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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?

no

If not please comment:

No, the Brazilian Copyright Act (Law no. 9,610/98) and no other Brazilian law provide for exceptions or limitations to copyright protection specifically for libraries and archives. The Brazilian Copyright Act does set forth a number of limitations on Copyright and the closest one to libraries and archives the Law provides for is the use of excerpts of protected works for the purposes of study, criticism or debate, as per Section 46, III of the aforementioned Law.

a) reproduction and/or distribution for the purpose of preservation or replacement;

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?

N/A, as the Law does not grant exceptions or limitations specifically for libraries and 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.
	N/A, as the Law does not grant exceptions or limitations specifically for libraries and archives.
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.
	N/A, as the Law does not grant exceptions or limitations specifically for libraries and archives.
5)	Does your law provide for exceptions or limitations to copyright protection for education and research institutions?
	no If not please comment: The Brazilian Copyright Act (Law no. 9,610/98) and no other Brazilian law provide for exceptions or limitations to copyright protection specifically for education and research institutions. However, as per the answer to question 1 above, the Law provides for the use of excerpts of protected works for the purposes of study, criticism or debate, as per Section 46, III of the aforementioned law. In addition, the Law provides for a specific exception for the use of notes taken in the course of lessons given in education institutions by the persons for whom they are intended, provided that their complete or partial publication is prohibited without the express prior authorization of the person who gave the lessons (Section 46, IV of the Law).
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?
	Only the limitation set forth in Section 46, IV mentioned above, which specifically refers to notes taken in the course of lessons given in education institutions.
7)	Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.
	N/A, as the Law does not grant exceptions or limitations specifically for libraries and archives. As mentioned in response to question 5, there are exceptions for the purposes of study, criticism and debate and for the use of notes taken during lessons in education institutions.
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.
	N/A, as the Law does not grant exceptions or limitations specifically for libraries and archives.

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

9)	<p>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?</p>
	<p>Although it is not possible to assert that exceptions and limitations to Copyright for libraries, archives, educational and research purposes are specifically allowed in Brazil, it is important to comment a specific case law that accepted other limitations and exceptions not specifically referred to in the Brazilian Copyright Act.</p> <p>It is represented by the Brazilian Superior Court of Justice's decision on an appeal^[1] in which it is stated that (i) exceptions and limitations to copyright are not exhaustively listed in Section 46 of the Brazilian Copyright Act since further exceptions and limitations may be construed by basically analyzing the supremacy of constitutional rights over infra-constitutional rights. In other words, the decision sets forth that exceptions and limitations to copyrights must be primarily based on the fundamental rights (provided for by the Brazilian Constitution), such as access to culture, right to education, privacy, freedom of speech and national development, and not be strictly limited to a simple list in an infra-constitutional law. On the other hand, the decision also highlighted that the assessment of exceptions and limitations to Copyright must always be made under rigid and strict criteria and the Berne Convention's Three-Step Test must always be complied with.</p> <p>Footnotes</p> <p>1. REsp 964.404 - ES (2007.0144450-5), Terceira Turma, Ministro Paulo de Tarso Severino, March 15th, 2011.</p>
10)	<p>Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?</p>
	<p>Not specifically, as the Law does not grant exceptions or limitations specifically for libraries and archives.</p>
11)	<p>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).</p>
	<p>N/A, as the Law does not grant exceptions or limitations specifically for libraries and archives.</p>
12)	<p>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?</p>
	<p>N/A, as the Law does not grant exceptions or limitations specifically for libraries and archives.</p>
13)	<p>Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.</p>
	<p>No.</p>

14)	Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?
	No, but as mentioned in response to question 9 above, case law has determined that the list of limitations and exceptions to Copyright is not exhaustive.

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.:
	Changes to the Brazilian Copyright Act are currently being discussed and a proposed bill of law is currently under review of the Ministry of Culture. In the current proposal for the bill of law, there are provisions to allow libraries and archives to reproduce existing and protected works for the purposes of conservation, as well as to make protected works available to the public for the purposes of study. The Brazilian Association for Intellectual Property (ABPI) also addressed this matter, issuing Resolution no. 37, of October 20 th , 2005. The Resolution suggests an amendment to Section 46 of Law no. 9,610/98 (the Brazilian Copyright Act), which lists the exceptions and limitations to Copyright. The ABPI suggests the broadening of the scope of the list of limitations and exceptions, adding provisions to allow the partial or entire reproduction, distribution and use of intellectual works for purposes of preserving or studying the work, provided that moral rights are preserved, and provided that (i) the purpose of the reproduction, distribution or use will not be essentially commercial; and (ii) the reproduction, distribution or use does not hamper the normal exploitation of the work. The Resolution was submitted to the House of Representatives on December 2 nd , 2005, but has not become a bill of law. It does fit with the current proposals for the bill of law, currently undergoing review at the Ministry of Culture.

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?:
	Yes, in line with the ABPI's studies and reports, there should be exceptions and limitations to copyright for libraries and archives primarily for information, preservation and access to information and culture purposes.

17)	Should there be any exceptions or limitations to copyright protection for education and research institutions?
	yes If yes, in relation to what activities? :
	Yes, on the same basis as the answer to question 16, exceptions and limitations to copyright for educational and research institutions shall also be established for activities strictly related to the aim of those organizations, preservation of works, provided that moral rights of the authors are respected.

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

Why?:

Yes, the Three-Step Test should always be complied with when assessing whether an exception or limitation to copyright is acceptable or not, since it encompasses all main criteria that aim at protecting the author and his work.

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

No. Considering the reflections above, exceptions and limitations are constitutionally based and, thus, shall not be overridden by contract.

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

We understand that remuneration shall only be payable for the activities described in 16) and 17) above in case the use of protected works are likely to hamper the normal exploitation of the works by the author or the owner.

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?

The Brazilian Copyright Act currently in force could be improved in the event it is amended to encompass the exceptions and limitations mentioned herein, by allowing certain exceptions, in line with the moral rights of the author and the constitutional rights, access to information and to culture.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Yes, considering the globalization and range of possibilities for the exchange of information among users of copyrighted works around the world.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

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

24) If yes to question 16):

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

Such exceptions and limitations should mainly apply to non-profit organizations, public libraries and public archives certified by the Government.

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

The exceptions and limitations should apply to the use, copying and reproduction of copyrighted work for the purposes of preservation thereof and access to culture and education, respecting the moral rights of the author.

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

Under the limited scope of use during lessons, in the course of educational activities or activities at non-profit institutions, provided that there is no economic harm to the author, etc.

25) If yes to question 17):

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

Such exceptions and limitations should mainly apply to non-profit organizations and public education and public research institutions certified by the Government.

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

The exceptions and limitations should apply to the use, copying and reproduction of copyrighted work for the purposes of preservation thereof and access to culture and education, respecting the moral rights of the author.

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

Under the limited scope of use during lessons, in the course of educational activities or activities at non-profit and public institutions, provided that there is no economic harm to the author, etc.

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)?

Automatically without any further action, subject to conditions to be complied with, to be determined by a change in the current Copyright Act.

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 remuneration for use under an exception or limitation should be calculated on the basis of the market value of the work and the number of copies used or the public/audience reached. Payment should be made by the relevant institution which made the work available to the public, subject to Government's incentives, and to a collecting society which would remunerate the authors/owners.

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

There should be an obligation, placed on the institution making the work available to the public, to be sufficiently equipped for and providing evidence that it had unsuccessfully searched for the copyright holder without success. In those cases, the institution would pay a standard fee to the collecting society for future remuneration of the author, such fee to be kept under escrow by the collecting society for a certain period of time and, if not claimed, to be invested in its own activities.

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

Exceptions and limitations should never be overridden by contract since they are based on constitutional provisions that must be observed by private entities.

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?

Those institutions should aid the government authorities, the Ministry of Culture and the ABPI and other representative organisations to draft and amend the existing Copyright Act, to add the aforementioned exceptions and limitations and regulate their applicability.

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.