggestions and advice based on the results from the Consortium of University Research Libraries Exemplars in Digital Archives (CEDARS) project. For example, it gives a set of steps to be undertaken when negotiating rights in order to preserve with a sample letter to be sent to the rights owners. In their summary, the authors write: "An institution should ensure that purchase of a digital object, or the licence to use it, includes the right to preserve access to the intellectual content of the digital object" (n.pag., Section 6).

Annotation:

The explanation of copyright in the UK is simple and clear, but the authors are not focused on scenarios when rights cannot be negotiated or when the owner may be hesitant to assign rights, or when use is not authorized in a formal licensing system.

Annotator:	A. Torrance
Date of Annotation:	April 20, 2005
Other Notes:	

68.

Bibliographic Information:

Author:	Smith, Abby.
Title:	"The Copyright Conundrum"
Journal or Book:	<i>CLIR Issues</i>
Editor(s):	
Publication Details:	29 (September/October 2002)
Page Numbers:	

Web Source:	http://www.clir.org/pubs/issues/issues29.html#copyright (Retrieved April 20, 2005)
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Abstract:

This is a brief article that provides an overview of copyright issues pertaining to born-digital material from both the creator and preserver's perspective and outlines steps that need to be taken. For example, she writes: "Developing and testing transparent, trustworthy, and cost-efficient preservation deposit regimes for commercially owned digital data will require clarification of copyright law, controlled pilot projects between commercial entities and libraries, and the commitment of all partners to finding a solution" (n.pag., par. 6). The author mentions dark archives briefly when summarizing the consultations between the U.S. Library of Congress and some publishing and media companies. She writes: "None of the firms wants dark archives—those with restricted access—because they believe that an asset to which few have access is not worth preserving" (n.pag., par. 5). There is also mention of digital asset management systems that are designed to keep content for repurposing and not for preservation purposes.

Annotation:

This article explains in a succinct way some reasons why creators are wary of digital preservation and the copyright repercussions. There is no substantial discussion of dark archives or digital asset management systems.

Annotator:	A. Torrance
Date of Annotation:	April 20, 2005
Other Notes:	

Bibliographic Information:

Author:	Xie, Sherry
Title:	Workright Legislation Study – P.R. (People's Republic of) China
Journal or Book:	n/a
Editor(s):	
Publication Details:	n/a
Page Numbers:	Approx. 18 pages
Web Source:	n/a

Subjects:	
Class Descriptor:	

Abstract:

This paper examines the several "workright" (i.e. copyright) laws and regulations that effect archival practice in the People's Republic of China. The first several pages of the paper explain in some detail the major copyright law governing China, the Workright Law of the PRC (2001). This explanation covers the various types of works that are protected under the law, how the law is administered by the government, types of workright, the workright protection period, fair use, and how a workright owner's

rights may be violated. The remainder of the paper goes on to consider several other laws and regulations (i.e. ordinances, stipulations, circulars, etc) concerning worksright protection in China.

Annotation:

This paper succeeds in conveying the characteristics of copyright law in China and how it affects archival practice.

The author notes (in section “Worksright Law of the PRC; Overview of the Law”) that “[t]he construction of the worksright law is an important component of China’s national policy of opening to the outside. The intention of normalizing the relationships with foreign countries regarding worksright and the recognition of international treaties and conventions result in the fact that the principal articles in the Chinese worksright law correspond to those in the Berne Convention [to which China is a signatory; ed.] to a large degree.” This is evident in the term of protection designated by the PRC, which is generally fifty years after the death of the author or fifty years after publication if the author is a juridical person or an organization.

The section on fair use states that a work may be used without permission or remuneration, but that the names of the author and work shall be referred to specifically in the case of:

“[T]he reproduction of works in their collections by library, archives, memorial hall, museum, art gallery, or any other similar institutions, for the purposes of displaying or preserving works.”

In section “Worksright Law of the PRC; Types of Worksright,” the 17 types of worksrights are listed. Worksright numbers 1-4 are essentially “moral rights” and are not transferable, while the remainder of the rights (essentially “economic”) is transferable.

The “Stipulation on the Implementation of International Worksright Conventions (1992)” (discussed in the section by that name) stipulates the protection of foreign computer software and databases under worksright.

The “Ordinance on the Protection o Computer Software (2002)” (discussed in the section by that name) appears to provide for the protection of domestic computer programs and software. Computer programs are defined in the law as “coded commands sequence for the purpose of generating certain results that can be executed by devices such as computer and the like capable of processing information, or symbolic commands sequence or symbolic sentence sequence that can be converted automatically into coded commands sequence.” It is unclear from this discussion whether or not databases are protected under the law; the author does not explicit refer to their coverage.

In the section “Rights of the Owner of a Legal Copy of Software” under the law named above, the making of back-up copies by the owner of the legal copy “for the purpose of preparing for damage to the legal copy” is permissible under the law. These copies may not be transferred to anyone else, and the owner of the legal copy of software is

“responsible for the deconstruction of such [back-up] copies when the ownership of the legal copy loses [sic].”

This paper does not include an examination of the Archives Law of the People’s Republic of China, despite its claim to do so. In addition, the language could use some polishing and a proofread, and the presentation of the laws and regulations could be better organized.

Keywords: (modify as required)

Authenticity:	
	(if necessary, add quotation from text with page numbers)
Accuracy:	
	(if necessary, add quotation from text with page numbers)
Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher
Date of Annotation:	December 2005
Other Notes:	<p>Backup: Back-up copying is allowed. Must be conducted by the owner of a legal copy of software.</p> <p>Processing: Appears to be allowed under “Rights of the Owner of a Legal Copy of Software” (as above).</p> <p>Migration: Seems to be allowed under fair use.</p> <p>Temporary user access: Different treatment of use: Time delay until unlimited access:</p>

Keywords: (modify as required)

Authenticity:	
	(if necessary, add quotation from text with page numbers)
Accuracy:	
	(if necessary, add quotation from text with page numbers)
Reliability:	
	(if necessary, add quotation from text with page numbers)

Other key terms:	(Indicate here whether other terms are being used to indicate Domain 2 concepts; how they are being used, etc.)
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Annotator:	Luke Meagher; Abstract distilled from that provided by author.
Date of Annotation:	December 2005
Other Notes:	Backup: Processing: Migration: Temporary user access: Different treatment of use: Time delay until unlimited access: