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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:

Under Chinese law, libraries, archives, memorial halls, museums, art galleries, and other such organizations may reproduce "works among its collections, for the purpose of displaying or preserving an edition of the work."

These exceptions to copyright protection, which include the rights to use the work without authorization from the copyright owner and without payment of remuneration, are limited, however, by the fact that author's name and the title of the work must be indicated and other rights to which the copyright owner is entitled may not be infringed. The basis for these rules are found in The Copyright Law of the PRC, pertinent sections found below.

Article 22 of Copyright Law of PRC:

Under the following circumstances, a work may be used without authorization from the copyright owner and without payment of remuneration thereto, provided that the author's name and the title of t

he work shall be indicated and other rights to which the copyright owner is entitled under this Law shall not be infringed:

.....

(8) Reproduction made by a library, archive, memorial hall, museum, art gallery, etc., of a work among its collections, for the purpose of displaying or preserving an edition of the work;

.....

The provisions of the preceding paragraph are applicable to limiting the rights of publishers, performers, producers of sound or visual recordings, radio stations, and television stations.

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

no

Please comment:

The Chinese law doesn't provide for exceptions or limitations to copyright protection in relation to reproduction and/or distribution for the purpose of 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:

Regarding digital reproduction and dissemination, there also various exceptions to copyright protection found under Chinese law. Again, without the copyright owners' authorization or payment of remuneration, libraries, archives, memorial halls, museums, art galleries, and other such organizations, 1) may make available via an information network legally published digital works within their respective collections and 2) may reproduce works in digitalized form for the purpose of displaying or preserving an edition. The main basis for these rules are found in the Regulations on the Protection of Right of Dissemination via Information Network, pertinent sections found below.

Article 7 of Regulations on the Protection of Right of Dissemination via Information Network:

Libraries, archives, memorial halls, museums, art galleries, etc. may make available via an information network to those who receive their services inside their premises legally published digital works within their respective collection and may reproduce works in digitalized form for the purpose of displaying or preserving an edition thereof, without the copyright owners' authorization or payment of remuneration thereto, from which direct or indirect gain of economic benefits shall be prohibited, unless the parties agree otherwise.

Works reproduced in digitalized form for displaying or preserving an edition thereof, as specified in the preceding paragraph, shall be works that are already damaged or could be damaged imminently, works that are lost or stolen, or works of which the storage format is outdated, and it is impossible to purchase such works or they may only be purchased on the market at a price obviously higher than the price listed on the label.

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

no
Please comment:
The Chinese law doesn't provide for exceptions or limitations to copyright protection in relation to any other activities.

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 or limitations apply to such organizations generally. However, with regard to digital dissemination of legally published digital works and reproduction of works in a digitalized form (as mentioned just above) direct or indirect gain of economic benefits is strictly prohibited.	

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.
Yes. The conditions are as follows:  (1) The reproduction of a work by such organizations must be for the purpose of the display or preservation of the copy of the work.  (2) Digital reproduction is not excluded, but it can only be done for works that are 1) already damaged (or are in imminent danger of becoming damaged), 2) lost or stolen, 3) whose storage format is outdated, and 4) re-purchasing the original work through ordinary channels is impossible (or then-current market price is substantially higher than the price listed on the label of the original).	

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.
Yes. The conditions are as follows:  (1) The general reproduction can only be performed on works that are already in the collection of libraries or archives.  (2) Works made available over an information network in digitized form must be "legally published digital works within their respective 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;
no	
Please comment:	

“Performance” and “display” are not mentioned specifically under Chinese law.

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

yes

Please comment:

In order to implement the system of nine-year compulsory education in China, a textbook may contain compilations of segments of published works or short written works, musical works, fine art works printed in single-piece format, or photographic works. The main basis for these rules are found in the Copyright Law of PRC, pertinent sections found below.

Article 23 of Copyright Law of PRC:

Where a textbook is compiled and published in order to implement the system of nine-year compulsory education and the State plans for education, the textbook may contain compilation of segments of published works or short written works, musical works, fine art works in form of single-piece, or photographic works that have been published, without having to obtain the copyright owners' authorization, except that the copyright owners have declared in advance that the exploitation is not permitted, insofar as the remunerations are paid and the authors' names and the works' titles are indicated, in accordance with the relevant provisions, and the other rights to which the copyright owner entitled hereunder shall not be infringed.

The provisions of the preceding paragraph are applicable to limiting the rights of publishers, performers, sound or visual recording producers, radio stations, and television stations.

c) making translations;

yes

Please comment:

Translating a published work for teachers' or scientific researchers' use in their classroom teaching or scientific research, provided that the translation copies shall neither be published nor distributed. The main basis for these rules are found in the Copyright Law of PRC, pertinent sections found below.

Article 22.1.(6) of Copyright Law of PRC

.....

(6) Translating, or reproducing in a small number of copies, a published work for teachers' or scientific researchers' use in their classroom teaching or scientific research, provided that the translation or reproduced copies shall neither be published nor distributed;

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:

In conjunction with the implementation of the system of nine year compulsory education in China, “courseware” may be produced by using segments of published works or short written works, musical works, fine art works printed in single piece format, or photographic works that have been published may be made available to registered students via information network by distance education institu

tions that produce or have lawfully obtained the courseware. The main basis for these rules are found in the Regulation on Protection of the Right to Network Dissemination of Information, pertinent sections found below.

Article 8 of Regulation on Protection of the Right to Network Dissemination of Information:

To implement the system of nine-year compulsory education and the State plans for education via information network, courseware may be produced by using segments of published works or short written works, musical works, fine art works in the form of a single-piece, or photographic works that have been published, without having to obtain the copyright owners' authorization, except that the copyright owners have declared in advance that the exploitation is not permitted. The courseware can be made available to registered students via information network by distance education institutions that produce or have lawfully obtained the courseware, subject to the payment of remuneration to the copyright owners.

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

yes

Please comment:

Reproducing a published work for teachers' or scientific researchers' use in their classroom teaching or scientific research, provided that the reproduced copies shall neither be published nor distributed, is also allowed - as is making that work available via an information network. The main basis for these rules are found in the Copyright Law of PRC and the Regulation on Protection of the Right to Network Dissemination of Information, pertinent sections found below.

Article 22.1.(6) of Copyright Law of PRC

.....

(6) Translating, or reproducing in a small number of copies, a published work for teachers' or scientific researchers' use in their classroom teaching or scientific research, provided that the translation or reproduced copies shall neither be published nor distributed;

Article 6 of Regulation on Protection of the Right to Network Dissemination of Information:

A work of another person may be made available via an information network without the copyright owner's authorization and payment of remuneration thereto when involving any of the following circumstances:

.....

(3) Provision of a published work, in a small amount, to a small number of teachers or scientific researchers for classroom teaching or scientific research;

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

no

If not please comment:

The Chinese law doesn't provide for exceptions or limitations to copyright protection for education and research institutions in relation to any other 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?

These exceptions or limitations apply to educational and research institutions generally.

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. The conditions are as follows:

(1).The reproduction of the woks should be in a small quantity.

(2).Only segments of published works or short written works, musical works, fine art works in form of single-piece, or photographic works that have been published can be compiled in textbooks or be used in courseware which is provided to registered students via information network, and the textbooks and courseware must be produced in order to implement the system of nine-year compulsory education and the State plans for education. In addition, remuneration should be paid and the authors' names and the works' titles need to be indicated. What's more, such activities are forbidden if the copyright owners have declared in advance that the exploitation is not permitted.

(3).There's no conditions as to the persons who may engage in the translation and reproduction, however, such activities can only be made for teachers' or scientific researchers' use in their classroom teaching or scientific research.

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.

Yes. The copyrighted work has to be a published work.

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?

While certain cases are set forth annually by judicial bodies as possessing educational value, as a country based in the civil law system, China does not subscribe to a system of *stare decisis* where decided cases have precedential value. Such exceptions and limitations mentioned above are provided by statute, such as that found in the Copyright Law of the PRC, the PRC Regulations on the Protection of Right of Dissemination via Information Network, and others.

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

China does not have the "Three-Step Test" or any other named test for the determination of the correct applicability of the exception or limitation under discussion. However, under Chinese rules and

regulations, generally speaking, such exceptions will only be available under certain conditions, such as libraries' display or reproduction, etc. (i.e., "special cases"); where the use of a published work does not affect the normal use of the work (i.e., "no conflict with normal exploitation"; and where the use does not harm, in an unreasonable manner, the copyright owner's lawful rights and interests (i.e., "no unreasonable prejudice to the legitimate interests of the author"). The main basis for these rules are found in the Regulations for the Implementation of Copyright Law of the PRC, pertinent sections found below.

Article 21 of the Regulations for the Implementation of Copyright Law of the PRC:

The use of a published work without the copyright owner's authorization, as stated in the relevant provisions of the Copyright Law, shall neither affect the normal use of the work, nor harm, in an unreasonable manner, the copyright owner's lawful rights and interest.

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).

It is permitted automatically so long as the author's name and the title of the work are indicated and other rights to which the copyright owner is entitled under Copyright Law are not infringed.

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?

Remuneration is payable in the circumstances which have been described above. The amount of remuneration is calculated as below:

a. for written works: ¥300 yuan per thousand characters;

b. for musical works: ¥300 yuan per piece;

c. for fine art works and photographic works: ¥200 yuan per work, but if it's used in the cover or back cover of the textbooks, ¥400 per work;

d. for phonograms: ¥50 for one piece.

The institutions who conduct certain activities are liable for make the payment, and the payment should be made to the authors or to the organization for collective copyright management which have been authorized by the authors.

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

There's no special treatment for orphan works for use within such exception or limitation.

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

Yes. If both parties of the contract, on their own free will, agree to override the exception or limitation, the contract shall be valid, but it would only be valid and binding between the two parties of such contract.

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, there is not.

## 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, there should be.

The exceptions or limitations should be related to the reproduction of copyrighted works made by libraries and archives for the purposes of preservation or replacement, whether the reproduction is in physical or digital form. This is because copyrighted works in physical format may be damaged or lost easily, and if there were not such limitations or exceptions to the complement of rights in copyright, the work could, in theory, disappear forever, which, for certain works, would be a loss for society as a whole.

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, there should be.

The exceptions or limitations should be related to the activities made by education and research institutions, such as translation, performance, display, or distribution - but for non-commercial purposes; and reproduction, distribution or making available via digital networks for compulsory educational purposes.

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

yes

Why?:

It is surely a useful test - and it has already been shown that the system in China is somewhat similar -- but difficulties and challenges still exist in its application.

It's useful because we can easily pick out many conditions which apparently cannot pass the test, and where, therefore, the exceptions or limitations would not be allowed. But it's still a difficult task to determine whether a certain activity would conflict with a "normal exploitation" of the copyrighted work



or whether such use would “unreasonably prejudice” the legitimate interests of the author. What exactly “normal exploitation” is (i.e., would it include both actual use and potential use), and to what extent we could determine an “unreasonable” degree of prejudice are questions not easily answered.

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

Yes, in our opinion, it should be.

Parties should be totally free to choose whether to forgo some rights or not. If both parties to a contract, of their own free will, agree to override the exception or limitation, which means the licensees (libraries, archives, educational and research institutions) themselves are willing to pay the copyright owners to get the authority, even though it's provided in the law that there may be no need for them to do so, such contract should be valid and the exception or limitation should be overridden. Nevertheless, said contract would only be valid and binding for and between the two parties of it and will not take effect on any other party, for whom the exception or limitation would still be applicable.

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

For the activity described in 16), no remuneration needs to be paid, because the reproduction by libraries or archives should only be done for the purpose of preservation or replacement in the event that the physical form of such works is (or may be) damaged or lost, such preservation/replacement, therefore, being necessary for the greater public interest.

For the use of copyrighted works for educational or research purposes described in 17), there's also no need to pay remuneration. Education and scientific research are extremely necessary and important for any country in the world. It's reasonable to encourage increasing education and scientific research by setting some limited exceptions on the protection of copyright.

However, for reproduction, distribution or making available via digital networks for compulsory educational purposes (although also for education), such acts can generate a profit, which in many cases can even be huge. Therefore, paying the authors remuneration would do little harm to education itself and is beneficial to the authors and the increased creation of artistic and literary works, at the same time.

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 way for Chinese law to provide the exceptions and limitations is to directly list the available conditions in the statute. But the conditions which are now listed can't contain all the possible activities which should be excepted from copyright protection and which also could meet the requirements of “Three-Step Test.”

For improvement, therefore, we suggest to add an **Article 22.1.(13)** to Copyright Law of PRC, which would provide language very similar to the “Three-Step Test, such as “other activities, in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”. In order to implement this added clause more effectively, we also suggest our copyright law to set out the range or the definition of what “certain special cases” would entail.

### III. Proposals for harmonisation

22)	Is harmonisation in this area desirable?
	yes Please comment:
	Yes. With IP crossing borders at a greater and greater rate, it would surely be a desirable situation where one could ascertain, with relative certainty, whether a work (or part of it, and from whatever nation) could be reproduced, distributed, displayed, etc. or not.

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:
	Setting out more specifically the exceptions and limitations that should exist under what circumstances and to what extent would surely prove helpful for member countries' legislative bodies to harmonize their own laws with that of the international community, with the hopes of creating a more efficient overall system.

24)	If yes to question 16):
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a)	to what libraries, archives and other organizations should these exceptions or limitations apply;
	These exceptions or limitations could apply to all kinds of libraries, archives and other organizations.

b)	to what activities should these exceptions or limitations apply;
	These exceptions or limitations could apply to all kinds of activities.

c)	under what conditions should the activities be undertaken or the copyrighted work used?
	In accordance with the Three-Step test -- and for which it would seem beneficial that harmonization would exist -- libraries, archives and other such organizations for which exploitation of the work in question was not directly or indirectly of economic advantage, should be able to avail themselves of the exceptions for utilization of the work (to the extent justified by the purpose), provided that such exploitation was not in conflict with normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the creator. If such exploitation engendered economic benefit, however, a more complex system with remuneration at a base-market value should flow to the authors/creators.

25)	If yes to question 17):
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a)	to what educational and research institutions should these exceptions or limitations apply;
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These exceptions or limitations could apply to all kinds of educational and research institutions.

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

These exceptions or limitations could apply to activities which are for educational or research purposes.

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

In accordance with the Three-Step test -- and for which it would seem beneficial that harmonization would exist -- education, research institutions and other such organizations for which exploitation of the work in question was not directly or indirectly of economic advantage, should be able to avail themselves of the exceptions for utilization of the work (to the extent justified by the purpose), provided that such exploitation was not in conflict with normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the creator. If such exploitation engendered economic benefit, however, a more complex system with remuneration at a base-market value should flow to the authors/creators.

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)?

No. The nature of the exceptions and/or limitations under discussion for not-for-profit entities such as libraries, archives, and educational and research institutions ostensibly are to make it easier for them to provide services to the public and society. If "further action," such as the searching for the correct rights holder or remuneration were necessary, that would seem to conflict the reason for the exceptions in the first place.

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?

A reasonable market-determined royalty fee would seem fair. The entity exploiting the rights should be liable for the payment. And the payment should be made to the legal holder of such rights to be exploited.

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

Special treatment does not need to be afforded orphan works, except that a diligent inquiry so as to ascertain the relevant right holder's identity should be required, so that the rights-holder that should receive remuneration may be appropriately receive such, while the user's continued bona fide reproduction and use of the copyrighted work should be reasonably protected.

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

If a contract is in place between interested parties, then there should be no circumstances where exceptions override the parties' legitimate intentions and purposes.

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?

The premises of the Three-Step test can be reconciled with the use of such private organizations, which may also serve as a protector of the creators' interests when users exploit the work beyond the purposes of the exceptions.

#### Summary

Under Chinese law, specifically the Copyright Law and the Regulations on the Protection of Right of Dissemination via Information Network, exceptions and limitations to copyright protection do exist to a certain degree and type for libraries, archives, memorial halls, educational and research institutions. The overall system of these exceptions seems to generally mirror, in fact, the "Three-Step Test" first elucidated in the Berne Convention 1886. But to date, Chinese legislation is somewhat vague on the amount and degree of the reproduction (or other type of exploitation) that may be acceptable under such exceptions, as well as the specific type of organizations that may be able to avail themselves of such exceptions and limitations. Harmonization and an overall expansion of rules in this area would therefore likely lead to a more efficient functioning of the copyright system.

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.

No, there aren't any other additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question