

Working Guidelines

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Q246

Exceptions and limitations to copyright protection for libraries, archives and educational and research institutions

Introduction

- 1) This Working Question concerns the issue of what, if any, exceptions and limitations to copyright protection should be recognized for the benefit of libraries, archives and educational and research institutions.
- 2) Copyright law grants to the copyright owner certain exclusive rights to use the copyrighted work in certain ways, e.g. reproduction, distribution, performance, display and making available online. A person who uses a copyrighted work in such way without the authorization of the copyright owner will generally be liable for copyright infringement, and may be subject to an injunction or payment of damages.
- 3) However, in certain circumstances, a person may use a copyrighted work without the copyright owner's authorization and without being liable for infringement, either because the law provides for an exception to copyright protection or because the copyright protection is limited in some way.
- 4) Article 9(2) of the Berne Convention of 1886, which provides for the protection of literary and artistic works, also provides for exceptions to the right of reproduction. This is commonly referred to as the "Three-Step Test". Article 9(2) states:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works 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.
- 5) According to the Three-Step Test, reproduction of a copyrighted work is permissible:

- a. in certain special cases;
 - b. when the reproduction does not conflict with a normal exploitation of the work; and
 - c. when the reproduction does not unreasonably prejudice the legitimate interests of the author.
- 6) The Three-Step Test is also found in Article 10 of the WIPO Copyright Treaty of 1996 (**WCT**), which expands the test to all rights granted to authors of literary and artistic works.

Scope of this Working Question

- 7) This Working Question focuses on exceptions and limitations that are for the benefit of libraries, archives and educational and research institutions. Other possible exceptions and limitations to copyright protection (such as exceptions and limitations for private/personal use, exceptions and limitations for visually impaired persons and persons with disabilities, exceptions and limitations for religious or cultural use, and exceptions and limitations for orphan works) are outside the scope of this Working Question, unless they relate to libraries, archives and educational and research institutions.
- 8) While limited to exceptions and limitations to copyright protection, neighbouring rights and moral rights recognized under copyright law are included within the scope of this Working Question.
- 9) Instances in which a person may use a copyrighted work without the authorization of the copyright owner, but where remuneration is payable for such use, is also within the scope of this Working Question.

Previous work of AIPPI

- 10) AIPPI has previously studied exceptions and limitations to copyright protection.
- 11) Q216A – "Exceptions to copyright protection and the permitted uses of copyrighted works in the hi-tech and digital sectors" (Paris, 2010) focused on exceptions and limitations to copyright protection in the context of the digital environment.
- 12) The Resolution on Q216A confirmed that effective and enforceable copyright protection should be safeguarded in the digital environment, and that the Three-Step Test should apply to exceptions and limitations to copyright in such environment. Further, Q216A studied the specific issues of liability of internet service providers (ISPs), format shifting, and orphan works. With respect to orphan works, AIPPI resolved that a diligent inquiry so as to ascertain the relevant right holder's identity should be required, that the right holder should be guaranteed a fair remuneration for the use of the work and retain the option to re-claim the work for his further exclusive exploitation, and that the user's continued bona fide reproduction and use of the copyrighted work should be reasonably protected.

- 13) The following year, AIPPI studied Q216B – "Exceptions to copyright protection and the permitted uses of copyrighted works in the hi-tech and digital sectors" (Hyderabad, 2011), focusing on the exceptions and limitations to copyright protection in general, and certain issues that were not resolved in the Resolution on Q216A.
- 14) The Resolution on Q216B confirmed that, in respect of exceptions and limitations to copyright protection, in general, national laws should be harmonized relying on the Three-Step Test. Q216B also studied issues relating to user generated content (UGC) providers, hyperlinks, search engines, transient or temporary copies and private copying.
- 15) While AIPPI confirmed in the Resolution on Q216B that the Three-Step Test should apply to exceptions and limitations to copyright protection in general, how to implement the test in each specific circumstance was left to future studies. Neither Q216A nor Q216B studied the issue of exceptions and limitations to copyright protection for libraries, archives and educational and research institutions.

International treaties

- 16) As mentioned above, Article 9(2) of the Berne Convention established the Three-Step Test as an exception to the right of reproduction in general. It does not, however, specifically reference libraries, archives or educational or research institutions.
- 17) Article 10(2) of the Berne Convention deals with utilization of literary or artistic works for teaching:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

- 18) The Rome Convention of 1961, which provides for the protection of performers, producers of phonograms and broadcasting organizations, deals with this issue to some extent. Article 15(1)(d) of the Rome Convention deals with use for the purposes of teaching and scientific research:

Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

...

(d) *use solely for the purposes of teaching or scientific research.*

- 19) The Bangui Agreement of 1977, relating to the creation of an African Intellectual Property Organization, deals with the use for teaching in Article 13 of Annex VII:

Notwithstanding the provisions of Article 9, it shall be permitted, without the consent of the author and without payment of remuneration, but subject to the requirement of stating the source and the name of the author if such name is given in the source,

...

- (ii) *to reproduce, by reprographic means for teaching, or for examinations within teaching establishments whose activities are not directly or indirectly profit-making, and to the extent justified by the intended purpose, lawfully published individual articles from a newspaper or periodical, and short extracts from a lawfully published work.*

Article 14 of Annex VII deals with the reproduction by libraries and archives:

Notwithstanding the provisions of Article 9, a library or archive service whose activities are not directly or indirectly profit-making may, without the consent of the author or other holder of copyright, make individual copies of a work by means of reprographic reproduction,

...

- 20) The preamble of the WCT mentions that there is a need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information. However, the WCT does not have a provision that specifically deals with the issue of exceptions and limitations for education or research.
- 21) Article 5(2)(c) of the EC Directive 2001/29/EC¹ deals with a number of institutions specifically:

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;*

- 22) So does the EU Directive 2012/28/EU², which according to Article 1(1) concerns:

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights and the information society.

² Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

...

certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.

- 23) In each instance cited above, the issue of whether to create exceptions and limitations to copyright protection to national legislation is left to the relevant member states.

Work of WIPO

- 24) The WIPO Tunis Model Law on Copyright for Developing Countries of 1976 includes an exception for a number of institutions in Section 7 (v):

Notwithstanding Section 4, the following uses of protected work, either in the original language or in translation, are permissible without the author's consent:

...

- (v) *the reproduction by photographic or similar process, by public libraries or non-commercial documentation centers, scientific institutions and educational establishments of literary, artistic or scientific works which have already been lawfully made available to the public, provided that such reproduction and the number of copies are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;*

- 25) The WIPO Standing Committee on Copyright and Related Works (**SCCR**) has been working on the issue of exceptions and limitations to copyright protection, including those for the benefit of libraries, archives and educational and research institutions. Various studies on this issue have been conducted and reported to the WIPO SCCR.
- 26) In 2010, WIPO sent a questionnaire to the member states and the EU, asking for an explanation of the position in each jurisdiction in relation to exceptions and limitations to copyright protection. The answers were compiled in a consolidated paper entitled "Updated Report on the Questionnaire on Limitations" (SCCR/21/7). This report provides useful insights regarding the issues to be studied in this Working Question.

Discussion

- 27) There are various circumstances under which exceptions and limitations to copyright protection raise issues in relation to libraries, archives, and educational and research institutions.

- 28) **Libraries and archives.** One instance in which libraries might wish to make use of copyrighted works is when there is a need to reproduce a work for the purpose of preservation or replacement. A copyrighted work in physical form (such as paper books and tapes) may deteriorate, be damaged or lost, or the format of the copyrighted work might become obsolete with the passage of time. Therefore, it may become necessary to create a new copy of the work for the purpose of converting the work into a format that is more amenable to preservation (such as digital format).
- 29) Libraries may also wish to reproduce a copyrighted work in the context of interlibrary lending. If a library wishes to add a book to its collection but that book is out of print or only available at a very high price, the library might wish to obtain a copy from another library that already has the book in its collection. In such a case, in order for the second library to retain the book in its collection, it would be necessary for the second library to create a copy of the book and provide that copy to the first library.
- 30) Further, the activity of lending books may involve reproduction of copyrighted works. Traditionally, libraries lent physical copies of copyrighted works to users, thereby temporarily losing possession of such physical copies. However, if libraries can create further hard copies or digital copies to lend to users, damage to or loss of works could be avoided. It may also be more convenient for users because more than one user can borrow the same work at the same time.
- 31) The above discussion has focused mostly on libraries. However, there are other organizations that serve archival purposes, such as museums and educational institutions. Thus, if exceptions and limitations to copyright protection for the above purposes are to be recognized, another issue is what other organizations should also be entitled to the benefit of such exceptions and limitations.
- 32) **Educational and research institutions.** With respect to educational and research institutions, one instance in which educational institutions may wish to make use of copyright materials is when performing or displaying a copyrighted work for educational purposes. For example, a school teacher may sing a song, play music or read literature to students. Students may make presentations or perform school plays, where audiences could be from inside or outside the school. In these instances, a right of (public) performance and display may be an issue.
- 33) Another instance is reproduction and distribution of copyrighted works for educational purposes. Course packs, compilations and anthologies created in the course of educational activities may reproduce various existing copyrighted works. Further, examinations given by schools may use copyrighted works.
- 34) A further instance is translation of copyrighted works for educational purposes. Material in another language may need to be translated into the native language of the students to be used in teaching.
- 35) Educational activities increasingly involve the use of information technology. Schools use communication networks. Course packs and submissions from students are often uploaded on servers and communicated via the Internet. Some educational institutions provide distance education, also through communication

networks. These may give rise to issues with the right of reproduction, the right of distribution and the right to make material available online.

36) Further, there could be an issue as to whether all educational institutions should be entitled to the exceptions and limitations mentioned above, or whether only certain institutions (e.g. non-profit institutions) should be so entitled.

37) The above discussion focuses mostly on education, but similar issues may arise in the context of research. Research papers often include extracts from existing copyrighted works, and such papers may be further reproduced and uploaded on servers to be made available to the public. Whether these activities may be conducted without the copyright owner's authorization is another issue.

38) Article 5(3)(a) of the EC Directive 2001/29/EC deals with some but not all of these issues, providing that:

Member States may provide for exceptions or limitations to the rights provided for in Articles 2 [reproduction] and 3 [communication / making available to the public] 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;

39) **Other conditions.** Assuming that one or more of the exceptions or limitations to copyright protection for the above purposes should be recognized, the next issue is under what conditions such exceptions and limitations should apply.

40) One issue is the manner and scope of activities that may be permitted under any exceptions and limitations. For example, even if one is entitled to reproduce copyrighted work, a limit may be imposed on the number of copies that may be created. In some cases, it might be sufficient to make an extract of a work, rather than reproducing the entire work.

41) Further, in the case of performance for educational purpose mentioned above, there may be an issue as to who may make such performances, e.g. teachers, students.

42) Another issue is possible preconditions of such exceptions or limitations. For example, if a library is permitted to engage in activities mentioned above, that might be limited to circumstances in which the library owns at least one original (physical or digital) copy of the book, and not just a copy of an original, or has at least lawfully obtained a copy of the original. A further precondition might be that the work is a published work, thereby excluding for example, unpublished manuscripts.

43) Also, it may be the case that only certain types of copyrighted works may be used under any relevant exceptions and limitations, e.g. only computer software.

44) Another issue is whether use of copyrighted works under any exceptions and limitations should be permitted automatically, or whether any procedure (such as court proceedings) should be necessary in order to use the copyrighted works.

- 45) Another issue is remuneration. While certain activities may be conducted without the authorization of the copyright owner, should the copyright owner have a right to receive a fair price? Would this ensure that the copyright owner would not be unreasonably prejudiced by such activities? If such remuneration is payable, there will be additional issues of how the amount should be determined or calculated, and what the mechanism for the payment should be.
- 46) **Additional issues:** In addition to the above points, there may be an issue when the work to be used is an orphan work. While orphan works were dealt with to some extent in Q216A (Paris, 2010), given the prevalence of orphan works, this Working Question re-visits this issue in the context of libraries, archives and educational and research institutions.
- 47) Further, this Working Question considers whether exceptions and limitations provided in the law (statute or otherwise) can or should be overridden by contract, where the parties have decided to adopt a scheme different from what is provided in the law.
- 48) Finally, this Working Question also explores the possibility of resolving the issue of use of copyrighted works by libraries, archives and educational and research institutions, not through individual legal means, but through efforts of private sectors. For example, there may be private collective licensing organizations that grant licenses to educational institutions and libraries. This question examines whether such private sector efforts may in some circumstances provide better outcomes than a strictly legal approach.

You are invited to submit a Report addressing the questions below. Please refer to the 'Protocol for the preparation of Reports'.

Questions

I. Current law and practice

- 1) Does your law provide for exceptions or limitations to copyright protection for libraries and archives? If so, please provide details of such exceptions or limitations, including in relation to the following activities:
- a. reproduction and/or distribution for the purpose of preservation or replacement;
 - b. reproduction and/or distribution for the purpose of interlibrary lending;
 - c. reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or
 - d. any other activities, and if so, what activities?

- 2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?
- 3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.
- 4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.
- 5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions? If so, please provide details of such exceptions or limitations, including in relation to the following activities:
 - a. performance and/or display for educational purposes;
 - b. reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);
 - c. making translations;
 - d. making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);
 - e. reproduction and/or distribution for research purposes; or
 - f. any other activities, and if so, what activities?
- 6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?
- 7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.
- 8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

For the questions below, please provide an answer for each exception or limitation mentioned above.

- 9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is

interpreted as covering such specific exception or limitation?

- 10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?
- 11) Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s).
- 12) Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?
- 13) Is there any special treatment for orphan works for use within such exception or limitation? If so, please explain.
- 14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?
- 15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions? If so, please explain those efforts.

II. Policy considerations and proposals for improvements of the current law

- 16) Should there be any exceptions or limitations to copyright protection for libraries and archives? If yes, in relation to what activities? If no, why not?
- 17) Should there be any exceptions or limitations to copyright protection for education and research institutions? If yes, in relation to what activities? If no, why not?
- 18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection? Why/why not?
- 19) Should the exception or limitation be capable of being overridden by contract? Why/why not?
- 20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why/why not?
- 21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

III. Proposals for harmonisation

- 22) Is harmonisation in this area desirable?

If yes, please respond to the following questions without regard to your national or regional laws.

Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

- 23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?
- 24) If yes to question 16):
- a. to what libraries, archives and other organizations should these exceptions or limitations apply;
 - b. to what activities should these exceptions or limitations apply;
 - c. under what conditions should the activities be undertaken or the copyrighted work used?
- 25) If yes to question 17):
- a. to what educational and research institutions should these exceptions or limitations apply;
 - b. to what activities should these exceptions or limitations apply;
 - c. under what conditions should the activities be undertaken or the copyrighted work be used?

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

- 26) Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?
- 27) How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made?
- 28) What special treatment, if any, should there be for use of orphan works within such exception or limitation?
- 29) In what circumstances should the exception or limitation be capable of being overridden by contract?
- 30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.