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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:

*Yes, according to the Danish Copyright Act (hereinafter DCA) art 16 institutions such as public archives, public libraries and other libraries, which are fully or partly subsidized by the Danish State, and governmental museums or museums approved according to the Danish Museum's Act, may in certain instances mentioned in art. 16, section 2-5, reproduce or distribute copies of protected works for use in connection with their work to the extent the exploitation is not for commercial purposes.*

*The instances mentioned in art. 16, section 2-5 are the following:*

*1. if the reproduction is made for the purpose of preservation or replacement,*

1. *if the copy of the work in the institution's possession is incomplete and the work cannot be acquired in normal trade or from the publisher,*

1. *if the work ought to be available for lending at a library but cannot be acquired in normal trade or from the publisher,*

1. *if reproduction is necessary to fulfill the duty according to the Danish law on Duty to Deliver Published Works*

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

yes

Please comment:

see above

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:

see above

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

yes

Please comment:

see above

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?

*As stated under 1) only public archives, public libraries and other libraries, which are fully or partly subsidized by the Danish State, or governmental museums or museums approved according to the Danish Museum's Act may be covered by the exemptions.*

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.

*There are no specific limit for how many copies may be reproduced in each instance mentioned in the law or precedence, but the number of copies that may be produced must be justified by the underlying*

*purpose behind the individual exemption.*

*The exemptions do not cover computer programs in digital form except for computer games. Computer programs in digital form may only be reproduced by the institution for back-up purposes or testing.*

*Furthermore only institutions with an actual legitimate interest in the particular work may perform a reproduction of a work which the institution deems important to its collection in accordance with 1 c) above. Mere faint interest in the work does not justify reproduction of a specific work*

*Finally the usage of the reproduced copies may be limited depending on the underlying purpose behind the individual exemption.*

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.

*In general according to DCA art. 11 the exemptions granted in the Danish Copyright Act to reproduce protected works require that the copy reproduced is a lawfully created and distributed copy. This however does not cover the exemption mentioned above under 1 d) according to DCA art. 11, section 3.*

*Furthermore most exemptions offered requires the institution to possess a copy of the protected work itself, except for 1 c) above.*

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:

*Yes according to DCA art. 13 education institutions may produce copies of protected works including recording of performances broadcasted via TV or radio on the condition that the institution has entered into a voluntary license agreement with a copyright administration organization approved under the rules set out in DCA art. 50. The use of the copyrighted material is limited to the purposes covered by the agreement. The license has as a consequence that also protected works created by persons, who do not have an agreement with the organization will be covered by the exemption and limitations.*

*In principle the rights granted to the institution may cover all the above under a) - f) mentioned to the extent the exploitation or distribution only takes place within the sphere defined in the license*

agreement.

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

yes

Please comment:

See above

c) making translations;

yes

Please comment:

see 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:

see above

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

yes

Please comment:

see above

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

yes

if so, what activities?:

see above

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 and limitations apply to all educational institutions that have entered into a license agreement with a relevant organization. Dancing schools are for some odd reason not covered.*

7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

*The law only provides for one exemption namely that the limitation does not allow for digital reproduction of computer programs. Besides this all types of activities may be covered by the exemption to the extent covered by the license agreement.*

- 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.

*Cinema movies are not covered by the limitation for as long as they are part of the movie theaters normal repertoire.*

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

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

- 9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation?

*As stated above the exemption regarding libraries and archives is codified in DCA art. 16 and the exemption regarding educational institutions are codified in DCA art. 13.*

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

*All though not specifically mentioned in the law, the exceptions or limitations are all drafted along the Three-Step Test principle, which for example leads to a general assumption that the limitations and exceptions in general should not be interpreted against the copyright holder.*

- 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).

*As stated above most of limitations or exceptions covered by this Question may be exercised without further conditions. However the limitations and exceptions pertaining to educational institutions require the entering in to a compulsory license agreement.*

*To the extent a license agreement is required the institution must contact the organization prescribed by law and negotiate the conditions for an agreement. There are model agreements available, but changes can be made to the extent the educational institution has special needs etc. the license agreements are normally valid for a certain period and must be renewed. In most license agreement the number of copies allowed under the agreement will be adjusted regularly based upon the actual use.*

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?

*The remuneration payable under DCA art. 13 is determined based upon the amount of copies being produced by the institution. The price is not the same for each copy as a certain discount is applied to larger agreements. The Institution as such is liable for making the payment and keeping track of the number of copies being produced and the conditions for their use. The payment is to be made to an organization approved by the State in accordance with DCA article 50.*

*The advantage of the compulsory license system is that the organization automatically represent all copyright holders within the specific field of business, whether or not they are members of the organization or not. The organization is obliged also to administrate money received for use of protected works created by a person, with whom the organization does not have an agreement, or whom the organization cannot identify. A person can specifically request that his or her works are exempt from the license system. This however is quite rare.*

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

*Denmark has implemented EU directive 2012/28/EU regarding orphan works. According to DCA chapter 6b a work will be deemed an orphan work, if it has not been possible through extensive and documented searches, to find the author. In order to qualify as an orphan work, the institution claiming the limitation, must submit the results of their extensive research to the Ministry of Culture. The search must be performed among sources of information available in Denmark. To the extent there are indications of foreign copyright, the search must be broadened to cover also relevant sources from such countries.*

*Libraries, educational institutions and museums that are available to the public as well as archives and sound movie- and sound heritage institutions may exploit orphan works.*

*If the copyright holder is later identified, he or she has the right to claim payment for the exploitation performed.*

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

*Yes to the extent the exception is covered by a compulsive license, the extent of the allowed usage will depend on the contract.*

*Besides moral rights, there are no provisions in the DCA that may not be overridden by contractual agreements involving the institution and the copyright holder.*

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.:
	<i>As stated above the use by educational institutions is administrated by private organizations approved by the government.</i>

## 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?:
	<i>Yes, we find that an exemption should be available and we find that the system implemented in Denmark is reasonable and sufficient. Please see answer to question above 1-4.</i>

17)	Should there be any exceptions or limitations to copyright protection for education and research institutions?
	yes If yes, in relation to what activities? :
	<i>Yes, we find that an exemption should be available and we find that the system implemented in Denmark is reasonable and sufficient. Please see answer to question above 5-8.</i>

18)	Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?
	yes Why?:
	<i>Yes the Danish group finds that the three-Step Test is a useful test, since it balances the public interested against the interest of the copyright holder. We find it reasonable and desirable that any exceptions offered in case of uncertainty is interpreted in favor of the copyright holder, which is one of the consequences of the Three-Step Test.</i>

19)	Should the exception or limitation be capable of being overridden by contract? Why? Why not?
	Yes, in our opinion the copyright holder should be entitled to enter into agreements with institutions which override the provisions stated in the law. It is only natural that the holder of the copyright decides on the extent of his or her rights and take their own decision on to what extent a specific institution should be allowed to use their work to a larger extent than offered by law. However the exeption should only overrideable in favour of the copyright holder.

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

*No, the Danish group finds that the system provided for in the DCA is reasonable and fair, thus allowing for license free limitations for public purposes and requiring educational institutions to pay for their usage of copyrighted material. The first, because the usage is important to document and spread copyrighted material, which otherwise is not available from the source for public purposes. In relation to educational material, it is necessary to invest in and fund the production of new and updated material.*

*If the exception were free of license, the authors would not be encouraged to publish new material and that would be damaging to the society. Furthermore a large amount of copyrighted works are created for the sole purpose of being use in educational institutions, and if such use was free of license this important group of authors would be diploid of income from relevant usage of their works.*

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?

*We do not find that the current system is in need of immediate improvement*

### III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

*Yes, we find that harmonization is desirable since copyright is to a large extent international and since copyright holders may have difficulties administrating their rights across borders.*

*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.*

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:

*Yes, we find that it is desirable to have harmonized rules on exceptions and limitations for the areas in question.*

*We expect it is a mistake that this question is conditioned on a no to q. 16) or 17)*

24) If yes to question 16):

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

*Only to institutions that have a clear public purpose and do not have a commercial purpose*

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

*To activities that further the public purpose, ie. Offering of works that are not available through commercial channels,*

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

*For exploitation that does not seriously damage the interests of the copyright holder. For this reason attention should be had at the level of distribution of digitally copied material.*

25) If yes to question 17):

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

*We find that the Danish model of compulsory license is reasonable and fair, and therefore the limitation/exception should be available to institutions who have entered into such a compulsory license agreement*

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

*For the purposes naturally associated with the educational purpose*

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

*Since we recommend a compulsory license system, the purposes conditions should be stated in the agreement and should aim to further the educational process, which includes the distribution of material in digital form.*

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

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

26) Should use under the exception or limitation be permitted automatically (without any further action), or

should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?

*We do not find that any particular procedures should be applied, other than the ones already covered by DCA - i.e. in particular the requirements in chapter 6A regarding orphan works.*

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 should to the largest extent possible be calculated based on transparent principles commonly available to all institutions of equal character. Preferably the remuneration should be calculated based upon volume, since it is preferable for both parties, that system is easy to manage.*

*The institution should be liable for the payment, and the system should be administrated by organizations approved by the local government.*

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

*The system adopted by the European Union in directive 2012/28/EU seems like a fair balancing of the interests of the parties involved. The institution who wants to use the orphan work should be required to perform reasonable research in order to identify the copyright holder and to the extent such research does not lead to a result the institution should be allowed to use the material. Al though it is slightly burdensome it seems reasonable that the institution must prove the extent of its research to be able to claim the limitation.*

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

*We find that the copyright holder should have the rights to make whatever agreement with specific institutions as he or she may wish.*

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?

*We find that it is desirable that such private organizations are covered by governmental control in order to ascertain the fair and reasonable administration of the copyright holder's rights. It is furthermore advantageous to have a system, whereby institutions can enter into one agreement covering all works of a certain type.*

#### Summary

*In Denmark the exemptions/limitations of copyright protection for use by libraries and educational institutions are extensively regulated in the Copyright Act. Publicly founded Libraries and Archives are granted a right to create copies of copyright protected material in certain well defined situations without having to pay remuneration. Educational institutions are entitled to create copies of copyrighted material on the condition that they enter into a compulsory license with a copyright administration*

*organization approved by government. The extent of use granted to educational institutions depends on the provisions of such an agreement. Denmark has implemented the limitations for orphan work approved by the European Union, whereby a work is considered orphan to the extent an institution through extensive research is not able to identify the author. Once a work is considered orphan, it is free to use for certain institutions for public purposes.*

*The Danish Group finds the extent of and conditions for applying exemptions/limitations to be adequate*

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.