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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:

The Finnish Copyright law provides for a number of exceptions related to educational use and for archives, museums and libraries. These exceptions are defined in very detailed manner and represent the so-called "closed list" approach. The specific and detailed exceptions permitting limited use of a work are supplemented with an extended collective licensing system that allows more flexibility. Extended collective licence is a concept in which the licence covers authorizations also for works of authors who are not represented by the collecting society which grants the licences. For example, the extended collective licensing system is used for permitting the taking of photocopies without explicit permission of the right holder. The exception is applicable but not limited to use for cultural and educational purposes.

The exceptions related to educational use and for archives, museums and libraries are, for the most part, subject to fair remuneration to the right holders. There are various ways of providing the

remunerations, and it does not necessarily come directly from the beneficiary of the copyright exception.

An English translation of the Finnish Copyright Act (FCA) can be found at <https://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf>[<https://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf>] amendments up to 2010.

**Response to 1:** Yes, please see FCA sections 16 (reproduction in archives, libraries and museums) and 16 a (reproduction of copies of works for the public and communication of works to the public).

According to the FCA 19(1), once a copy of a work has been sold or otherwise permanently transferred with the consent of the author within the EEA, the copy may be further distributed also by lending. The provisions of subsection 1 do not apply to public lending of a cinematographic work or a computer-readable computer program. Thus, public lending of such works is permitted only under a right holder's licence.

The author has a right to remuneration for the lending of copies of a work under section 19(1) of the FCA.

**Response to 1 a):** Libraries and archives are allowed to reproduce and distribute certain materials for the purpose of preservation and replacement of works in their own collection. In some cases only the making of copies by photocopying or similar means is permitted (see below item c).

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

yes

Please comment:

Reproduction exception is applicable for works in the organizations' own collection. There is no statutory interlibrary lending exception. However, as regards interlibrary lending of copies sold or otherwise permanently transferred with the consent of the author within the EEA, interlibrary lending is permitted under FCA 19 (the distribution right of that particular copy has been exhausted).

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:

Libraries and archives are allowed to reproduce and make available certain materials for the purpose of preservation and replacement of works in their own collection. Please note that reproduction for the purpose of lending or for the purpose of handing material over to borrowers for their private use is permitted only by photocopying or corresponding means (FCA 16 a (1)).

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

yes

Please comment:

A statutory exception permits reproduction for the purpose of administration and organizing collections and for other internal purposes as well as supplementing a deficient item or completing a work that is published in several parts.

The FCA includes a section that permits extended collective licenses for other activities. However,

no extended collective licenses concerning libraries and archives are currently in place or applicable.

2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

The exceptions for libraries apply to libraries that are open to the public. The museums, archives and other organizations to which museum and archive and other organization exceptions are applicable are expressly defined in the FCA and the relating decree.

(FCA 16, 16 a - d)

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.

All permitted activities are specific and defined in detail in the statutory exceptions. The exceptions apply to activities for purposes other than financial gain. General requirements of making source information available in accordance with good practice, and the principle of not making any further modifications or changes than what the use of the exception requires, apply.

Digital reproduction is excluded as regards reproduction for the purpose of lending or for the purpose of handing material over to borrowers.

Furthermore, the exceptions permitting communication and related reproduction are restricted to communication to the public on the institutions' premises.

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.

The legislation aims to respect the exclusive right of the creator to decide over publication of a work. Also the reproduction for supplementing a deficient item or completing a work that is published in several parts is permitted only in case a copy is not available from a commercial source (FCA 16 (1) 4). The exceptions are subject to a variety of conditions that apply to different forms of use.

There is a general condition (FCA 11) that reproduction under the provisions in chapter 2 of the FCA (Limitations on copyright and provisions concerning extended collective licence) is not permitted from an unlawful source.

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

<p>Please comment:</p> <p>Yes, please see FCA 14.</p> <p>Specific statutory exceptions permit activities related to performance and display of copyrighted works for educational purposes.</p> <p>According to the FCA 21(1) a published work may be publicly performed in connection with education with the exception of films and dramatic works.</p>
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<p>b) reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);</p>
<p>yes</p> <p>Please comment:</p> <p>Specific statutory exceptions permit reproduction and distribution of copyrighted works for educational purposes to a certain defined extent. Distribution of copies sold or otherwise permanently transferred with the consent of author is permitted as the right of distribution of such copies is exhausted</p>

<p>c) making translations;</p>
<p>no</p> <p>Please comment:</p> <p>Statutory exceptions do not permit translations.</p>

<p>d) making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);</p>
<p>yes</p> <p>Please comment:</p> <p>According to the FCA a collecting society may grant an extended collective licence permitting digital reproduction. Making available via communications networks may be permitted under an extended collective licence with the exception of television and radio broadcasts.</p>

<p>e) reproduction and/or distribution for research purposes; or</p>
<p>yes</p> <p>Please comment:</p> <p>According to the FCA a collecting society may permit, under an extended collective licence, reproduction for use in educational activities or in scientific research and communication to the public by means other than transmitting on radio or television. The copyright holder may opt out from the application of the extended collective licence. (FCA 14 (1))</p> <p>Reproduction by photocopying or by corresponding means may be permitted by virtue of an extended collective licence (FCA 13).</p>

<p>f) any other activities, and if so, what activities?</p>
<p>yes</p> <p>if so, what activities?:</p>

In educational activities, a work that has been made public, and that is performed by a teacher or a student, may be reproduced by direct recording of sound or image for temporary use in educational activities. A copy thus made may not be used for other purposes.

Parts of a literary work that has been made public or, when the work is not extensive, the whole work, may be incorporated into a test constituting part of the matriculation examination or into any other corresponding test.

(FCA 14 (2) and 14 (3))

- 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?

Education and research exceptions are applicable in general. However, the provisions of the FCA regarding educational activities shall not apply to educational activities conducted for the purpose of financial gain (FCA 54 a).

- 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.

Cultural and educational limitations concern activities that take place at certain institutions for the benefit of the public. From the user's perspective, also the private use exception ensures limited access to educational material. The extended collective licensing system is used for granting permission to make photocopies and the applicable agreement sets out quantitative restrictions.

Please see FCA 12 and 13

- 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.

Exceptions do not permit the reproduction of a copy of a work which has been made or made available to the public contrary to the copyright holder's exclusive rights or whose technological measures have been circumvented in violation of the law. However, the requirement of lawful procurement is applicable to educational exceptions but not to the archives and libraries.

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?

Exceptions and limitations are legislated and incorporated in the FCA. The system is closed and the permitted use is specific

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

The three step test has been adopted in EU legislation and it is referred to in the national preparatory works (travaux préparatoires) of the current legislation. The principle is not enshrined in the copyright law but affects its interpretation.

- 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).

The statutory exceptions apply automatically in case there is no explicit reference to the extended collective licensing system. The statutory exceptions define the limits of the copyright entitlement and thereby exclude certain acts from the scope of the exclusive right.

- 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 statutory exceptions that do not refer to extended collective licensing system define the limits of the copyright and thereby exclude certain acts from the applicability of the exclusive right. The remuneration becomes payable only in case the use is covered by copyright.

In case there is an extended collective license in place, the collective licensing organization negotiates the amount of remuneration and distributes it in accordance with its own stipulations. In some cases it is required (e.g. in Infosoc Directive) that some kind of compensation shall be paid for the right holders (not necessarily by users).

From the user's perspective, also the private use exception ensures limited access to educational material and works. According to section 19 (4), the author shall have a right to remuneration for the lending of copies of a work to the public. The state is responsible for the remuneration of private use and the end-user who benefits from the license is not directly responsible for making any payments.

The state remunerates authors for the reproduction of works for private use from funds taken up in the state budget, the amount of which is determined pursuant to an independent study of the prevalence of private copying. The remuneration is distributed by a collecting society appointed by the state and in accordance with a spending plan confirmed by the Ministry of Education.] Please see FCA 26(4) (amendment 19.12.2014)]

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

Orphan work exceptions are applicable also in the context of archives and libraries and educational use. Finland has implemented EU-directive (2012/28/EEC) on certain permitted use of orphan works by a separate Act on orphan works (764/2013).

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

Exceptions can be overridden by contract to certain extent. Agreements are prima facie valid and enforceable between the parties. In case someone uses a work in accordance with an exception but contrary to such agreement, the use does not constitute a copyright infringement.

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. :
	To our knowledge, there are no such efforts other than by established collecting societies. The extended collective licensing system is meant to ensure the licensing needs of libraries, archives, and educational and research institutions.

## II. Policy considerations and proposals for improvements of the current law

16)	Should there be any exceptions or limitations to copyright protection for libraries and archives?
	yes If yes, in relation to what activities?:
	Legislation that provides for simple and justified privileges to reproduce and make copyrighted works available in a digital environment would be desirable. The legitimate interests of the right holders and users as well as the public interest should be taken into account. The desirable exceptions would permit temporary reproduction of works merely for non-commercial use that takes place in a closed network. Such exceptions should conform to the three step test requirements.

17)	Should there be any exceptions or limitations to copyright protection for education and research institutions?
	yes If yes, in relation to what activities? :
	Legislation that provides for simple and justified privileges to reproduce and make copyrighted works available in a digital environment would be desirable. The legitimate interests of the right holders and users as well as the public interest should be taken into account. The preconditions for justified exception would be the same as in item 16 above.

18)	Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?
	yes Why?:
	Compulsory EU legislation requires the use of the three step test as well as international copyright treaties (Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty). The Finnish AIPPI Group finds that the application of the three step test has not caused any significant difficulties at national level. The test is also very much in line with e.g. the constitutional requirements which exist at national level.

19)	Should the exception or limitation be capable of being overridden by contract? Why? Why not?
	As a general matter, the principle of freedom of contract requires that exceptions should be capable of

being overridden by a contract unless there are important legitimate reasons for legislating to the contrary. Substantial number of the current statutory and detailed exceptions has been enacted for the purpose of promoting public benefit. The possibilities of a third party to benefit from any statutory exceptions should not be limited by a contract.

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

Remuneration for activities described in items 16 and 17 seems justified. The Information society directive sets requirements for such remuneration with some exceptions. The extended collective licensing system is in use for the purpose of remuneration of such activities. The end user can benefit from the licensing free of any direct payments as the state is responsible for the remuneration.

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 law in Finland should be simplified and updated to the digital environment.

### III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

no

Please comment:

Educational and research institutions are becoming more and more international and may nowadays have cross-border programs and other operations. This calls for an increased cooperation between countries and increased understanding of different regimes for exceptions and limitations to copyright protection in the field of education and research.

However, due to the profound differences in national educational and research systems, their structure and financing as well as differences in remuneration regimes for copyright exceptions, international harmonization of copyright exceptions and limitations in this field does not appear to be a workable or a desired solution. Moreover, the fact that the exceptions and limitations for educational and research purpose often have a limited commercial impact further reinforces this conclusion.

As to international harmonization of exceptions and limitations for libraries and archives, the national differences in the structure of such institutions and their financing as well as the non-commercial nature of these exceptions are even more prominent than in the field of education and research. Given such differences, international harmonization seems an unsuitable way to address the exceptions and limitations to copyright in this field.

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?

no



Please comment:

Harmonization in form of a binding international treaty or convention prohibiting exceptions seems unfeasible and undesirable.

24) If yes to question 16):

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

Comment: International assessment of common current and future challenges and information sharing concerning solutions and experiences in workable copyright exceptions and limitations seem advantageous. However, for the reasons stated in connection to the item 22 above, no binding international convention or agreement would be desirable. The legislative power to decide about the exceptions whether in the analog or digital environment should remain on a national level.

*We find the exceptions applicable to public libraries and defined institutions justified.*

*Please see the comment above*

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

*We find the exceptions applicable to the use of material in public libraries and defined institutions justified.*

*Please see the comment above.*

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

*The current exceptions seem functional and justified and the desirable improvements would do the same in the digital environment.*

*Please see the comment above.*

25) If yes to question 17):

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

Comment: International assessment of common current and future challenges and information sharing concerning solutions and experiences in workable copyright exceptions and limitations seem advantageous. However, for the reasons stated in connection to the item 22 above, no binding international convention or agreement would be desirable. The legislative power to decide about the exceptions whether in the analog or digital environment should remain on a national level.

*We find the exceptions applicable to defined educational and research institutions justified.*

*Please see the comment above.*

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

*We find the exceptions applicable to the use of material for the purpose of education and research justified.*

*Please see the comment above*

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

*The current exceptions seem functional and justified and the desirable improvements would do the same in the digital environment.*

*Please see the comment above.*

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

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

The automatic application of specific exceptions is preferable but the optimal functioning of the system would require simple and easy rules for the user. However, the limitations should not unreasonably harm publishing activities for research and educational purposes.

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 calculation mechanisms for use of protected content should be transparent. Extended collective bargaining is preferable as the agreements are negotiated by professionals on both sides. However, the possibility to opt out from the collective licensing system in individual cases requires further study.

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

The current regulation seems to be adequate at least for the time being.

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

Agreements should be allowed to the extent possible without adversely affecting general public interest or the collective bargaining system.

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?

See answer to question 15.

Summary

The findings of the Finnish group are:

The exceptions to copyright concerning the institutions like libraries, archives and educational and research institutions are scattered and open to interpretations and also varying by their structure, because exceptions especially in this environment are written in a very restricted and casuistic manner. Of course simplification is wished but it is not an easy task, because the interests of right holders, users including these institutions and the general public are not always parallel.

The legislation and the supplementing extended collective licensing system should be simple enough to promote effective and adequate use of the system and leave room for the freedom to contract. Since the changes in the digital environment are quick and an extended collective licensing system requires time to become established and familiar to the users, new ways of using digital content brings new challenges as identical exceptions do not seem feasible in both digital and analog contexts.

The educational and research exceptions reflect important public interests and support the essential structures of cultural and educational activities. The national exceptions enacted in accordance with the three step test for the public benefit should continue to be permitted and decided on a national level. Compulsory international harmonization limiting such national decision making is unnecessary and undesirable.

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.

Comments:

The relatively recent amendments to the FCA (2005) did not result in full compatibility with the digital environment and the baseline for exceptions continues to be the reproduction and use of traditional material in the analog environment. Some further amendments could be needed and the functioning of the limitations in the digital environment should be reassessed.