



Date: 11th June 2015

Q246

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

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Date	11-06-2015

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:

Under the Canadian Copyright Act ("the Act"), it is not an infringement for a qualifying library, archive or museum, or any person acting under their authority, for the purposes of maintaining or managing their permanent collection, or that of another library, archive or museum, to make a copy of a published or unpublished work or subject matter (i.e. sound recordings, performer's performances) in that collection where it: (i) is rare or unpublished and is, or is at the risk of becoming deteriorated, damaged or lost; (ii) is for the purpose of on-site consultation and the original cannot be used because of its condition or the atmospheric conditions under which it must be kept; (iii) needs to be in an alternative format because the original is considered to be in a format that is, or is becoming, obsolete or the technology required to use the original is, or is becoming, unavailable; (iv) is for the purpose of internal record-keeping and cataloguing; (e) is for insurance purposes or police investigations or (v) is necessary for restoration.

However items i, ii and iii do not apply if an appropriate copy is commercially available.

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

yes

Please comment:

A library, archive and museum, or any person acting under their authority, may do, on behalf of a patron of another library, archive or museum, anything it could do for their own patrons who are exercising their rights under the fair dealing provisions of the Act. These would be the same actions as discussed under (c) below and could include making and distributing a single copy of a work at one library, archive or museum for the benefit of a patron of a different library, archive or museum.

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:

It is not an infringement for a library, archive or museum, or a person acting under their authority, to do anything on behalf of a patron that the patron could do themselves under the fair dealing sections of the Act, for example, this would include reasonable copying, distributing, telecommunicating) of a work for the purposes of (a) research, private study, education, parody or satire or (b) criticism or review. In respect of (b) it is also necessary to cite the source of the work and, if it is given in the source, the author of the work, the performer of the performance, and/or the maker of the sound recording.

More specifically, it is not an infringement for a library, archive or museum, or anyone acting under their authority, to make for a patron engaged in research or private study a print copy of an article, or part of an article, published in (i) a scholarly, scientific or technical periodical or (ii) a newspaper or non-scholarly, scientific or technical periodical, if the newspaper or periodical was published more than a year before the copy was made. Part (ii) of this exemption does not apply to works of fiction, poetry or dramatic or musical works.

In addition archive can make a copy of an unpublished work deposited in its archive for a patron conducting research or private study, subject to certain restrictions discussed under question 3 below.

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

yes

Please comment:

The Copyright Act provides a two part procedure for insulating libraries, archives and museums from liability for offering patrons photocopying machines on their premises.

(1) there is no infringement for copies made on such machines where the machines have been installed with the approval of the library, archive or museum and there is affixed, in a prescribed manner and location (which can be specified in government regulations), a notice warning against copyright infringement.

(2) the exemption only applies if: (i) the library, archive or museum has entered into an agreement with a collective society authorized to grant licenses on the copyright owner's behalf; (ii) the Copyright Board of Canada has fixed royalties/licence terms; (iii) a tariff by this Board has been approved or (iv) a collective society has filed a proposed tariff with this Board for approval.

This exemption will also apply where a library, archive or museum enters into an agreement directly with a copyright owner concerning that owner's works.

It is also not infringement for the Librarian and Archivist of Canada to make copies of various works and subject matter for various purposes, including preservation, as set out in the *Library and Archives Act of Canada*.

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?

These exceptions apply only to (a) non-profit libraries, archives and museums that hold and maintain a collection of documents or other materials that are open to the public or to researchers and (b) any other non-profit institutions that may be prescribed by regulation.

Further the activities exempted under many of these sections must be carried out without motive of gain (i.e. at cost).

In addition, it should be noted that the exceptions and limitations to infringement provided for educational institutions (see below) also apply to any library, archive or museum that forms part of an educational institution.

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.

The exemption for preservation and replacement purposes, discussed under 1(a) above, only permits the making of a single copy. If a person must make an intermediate copy in order to make the copy under this exemption, he/she must destroy that intermediate copy as soon as it is no longer needed.

Furthermore, the exemptions allowing the library, archive or museum to make a copy where it (i) is of a rare or unpublished work that is, or is at the risk of, becoming deteriorated, damaged or lost or (ii) needs to be in an alternative format because the original is considered to be in a format that is, or is becoming, obsolete or the technology required to use the original is, or is becoming, unavailable, do not apply where there is an appropriate copy commercially available and in a medium and of a quality to meet the purposes of those sections.

The library, archive or museum can only rely on the exemption allowing it to provide a patron with a print copy of an article in a newspaper or periodical, as discussed above in section 1(c), if it (i) provides a single copy of the work and (ii) informs the patron that the copy is to be used solely for research or private study and that any use of the copy for any other purpose may require the authorization of the copyright owner.

A library, archive or museum, or person acting under their authority, may only provide a digital copy to a requesting patron of another library, archive or museum if it takes measures to prevent that patron from (i) making any further reproductions other than a single print copy and (ii) communicating the digital copy to another and (iii) using the digital copy for more than 5 business days from the day on which it was first used.

Any intermediate copies made to facilitate making that copy for the patron must be destroyed once the patron receives the copy.

An archive can only provide a copy of an unpublished work to a patron engaged in research or private

study where (i) the person who deposited the work, at the time of the deposit, if a copyright owner, did not prohibit its copying, nor has any other copyright owner prohibited its copying; (ii) the archive informs the person depositing the work that it may be copied for these purposes and (iii) the patron is provided with a single copy and informed it is to be used solely for research and private study and that any other uses may require the authorization of the copyright owner.

Further as mentioned above these activities exempted must be carried out without motive of gain (i.e. at cost).

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.

Although not expressly stated, it can be assumed the exemptions would only apply to copies made from lawful copies. The exemptions aimed at preservation and replacement of materials expressly only apply to materials existing in the library's, archive's or museum's permanent collections.

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:

It is not an infringement of copyright for an educational institution or person acting under the authority of an educational institution to reproduce a work or do any other act necessary to display the work for the purposes of education or training on the institution's premises. However, this exception does not apply if the work is commercially available in a medium that is appropriate, giving consideration to: (i) the availability of the work on the Canadian market within a reasonable time and for a reasonable price, and if it may be located with a reasonable effort or (ii) the availability from a collective society of a licence to reproduce the work, to perform it, or to communicate the work to the public by telecommunication, which licence is available within a reasonable time and for a reasonable price, and may be located with reasonable effort.

Moreover, the Canadian statute creates an exception to copyright infringement for performances by educational institutions for educational or training purposes before an audience primarily of students, instructors or those responsible for setting the institution's curriculum, so long as the act is not done for profit. The exception includes the following acts: (a) the live performance in public, primarily by students of the educational institution, of a work; (b) the performance in public of a sound recording, or of a work or performer's performance that is embodied in a sound recording; (c) the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication; and (d) the performance in public of a cinematographic work.

The above-described exceptions and limitations under the Canadian statute do not apply where certain excepted actions are carried out with motive of gain. This is defined under the Canadian *Copyright Act* to involve no more than a recovery of the costs, including overhead costs, associated with the excepted activity.

Finally, under the Canadian statute, educational institutions and those acting under their authority can make a copy of a news program or a news commentary program (but not a documentary) at the time the work is communicated to the public by telecommunication for the purposes of performing the copy for students of the educational institution for educational or training purposes, and perform that copy before an audience of primarily students of the institution on its premises for educational or training purposes. The educational institution must assign a reference code to the copy and mark it on the copy as well as the educational institution identifier code, if one is assigned by a collective society. Further, unless the copy is destroyed within 72 hours of making it, the educational institution must complete an information record in the form set out in the schedule to the Regulations regarding the copying of the program, work or subject matter; all performances of the copies for which royalties are payable; and the destruction of the copy. This record must be forwarded to the collective society in accordance with the Regulations.

The exceptions and limitations under the Canadian statute do not apply where the communication to the public by telecommunication of a work that would otherwise receive the exemption was received by unlawful means.

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

yes
Please comment:

There is an exception for reproduction for examinations. Under this exception, it is not an infringement of copyright for an educational institution or person acting under its authority to (a) reproduce, translate or perform in public on the premises of the educational institution, or (b) communicate by telecommunication to the public situated on the premises of the educational institution a work as required for a test or an examination. However, this exception does not apply if the work is commercially available in an appropriate medium, having regard to the purposes set out in our answer to Question 5(a) above.

Moreover, this exemption does not apply where the excepted activities are carried out with motive of gain, as explained in our answer to Question 5(a) above.

c) making translations;

yes
Please comment:

Translation is permitted for the making of examinations, in the circumstances described in our answer to Question 5(b) above.

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:

The Canadian statute facilitates distance education by providing an exception to infringement for an educational institution or person acting under its authority to (a) to communicate a lesson by telecommunication for educational or training purposes to students enrolled in a course of which the lesson forms a part or to persons acting under the authority of the educational institution; (b) to make a fixation of the lesson for the purpose of the act referred to in paragraph (a); or (c) to do any other act that is necessary for the purpose of the acts referred to in (a) and (b). Under this section, lesson is defined to mean "lesson, test or examination or part of one" Students enrolled in such

courses receiving a lesson by means of telecommunication are deemed to be “on the premises of the educational institution while receiving or participating in the lesson.”

The Canadian statute provides that it is not an infringement of copyright for a student who has received a lesson by means of communication by telecommunication to reproduce the lesson in order to be able to listen to or view it at a more convenient time. However, the student must destroy the reproduction within 30 days after the day on which the students who are enrolled in the course to which the lesson relates have received their final course evaluations.

Under subsection (6) of the same provision of the Canadian statute, certain conditions attach to the exception for lessons. The educational institution must destroy any fixation of the lesson within 30 days of the final evaluation of the course, take reasonable measures to limit the communication to students enrolled in the applicable course, take reasonable measures to prevent the students from fixing, reproducing or communicating the lesson other than as provided above and take any other measures as may be prescribed by regulation.

With respect to digital reproductions of paper works, the Canadian statute provides that it is not an infringement of copyright for an educational institution with a reprographic reproduction licence for works in a collective society’s repertoire for educational purposes to (a) make a digital reproduction of a paper form of any of those works of the same general nature and extent as the reprographic reproduction authorized under the licence; (b) communicate the digital reproduction by telecommunication for an educational or training purpose to persons acting under the authority of the institution; or (c) to do any other act that is necessary for the purpose of the acts referred to in (a) and (b). A person acting under the authority of the educational institution who has received the work under (b) may also print one copy of the work. Further conditions and restrictions apply to these particular exemptions, as explained below.

An educational institution that makes a digital reproduction of a work in paper form must pay the collective society royalties, take measures to prevent the digital reproduction from being communicated by telecommunication to persons not acting under authorization of the institution, and take measures to prevent those to whom the reproduction has been communicated from printing more than one copy.

Further, an educational institution may not make a digital reproduction of a work under the exemption if the institution has entered into a digital reproduction agreement with a collective society governing those acts; there is a certified tariff applicable to those acts; or the institution has been informed by the collective society that the owner refuses to authorize the collective society to enter into a digital reproduction agreement.

The Canadian statute also limits remedies in the case of any proceedings against educational institutions or persons acting under their authority in the context of the foregoing exemptions. For educational institutions, very generally damages will be limited to the amount of royalties that would have been payable under any digital reproduction licence in respect of the work or of a work of the same category for the acts complained of. For persons acting under the authority of educational institutions, no damages can be claimed where such person prints one copy of a work that is communicated to such person by telecommunication, and where it was reasonable for such a person to believe that the communication was made in accordance with the applicable exemption

e)	reproduction and/or distribution for research purposes; or
	no
	Please comment:
	There are no specific exceptions <i>per se</i> for research institutions that are not educational institutions. However, the Canadian statute contains a generic “fair dealing” exception, which applies generally

to research and education purposes.

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

yes
if so, what activities?:

The reproduction for broadcast exception of the Canadian statute permits an educational institution or person acting its authority to make a single copy of a work that is communicated to the public by telecommunication and keep the copy for up to 30 days to decide whether to perform the copy for education purposes. Under subsection (2) of the same provision, if the copy is not destroyed within 30 days, the educational institution will be deemed to be infringing copyright unless it pays any royalties and complies with any other terms fixed by the Canadian statute. Additionally, the educational institution making a copy of a broadcast must keep a record of certain information related to the copy, its destruction, any performance and royalties payable. The educational institution must mark the copy in the manner prescribed by regulation. Specifically, the educational institution must assign a reference code to the copy and mark it on the copy as well as the educational institution identifier code, if one is assigned by a collective society. Further, the educational institution must complete an information record in the form set out in the schedule to the Regulations regarding the copying of the program, work or subject matter; all performances of the copies for which royalties are payable; and the destruction of the copy. This record must be forwarded to the collective society in accordance with the Regulations.

Under the Canadian statute, it is not an infringement of copyright for an educational institution or a person acting under its authority to perform the copy of the work that is communicated to the public and kept as above for performance, provided the performance is for educational and training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution, and provided royalties are paid and any other terms and conditions fixed by the Canadian statute for the performance in public are complied with.

In addition, the exemption for installing photocopying machines, as discussed above in our answer to Question 1(d), also applies to educational institutions. Photocopying by students, instructors or staff at the educational institution will not constitute an infringement by the educational institution where a copy is made of a work in printed form, the machine is installed with approval of the educational institution, and a notice warning of infringement is affixed. The contents of the warning are prescribed by regulation, under which the warning must include that works protected by copyright may only be copied by the photocopier if authorized under the *Copyright Act*, by the copyright owner or by virtue of a licence agreement. Moreover, this exception only applies where the educational institution has an agreement with a collective society, the Copyright Board has set royalties and terms, a tariff has been approved, or the collective society has filed a proposed tariff.

The Canadian statute also includes an exemption for short passages from published literary works - in which copyright subsists and where the literary works themselves were not published for the use of educational institutions - in a collection that is mainly composed of non-copyright matter intended for the use of educational institutions and so described in the title and any advertisements issued by the publisher. Under the Canadian statute, the exemption for literary collection applies where (a) not more than two passages from works by the same author are published by the same publisher within five years; (b) the source from which the passages are taken is acknowledged; and (c) the name of the author, if given in the source, is mentioned.

Finally, where a work is available through the Internet, it is not an infringement of copyright for the educational institution or person acting under its authority to reproduce it, communicate it to the public by telecommunication, perform it in public if the public is primarily students of the institution, or do any acts necessary for the purposes noted. However, the educational institution or person acting under its authority must mention the source, and, if given in the source, the name of the

author, performer, maker or broadcaster. Moreover, the exception does not apply if the work is protected online by a technological measure restricting access or doing the specific act, or if a clearly visible notice is provided prohibiting the specific activity. Lastly, the exception does not apply if the educational institution or person acting under its authority knows or should have known that the work or other subject-matter was made available through the Internet without the copyright owner's consent.

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?

These exemptions only apply to non-profit or government institutions. Under the Canadian statute, "educational institution" is defined to mean either "(a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education; (b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training; (c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b); or (d) any other non-profit institution prescribed by regulation."

Additionally, it should be noted that the exceptions and limitations to infringement provided for any library, archive, or museum or also apply to any library, archive, or museum that forms part of an educational institution.

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.

Yes. See our answers above for conditions attaching to the specific 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.

The exception for performance by an educational institution or a person acting under its authority in public of the work stipulates that the exception does not apply where the work in question is infringing and the person responsible for the performance has reason to believe it is an infringing copy.

The exceptions to infringement of copyright provided for performance and in respect of a copy of work communicated to the public by telecommunication will not apply where the telecommunication was received by unlawful means.

Likewise, the exception for communication by telecommunication of a lesson to students who are enrolled in the course does not apply where a work used in the lesson constitutes an infringement or where use of the work in the lesson requires consent of the copyright owner. Neither does the exception for works available on the Internet apply where the educational institution should have known the work was made available without the owner's consent.

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?

All of the specific exemptions discussed in questions 1 through 9 arise from specific statutory provisions in the Act.

In addition, Canadian case law has recognized similar exemptions in respect of libraries providing copies of works to their patrons for research and private study purposes and installing photocopying machines on their premises to facilitate copying materials for those same purposes, as long as they post appropriate notices warning against copyright infringement.

Finally there are general fair dealing exceptions for research, private study and education.

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

Canada has signed the Berne Convention and the WCT, but such treaties are not self-executing in Canada. Although the Act does not contain the express, or similar, wording of the Three Step test, all of the exceptions in the Act comply with the Three Step test. In respect of fair dealing exceptions in general, the question of what is "fair" would be interpreted in Canada consistent with the application of the three step test.

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).

Most exceptions are granted automatically; however, some require a licence from an appropriate copyright collective or the copyright owner. For instance, one exemption for educational institutions, libraries, archives and museums in respect of photocopying machines requires these institutions to have obtained a licence from an appropriate copyright collective or the copyright owner directly.

By way of further example, the exceptions and limitations for digital reproductions by educational institutions under the Canadian statute also require that an educational institution have a reprographic reproduction licence.

See above for exceptions that require specific measures to be taken by educational institutions and those acting under their authority in order for exemptions and limitations to apply.

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 for any of the exceptions except for the above-noted license required from a copyright collective or individual copyright owner for copying on photocopying machines installed in libraries, archives and museums. The remuneration paid to a collective is in most cases, set by the Copyright Board of Canada, or by an individual copyright owner where there is a direct license with the owner. It is payable by the library, archive or museum.

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 provision for libraries, archives, museums or educational institutions. Anyone wishing to obtain a copyright license for such works may apply to use such works.

Canada's "orphan works" regime is a licensing regime. A person who wishes to use certain works, whose owner cannot be located, applies to the Copyright Board for a licence to be issued.

However, a licence is not needed in the special case where the intended use is not protected by copyright, i.e. the use falls within the exceptions or limitations to copyright protection for libraries, archives, education institutions, and research institutions. Since the regime was enacted, educators or educational institutions have accounted for 13% of all applications. A small percentage of all applications have been rejected, usually because no licence was needed.

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

It appears to be an open issue whether the exceptions or limitations can be overridden by contract. The *Copyright Act* does not appear to permit or prohibit contracting out of the exceptions or limitations to copyright protection for libraries, archives, education institutions, and research institutions.

On the one hand, privately negotiated contracts should be enforced. On the other hand, contracts in unlawful restraint of trade are contrary to public policy and, therefore, unenforceable. Contracts will only be upheld if they are reasonable in reference to the interests of the parties concerned and the interests of the public in discouraging restraints on trade.

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right.

Accordingly, to the extent that overriding any user rights under the exceptions or limitations is not reasonable in reference to the interests of the public, then the exceptions or limitations cannot be overridden by contract, but no case has addressed the issue of whether it is against public policy to contract out of such rights

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.:

Canada has a significant number of "collectives" authorized by the Copyright Act. These collectives have collected rights to copyrights or portions of copyrights and will license them at rates approved by the Copyright Board of Canada to persons who find it more convenient to obtain a blanket license rather than a license for any individual work. Such collectives include non-profit organizations who manage literary, dramatic works and educational texts such as Access Copyright and agencies which control music rights such as SOCAN (Society of Composers, Authors and Music Publishers of Canada), CMRRA (Canadian Musical Reproduction Rights Agency), and Re:Sound. They provide copyright licenses for Canadian libraries, archives, educational and research institutions, as required and collect the approved royalties and remit them to the copyright owners. In addition there is a collective which collects the levy generated by the sale of blank audiovisual media and distributes it to certain of the collectives.

Much of the copyright licensing in Canada to all organizations (including libraries, archives and educational and research institutions) occurs through the collectives at the tariff rate established by the

Copyright Board.

There are fair dealing exceptions for fair dealing for the purpose of research, private study, education (among others) The recent case law has expanded these rights as “user rights”, and have allowed educational institutions, for example, to benefit from the private study rights of students in respect of individual copies made for a student’s own use. In addition there are numerous specific exemptions for such institutions as set out in the answers above. This may result in a re-evaluation of the activities that require a license from the collectives and the tariff rate that may apply.

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 order to balance and meet the competing public benefit purpose of copyright law, i.e. to provide reasonable public access to artistic and scientific works while also providing adequate financial incentives to creators to create further works. Non-profit public libraries, archives and museums are particularly important institutions to provide such access and require reasonable exceptions to preserve and maintain their collections and to facilitate the public to conduct research and private study without onerous copyright consequences. These exceptions were last updated in 2012. Except as noted for possible study in the answer to Question 24, additional exceptions are not necessary at this time.

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

yes

If yes, in relation to what activities? :

Canada currently has many exceptions and limitations to copyright protection for educational and research institutions, as noted above. These exceptions were last updated in 2012. Except as noted for possible study in the answer to Question 24, additional exceptions are not necessary at this time.

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

yes

Why?:

See the answer to question 10 above. The Three-Step Test is a useful first start but may be too general to be useful in many particular situations.

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

At this time, the Canadian group believes that this issue should receive further study. In general, privately negotiated contracts should be enforced unless contrary to public policy, but the issue should be studied to determine if allowing such enforcement could be open to abuse.

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

Remuneration should be paid for exempted activities, where those activities interfere with the normal commercial exploitation of the work or where the exemptions specifically provide for a tariff to be set by an independent quasi-judicial body (such as the Copyright Board). However the Canadian Group recognizes the importance of educational institutions, public libraries, archives and museums being able to offer reasonable access to their collections to the public for educational, research and cultural enrichment purposes.

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 current exemptions only apply to Canadian non-profit educational institutions. Given distance education and the internet, consideration should be given as to whether it is advisable to extend these specific statutory exceptions to foreign non-profit educational institutions. Furthermore as many of the exceptions already provide that they only apply where there is no motive of gain, it is worth studying whether the exemptions should apply to certain for-profit educational institutions, archives or museums in respect of very limited activities that are not carried out with motive of profit or gain. However the Canadian Group suggests further study and makes no recommendation at this time.

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?

24) If yes to question 16):

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

To non-profit public libraries, archives and museums (or perhaps those other institutions whose specific activity is carried out without motive of gain), as reflected in international agreements and in the Canadian Act.

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

Preservation and maintenance of collections, fair dealing/fair uses by patrons for appropriate non-commercial purposes, such as research, private study criticism and review, as reflected in international agreements and the Canadian Act.

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

The exceptions should apply only to the use of lawful copies of works/materials that have been acquired by and form part of the permanent collection of a library, archive or museum. Generally

speaking, the making of single or, certainly only small numbers of copies for non-commercial purpose and without motive of gain should be permitted. With the speed and number of new technologies emerging and becoming mainstream, greater leeway may need to be given to libraries, archives and museums to make and provide digital copies, provided safeguards can be developed to prevent, or at the very least discourage further electronic dissemination of these digital copies.

25) If yes to question 17):

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

See answers to question 24 to apply *mutatis mutandis* to educational and research institutions as well.

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

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

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

26) Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?

Generally it should be permitted automatically where the exception is narrow and has no possibility of interfering with the commercial exploitation of the work. It should be subject to review by the Copyright Board or the Court where the exception requires a considered balance between the rights holders and the users.

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?

See answer to question 20.

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

There is no need for special treatment. Where there are exceptions that apply to libraries, archives and educational and research institutions, there is no need for the orphan works exemption. Where those exceptions do not apply, the orphan works provisions should apply to all equally. However this is not to say that the orphan works provision could not use improvement.

It is noted that authorship should be attributed, if the author is known, as a condition for using orphan works generally. Attribution would clarify that the work is the product of another author and the copyright is owned by another, facilitate the subsequent location of copyright owners, and help avoid moral rights issues.

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

See the answer to Question 19.

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 should be decided by a quasi-judicial independent body such as the Canadian Copyright Board taking into account the three step test and considering appropriate economic data.

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.