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Q246

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

Responsible Reporters: by Sarah MATHESON, Reporter General John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General Yusuke INUI, Ari LAAKKONEN and Ralph NACK Assistants to the Reporter General

National/Regional Group	CA-Caribbean Regional-Group
Contributors name(s)	Edy Guadalupe PORTAL
e-Mail contact	egportal@portallaw.com
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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:

Article 45 d) of the Salvadorian Intellectual Property Law allows the reproduction of a copy of a work by a library, as long as the library is a non profit organization, such work is a part of its permanent collection, and the reproduction is made for safe keeping purposes or in order to substitute the original in case it deteriorates, as long as the work cannot be acquired in normal conditions. The law does not grant the faculty to issue copies for distribution purposes.

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

yes

Please comment:

Reproduction of a copy of the work for interlibrary lending is allowed, as long as it is done between non-profit organizations.

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:

Salvadorian Intellectual Property Law does not grant libraries the faculty to reproduce the work in order to provide copies to the users.

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

yes

Please comment:

Does not apply.

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 exceptions only apply to non-profit libraries or archives.

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.

Salvadorian Intellectual Property Law does not mention a limitation in regards to the number of copies, but it states that it must be an individual copy and that the purpose for such copy has to be either safe keeping, the substitution of a deteriorated work or interlibrary lending. However, article 45c) states that "the reproduction by reprographic means, to the extent justified by the purpose, of articles, brief extracts or lawfully published short works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use is made in accordance with proper practice". This means that no specific number of copies are established, but the copies must be based on justified factors.

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.

No, there are no conditions as to the type of copyrighted work that may be used.

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:

performance and display for educational purposes is allowed as long as it is done by a legally accredited entity (schools, universities, etc.), and for non-profit purposes. Specifically, the Law provides the following exceptions:

Article 44. Art. 44. The following communications shall be lawful without the authorization of the author or payment of remuneration:

c) those recognized as being for exclusively educational purposes and which take place in teaching establishments, provided that there is no gainful intent.

Art. 45. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration:

the reproduction by reprographic means, to the extent justified by the purpose, of articles, brief extracts or lawfully published short works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use is made in accordance with proper practice

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

yes

Please comment:

As stated in question 3, reproduction is allowed for educational purposes, limited to brief extracts, articles and small works. The law does not grant the faculty to reproduce a complete work. Article 45, letter c) above referred is the one appropriate limitation for this case:

Art. 45. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration:

the reproduction by reprographic means, to the extent justified by the purpose, of articles, brief extracts or lawfully published short works for teaching or the holding of examinations at educational institutions, provided that there is no gainful intent and that such use is made in accordance with proper practice

Specially for anthologies the following limitation is the one that applies:

Art. 49-Đi.- It shall be lawful to reproduce brief fragments of literary, scientific or artistic works in publications or anthologies for the purposes of teaching, science, literary criticism or research, provided that the source is unmistakably indicated; that the texts reproduced are not altered; and that the reproduction does not conflict with the normal exploitation of the work or prejudice the legitimate interests of the author.

c) making translations;

yes

Please comment:

Salvadorian Intellectual Property Law does not incorporate translations as a licit use of the work. However, brief fragments of translations from protected works can be cited without legal restriction. Accordingly, it is not permitted to disclose an entire work as a translation of the same, but is acceptable to cite brief fragments of the same. Article 49 last part literally states:

For the same purposes and with the same restrictions, brief fragments may be published in translations. The entire article is as follows:

Art. 49-Đi.- It shall be lawful to reproduce brief fragments of literary, scientific or artistic works in publications or anthologies for the purposes of teaching, science, literary criticism or research, provided that the source is unmistakably indicated; that the texts reproduced are not altered; and that the reproduction does not conflict with the normal exploitation of the work or prejudice the legitimate interests of the author.

For the same purposes and with the same restrictions, brief fragments may be published in translations.

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

yes

Please comment:

Salvadorian Intellectual Property Law does not incorporate making available in digital networks for educational purposes as a licit use. Lack of regulation is due to the fact that the Intellectual Property Law was issued in the year 1993. Nevertheless, since these are uses for educational purposes, it can be considered as an exception also. Accordingly, it does not matter if the fragments are available in digital networks, what really matters are that the disclosure of these fragments is based on educational purposes. Therefore, even though our Intellectual Property Act does not incorporate this kind of disclosures, we believe that the same limitations of Articles 44, 45 and 49 apply for these actions also.

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

yes

Please comment:

Reproduction for research purposes is allowed, but the reproduction must be done on brief fragments of the work.

Reproductions is allowed for personal and family use, educational purposes, official government events with certain restrictions, judicial procedure based on the evidentiary value of the work and by the pres with certain restrictions.

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

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

The exceptions or limitations apply only to educational and research institutions, as long as the use is non-profit oriented. The law does not estate that the institution must be non-profit; it requires that the institution is legally incorporated and that the use is for non-profit purposes. For example a private school can make a copy of a work as a backup copy or due to the deterioration of the original work, but it cannot distribute it or sell such copy.

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.

There are no regulations in regard to the persons, the only condition is that the use must be done based on a non-profit activity, it does not matter if the institution is a non-profit organization or not. The reproduction must be done based on non-profit activities. However, in regard to libraries and archives, these entities must be a non-profit institution in order to have these exceptions.

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.

No, there are no conditions to that regard.

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?

No.

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

Yes, as members of the Bern Convention, the Three-Step test is applicable. In fact, the three step test is included into our Intellectual Property Law, specifically in article 45a), as follows:

Art. 45. With regard to works that have already been lawfully disclosed, the following shall be allowed without the consent of the author or remuneration:

(a) production of one copy of the work for the personal and exclusive benefit of the user, who shall have made it himself with his own facilities, provided that the normal exploitation of the work is not affected and the legitimate interests of the author are not unjustifiably prejudiced thereby

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).

Use under the exception or limitation 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?

As the exceptions or limitations are only applicable to non-profit activities, there is no remuneration

payable under the exceptions or limitations.

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

No, there is no special treatment for orphaned work.

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

No.

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?

yes

If so, please explain those efforts.:

recently Creative Commons International authorized Creative Commons El Salvador as an official chapter. Therefore, they are addressing the use of the Licenses to archives, libraries and other institutions.

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?:

there should be exceptions or limitations to copyright protection for educational and research institutions. As long as the activities comply with the three step test, and such use is destined to a non-profit purpose and limited to the making of a single copy but not the distribution which would directly affect the author. Nevertheless, Intellectual Property Law should include more limitations and exceptions to libraries and archives such as reproduction of entire Works for research purposes only.

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

yes

If yes, in relation to what activities? :

there should be exceptions or limitations to copyright protection for educational and research institutions. As long as the activities comply with the three step test, and such use is destined to a non-profit purpose.

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

yes

Why?:

Yes it is useful. The three-Step Test establishes easy to follow criteria which must be applied on a case by case basis. Such criteria allows the use of the work without undermining the right of the author and provides rules for the reasonable and legal use of the work.

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

No. The exceptions or limitations purpose is to allow licit uses of a work, for educational, research and personal use. If through a contract the right of fair use is limited, the author would be invading the legal sphere of conducts which in compliance with the three step test would not be affecting him directly, therefore contractually overriding the exceptions or limitation should not be allowed.

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

Yes, as limitations and exceptions work in favor of the author, international tendencies seek to generate further protection for the authors and the creation of special laws to regulate the activities of libraries.

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?

Due to changes in technology, and as the Salvadorian Intellectual Property Law was issued in the year 1993, it could be improved by incorporating regulations in accordance to the technological changes which have taken place since that date.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

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:

Does not apply.

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

They should be applied to all types of libraries, archives and other organizations, as long as the use of the work is for a non-profit purpose.

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

The exceptions or limitations should be applied to educational and research activities.

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

As long as the activities comply with the three step test, and such use is destined to a non-profit purpose and limited to the making of a single copy but not the distribution which would directly affect the author.

25) If yes to question 17):

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

They should be applied to all types of libraries, archives and other organizations, as long as the use of the work is for a non-profit purpose.

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

The exceptions or limitations should be applied to educational and research activities.

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

As long as the activities comply with the three step test, and such use is destined to a non-profit purpose.

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)?

The use under the exception or limitation should be permitted automatically, based on the criteria contained in the three step test and the national law of each country.

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?

No remuneration should be done for limitations and exceptions. however, if payment is required, the calculation should be less than the amount paid for the regular use of the work due to the purpose of such use, which would have to be educational or research oriented. The user of the work, (library, researcher, etc.), should be liable for making such payment, and it should be paid directly to the author or through copyright collecting societies or collective management organizations.

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

In the case of orphaned work, the remuneration could be less, but otherwise such works should not receive special treatment.

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

The exception of limitation should not be overridden by contract.

30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

Private organizations can generate programs to generate consciousness on the use within the exceptions and limitations being made by libraries and research facilities.

Summary

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.