AN INSTRUMENT ON PRESERVATION OF CULTURAL HERITAGE

**AN INSTRUMENT ON PRESERVATION OF CULTURAL HERITAGE
FOR LIBRARIES, ARCHIVES AND MUSEUMS
(PRESERVATION+)**

Prepared by IFLA, ICA, ICOM, EIFL

**Why promote an international instrument to support the preservation activities of
Libraries, Archives, and Museums (LAMs)?**

- Libraries, archives and museums (LAMs) have a core function, often mandated by law, to **preserve cultural and scientific heritage** for the benefit of all, now and in the future.
- Heritage collections preserved by LAMs provide an invaluable resource for other **public interest activities**, such as research, private study, and education.
- However, **these important and often unique collections are at risk** for a range of reasons, such as obsolescence of storage media (including digital formats), inadequate storage conditions or extreme events such as fire and flooding from rising sea-levels).
- **Heritage collections are sometimes split between different countries** due to colonialism, migration, war or other factors, so that the culture and history of a nation or a people is dispersed across borders, hampering research and access.
- UNESCO instruments (notably the 2015 Recommendation concerning the preservation of, and access to, documentary heritage, including in digital form, and the 1958 Convention concerning the International Exchange of Publications) underline **the importance of maximal and equal access to the full diversity of the memory of the world**, including across borders.
- **Digital tools can facilitate preservation**, as well as cross-border co-operation among LAMs to share technical expertise and resources, but **appropriate laws are needed** to ensure that copyright is not a barrier to preservation copying.
- Outdated or inadequate exceptions and limitations to copyright in national legislation – as well as a lack of cross-border provisions – **prevent LAMs from preserving and giving access to heritage** across the world.
- At the three WIPO Regional Seminars on Libraries, Archives, Museums and Educational & Research Institutions in the Field of Copyright held in 2019, there was **broad concern among member states about how copyright barriers affect the preservation of cultural heritage**, including across borders, and consensus on the need for action in this area.

We would therefore like to recommend the draft instrument on preservation. This contains:
- an exception to the reproduction right to allow LAMs to make and store copies for preservation (drawn from Art. 6 EU DSM Directive (2019);
- an exception to the distribution right to make preserved items available for non-commercial education and research purposes, subject to the three-step test (drawn from section 108 of the U.S. Copyright Act (1976));
- a provision on cross-border use (drawn from Art. 5 Marrakesh Treaty (2013));
- a provision prempting contract terms, and allowing circumvention of technological protection measures which prevent preservation copying (drawn from Art. 7 EU DSM Directive (2019).

This proposal focuses on a **specific public interest objective**, for which the **risk of market failure is high** and that of harming the interests of rightsholders is particularly low. It is **not prescriptive**, allowing Member States to decide how to implement the provisions nationally. It **does not prejudice the application of other exceptions**, with such decisions again left up to member states, within the framework of the three-step test, and draws on the

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Marrakesh Treaty concept of using specific (approved) entities as vehicles for the delivery of the exception.

In short, this instrument aims to provide a response to a specific need, and in doing so ensure that copyright supports – rather than hinders – world heritage preservation.

Article 1
Preservation of Cultural Heritage

1. Contracting Parties shall provide for a limitation or exception to copyright and related rights in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for the purpose of preservation of such works or other subject matter and to the extent necessary for such preservation.
2. For purposes of this Instrument, "cultural heritage institution" means a publicly accessible library or museum, an archive, or a film or audio heritage institution.

Article 2
Access to Preserved Works

Contracting Parties shall provide for a limitation or exception to copyright and related rights in order to allow cultural heritage institutions to provide access to preserved works in their collections as follows:
1. Cultural heritage institutions shall be permitted to provide on the premises access to copies in any format or medium.
2. Cultural heritage institutions shall be permitted to provide copies in any format or medium to persons for the purpose of private study, scholarship, or research.
3. Cultural heritage institutions shall be permitted to reproduce and make available to the public any work that is out of commerce, where no collective management organization exists that is broadly representative of right-holders in the relevant sector, and that holds relevant mandates from its members for the acts in question.

Article 3
Cross-Border Activities

Contracting Parties shall provide that if a copy is made under a limitation or exception provided for in Article 1, that copy may be distributed or made available as provided in Article 2 in another Contracting Party.

Article 4
Common Provisions

1. Contracting Parties shall provide that any contractual provision contrary to the limitations or exceptions provided for in this Instrument shall be unenforceable.
2. Contracting Parties shall take all appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal measures against the circumvention of effective technological measures, this legal protection does not prevent enjoyment of the limitations and exceptions provided for in this Instrument.

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