



Summary Report

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Question 246

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

This Question primarily examines national laws relating to exceptions and limitations to copyright protection for the benefit of libraries and archives, as well as educational and research institutions. Copyright law grants comprehensive and exclusive exploitation rights to the copyright holder with regard to the copyrighted work. However, in certain circumstances, these rights can be restricted either by exceptions or limitations to copyright protection.

This Question addresses 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. Neighboring and moral rights recognized under copyright law are also covered by the scope of this Question. A key area of focus is the conditions under which such exceptions or limitations to copyright apply. In addition, this Question examines the national and regional acceptance of the current provisions and potential avenues for international harmonization. General exceptions and limitations to copyright protection not specific to such institutions (such as exceptions and limitations for private/personal use et cetera) do not fall within the scope of this Question, unless they relate to libraries, archives and educational and research institutions.

For the purposes of this Question, the **Three-Step Test** means the test provided in Article 9(2) of the Berne Convention of 1886, under which the 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.

The Reporter General has received Reports from the following Groups in alphabetical order: Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Central American & Caribbean Regional Group, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Italy, Japan, Latvia, Mexico, the Netherlands, New Zealand, Paraguay, the Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States of America, Uruguay and Venezuela. 40 Reports were received in total. All of the Reports were very helpful and assisted generally.

The Reports provide a comprehensive review of national and regional provisions and policies relating to the exceptions and limitations to copyright protection for libraries,

archives and educational and research institutions. This Summary Report does not attempt to reproduce the detailed responses given by each Group. If any question arises as to the exact position in a particular jurisdiction, reference should be made to the original Reports. See <https://www.aippi.org>.

Where percentages of responses are given, they are to the nearest 5%.

In Part IV below, some conclusions have been drawn in order to provide guidance to the Working Committee.

I. Current law and practice

1) Does your law provide for exceptions or limitations to copyright protection for libraries and archives?

The vast majority of the reporting Groups indicate that different types of exceptions or limitations to copyright protection apply for the benefit of libraries and archives in their jurisdictions. All responses reported at 2) to 4) below are with reference to those Groups who answered YES to this question.

Only four countries do not provide for such exceptions in favor of libraries and archives¹. However, libraries and archives are free to make use of general exceptions subject to certain conditions that are not specifically designed for their purposes (e.g. “use of excerpts of protected works for the purposes of study, criticism or debate” as a general limitation to copyright protection in Brazil).

Currently, Uruguay is discussing a new proposal for amendments to the Uruguayan Copyright Act, which would provide for such exceptions or limitations for the benefit of libraries and archives.

If the answer to question (1) is yes, 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.

All Groups who answered YES to question (1) indicate that their law implements specific provisions for preservation and replacement purposes.

In systems which differentiate between reproduction for the purpose of preservation and reproduction for the purpose of replacement, the latter is subject to considerable higher conditions.²

Two-thirds of these Groups state that reproduction for the purpose of preservation or replacement are only permitted where it is impossible for the library or archive to acquire a copy of the work under reasonable conditions and/or within a reasonable time on the market.³

¹ Argentina, Brazil, Turkey and Uruguay.

² See Reports from Australia and the US.

³ According to the Czech report it doesn't depend on availability on the market as far as only a minor part of the work is reproduced. The Group from Denmark mentions that only reproduction for the purpose of completion is conditional upon availability.

The other third explains that these specific exceptions for preservation or replacement only apply to institutions that do not pursue any direct or indirect commercial advantage (with this reproduction).

Further, the Korean Group states that this exception does not apply to books sold in digital form.

b. Reproduction and/or distribution for the purpose of interlibrary lending

Almost half of all Groups indicate that their jurisdiction provides for specific provisions which in general permit the reproduction of works for the purpose of interlibrary lending. Six of these Groups additionally report varying conditions in relation to such permissions (e.g. the work cannot be acquired in normal trade, entails an obligation to remuneration).⁴ Within the Groups whose law provides specific provisions, considerable divergence is found as to the conditions for this reproduction:

40% of the jurisdictions make the reproduction of a work for interlibrary supply conditional upon the fact that a copy of that work is not available on the market under reasonable terms.⁵

30% allow the reproduction only in cases where the library or archive does not pursue any economic or commercial advantage.

In 20% the action of interlibrary lending is subject to an equitable remuneration.⁶

Three Groups⁷ report that reproduction is limited to one additional copy of the work for the purpose of interlibrary lending. The laws of Australia and Sweden restrict the right to reproduce works to a reasonable portion of the work.⁸ In the UK, reproduction conditional upon the fact that the person entitled to authorize the reproduction could not be found despite reasonable effort.⁹ Korea excludes works available for sale in digital format. Singapore excludes reproductions which would replace a subscription of periodicals. Moreover, the "fair use" doctrine, as applicable in the US¹⁰, permits such interlibrary agreements only to the extent that intended subscriptions or acquisitions of a work are not being substituted.

The remaining Groups (55%) implicitly or explicitly respond that the lending of reproductions is not permissible to libraries or archives. The lending of their own legally obtained copy of a work, however, is either not subject to copyright law or generally allowed between libraries.

⁴ The Group Reports from Italy and the Netherlands mention that their law does not contain a specific exception for the benefit of interlibrary lending, but it may be argued that other general provisions at least partly cover the reproduction and distribution for lending purposes.

⁵ In Australia this prerequisite only applies if the whole work or a major part of it is reproduced.

⁶ New Zealand provides for an equitable remuneration only in the case of reproduction for the purpose of supplying another library. In the Czech Republic and France the obligation to remunerate applies even if the library is lending its own copy of the work without reproduction.

⁷ Canada, Greece and the UK.

⁸ The Australian Group defines a "reasonable portion" as "10% of the work or, if it is published in chapters, not more than one chapter." The Swedish Group defines the restriction on this exception by reference to the term "short extract", which "refers, for example, to a single chapter of a book. However, the chapter must be short; copying of dozens of pages is not permitted."

⁹ The UK Group Report explains that "at the time of making the copy the librarian does not know or could not reasonably find out, the name or address of a person entitled to authorise the making of a copy of the work."

¹⁰ The US Group Report US mentions that making of copies for the purpose of interlibrary supply is legal "so long as the arrangements do not have the purpose or effect of the receiving library or archive substituting this arrangement to or purchase of the work."

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

Two-thirds of the Groups indicate that their law generally permits libraries and/or archives to reproduce and distribute works in order to provide them to their patrons. In contrast, one-third of the Groups either explicitly or implicitly state that their law does not generally provide for such exceptions.

However, among the Groups that report that reproduction and distribution of works for the purpose of providing copies is generally permitted, the following restrictions can be found (individually or cumulatively):

More than half of these Groups report a restriction to the provision of copies for the purposes of private study, education and/or the absence of a commercial advantage.

30% of the relevant Groups report that such permission is limited to reproduction of an extract or a small part.

One quarter indicates that according to their legislation as to the type of copy **both** hard (e.g. photo copies or similar means) and electronic copies may be provided to their users. Another quarter states that only hard copies of works may be provided.

According to the Reports from France, Hungary and Poland, reproduction for the purpose of providing copies to users is limited to an on-the-spot consultation on the premises of the establishment or on dedicated terminals. In contrast, China, Sweden and the UK provide for such restrictions only as far as digital copies are concerned.

It is noteworthy that four Groups¹¹ point out that the permission to prepare a reproduction of a work may be based on the users' rights to prepare such copies for themselves (the so called "private copy exception").

d. Any other activities, and if so, what activities?

More than half the Groups confirm that in their jurisdiction other activities are also covered by exceptions or limitations to copyright, beside regulations concerning preservation or replacement, interlibrary lending and providing copies to libraries' patrons.

However, considerable divergence is found within these Group Reports:

About one-third of the Reports note that limitations to copyright protection other than mentioned in the responses to the Questions 1a), b) and c) may apply if the reproduction and/or the distribution is made for the purpose of research or education.¹²

Further, one-third of the Reports indicate that libraries or archives are allowed to provide a work or display a digital copy of it on their premises or within dedicated networks under certain conditions.

¹¹ Canada, Germany, Netherlands and Sweden.

¹² In Sweden, the permission to distribute is subject to the condition that the research needs to be reasonably qualified; ordinary student papers do not fall within the scope of this limitation.

The Estonian and the German group state that their legislation, in addition, provides for an exception in connection with an exhibition. The German provisions only apply to public libraries, educational institutions and museums, but not to archives. Of note, this exclusion of archives from the scope of the exception does not correspond to the broader scope of Art. 5 (2) lit. c Copyright Directive 2001/29/EC.

Finland and Germany also respond that the reproduction of work for the purpose of administration and organization is permitted in their jurisdiction.

In addition, the Groups from the Philippines and the United States make reference to the "fair use" doctrine to determine if the particular activity falls within the scope of a "fair use" or not.

The Russian Group states that reproduction of special copies for people with disabilities is permitted.

Finally, the Australian Group reports that their law provides for exceptions regarding Parliamentarians and certain works of historical and cultural significance.

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?

About two-thirds of the Reports who answered YES to question (1) indicate that the institutions must not pursue an economic or commercial gain to benefit from certain exceptions referred to in Question 1 a) to d).¹³

About 60% of the relevant Group Reports indicate that "public accessibility" of a library, an archive or similar organizations is a condition for at least one of the various exceptions mentioned above in 1a) to 1d) above. In Finland and the Netherlands, this condition only applies to archives and not to libraries.

Further, about 40% state that at least some of the relevant exceptions are not only applicable to libraries and archives but also to similar institutions such as museums or educational establishments.

About 25% of the Reports mention that some of these above mentioned exceptions, in particular those which tend to restrict the copyright holder's rights more severely, only apply to a specific form of institutions (e.g. institutions governed by the state, only declared or recognized by the government, national libraries).

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.

Numerous restrictions to the permitted activities already arise in the prerequisites of the relevant exceptions. A more detailed breakdown is beyond the scope of this summary.

¹³ The Dutch Group explains that it is not entirely clear whether the "not-for-profit condition" only applies to archives. The Swiss Group points out that the differentiation between commercial and non-commercial use is mainly decisive for the obligation to pay remuneration.

However, some common themes can be found in the particular exceptions for the benefit of libraries or archives:

Slightly less than half of the Groups who answered YES to question (1) indicate that their exceptions and limitations also imply quantitative restrictions. Ten Groups point out that generally just one additional copy is permitted. Three Groups explain that the number of copies that may be produced or used must be justified by the underlying purpose of the applicable exception.

About 40% of the Groups respond that at least some of their limitations also imply a restriction with regard to the scope of the reproduction: Five Groups¹⁴ explain that a copy relying on one of these exceptions may only be a “minor part” or a “reasonable proportion”. The German Group suggests 12% of the work, while Singapore suggests 10% (for certain scenarios). Belgium and Estonia rely on the Three-Step Test to determine the scope of the copy.

The restrictions relating to the form of the reproduction or distribution mostly depend on the specific exception. However, nine Groups state that, in general, reproduction and/or distribution of digital copies is not allowed.

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 archives collection, published works)? If so, please explain the conditions.

Insofar as such conditions exist, they do not apply generally to all exceptions, but rather to particular exceptions.

More than half of the Groups which report the existence of exceptions for libraries/archives explain that certain exceptions are not applicable to unpublished works.

In addition, more than half of the Groups indicate that the exceptions for digitization and presentation of works on institutions’ premises as well as for the purpose of preserving and replacement of works require that the copies are part of the library’s or archive’s collection.

About one-third of the Groups expressly remark that such exceptions only apply on reproduction made from lawful copies.

5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

All Groups except Mexico report that some exceptions for education and research institutions are provided by their jurisdiction.

a. Performance and/or display for educational purposes

Almost all Groups confirmed the availability of exceptions in relation to the performance or display of works for educational purposes (in a narrow sense, e.g. not covering school music festivals).¹⁵ Only the Reports from China, Greece and Poland state that their respective laws do not provide for such exceptions.

¹⁴ In particular Hungary, Japan, New Zealand, Sweden, Switzerland and the UK.

¹⁵ According to Brazilian Group, Brazilian law provides for the use of excerpts of protected works for the purposes of study, criticism or debate only in general. In Denmark the permission is subject to a “voluntary license agreement with a copyright

However, more than two-thirds of all Groups state that the qualification as performance or display for educational purposes (e.g. teaching) requires a non-profit character of use.

b. Reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams)

The clear majority of all Groups indicate that their law also provides for exceptions with regard to the reproduction or distribution for educational purposes. Of note, these permissions tend to be of narrow scope and are subject to strict conditions (e.g. the exception only applies to works not available in the market, or only to reproductions in textbooks, or is conditional upon remuneration).

Furthermore, the reports from France, Germany, Italy, Japan, Singapore, Sweden and the UK describe a highly differentiated regime with various conditions and permissions for the reproduction and distribution for educational purposes.

Finally, about 25% of all Groups state that the distribution of these legally reproduced copies is only permitted if the source and the name of the author are indicated.

c. Making translations

Almost two-thirds of the Groups point out that exceptional provisions regarding translations are provided by their law.¹⁶ However, five Groups¹⁷ note that the preparation of a translation is covered by a general provision in connection with educational use.

d. Making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education)

About two-thirds of the Groups report that making works available in digital networks for educational purposes is permitted under specific conditions – as long as the institutions can ensure that only intended users (e.g. students) have access. Seven Groups¹⁸, however, indicate that the distribution via digital networks is already covered by an existing general exception.

Further, the Groups from Australia, Denmark and Finland point out that such acts falls within the scope of their system of collective licenses, giving the institutions the right to make copies of works available online.

e. Reproduction and/or distribution for research purposes; or

About 75% of all Groups confirmed the availability of exceptions with regard to the reproduction or distribution for research purposes. Among these Groups France, Germany, Italy, Japan and Turkey indicate that reproduction and distribution is covered by a right to quotation.

administration organization“. The German and the Italian Groups emphasize that the display or performance shall not be considered as public (and does not infringe the scope of copyright) if it takes place within a teaching relationship.

¹⁶ The Belgian Group reports that it is still unclear whether or not making translations is included in the copyright exception for educational purposes. Hence, it was counted as a negative response.

¹⁷ Germany, the Netherlands, the Philippines, Switzerland and the UK.

¹⁸ Egypt, Germany, Korea, the Netherland, the Philippines, Russia, and Switzerland.

The Chinese provisions, however, only allow the reproduction and the use for scientific research and do not include publication or distribution thereof. According to the Reports from Greece and Mexico, the permission to reproduce works for the purpose of research is partly covered by the private use exception (without reference to specific statutory exceptions).

f. Any other activities, and if so, what activities?

About half of the Reports mention that the statutory exceptions also cover other activities. However, these additional exceptions cover such a broad range of different activities that a detailed description is beyond the scope of this Summary.

However, one particular exception is noted by the Groups of Japan, Paraguay and Switzerland: reproduction and distribution of works by means of the Braille system or other specific systems designed for visually as well as hearing impaired people is permitted.

6) Do any of these exceptions or limitations apply to educational or research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

Half of the Groups mention certain generally applicable restrictions as to the type of institution, most importantly a restriction to non-profit organizations (e.g. public schools). About one-third of these Groups indicate that the institutions must be either recognized by the government (e.g. as official educational institutions) or must have entered into specific license agreements.

Germany, Italy and the Netherlands provide for a more complex system that sets up independent conditions for each exception. For further detail, refer to the respective Group Reports.

The Central American & Caribbean Regional Group states that while the institution does not have to be non-profit, the use must be for non-profit purposes.

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.

About 30% of the Groups report that their law does not provide for the exceptions referred to in the question, or that there are no specific conditions as to the type or scope.

Within the remaining 70% of Group Reports several conditions and/or limitations are mentioned:

About 25% of those Reports explain that their jurisdictions does not specify exact numerical conditions, but rather provide for concepts such as a reasonable portion, or refer to (eg) segments, extracts, parts.

The German Group mentions a numerical limitation of 12% to 33% of the work, and an absolute limit of 100 pages. Turkey sets a limit of 10% of a work. The French, Italian and Singaporean Reports describe other numerical limitations.

In addition, 7 Groups¹⁹ (directly or indirectly) refer to the “fair use doctrine” as a limiting factor for usage of works under certain provisions. Several Groups state that the source and author of the original work has to specified, if appropriate. Three Groups²⁰ indicate that certain statutory exceptions distinguish between pupils/students and teachers/researchers/instructors.

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.

About two-thirds of the Reports state that there are conditions as to the type of copyrighted work.

About 60% of these Groups explain that the provisions for the benefit of education and research institutions are not applicable to unpublished works.

Further, about one-third of these Reports emphasize that only lawfully acquired copies of the work may be a subject matter of the exceptions pointed out in the previous questions.

Three Groups²¹ exclude the reproduction of computer programs from the scope of several exceptions. Moreover, the French and German Reports remark that works intended for instructional or pedagogical purposes cannot benefit from the exceptions in favor of education institutions.

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?

Almost all Reports (except those from Argentina and Brazil) state that, in principle, all relevant exceptions and limitations to copyright protection are stipulated by statutory provisions.

The Argentinian Group explains that only the right to use a work for educational purposes is codified. However, more general exceptions exist. In contrast, the Brazilian Group indicates that no corresponding statutory provisions exist. However, exceptions and limitations to copyright may be based on fundamental constitutional rights (e.g. right to education, freedom of speech).

In addition, the Canadian, Greek, Korean and US Groups state that further exceptions are/can be recognized by the courts.

10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?

About half of the Reports indicate a direct implementation of the Three-Step Test within the above mentioned exceptions and limitations.

¹⁹ Australia, Greece, Korea, the Philippines, Sri Lanka, UK and the USA.

²⁰ China, the Czech Republic and the UK.

²¹ Germany, Switzerland and Venezuela

In addition, according to more than one-third of the responses, the Three-Step Test is either applied as a rule of interpretation or through “general” terms (e.g. fair use doctrine).²²

About 20% of the Groups explain that the Three-Step Test has not been adopted in their jurisdiction. However, the Polish and Turkish Groups state that the Three-Step Test is likely to be included in an upcoming amendment.

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 license)? If it is the latter, please explain the criteria/procedure(s).

Almost all Reports explain that use under the exception or limitation is permitted automatically. About 30% of the Groups explain that several exceptions provided by their jurisdictions require participation in a collective license agreement.

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?

Nearly half of the Groups note that either no remuneration is payable for use under above mentioned exceptions/limitations or no regulation is provided in their legislation regarding any kind of compensation.

In contrast, about 55% of the Groups indicate that a remuneration fee is at least partly payable for actions falling within the scope of such exceptions/limitations. It is either determined by a collecting society, an authority or a negotiated collective license. In addition, various calculation systems were described. Most systems calculate an adequate remuneration on the basis of the actual use or the number of the registered users summarized in an annual report prepared by the institution. In some cases the compensation rates can be adjusted depending on the extent of the use (e.g. discounts for large amounts of copies) or the character of the institution (e.g. better tariffs for public and non-commercial libraries).

Almost all Groups referring to a compensation system explain that the remuneration is payable by the institution which conducted certain activities. The French Group explains a model where the fee is partly paid by the state and partly by the booksellers. Likewise, the Finish Group points out that in cases of private use the state is liable to pay the remuneration fee.

However, almost all Groups clarified that the fees or royalties have to be paid to the competent collecting society. It is only possible in a few Groups to effect the payment directly to the author.

13) Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.

About 45% of Groups indicate that their jurisdictions provide for specific regulations regarding orphan works – but not necessarily as part of the exceptions and limitations for libraries, archives and educational and research institutions.

²² The Groups from Germany and Mexico further indicate that even without an explicit adoption of the Three-Step Test, the requirements in Art. 9 para 2 of the Berne Convention can be applied directly.

About 70% of these jurisdictions require that the use (in particular the reproduction and making available) of such works is in the public interest and is only practiced by non-profit organizations. This is in particular true for EU countries due to the EU Directive 2012/28/EU on certain permitted uses of orphan works, which had to be implemented by all member states.

The Hungarian Group additionally points out that the Hungarian Intellectual Property Office may grant a 5-year compulsory license of orphan works protected by copyright. Similarly, the Indian Group points out that for the purpose of using orphan works, an application must be made to the Copyright Board for compulsory licensing of such work.

14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?

Many Groups were unable to give a definitive answer as this issue is not clear under their law.

Nevertheless, about 55% of all Groups consider that the above mentioned exceptions may be overridden by contract, at least to the extent that other fundamental rights protected by the exceptions are not unduly restricted (e.g. access to information, right to education, freedom of quotation).

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?

Nearly 45% of the Groups respond that such private organizations exist. Licensing organizations (mainly limited to a certain field, e.g. licensing organization for newspaper articles, or more generally for the educational use of works) representing copyright owners administer and provide licenses for libraries, archives and educational and research institutions not covered by statutory exceptions and limitations.

Moreover, according to a vast majority of their responses, these organizations fulfill the role of collecting societies and facilitate the payment of royalties and compensation.

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?

Most Groups are of the view that there should be at least some exceptions or limitations to copyright protection for libraries and archives. For example, the Belgian Group states that there should be exceptions and limitations in relation to the activities that pertain to the public interest mission that libraries and archives are supposed to pursue, namely: (i) preservation; (ii) restoration (including format shifting); and (iii) making accessible (dissemination) to the public of cultural, scientific or informational works.

The Egyptian and the Turkish Group answer NO to the above question, but do not seem to object to having such exceptions and limitations.

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

Most Groups are of the view that there should be at least some exceptions or limitations to copyright protection for education and research institutions. For example, the Japanese Group states that in order to provide high-quality education, it is essential to use a work in a textbook and exam questions, to produce, present or recite a work in the course of classes, to make an adaptation of a work for pupils and students with disabilities, and to allow pupils and students to use a work by way of performance or recital. The Japanese Group also states that understanding of prior research achievements found in academic journals and books is essential for the creation of new research themes.

The Turkish Group answers NO to the above question, but does not seem to object to having such exceptions and limitations.

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

Most Groups are of the view that the Three-Step Test is a useful test for the above purpose. For example, the French Group states that the Three-Step Test is an appropriate test for determining the legitimacy of an encroachment on the author's monopoly, and that the test makes it possible to guide the courts in their interpretation of the scope of the limitations and exceptions.

Some Groups find the Three-Step Test useful but with some reservations. For example:

- The Dutch Group states that an overly restrictive interpretation of the Three-Step Test (such as the interpretation adopted by the CJEU) discredits the test as an additional assessment tool and casts doubt upon the appropriateness of use of the test in general. The Dutch Group supports an alternative approach, namely, an approach employing the test as a refined proportionality test that offers the opportunity to weigh carefully the different rights and interests involved. A similar concern is shared by the Spanish Group
- The Mexican Group states that it would be convenient to modify the Three-Step Test in order to extend the limitations into the digital environment and create new exceptions as appropriate.

Five Groups are of the view that the utility of the Three-Step Test is limited due to its abstract nature. For example, the Australian Group states that the terms in which the test is expressed are very general and uncertain in application, and that there is very little guidance to courts and the general public on how the test should be applied in day to day situations.

The Indian Group states that it does not favour the Three-Step Test, since it is likely to restrict the scope of compulsory license in a developing economy; nevertheless, as a compromise with the international community, the test may be used provided that the author is compensated.

19) Should the exception or limitation be capable of being overridden by contract? Why? Why not?

Around half of the Groups are of the view that the exceptions or limitations should not be capable of being overridden by contract. The Groups that take this view generally state the public interest that underlies the exceptions or limitations. For example, the Greek Group states that the exceptions are placed in order to safeguard the access to basic information and educational material for all users (especially students), as well as the viability of libraries, archives and educational institutions.

The French Group, while taking the above view, states that authors can waive their right to remuneration by contract.

Around one third of the Groups state that the exceptions and limitations should be capable of being overridden by contract. However, most Groups taking this view make certain reservations, for example:

- The contract should not be against public interest (4 Groups)
- The parties should have equal bargaining power on an arm's length basis (1 Group)
- The exceptions should only be overridable in favour of the copyright holder (1 Group)
- Certain exceptions such as private copy exception should not be overridden by contracts (1 Group).

The Australian Group takes a mixed approach, namely, that while the exceptions and limitations for libraries and archives should not be overridden by contract, it should be possible to contract out of the exceptions and limitations for educational institutions.

The Belgian, the Canadian and the US Groups do not take a particular view on this issue. The Canadian Group states that this issue should be left to further study.

20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not?

Around 70% of the Groups state or suggest that remuneration should be paid at least under certain circumstances. However, the circumstances under which remuneration should (or does not have to) be paid vary greatly among the Groups, for example:

- Remuneration should be paid in general (5 Groups)
- Libraries and archives should not have to pay remuneration (2 Groups)
- Remuneration should not have to be paid for preservation/replacement (4 Groups)
- Remuneration should be paid for public lending by libraries (5 Groups)
- Remuneration should be paid for educational activities generally (3 Groups)
- Remuneration should be paid for educational activities, if multiple copies are made (2 Groups)
- Remuneration should be paid when a work, provided primarily for education or research purposes, is also capable of being used for normal purposes (1 Group)
- Remuneration may be payable if the quantity of copying from a particular work exceeds some reasonable portion (2 Groups)
- For-profit organizations should pay remuneration (2 Groups)

- Remuneration should be paid for commercial activities, but not for non-commercial activities (2 Groups)
- Remuneration should be paid for activities that interfere with normal exploitation of the work (2 Groups)
- Whether remuneration should be paid or not shall be determined by taking into account various factors (2 Groups).

Around a quarter of the Groups state that remuneration should not be payable.

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?

Various proposals were made by the Groups, for example:

- Around 30% of the Groups state that their current law should be improved so as to address the issue of digital copies (e.g., digitization of collections in libraries and providing digitized copies, distant education)
- 3 Groups propose adopting a broader and more general exception or limitation (e.g., fair use, implementation of the Three-Step Test) as opposed to just having a list of very specific exceptions and limitations
- 2 Groups propose broadening the exception to allow libraries to make more than one copy for preservation purposes
- The Dutch Group suggests adopting an extended collective license (ECL) regime for the digitization and making available of works by libraries and archives.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

Most Groups are of the view that harmonization in this area is desirable. For example, the Estonian Group states that similar exceptions and limitations provide a clearer legal environment on the free use of works for the purpose of preservation and access to knowledge. However, the Hungarian Group considers harmonization is unrealistic due to the different approaches between general fair use/fair dealing exceptions on the one hand, and specific exceptions on the other.

The Finnish, French and US Groups are of the view that harmonization in this area is not desirable.

- The Finnish Group states that due to the profound differences in national educational and research systems, their structure and financing as well as differences in remuneration regimes for copyright exceptions, international harmonization is not a desired or workable solution. The Finnish Group also states that the national differences in the structure of libraries and archives and their financing are more prominent than in the field of education and research, which renders international harmonization unsuitable
- The French Group states that the policies and priorities for education and research of each country must prevail and enable each country to develop its exceptions and limitations in line with public interest

- The US Group states that, under the Three-Step Test, many countries already successfully provide for such exceptions and limitations; and that while they tend to vary in their detail, there is no perceived need for additional harmonization at this time, which may prove disruptive to local practices and copyright holders.

Notwithstanding their general position, these 3 Groups do make some proposals for certain questions, as stated below.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

Most Groups essentially answer "Not Applicable" to this question, since their answers to question 16) and 17) were YES.

24) If yes to question 16):

a. To what libraries, archives and other organizations should these exceptions or limitations apply

Around 60% of the Groups are of the view that the exceptions and limitations should apply only to libraries or archives that are public, non-profit (non-commercial) and/or publicly accessible. For example, the Dutch and German Groups consider these exceptions and limitations to copyright protection are justified on the basis of public interest.

Around 20% of the Groups are of the view that the exceptions and limitations should apply to any kind of libraries, including private and for-profit libraries.

However, the Swiss and UK Groups, while taking the above view, suggest that certain libraries should be treated differently. The Swiss Group states that that publicly accessible libraries and archives should benefit from lower rates. The UK Group states that different considerations may apply if the organizations are of a commercial nature, such as private or commercial libraries.

b. To what activities should these exceptions or limitations apply

Around 40% of the Groups are of the view that the exceptions and limitations should apply to preservation and/or replacement purposes (including making back-up copies). For example, the Argentinian Group states that the following activities should be allowed: (a) making back-up copies for high-value documents and possible replacement for prevention in hypothetical cases of loss, theft or catastrophe; (b) making back-up copies for temporary moving purposes (e.g., when the documents are moved from libraries for an exhibition or fair); (c) making an access copy in order to avoid manipulation of a single original; and (d) making copies in order to prevent loss of data or inability to access documents for obsolescence issues.

Around one third of the Groups are of the view that the exceptions and limitations should apply to education and/or research activities.

6 Groups are of the view that the exceptions and limitations should apply to providing on-site access to works (e.g., via reading stations).

8 Groups are of the view that the exceptions and limitations should apply to lending of copies (including e-books). On the other hand, the Japanese Group states that it is premature to apply the exceptions and limitations to lending of e-books.

5 Groups are of the view that the exceptions and limitation should apply to interlibrary lending of copies.

Examples of other exceptions and limitations raised by the Groups are:

- Making copies for criticism and/or news reporting purposes (2 Groups)
- Providing copies of works that became unavailable on the market (2 Groups)
- Making copies for personal use (2 Groups)
- Copy delivery services (1 Group)
- Data mining (1 Group).

c. Under what conditions should the activities be undertaken or the copyrighted work used?

The Groups' answers to this question, as well as their levels of detail, vary greatly. Examples of the conditions stated in the Group Reports include:

- The activities should be in accordance with the Three-Step Test. (3 Groups)
- The library or the archive should possess a legitimate copy. (6 Groups)
- Reproduction may be allowed only if the work is not otherwise commercially available. (4 Groups)
- Safeguard measures should be adopted with respect to digital copies. (3 Groups)
- Limitation on number of copies:
 - In case of e-lending, one digital copy may be lend out to only one user (1 Group)
 - In case of providing on-site access, the number of copies accessible at one moment should not be increased (1 Group)
 - Only a single copy may be made (3 Groups)
- The Library or the archive should keep a record of to whom copies were provided. (1 Group).

25) If yes to question 17):

a) To what educational and research institutions should these exceptions or limitations apply

Around 35% of the Groups are of the view that the exceptions and limitations should apply to all educational and research institutions (either public or private, for-profit or non-profit). Of these Groups, 4 are of the view that any such institutions may benefit from such exceptions and limitations, provided that their use of the copy is not for profit. For example, the German Group states that the exceptions should apply to all kinds of educational and research institutions, as long as they do not pursue any commercial purpose with the use.

Around 30% of the Groups are of the view that the exceptions and limitations should apply only to educational and research institutions that are public and/or non-profit (non-commercial).

The Argentinian and the Greek Groups treat educational and research institutions differently: for educational institutions, the exceptions and limitations should apply to both public and private institutions; for research institutions only public research institutions should benefit from such exceptions and limitations.

The Australian Group is of the view that whether an educational institution qualifies for the exceptions and limitations should be determined by taking into account whether the main focus of the institution is to provide education and/or training, and whether the copy is provided for a charge in excess of costs. The Australian Group does not make any proposal in relation to research institutions.

The Danish Group is of the view that the exceptions and limitations should be available to institutions that have entered into a compulsory license agreement (under the Danish model).

b. To what activities should these exceptions or limitations apply

Around 40% of the Groups are of the view that the exceptions and limitations should apply to educational or research activities in general.

3 Groups are of the view that the exceptions and limitations should apply to providing of copies (including digital copies) to teachers and students.

The Brazilian Group is of the view that the exceptions and limitations should apply to the use and reproduction of works for the purpose of preservation and access to culture and education.

The Singaporean Group is of the view that the exceptions and limitations should apply to the provision of information, whether online or in physical format, for the purpose of education or research.

The Spanish Group is of the view that the exceptions and limitations should apply to reproduction and communication to the public for the benefit of professors, researchers, academics and students.

The Sri Lankan Group is of the view that the exceptions and limitation should apply to: (i) performance or display of works and reproduction or distribution for educational purposes in educational and research institutions; (ii) translations; and (iii) transmission via communication networks for educational and research purposes.

c) Under what conditions should the activities be undertaken or the copyrighted work be used?

The Groups' answers to this question, as well as their levels of detail, vary greatly. Examples of the conditions stated in the Group Reports include:

- The activities should be in accordance with the Three-Step Test (3 Groups)
- The institution should possess a legitimate copy (4 Groups)
- Reproduction should be allowed only if the work is not available in the marketplace (2 Groups)
- Only a portion of a work should be used where appropriate (3 Groups)
- The institution should give a notice to copyright owners to pay remuneration (1 Group)

- The author and the source should be cited whenever possible (2 Groups)
- Safeguard measures should be adopted with respect to digital copies (1 Group).

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)?

Around 70% of the Groups are of the view that use under the exception or limitation should be permitted automatically.

The Canadian Group states that use should be permitted automatically in general, but where the exception requires a considered balance between the rights holders and the users, it should be subject to review by an independent quasi-judicial body or a court.

The Italian Group states that use should be permitted automatically in general, but collective agreements are required in case of digitization of out-of-commerce works.

The Dutch Group states that use should be permitted automatically in general, but in case of orphan works, it should be subject to either a diligent search or a collective licensing scheme.

The Australian Group is of the view that the libraries and archives should keep a record of each copy made and to whom it was supplied. Also, educational institutions should give a notice to the copyright owner or a collecting society to pay equitable remuneration, and also pay the remuneration.

The Singaporean Group is of the view that institutions should notify the copyright owner that the work will be released to the public under certain exceptions or limitations.

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?

The Groups' answers to this question, as well as their levels of detail, vary greatly. As to how (by what means) a remuneration should be determined, examples in the Group Reports include:

- Private negotiation between the parties (2 Groups)
- Market (1 Group)
- Collective negotiation between representatives of each interest group (3 Groups)
- An independent quasi-judicial body (3 Groups).

As to the factors to be considered in calculating the amount of remuneration, examples of such factors provided in the Group Reports include:

- Amount copied (1 Group)
- Number of copies used (3 Groups)
- Market value of the work (1 Group)
- Nature of the material copied (e.g., whether it is illustration or text) (1 Group)
- Nature of use of the work (e.g., whether it is use by universities or primary/secondary schools) (2 Groups)
- Harm to copyright owner (2 Groups)
- Public or audience reached (1 Group)

- Revenue derived (2 Groups)
- The amount should be less than the amount paid for regular use of the work. (1 Group).

As to who should make the payment, around 30% of the Groups are of the view that the payment should be made by the institution that uses the work. On the other hand, the Czech, the Estonian and the Paraguayan Groups are of the view that the State should make the payment, and the Polish Group is of the view that the money should come from special public funds. The German Group states that manufactures and importers of copying device should also pay the remuneration with respect to libraries and archives exceptions and limitations.

As to who should receive the payment, 6 Groups are of the view that payment should be made directly to the copyright owner, while 5 Groups are of the view that payment should be made to the collecting society. The Australian Group and the Central American & Caribbean Regional Group are of the view that payment should be made either to the copyright owner or the collective society.

5 Groups are of the view that remuneration should not be payable at all.

28) What special treatment, if any, should there be for use of orphan works within such exception or limitation?

Around 45% of the Groups are of the view that the institution must make a reasonable (diligent) search for the copyright holder before using an orphan work. For example, the Danish Group states that, as provided in EU Directive 2012/28/EU, the institution which wants to use the orphan work should be required to perform reasonable research in order to identify the copyright holder, and to the extent such research does not lead to a result, the institution should be allowed to use the material.

3 Groups are of the view that deposit of remuneration is required in the case of an orphan work.

2 Groups are of the view that attribution of authorship is required if possible.

The Central American & Caribbean Regional Group is of the view that remuneration could be less in case of an orphan work.

6 Groups are of the view that there should be no special treatment for orphan works.

29) In what circumstances should the exception or limitation be capable of being overridden by contract?

Around 40% of the Groups are of the view that the exception or limitations should not be capable of being overridden by contract.

Around 30% of the Groups state that the exceptions and limitations should be capable of being overridden by contract. However, most Groups with this view make certain reservations, for example:

- The contract should not be against public interest (2 Groups)
- There must be actual contract between the parties (4 Groups)

- The parties should have equal bargaining power on an arm's length basis (1 Group)
- It can be overridden only in the case of out-of-commerce works (1 Group)
- The contract must be mutually more beneficial to both parties (1 Group)
- There must be permission by the copyright holder (1 Group).

The Canadian and the US Groups do not take a particular view on this issue. The Canadian Group states that this issue should be left to further study.

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?

Many of the answers provided in the Group Reports do not seem to directly address this question.

There are however some useful suggestions. For example:

- The Belgian Group states that in cases where it is not clear whether the exception or limitation apply, it might be useful to address the use of the works through contractual arrangements
- The French and the Italian Groups state that the efforts of private organizations may be useful in areas beyond the scope covered by the exceptions or limitations (e.g., for-profit activities)
- The German Group states that it is in the genuine interest of collecting societies and right-holders to establish such private organizations in order to provide sustainable licensing models, where individual licensing is not feasible
- The Italian Group states that institutions may find it more efficient to rely on services offered by the copyright holders (e.g., contractual base e-lending service performed by publishers, massive digitization of collections)
- The Singaporean Group states that collective management organizations can facilitate requests for remuneration by copyright holders, when the exceptions or limitations are invoked by the institutions.

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.

The Egyptian Group comments that people with visual incapacity shall be entitled to benefit from a possibility to transform works into an appropriate form suitable to satisfy their needs.

The Italian Group comments that the exceptions and limitations provided in its copyright law apply also to neighbouring rights.

IV. Conclusions

General

Most Groups agree that there should be at least some kind of exceptions or limitations to copyright protection for libraries and archives, as well as for educational and research institutions.

Most Groups agree that the Three-Step Test is a useful test for determining exceptions or limitations to copyright protection.

Exceptions or limitations for libraries and archives

As to the exceptions or limitations for libraries and archives, around 60% of the Groups agree that such exceptions or limitations should apply only to libraries or archives that are public, non-profit and/or publicly accessible, while around 20% of the Groups are of the view that they should apply to any kind of libraries and archives.

As to the type of activities to which the exceptions or limitations for libraries and archives apply, around 40% of the Groups agree that such exceptions or limitations should cover preservation and/or replacement, and around one third of the Groups agree that such exceptions or limitations should apply to education and/or research activities. Examples of other activities raised by the Groups are: (a) on-site access to works; (b) lending of copies (including e-books); and (c) interlibrary lending.

As to the conditions for the exceptions or limitations for libraries and archives, the Groups' answers vary greatly. Examples of the conditions raised by the Groups are: (a) the activities should be in accordance with the Three-Step Test; (b) the library or the archive should possess a legitimate copy; (c) reproduction may be allowed only if the work is not otherwise commercially available; (d) safeguard measures should be adopted with respect to digital copies; and (e) limitation on number of copies.

Exceptions or limitations for educational and research institutions

As to the exceptions or limitations for educational or research institutions, around 35% of the Groups are of the view that such exceptions or limitations to apply to all educational and research institutions (whether public or private, for-profit or non-profit), while around 30% of the Groups are of the view that such exceptions or limitations should apply only to educational and research institutions that are public and/or non-profit.

As to the type of activities to which the exceptions or limitations for educational or research institutions, around 40% of the Groups are of the view that such exceptions or limitations should cover educational or research activities in general.

As to the conditions for the exceptions or limitations for educational and research institutions, the Groups' answers vary greatly. Examples of the conditions raised by the Groups are: (a) the activities should be in accordance with the Three-Step Test; (b) the library or the archive should possess a legitimate copy; (c) reproduction may be allowed only if the work is not otherwise in the marketplace; and (d) only a portion of a work may be used where appropriate.

Other issues

Around 70% of the Groups agree that use under the exceptions or limitations should be permitted automatically.

As to remuneration, around 70% of the Groups agree that remuneration should be payable at least under some circumstances, but the Groups disagree on under what circumstances remuneration should become payable. Examples of the Groups' answers are: (a) remuneration should be paid in general; (b) remuneration does not have to be paid for preservation or replacement; (c) remuneration should be paid for public lending by libraries; and (d) remuneration should be paid for educational activities.

Also, the Groups disagree on who should determine the remuneration (e.g., private negotiation between the parties, collective negotiation between representatives of each interest group, an independent quasi-judicial body) and the factors to be taken into account in the determination (e.g., amount copied, number of copies used, nature of use of the work, harm to copyright holder). As to who should make the payment, more than a quarter of the Groups are of the view that the payment should be made by the institution itself, while a few Groups take the view that the state should make the payment. As to whom the payment should be made, some Groups state that the payment should be made directly to the copyright holder, while some other Group state that it should be made to the collective society.

As to the treatment of orphan works, around 45% of the Groups are of the view that an institution should make a reasonable (diligent) search of the copyright holder before using the orphan works.

Around 40% of the Groups are of the view that the exceptions or limitations should not be capable of overridden by contract, while around 30% of the Groups state that such exceptions or limitations may be overridden by contract, at least under certain conditions (e.g., not against public interest).

Finally, as to how the efforts by private organisations to address use by libraries, archives, educational and research institutions be reconciled with exceptions or limitations provided by law, the Groups' views vary greatly. One example of such views is that, the efforts of private organizations may be useful in areas beyond the scope covered by the exceptions or limitations (e.g., for-profit activities).