



## **EIFL Review and Recommendations**

### **Lao People's Democratic Republic Law No. 38/NA of November 15, 2017 on Intellectual Property**

**1 March 2019**

#### **BACKGROUND**

On 8th June 2018, a new Law on Intellectual Property (IP) of the Lao People's Democratic Republic took effect<sup>1</sup>, replacing the previous law adopted in 2011<sup>2</sup>.

WIPO's Study on Copyright Limitations and Exceptions for Libraries and Archives (2017)<sup>3</sup>, published shortly before the new law was adopted, found that while the 2011 law has some basic exceptions allowing limited uses of copyright protected works (for example, making quotations and teaching), the law includes no explicit library exceptions.

The new law, unfortunately, still does not address the needs of libraries, and does not remedy the problem of the absence of both a specific exception for libraries and a general fair use or fair dealing exception. Accordingly, the scope of permissible library activities turns on the interpretation of the basic exceptions for quotation, illustration, and archiving of electronic copies. It is difficult to predict whether these exceptions would be interpreted broadly enough to permit Lao libraries to operate effectively in the 21<sup>st</sup> Century.

At the same time, enforcement measures in the new law have been strengthened e.g. intentional infringement has become by itself a criminal offence (a second condition, infringement for a commercial purpose, was dropped), and first time unintentional violations are subject to fines for damages.

The review below evaluates the copyright provisions of the 2017 Law on Intellectual Property against the EIFL "Core Library Exceptions Checklist". In many instances, the analysis finds that it is unclear whether the activity is lawful. In the face of this ambiguity, we recommend enactment of a robust exception, in line with international developments and best practices, to support library activities and services in Laos for the benefit of education, research and development<sup>4</sup>.

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<sup>1</sup> Lao People's Democratic Republic on the Promulgation of the Law on Intellectual Property (Amended) No. 322/P, 25 December 2017, <https://wipolex.wipo.int/en/legislation/details/18024>

<sup>2</sup> <https://wipolex.wipo.int/en/legislation/details/13482>

<sup>3</sup> [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=389654](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=389654)

<sup>4</sup> See p.6 Recommendation for amendments.

## REVIEW<sup>5</sup>

### Collection Development

#### **May a library buy lawfully produced books and other materials from another country for inclusion in its collection?**

It appears that a library in Laos could import books for inclusion in its collection. Article 102, which sets forth the economic right of the copyright owner, specifies that the author or copyright owner has the exclusive right to import a copy of the work, but this right “shall not extend to prevent the subsequent importation ... of an original or copy that was legally acquired with the authorization of the owner of copyright.” Thus, if the library or its agent acquires a lawfully made copy of a book in France, for example, the library could import the book for purposes of including it in its collection. However, sound recordings are excluded from this exception to the importation right.

#### **May a library lend a physical book/CD/DVD to a library user, or to another library?**

There is no provision in the Law of Intellectual Property that explicitly permits Lao libraries to lend copies in their collections to users or other libraries. Article 102 gives the author or copyright owner the exclusive right to carry out or authorize the “distribution of copies” of his or her works. However, there does not appear to be a general exhaustion principle similar to that which exists with respect to imports that would permit library lending. Accordingly, the 2017 Law might not permit library lending.

#### **May a library by law lend an e-book to a library user?**

There is no provision that allows a Lao library to lend an e-book to a user.

### Support For Education and Research

#### **May a library supply a copy of a work such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library?**

Article 115(2) permits the use of a literary or artistic work “by way of illustration in publications, broadcasts or sound or visual recordings for teaching or scientific research,” to the extent “justified by the purpose” and provided such use “is compatible with fair practice.” This provision, based on Article 10(2) of the Berne Convention, might allow a library to supply a copy of an article to a researcher who would then use part of it for purposes of illustration.

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<sup>5</sup> The review is a good faith analysis of Law No. 38/NA of November 15, 2017 on Intellectual Property. Comments and corrections are welcome <info@eifl.net>. The information does not constitute legal advice, if in doubt seek local support.

Article 115(1) also permits making quotations from a work, provided that their making is “compatible with fair use, and their extent does not exceed that justified by the purpose.” A library could argue that the copying of an entire article, or a chapter of a book, falls within this quotation exception based on Article 10 of the Berne Convention. It is unclear whether a court would be receptive to such an argument.

**May a library send and receive such copies across borders?**

There is no provision in the Law of Intellectual Property that would allow such cross-border use.

**May a library create databases of collection material, including e-resources managed by the library, to facilitate text and data mining by researchers?**

As noted above, Article 115(1) permits making quotations from a work, provided that their making is “compatible with fair use, and their extent does not exceed that justified by the purpose.” A library could argue that creation of a database to facilitate text and data mining—that is, to facilitate quotation—falls within the scope of the quotation exception. Again, it is uncertain whether a court would be receptive to such an interpretation.

**May a library provide copies of collection material for use in virtual learning environments to facilitate distance learning?**

As discussed above, Article 115(2) would allow an educational institution to broadcast works by way of illustration for the purpose of teaching. A library that is part of the educational institution likely would be permitted to perform (or enable) such broadcasting.

**May a library digitize orphan works in its collection, and make them available online?**

It is doubtful that a court would interpret the quotation exception as permitting the making the full text of orphan works available online.

**Preservation and Replacement**

**May a library make copies of works in its collection in any form for preservation or backup, and provide access to these copies?**

Article 115(6) permits “reproducing a work embodied in electronic media for backup or archival storage, or for replacement of a legally acquired work that is lost, destroyed, or fails to work.” This exception, not limited to libraries, would allow a library to make a preservation copy of a digital work. The second clause of Article 115(6) arguably could apply to analogue copies “of a legally acquired work that is lost, destroyed, or fails to work,” although the structure of the sentence suggests that the second sentence also applies only to digital works.

**May a library procure from another library the missing parts of any work in its collection?**

As noted above, there is no explicit provision permitting a library to lend copies in its collection. But if a library is permitted to lend copies, then a borrowing library likely could make preservation copies to the extent permitted under Article 115(6).

**May a library web archive, i.e. preserve publicly accessible websites?**

A library could argue that web archiving falls within the scope of Article 115(6), but a court could decide that the term “lawfully acquired” means copies purchased by the library.

**Persons With Disabilities**

**May a library make an accessible format copy of a work and provide it to a person with a disability?**

Article 115(4) permits “translating literary works into Braille or other characters for visually-impaired persons.” This provision is narrower than the Marrakesh Treaty for persons with print disabilities in that it does not appear to allow the creation of audiobooks. Additionally, it only implicitly allows the distribution of the Braille copies once they are made. Under the Marrakesh Treaty, the right to distribute accessible copies must be unambiguous.

**May a library send and receive accessible format copies to and from other countries?**

As noted above, Article 102 permits the importation and exportation of a copy that was “legally acquired with the authorization of the copyright owner.” A library could argue that an accessible copy lawfully made in another country from a copy sold with the authorization of the copyright owner meets this requirement. A copyright owner, however, could argue that this interpretation is overly expansive. Compliance with the Marrakesh Treaty would require an unambiguous right to engage in cross-border exchanges of accessible copies.

**Format Neutral**

**May a library make copies in any format, including digital copies?**

Although Article 115(6) allows preservation only of digital copies, there appears to be no restriction on the format of the preservation copy; it could be analog or digital. The copies for visually impaired persons must be in “Braille or other characters,” and thus presumably includes digital Braille, but not audiobooks. The law does not appear to restrict the quotation and illustration exceptions to any particular format.

## Safeguarding Exceptions in the Digital Environment

**Are the exceptions granted to libraries in copyright law safeguarded from override by license terms?**

Nothing in the law safeguards copyright exceptions from being overridden by license terms.

**Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?**

Section 115 explicitly provides that exceptions cannot be exercised if doing so would require the circumvention of TPMs. In other words, TPMs have priority over exceptions.

## Limitation on Liability

**Does the law protect librarians from being sued in the course of their duties?**

The copyright law does not limit the liability of librarians for any copyright infringement they commit in the course of performing their duties.

## A Flexible Exception

**In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?**

There are no specific library exceptions, nor is there a flexible fair use or fair dealing exception. Although Article 115 is entitled “Acts Consistent with Fair Use,” Article 115 actually consists of a set of specific exceptions, such as for quotation or illustration, that are permitted to the extent compatible with fair use or fair practice, and provided that they do not “conflict with a normal exploitation of the work” and do not “unreasonably prejudice the legitimate interests of the author.” In other words, Article 115 identifies the “special cases” (the first step) that are then subject to the second and third steps of the Berne Convention’s Three Step Test for permissible exceptions.

## RECOMMENDATION

EIFL recommendation for amendments to Law No. 38/NA of November 15, 2017 on Intellectual Property.

The following acts shall be permissible without consent of the author, and without remuneration:

| <p style="text-align: center;"><b>Chapter 7</b><br/><b>Limitations and Obligations of</b><br/><b>Copyright and Related Rights</b><br/><b>Article 115 (revised). Acts Consistent</b><br/><b>with Fair Use</b></p> | <p style="text-align: center;"><b>EIFL recommendation</b></p>   |
|--|---|
| <p>4. <del>Translating literary works into Braille or other characters for visually-impaired persons;</del></p>  | <p>4. for a nonprofit organization or a governmental agency that provides services to persons with visual or hearing impairments, or a person acting under its authority, to make or import copies in formats accessible to such persons, and to provide these copies to such persons by any means.</p>   |
| <p>6. <del>Reproducing a work embodied in electronic media for backup or archival storage, or for replacement of a legally acquired work that is lost, destroyed or fails to work.</del></p>                     | <p>6. for a library, archives, or museum, or a person acting under its authority:</p> <p>(A) to make a copy of a work, including in digital format:</p> <ul style="list-style-type: none"> <li>(i) for preservation or replacement;</li> <li>(ii) for deposit in another library or archives, if an unused copy cannot be obtained for a fair price; or</li> <li>(iii) to provide to a user <ul style="list-style-type: none"> <li>a) a copy of an article, or a pictorial or graphic work, or a small part of any other work; or</li> <li>b) a copy of an entire work, or a substantial part of it, if an unused copy of the work cannot be obtained at a fair price;</li> </ul> </li> </ul> <p>(B) to lend to its users a copy in its collection, including a copy made under paragraphs A(i) or (ii);</p> <p>(C) to import copies of works that are legally available in any country;</p> <p>(D) to allow the unsupervised use of reproducing equipment located on its premises;</p> |

(E) to copy and make available a work after conducting a diligent, but unsuccessful, search for the owner of the work's copyright. If the copyright owner claims the work, the library may continue to use the work only if it pays the copyright owner fair compensation.

(2) A prohibition on the circumvention of technological protection measures shall not apply to a library, archives, or museum, or a person acting under its authority. A term of a contract that prohibits a library, archives, or museum from engaging in an activity permitted under this Article shall not be enforceable.



# Rate my copyright law

How does your copyright law support activities and services in your library? This scorecard is a handy way to rate your national law for core library provisions. Check how the law performs, and compare with other countries. Identify any gaps, or see where it's doing well. The questions on the scorecard should be read together with the *EIFL Core Library Exceptions Checklist*. **Tip:** Library activities and services may be permitted through specific exceptions, a flexible exception such as fair use/fair dealing, case law, or related law. If in doubt, seek legal advice.

|  | YES<br>2                 | PARTLY<br>1              | NO<br>0                  |
|--|--------------------------|--------------------------|--------------------------|
| <b>COLLECTION DEVELOPMENT</b>  |                          |                          |                          |
| May a library buy lawfully produced books and other materials from another country for inclusion in its collection?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| May a library lend a physical book/CD/DVD to a library user, or to another library?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| May a library by law lend an e-book to a library user?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>SUPPORT FOR EDUCATION AND RESEARCH</b>  |                          |                          |                          |
| May a library supply a copy of a work, such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| May a library send and receive such copies across borders?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| May a library create databases of collection materials, including e-resources managed by the library, to facilitate text and data mining by researchers?                                 | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| May a library provide copies of collection materials for use in virtual learning environments to facilitate distance learning?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| May a library digitize orphan works in its collection, and make them available online?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>PRESERVATION AND REPLACEMENT</b>  |                          |                          |                          |
| May a library make copies of works in its collection in any format for preservation purposes or back-up, and provide access to these copies?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |



|   | YES                            | PARTLY                         | NO                             |
|---|--------------------------------|--------------------------------|--------------------------------|
|   | <input type="text" value="2"/> | <input type="text" value="1"/> | <input type="text" value="0"/> |
| May a library procure from another library the missing parts of any works in its collection?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| May a library web archive, i.e. preserve publicly accessible websites?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| <b>PERSONS WITH DISABILITIES</b>  |                                |                                |                                |
| May a library make an accessible format copy of a work and provide it to a person with a disability?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| May a library send and receive accessible format copies to and from other countries?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| <b>FORMAT NEUTRAL</b>   |                                |                                |                                |
| May a library make copies in any format, including digital copies?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| <b>SAFEGUARDING EXCEPTIONS IN THE DIGITAL ENVIRONMENT</b>   |                                |                                |                                |
| Are the exceptions granted to libraries in copyright law safeguarded from override by licence terms?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright? | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| <b>LIMITATION ON LIABILITY</b>  |                                |                                |                                |
| Does the law protect librarians from being sued in the course of their duties?  | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |
| <b>A FLEXIBLE EXCEPTION</b>   |                                |                                |                                |
| In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?               | <input type="checkbox"/>       | <input type="checkbox"/>       | <input type="checkbox"/>       |

## Does your law measure up?

|                    |                      |                        |                      |                |                      |
|--------------------|----------------------|------------------------|----------------------|----------------|----------------------|
| <b>TOTAL SCORE</b> | <input type="text"/> | <b>TYPE OF LIBRARY</b> | <input type="text"/> | <b>LAW*</b>    | <input type="text"/> |
| <b>COUNTRY</b>     | <input type="text"/> | <b>DATE</b>            | <input type="text"/> | * VERSION/DATE |                      |