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## Q246

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

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## I. Current law and practice

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

yes

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;

yes

Please comment:

A public archive, museum or library has the right to reproduce a work included in the collection thereof without the authorisation of its author and without payment of remuneration, in order to:

- a. replace a work which has been lost, destroyed or rendered unusable;
- b. make a copy to ensure the preservation of the work;
- c. replace a work which belonged to the permanent collection of another library, archives or museum if the work is lost, destroyed or rendered unusable; and
- d. digitise a collection for the purposes of preservation (subsections 20(1)(1)-(4) of the CA).

This exception applies only where the acquisition of another copy of the work is impossible (subsection 20(2) of the CA).

Regarding technological protective measures, the CA provides that the rightholder shall adjust such measures to his or her work or object of related rights which allow the entitled persons to freely use

the work or object of related rights to the extent necessary for the free use in the cases prescribed by law on the condition that entitled persons have legal access to the protected work or object of related rights. If the person entitled to freely use the work or object of related rights and the rightholder fail to reach an agreement on application of the corresponding measures within a reasonable period of time, the person entitled to freely use the work or the object of related rights has the right to address the copyright committee (subsection 80<sup>3</sup>(4) of the CA).

This rule applies to:

- a. sections (a)-(d) of this section 1(a);
- b. sections (b) and (c) of section 5(a); and
- c. section 1(e).

b) reproduction and/or distribution for the purpose of interlibrary lending;

no

Please comment:

No exception(s) for 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

yes

Please comment:

For on-the-spot users, the CA provides that a public archive, museum or library has the right, without the authorisation of the author and without payment of remuneration, lend works in its collections for individual use (section 20(4)(2) of the CA).

Regarding from libraries, there is another exception in the CA (free use with the obligation to pay remuneration): a library has the right to lend out a work (incl. phonograms) without the consent of the author but the author is entitled to receive remuneration for such lending (subsection 13<sup>3</sup>(1) of the CA). The amount of remuneration payable to the author is calculated on the basis of the state budget funds allocated for remunerations in the financial year and the electronically registered loans in public libraries within the calendar year (subsection 13<sup>3</sup>(4) of the CA). In this regard, see section 12 below.

d) any other activities, and if so, what activities?

yes

Please comment:

A public archive, museum or library has the right to use a work included in the collection thereof without the authorisation of its author and without payment of remuneration for the purposes of an exhibition or the promotion of the collection to the extent justified by the purpose.

A public library, museum or an archive may also make a private copy (i.e. not for commercial purposes) of the work to a natural person (subsection 20(1)(5) of the CA).

It must be noted that the promotion of the exhibition could be commercial in essence if e.g. the museum sells some sort of catalogues of the exhibition and receives income from such activity. It has been provided in the explanatory notes of the new draft of the CA that if such sale only covers the cost of printing the catalogues, then such sale is not commercial in essence.

### Neighbouring rights

For the purpose of illustration for teaching or scientific research to the extent justified by the purpose and on condition that such use is not carried out for commercial purposes and on condition that the source is indicated, it is possible to use (incl. reproduce) a performance, a phonogram, a radio or television broadcast or recordings thereof, or a film without the authorisation and without payment of remuneration to the performer or the "owner" of the related right (subsection 75(1)(2) of the CA).

- 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?

The law provides that such exceptions are provided to all "public archives, museums, libraries." According to the explanatory notes of the CA, it is provided that any museum, library or archive which is established for the public interest falls within the scope of section 20 of the CA.

- 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.

Neither the legislator nor the courts have provided any guidelines how many copies are required to "preserve" a work. The Three-Step-Test applies when deciding whether the "preservation" by the library, museum or archive has infringed the rights of the author.

- 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.

The exception is limited to the "work included in the library's or archive's collection".

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

yes

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;

yes

Please comment:

The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication:

- a. making summaries of and quotations from a work which has already been lawfully made available to the public, provided that its extent does not exceed that justified by the purpose and the idea of the work as a whole which is being summarised or quoted is conveyed correctly;
- b. the use of a lawfully published work for the purpose of illustration for teaching and scientific

research to the extent justified by the purpose and on the condition that such use is not carried out for commercial purposes; and

c. the reproduction of a lawfully published work for the purpose of teaching or scientific research to the extent justified by the purpose in educational and research institutions whose activities are not carried out for commercial purposes (subsection 19(1)-(3) of the CA).

The precondition of the exceptions provided in sub-section 19(1)(1)-(3) of the CA is that the work is lawfully published.

Regarding databases free use of databases, the CA provides that "a lawful user of a database which is lawfully made available to the public in whatever manner may, without the authorisation of its maker and without payment of remuneration, extract or re-utilise a substantial part of the database if extraction is made for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved (subsection 75<sup>6</sup>(2) of the CA).

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

no  
Please comment:

Covered by 5(a) above. No specific reference to course packs, exams etc.

c) making translations;

no  
Please comment:

No such exception.

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

no  
Please comment:

No specific rules for digital networks. See 5(a) above.

e) reproduction and/or distribution for research purposes; or

no  
Please comment:

See 5(a) above.

f) any other activities, and if so, what activities?

no  
If not please comment:

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?

All of these rules and exceptions provided in section 5(a) above apply to educational and research institutions generally independent of the fact whether the educational or research institution is privately or publicly funded.

- 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.

The CA provides two rules:

- a. the use of a work must not exceed the extent "that is justified by the purpose and the idea of the work as a whole"; and
- b. such use must not constitute use for commercial purposes (see section 5(a) above).

The CA does not provide any other conditions in that regard. Thus, similarly to section 3 above, the number of copies made under the free use exception for educational and research purposes is not numerically defined.

- 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.

Subsections 19(1)-(3) of the CA provide that the works must be lawfully published or made available (see section 5(a)).

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

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?

The exceptions provided above for public museums, libraries and archives and the exceptions provided for research and education are both statutory provisions in the CA.

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

Yes, the CA makes the Three-step test a statutory right and this covers both - museums, libraries, archives and research and education institutions - exceptions described above.

Section 17 of the CA provides that "...provided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, it is permitted to use a work without the authorisation of its author and without payment of remuneration only in the cases directly prescribed in sections 18 - 25 of this Act (i.e. specific cases on specific conditions).

Also, regarding limitations to neighbouring rights (see section 1(e) above), subsection 75(2) of the CA provides that the free use prescribed in section 75 of the CA is permitted only on the condition that that

this does not conflict with normal use and does not unreasonably harm the legitimate interests of holders of related rights.

- 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).

The CA does not prescribe any procedure or criteria for the use of exceptions and limitations. Thus, the use is permitted automatically.

- 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?

No remuneration is payable to the authors under sections 18<sup>1</sup> - 25<sup>1</sup> of the CA provided that the criteria prescribed in the aforementioned sections are followed.

Regarding the lending of works from libraries (see also 1(c) above; without the consent of the author but with an obligation to pay remuneration), a governmental regulation<sup>[1]</sup> is adopted which provides: a) the list of information to be submitted in an application (by the author(s)); b) the rates of distribution of the remuneration between different authors; and c) the bases of and procedure for calculation and payment of remuneration.

According to the regulation, the author(s) of a work are remunerated as follows:

- a. 59% to the author of the work in original language;
- b. 1% to the author of the work for the translation;
- c. 30% to the translator(s); and
- d. 10% to the illustrator of the work.

In order to receive remuneration, the author must file an application by 15 April which is valid for three years. After this period, a new application must be filed by the same date. The remuneration is based on the number the author's work was loaned by the users of the library.

The application must include the following information:

- a. name;
- b. pseudonym;
- c. personal identification code;
- d. contact details;
- e. bank details;
- f. name and registry code of the legal person; and
- g. authorship status (author, translator, illustrator)

#### Footnotes

1. <sup>^</sup> See: <https://www.riigiteataja.ee/akt/111122012004> [<https://www.riigiteataja.ee/akt/111122012004>] (in Estonian).

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

The CA provides an exception for the free use of orphan works for preservation or restoration purposes and for educational purposes. However, such right is not granted to all museums, archives and libraries and educational institutions as was the case with the free use exception. Subsection 27<sup>6</sup>(1) provides that such exception is only provided to “public memory institutions” and to “Estonian Public Broadcasting.” These institutions are permitted to use a work or phonogram contained in their collections which has been considered an orphan work and forwarded to the orphan works database, only in public interests and provided that the names of all identified rightholders are indicated.

The institutions referred to are permitted to generate revenues in the course of the permitted free use of the orphan work only for the purpose of covering the costs of digitising orphan works and making them available to the public.

According to the explanatory memorandum of the CA, a public memory institution is any public archive, museum, library, scientific or educational institution or institution dealing with the preservation of films and audio.

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

The CA is silent on the matter - it does not say that the free use exceptions are imperative (does not enable overriding by a contract) or dispositive (enables overriding by a contract).

Regarding free use of computer programs (section 24 and 25 of the CA; admittedly, free use of computer programs is outside the scope of this Report), it is provided that the free use exception is provided, unless the contract provides otherwise.

According to the proposed draft CA, the exceptions or limitations regarding museums, archives, libraries and educational and research institutions cannot be overridden with a standard term (subsection 39(5) of the draft CA)<sup>1</sup>. However, this implies that if a term is negotiated between the parties, free use exceptions could be overridden with a contract.

#### Footnotes

1. <sup>^</sup> *The draft CA is accessible only in Estonian: <https://ajaveeb.just.ee/intellektuaalneomand/wp-content/uploads/2014/08/Aut%C3%95S-EN-1-2014.pdf>[<https://ajaveeb.just.ee/intellektuaalneomand/wp-content/uploads/2014/08/Aut%C3%95S-EN-19-7-2014.pdf>].*

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?

no

If not please comment. :

No such efforts from private organization can be determined.

## 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?

yes

If yes, in relation to what activities?:

The law should provide exceptions to libraries and archives. Libraries and archives perform an important role in the society – preservation and distribution of culture and knowledge. Library is an important medium for many people and enables lending books (and other works) without payment, i.e. free access to knowledge. Thus, it has informational and heritage purposes. If there were no exceptions and limitation for libraries and archives then fulfilment of these objectives would be very expensive (they would need to acquire consents from right holders, pay remuneration etc.) and therefore for many libraries even impossible.

The exceptions should definitely take into account the digital society and also include exceptions for use of e-books by libraries and archives.

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

yes

If yes, in relation to what activities? :

Definitely. Exceptions or limitations for educational and research purposes are important for the same purposes. As science is built on the ideas of others (which are put into a tangible form), it is important for the development of science and sharing of knowledge that using parts of the works of others (i.e. citations) is possible. Taking into account question 16, it is important that such knowledge can be accessed, therefore, both of these exceptions are necessary to the distribution of knowledge and education.

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

yes

Why?:

It is a useful test as it enables to give a guiding principle to the legislator and at the same time, provides discretionary manoeuvrability for the courts. At the same time, it provides protection to the author.

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

The free use exceptions should not be allowed to be overridden by contract, as it would undermine the very purpose they are provided – sharing of knowledge and granting access to such knowledge.

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

No. For preservation purposes and knowledge sharing, taking into account the Berne Three-Step-Test as it is provided in the CA and the provisions of the CA setting the limits to such exceptions and limitations, such activities should not entail that the authors receive remuneration. Although, it must be pointed out that where e.g. library reproduces works in an amount that exceeds the “preservation purpose” exceptions provided in the CA, the authors should be remunerated according to the same principles as is the case with lending from the libraries. Therefore, the exceptions and limitations need to address the interests of both parties – the rights of the authors on the one hand (remuneration) and the right of the society as a whole on the other (access and sharing of knowledge).



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?

Taking into account questions 5(b) and 5(d), Estonian law lacks clarity on the matter of use of copyrighted works and materials for study materials and course packs. The law currently prescribes that free reproduction of a work is allowed (on the condition that the author and source is indicated) for the purpose of teaching or scientific research to the extent justified by the purpose in educational and research institutions whose activities are not carried out for commercial purposes (subsection 19(1)(3) of the CA).

This clause only allows reproduction of a work and not distribution of the reproduced copies or for example making available of any material in an online teaching environment. Also specific instructions on the extent of such clause would provide legal clarity to authors, teachers and speakers and also the society at large. Therefore, it is not the law that necessarily needs to be amended, guidelines from the courts or from the Ministry of Justice could also provide legal clarity on the matter. Also, entitled subjects under this section need to be specified - it is unclear whether it enables the free use of works by teachers and students alike.

Also, providing an explicit exception for interlibrary lending could be introduced in the CA.

Regarding the free use exceptions for libraries, libraries should be provided with the right of public performance and right of exhibition of the work to students and groups of students for in the direct teaching process on the conditions and limitations as set out in section 22 of the CA for educational institutions.

### III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

As Internet is the "library" of our time, it could be argued that international harmonisation is required as Internet at its essence is global. Although desired, achieving harmonisation at this level is a rather ambitious and at the moment impossible, if regional harmonisation has not been achieved. Thus, it could be asked whether regional harmonisation is necessary. If we take a look at the level of EU, it could indeed be argued 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. Why such harmonisation would be desired is the matter that course materials, course packs and online-courses/online-subjects could be used by different educational institutions in different countries. Therefore, if the system is harmonised, we could speak about the distribution of knowledge on a larger scale which could also mean that the author's rights are respected and in case the preconditions are set in the same way, authors should be remunerated for any use exceeding the strictly educational or scientific purposes (e.g. Estonian teacher using the course pack created by a French teacher). The differences in the educational systems (e.g. private and public schools, systems of universities) definitely pose a big problem in this regard. Questions like e.g. will private schools be allowed to benefit from the same limitations and exceptions as public schools immediately surface and the question to this is rather political than legal.

Taking in to account the aforesaid, harmonisation would enable the sharing and preserving knowledge on a larger scale.

E-books have become more of a standard than an exception. Thanks to wide spread of e-books, the opportunities for libraries to acquire different books, has become so much easier and cheaper. But if the legal issues with e-books (inter alia of how to lend out this e-book, how the exceptions and limitations

could be applied to e-books etc.) has not been solved, then this advantage does not have much value.

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?

yes

Please comment:

The answer to questions 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;

Only museums, archives and libraries that are established for the public interest should be allowed to benefit from such exceptions and limitations.

b) to what activities should these exceptions or limitations apply;

The exceptions and limitations should cover the following activities:

- a. replacing a copy of a work that has deteriorated to an extent that its content are no longer accessible;
- b. replacing a work if the work is lost, destroyed or rendered unusable;
- c. copying a work for preservation purposes; and
- d. digitising for the purpose of preservation;
- e. lending out regular as well as e-books.

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

The exceptions should only be applicable:

- a. in the case when acquisition of another copy of the work is impossible; and
- b. the purpose is non-commercial.

Exceptions should be equally applicable to tangible and intangible work.

25) If yes to question 17):

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

All educational institutions and universities. But not to companies providing consultations or who make promotional lectures etc.

b) to what activities should these exceptions or limitations apply;

The exceptions and limitations should be allowed for:

- a. making quotations and summaries; and
- b. illustrative use in teaching materials and educational purposes;
- c. other uses (copying, making available etc.) strictly for the purpose of teaching or scientific research.

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

The exceptions should only be applicable:

- a. for educational and research purposes (i.e. non-commercial);
- b. the author and the source is cited whenever possible; and
- c. the work is not used as a whole, but to the extent necessary for the purpose.

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

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)?

On the one hand, enabling the use of works under the exceptions and limitations automatically means that the author is the one who must track and identify whether any institution (educational or preserving) goes further than prescribed by law or not. On the other hand, making some sort of system for notification or other puts huge administrative burdens on the educational and research institutions and museums, libraries and archives. Therefore it should be permitted automatically.

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 exceptions and limitations for libraries, archives, educational and research institutions benefit the society as a whole, and therefore the remuneration for such uses could be paid from the state budget.

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

It should be possible for public memory institutions to make a copy of an orphan work for preservation purposes provided that the institution has carried out diligent search of the original author.

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

The exceptions or limitations should not be capable to be overridden by contract in any case.

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?

This questions is unclear.

#### Summary

1. Libraries and archives are important for the preservation and distribution of culture and knowledge, therefore the exceptions provided in the Copyright Act (hereinafter "**CA**")<sup>[1]</sup> are extremely important.
2. Exceptions or limitations for educational and research purposes are important for the development of science and knowledge sharing.
3. The free use exceptions should not be allowed to be overridden by contract - undermines the purpose of sharing and granting access to knowledge.
4. No remuneration should be payable for preservation and knowledge sharing purposes.
5. Improvements of the Copyright Act are necessary regarding the following: study materials and course packs; the exception of the reproduction of a lawfully published work for the purpose of teaching or scientific research is too narrow, only enabling reproduction, not distribution; exceptions regarding interlibrary lending should be introduced; libraries should be provided with a right of public performance of a work and a right of exhibition of a work for direct teaching purposes; clarification must be provided regarding lending of e-books.
6. For the purpose of preservation and granting access to knowledge on a larger scale, regional harmonisations is desirable.
7. The use under the exceptions and limitations should be permitted automatically.
8. Libraries, archives, museums, educational and research institutions should receive remuneration from the state budget.

#### Footnotes

1. <sup>^</sup> *Copyright Act is accessible in English:*  
<https://www.riigiteataja.ee/en/eli/531102014005/consolide>[<https://www.riigiteataja.ee/en/eli/531102014005/consolide>]

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.