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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 **Italian Copyright Act no. 633 of April 22, 1941** provides for several exceptions or limitations that apply to libraries and archives. All subsequent references shall be construed as references to such law.

The relevant provisions of the Italian Copyright Act are the following (unofficial and free translation):

a) **Article 15(3)** - *The recitation of literary works for non-commercial purposes in public museums, archives and libraries shall not be considered public, if it takes place exclusively for aims of cultural promotion and appreciation of the works as identified by agreements between SIAE and the Ministry of Cultural Heritage and Activities.*

b) **Article 68(2-3-5)** - *The reproduction by reprographic means of works collected in publicly accessible libraries, libraries of educational establishments or museums is free if it is done for the relevant services, unless it is done with the aim of drawing a direct or indirect economic or commercial advantage;*

Without prejudice to the prohibition to reproduce music sheets and music scores, the reproduction for personal use of any books or issues of periodical publications is allowed within the limit of fifteen per cent each, excluding pages with advertising, through photocopying, xerocopying or similar systems.

Reproductions of the works held in public libraries made for personal use within the public libraries themselves through the systems referred to in paragraph 3, are allowed within the limits provided for in said paragraph 3 subject to payment of a lump-sum remuneration to the right holders referred to in article 181-ter, paragraph 2, below, determined on the basis of the second sentence of article 181-ter, paragraph 1. Such remuneration shall be paid every year directly by libraries, within the limits of the revenues collected for the service, without additional charges for the budget of the State or of the entities managing the libraries. The limits set out in paragraph 3 shall not apply to out-of-print or rare works, insofar as difficult to find in the market.

c) **Article 69(1-2)** - *Loans by book and record libraries belonging to the State and to public entities, for the exclusive purposes of cultural promotion and personal study, shall not require the consent of the owner of the relevant right, to whom no compensation is due. Such loans shall only regard:*

(a) *the printed copies of the works, excluding music sheets and scores;*

(b) *phonograms and videograms containing cinematographic or audiovisual works or sequences of moving images, with or without sound, after at least eighteen months from the first exercise of the right of distribution or, failing such exercise, after at least twenty-four months from the making of said works or sequences of moving images.*

Phonograms and videograms embodying cinematographic or audiovisual works or sequences of moving images, whether with or without sound, held at book, record and movie libraries belonging to the State or to public entities, may be reproduced in one copy only for the services of such libraries, [provided that reproduction is] without any direct or indirect economic or commercial advantage.

d) **Article 69 bis (1-2)** *Publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organizations have the right to use the orphan works set out in the Art. 69 quarter contained in their collections, as follows:*

- i. *by reproduction of the orphan work for the purposes of digitization, indexing, cataloguing, preservation or restoration;*
- ii. *by making the orphan work available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.*

The orphan works can be used by the entities mentioned in paragraph 1 exclusively for purposes related to their mission of public interest, in particular preservation, restoration and access for cultural and educational scopes of the works and sound recordings contained in their collections

e) **Article 71-ter** - *Public libraries, education institutions, museums and archives may freely communicate or make available the works or other materials contained in their collections and not subject to restrictions deriving from acts of assignments or licenses, to single individuals, for research or private study purposes, on terminals to be used for such function only and located on their premises.*

As long as **reproduction and/or distribution for the purpose of preservation or**

replacement is concerned:

a) **Article 68(2)** allows libraries accessible to the public, school libraries, public museums and archives **to photocopy** the works comprised in their collections in order to perform their services, without any direct or indirect economic or commercial advantage.

b) **Article 69(2)** allows libraries, record and movie libraries belonging to the State or to public entities **to reproduce**, without any direct or indirect economic or commercial advantage, one copy of phonograms or videograms included in their collections in order to perform their services.

c) **Article 69-bis(1-2)** allows publicly accessible libraries, educational institutions and museums, archives and institutions for the cinematographic and sound heritage, and public service broadcasters **to reproduce** orphan works for digitisation, indexing, cataloguing, preservation and restoration purposes and to make them available to the public.

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

no

Please comment:

Italian Copyright Act does not include a limitation or exemption for reproductions made to the end of performing interlibrary lending services. However, it may be argued that Article 68(2) (see above, lett. a) allows such reproductions.

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:

Article 68(5) allows the users of public libraries **to reproduce** works contained in their collections for personal use by photocopying, xerocopying or analogous systems. This exception is subject to limitations as to the type of works that can be copied and to the extent of the allowed reproduction; moreover, an equitable remunerations should be paid to the rightholders (see below, no. 3). Such copies can not be distributed.

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

yes

Please comment:

a) **Article 15(3)** allows the **recitation of literary works** in public museums, **archives** and **libraries** if it takes place **not for profit and exclusively for aims of cultural promotion and appreciation of the works themselves** individuated by agreements between SIAE (the Italian collecting society representing authors and publishers) and the competent ministries.

b) **Article 69(1)** allows **loans** by book and record **libraries** belonging to the State and to public entities, performed **for the exclusive purposes of cultural promotion and personal study**. Such loans shall only regard: (a) the printed copies of the works, excluding music sheets and scores; (b) phonograms and videograms containing cinematographic or audiovisual works or sequences of moving images, with or without sound, after at least eighteen months from the first exercise of the right of distribution or, failing such exercise, after at least twenty-four months from the making of said works or sequences of moving images.

c) **Article 69-bis(1-2)** allows publicly accessible **libraries**, educational institutions and museums,

archives and institutions for the cinematographic and sound heritage, and public service broadcasters to reproduce **orphan works** for digitisation, indexing, cataloguing, preservation and restoration purposes and to **make them available to the public**.

d) **Article 71-ter** allows the “**communication**”, or “**making available**”, of materials to individuals for the purposes of research or private study on terminals located **on the premises** of publicly accessible **libraries**, educational institutions, museums and **archives** limited to the “works or other materials contained in their collections and not subject to restrictions deriving from acts of assignment or licensing”.

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?

There is a distinction under Italian law, from various different standpoints, between, on the one hand, **cultural institutions of the State or public bodies** and **private organizations**, and, on the other hand, between libraries, archives or other organizations **open or not open to the general public**.

So, for example, **Article 68(2)** allows all **publicly accessible libraries** to make photocopies of works existing in their collections in order to perform their services. As a consequence, libraries which are not open to the general public need to obtain an authorization from the rightholders to perform the same activities. On the other hand, **Articles 68(3)** and **68(5)** discipline the photocopies made by the users of publicly accessible libraries for personal use distinguishing between **libraries belonging to the State and privately owned libraries**. If privately owned libraries offer photocopying services, they must pay the equitable remuneration which is due by photocopying centres. To the contrary, libraries owned by the State or by public entities must pay an equitable remuneration which is calculated according to specific criteria.

Furthermore **art. 69**, as amended by legislative decree 68/2003, liberalises only for the benefit of **libraries and sound and video libraries of the State or of public bodies** a) the loaning of works for the purposes of cultural promotion and personal study, and b) the reproduction of one copy only of videograms and phonograms for the services of the same libraries, sound and video libraries.

Art. 71-ter then takes into consideration certain acts of communication by libraries and archives “**accessible to the general public**”, and in particular the “making available for single individuals for the purposes of research or private study activities, on terminals having such sole function located in the premises of the libraries [...] of works or other materials contained in their collections and not subject to restrictions deriving from deeds of transfer or licences”.

Under **art. 69-bis**, which has been recently introduced, the beneficiaries of the new orphan works exception are libraries, educational institutions and museums accessible to the public, institutions for cinematographic or sound heritage and public service broadcasters.

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 aforementioned provisions contain restrictions as to the permitted activities.

a) **Article 68(2)** allows libraries accessible to the public, school libraries, public museums and archives to **photocopy the works comprised in their collections** in order to perform their services, without any direct or indirect economic or commercial advantage. Therefore, digital reproduction is not allowed.

b) **Article 68(3)** does not allow the photocopying for personal use of music sheets and music scores. Moreover, it states that, if allowed, the photocopying cannot go beyond the **limit of fifteen per cent of each** book or periodical publication, excluding pages of advertising, unless the book is out of print and rare. It should be noted that reproductions for personal use can only be done through photocopying, xerocopying or similar arrangements; thus, digital reproduction (e.g. by scanning) is not allowed.

c) **Article 69(2)** allows libraries and record libraries belonging to the State or to public entities to reproduce, without any direct or indirect economic or commercial advantage, **one copy** of phonograms or videograms included in their collections in order to perform their services.

d) **Article 71-ter** provides for the **“communication”, or “making available”**, of materials to individuals for the purposes of research or private study on terminals located **on the premises** of publicly accessible libraries, educational institutions, museums and archives limited to the “works or other materials contained in their collections and not subject to restrictions deriving from acts of assignment or licensing”. Thus, the making available to terminals located outside of the library is not permitted.

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 works have to be lawfully published works and an original copy must be in the property of the library.

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, on the basis of the following law provisions of the Italian Copyright Act (unofficial and free translation):

a) **Article 15(2)** - *The performance, representation or recitation of the oral works such as musical, dramatic or cinematographic works, or any other work suitable for public showing, shall not be considered public and therefore do not require the author's consent provided their performance, representation or recitation is carried out within the ordinary context of the family, boarding school, school or institute for aged-people, provided that such uses do not take place for non profit purposes.*

b) **Article 64 sexies** - *The right holder's authorization referred to in Article 64-quinquies shall not be required in case of:*

(a) access to or consultation of the database when such activity is made exclusively for education or scientific research purposes, and is not performed within a business activity, subject to indication of the source and within the limits justified by the non-profit purpose sought. Within the scope of such access and consultation activities, any operations consisting in the permanent reproduction of all or

a substantial part of the contents onto another device shall in any case be subject to the right holder's authorization;

c) **Article 68(2)** - *The reproduction by reprographic means of works collected in publicly accessible libraries, libraries of educational establishments or museums is free if it is done for the relevant services, unless it is done with the aim of drawing a direct or indirect economic or commercial advantage”;*

d) **Article 69(1)** - *Loans by book and record libraries belonging to the State and to public entities, for the exclusive purposes of cultural promotion and personal study, shall not require the consent of the owner of the relevant right, to whom no compensation is due. Such loans shall only regard:*

(a) *the printed copies of the works, excluding music sheets and scores;*

(b) *phonograms and videograms containing cinematographic or audiovisual works or sequences of moving images, with or without sound, after at least eighteen months from the first exercise of the right of distribution or, failing such exercise, after at least twenty-four months from the making of said works or sequences of moving images.*

e) **Article 70(1)** - *The summary, quotation or reproduction of passages or parts of works, for purposes of criticism and discussion and also for teaching purposes, are allowed within the limits justified by such purposes and provided that they are not in competition with the economic exploitation of the work.*

In anthologies for schools, the reproduction may not exceed the limits set by the Regulations, which shall establish the modalities for the collection of equitable remuneration.

The summary, quotation or reproduction shall always be accompanied by the indication of the title of the work and of the names of the author, publisher and, in case of translations, translator, if the work object of the reproduction bears such indications.

f) **Article 70(1-bis)** - *Low-resolution or degraded images and music may be freely published through the Internet, for free, for education or scientific purposes, and exclusively where such use is not for profit. Limits to the use for education or scientific purposes within the meaning of this paragraph shall be defined by decree of the Minister for Cultural Heritage and Activities, after hearing the Minister of Education and the Minister of University and Research, subject to the prior opinion of the relevant Parliamentary Committees.*

g) **Article 71-ter** - *Public libraries, education institutions, museums and archives may freely communicate or make available the works or other materials contained in their collections and not subject to restrictions deriving from acts of assignments or licenses, to single individuals, for research or private study purposes, on terminals to be used for such function only and located on their premises.*

As long as **performance and/or display for educational purposes** is concerned, as mentioned above:

a) **Article 15(2)** allows the “**performance, representation or recitation**” of any kind of work within the ordinary context of **school** and for non profit purposes.

b) **Article 64-sexies** allows the **access to and consultation** of databases **for the sole purpose of illustration for teaching or scientific research**, as long as the source is indicated and to the extent justified by the non-commercial purposes of such uses.

c) **Article 70** allows the “**communication to the public**” for **purposes of teaching**, but limited

to "passages or parts of a work".	
b)	reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);
	yes
	Please comment:
	As mentioned above:
	a) Article 68(2) allows the libraries of educational establishments to " reproduce " their works by reprographic means, but only for their own services without any direct or indirect economic or commercial advantage.
	b) Article 70(1) allows the " summary, quotation and reproduction " for purposes of teaching , but limited to "passages or parts of a work".
c)	making translations;
	no
	Please comment:
	Translation of a work is not expressly included in the exceptions provided for the purposes of teaching or research under the Italian Copyright Act.
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:
	As mentioned above:
	a) Article 70(1-bis) allows the " free publication " on the Internet, without charge, of low resolution or degraded images and music for teaching or scientific use and only where such use is in a not-for-profit setting. The same Article also states that the limits for such teaching or scientific use will be established by Ministerial Decree (although the latter has not been issued to date).
	b) Article 71-ter provides for the " communication ", or " making available ", of materials to individuals for the purposes of research or private study on terminals located on the premises of educational institutions, limited to the "works or other materials contained in their collections and not subject to restrictions deriving from acts of assignment or licensing".
e)	reproduction and/or distribution for research purposes; or
	yes
	Please comment:
	As mentioned above, Article 70 allows the " summary, quotation and reproduction " also for " purposes of scientific research ", but limited to "passages or parts of a work" (the reproduction of the whole work is never allowed).
f)	any other activities, and if so, what activities?
	yes

if so, what activities?:

As mentioned above, **Article 69** allows **loans** of works by book and record public libraries for the purposes of cultural promotion and **personal study**, subject to the limits and conditions specified in the same Article; these obviously include public research and educational institutions.

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?

As mentioned above

a) the exception under **Article 15(2)** (performance, representation or recitation) applies only within the ordinary context of “**school**”;

b) the exception under **Article 68(2)**, (reproduction by reprographic means) only applies to “**libraries of educational establishments**”;

c) the exception under **Article 69(1)** (loan of works) is granted only to “**book and record libraries belonging to the State and to public entities**”;

d) the exceptions under **Article 64-sexies** (access to and consultation of databases) **Article 70(1)** (reproduction and communication to the public of passages or parts of a work) and **Article 70(1-bis)** (free publication on the Internet of low resolution images), apply to **anyone who pursues educational or scientific research purposes**, without any further specification;

e) the exception under **Article 71-ter** only applies to “**educational institutions**”.

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

As mentioned above:

a) With reference to display of databases, according to **Article 64-sexies** the authorization by the rightholder provided for in Article 64-*quinquies* shall not be required where the database is accessed and visualized **for the sole purpose of illustration for teaching or scientific research**, as long as **the source is indicated** and to the extent justified by the **non-commercial purposes** to be achieved. Within the above activities of access and visualization, the possible operations of permanent reproduction of all or a large part of the contents on any other device shall always be subject to the rightholder's authorization.

b) With reference to the exception to the reproduction right for research and educational institutions, **Article 68 (2)** allows photocopying of works made by public university and school libraries **for their services without the realization of a direct or indirect commercial or economic gain**, with the **exception of music scores or sheets**

c) With reference to lending by book and record public libraries, **Article 69** allows such loan only for:

- **printed works** with the **exception of music scores or sheets**;
- **phonograms and videograms** exclusively **only 18 months** after the first distribution or, if no distribution has occurred, **24 months** after the making of such works.

d) With reference to summary, quotation and reproduction and communication of works or part of works

“for purposes of teaching or scientific research”, under **Article 70 (1)** such exception shall be subject to the following conditions:

- the uses must be limited to **passages or parts** of the work;
- they must take place within the limits justified by such purposes and **not compete with the economic utilization** of the work;
- they must take place only for **illustrative purposes** and **non-commercial uses**;
- they must be **accompanied by the indication** of the title of the work, the name of the author, the publisher and, when translation is involved, the translator, where these details are mentioned on the copy of the work reproduced.

e) With reference to the publication on the Internet, **Article 70 (1-bis)** of the Italian Copyright Act authorizes the free publication on the Internet **of low resolution images and music for educational or scientific purposes** and only for **non-profit use**.

f) With reference to the exception for the reproduction in anthologies for educational uses, **Article 70(2)** states that such reproduction shall occur **within the limits set forth by the Regulation implementing the Italian Copyright Act**. Such limits amount to **12,000 characters for prose works, 180 lines for poetry works, 20 musical beats and 150 meters’ film**.

g) With reference to the right of communication and the making available for research and study purposes, **Article 71-ter** states that communication/making available is permitted **only to individuals and only on video terminals located in the premises of publicly accessible libraries and educational institutes**.

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.

With reference to the exceptions or limitations to copyright protection for education and research institutions, the Italian Copyright Act does not set any specific condition as to the type of copyrighted works that may be used, except to the following extent:

a) **Article 68** excludes from the reproduction by reprographic means by libraries of educational establishments **music scores or sheets**.

b) **Art 69** allows the loan made by book and record public libraries for:

- **print works** with **exception of music scores or sheets**;
- **phonograms and videograms** exclusively **no earlier than 18 months** after the first distribution or, if no distribution has occurred, **24 months** after the making of such works;

c) **Article 70, paragraph 1-bis**, allows the publication through the Internet, for free, **of low-resolution or degraded images and music**, for educational or scientific purposes and only for non-commercial use.

In spite of the lack of a specific provision, the above rules apply only to lawfully created copies.

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?

The above provisions are **only statutory**. Our jurisdiction does not have a general or broad exception or limitation, such as a “fair use” rule.

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

a) Under **Article 64 sexies (4)** of the Italian Copyright Act, the exception for access to and consultation of databases (**Article 64 sexies (1)**) cannot be construed in such a manner that its application would irretrievably and unduly affect the rightholder or come into conflict with the database ordinary use, in accordance with the provisions of the Berne Convention;

b) **Article 68(2)** provides that the copies obtained by reprographic means **must not be used in competition with the economic rights of the authors**;

c) the exception of **Article 70(1)** (reproduction and the communication to the public of passages or parts of a work) must **not compete with the economic utilization** of the work.

The other exceptions do not specifically provide for the application of the Three-Step Test. However **art 71 nonies** provides that all the exceptions and limitations in the Italian Copyright Act, when applied to the **making available** of a work, must be subject to 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).

Yes, the exception is effective by operation of law.

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 due. The sole exceptions are **anthologies, reprography of literary works, and public loan** Specifically:

- the remuneration regarding anthologies is paid by publishers;
- the remuneration regarding reprography is paid either by copy stores or libraries depending upon whether who, between the two of them, is responsible for providing the final user with photocopying services, i.e. if said services are provided by copy stores, copy stores will be responsible for the remuneration, and vice versa, in case services are provided by libraries
- the remuneration regarding public loan is obtained from a special Public Fund (“Fondo per il diritto di prestito pubblico”) and is paid to the right holders by the Italian collecting society (SIAE).

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

Yes, the Italian Copyright Act as amended by Legislative Decree 10 November 2014, No. 163, implementing Directive 2012/28/EU on certain permitted uses of orphan works (Italian Official Journal No. 261 of 10-11-2014) provides a special treatment for orphan works.

Article 69-bis of the Italian Copyright Act provides that only publicly accessible libraries, educational

establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organizations have the right to use the orphan works contained in their collections: (i) by reproduction of the orphan work for the purposes of digitisation, indexing, cataloguing, preservation or restoration; (ii) by making the orphan work available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

Such uses are possible exclusively for purposes related to the mission of public interest of the above mentioned entities, in particular preservation, restoration and access for cultural and educational scopes of the works and sound recordings contained in their collections.

Any revenues generated in the course of the uses referred to above shall be used to cover the costs for the digitization of orphan works and for making available such works to the public.

The entities referred to above shall indicate, in any use of the orphan work, the name of authors and other rights holders who have been identified. Moreover such entities, in the fulfillment of their mission of public interest, have the right to conclude agreements for the purpose of the promotion and exploitation of orphan works through the uses referred to above. Such agreements may not impose beneficiaries of the exception any restriction on the use of orphan works and may not allow the contracting party to use the orphan works or control the use by beneficiaries. The agreements shall not be in conflict with a normal exploitation of the works, neither cause unreasonable prejudice to the interests of right holders.

Pursuant to **Article 69-ter** the uses above apply only to certain protected works and, in particular, to: (i) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums, as well as in the collections of archives or of film or audio heritage institutions; (ii) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums, as well as in the collections of archives or of film or audio heritage institutions; (iii) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organizations up to 31 December 2002 and contained in their archives, including the works commissioned by public-service broadcasting organizations for their own exclusive use or for the exclusive use of other public-service broadcasting organizations up to such date; (iv) works and phonograms referred to in previous points (i), (ii) and (iii), deposited at the organizations listed in Article 69-bis before 29 October 2014, which have never been published or broadcasted but which have been made publicly accessible by the such organizations with the consent of the right holders, provided that it is reasonable assuming that the right holders would not oppose such uses; (v) works and other protected content that are embedded or incorporated in, or constitute an integral part of the works or phonograms referred to in points (i), (ii) and (iii).

According to **Article 69-quater**, a work or phonogram, as identified in Article 69-ter, is considered orphan if none of the holders of the rights in such work or sound recording has been identified or, even if one or more of them have been identified, none of them is being tracked, despite a diligent search. The diligent search shall be carried out by the organizations listed in Article 69-bis according to the specific proceedings and terms indicated in Article 69-quater or according to the proceedings and terms provided by the other Member State in which the search has to be conducted.

Where there is more than one right holder in a work or in a phonogram and not all right holders have been identified or, even if identified, have not been tracked, after a diligent search conducted under Article 69-quater, the work or phonogram may be used under the terms and within the limits of the authorizations granted by right holders identified and traced.

The orphan works and phonograms already considered orphan works under Directive 2012/28/EU in another Member State of the European Union, are considered orphan works under the Italian law.

Works in commerce cannot be classified as orphan works.

The above mentioned provisions do not affect the provisions of anonymous or pseudonymous work.

The organizations keep records of their diligent searches so that they are available to interested parties on request.

The information concerning (i) the results of diligent searches carried out that lead to conclude that a work or a phonogram is considered an orphan work; (ii) the uses made by that organizations of orphan works; (iii) any amendment to the orphan work status of the works and phonograms used by organizations; (iv) the relevant contact information of the organization concerned, is transmitted without delay by the Italian Ministry for Cultural Heritage and Activities and for Tourism to the Office for Harmonization in the Internal Market for registration in the publicly accessible online database.

Articles 69-quinquies and 69-sexies protect the rights of an orphan work legitimate rightholder, granting the latter the possibility of putting an end to the orphan work status at any time in relation to the rights due to the same, and of receiving fair compensation for the uses made under Article 69-bis, to the extent determined by specific agreements between the right holders' most representative associations and associations of the organizations listed in Article 69-bis.

Finally **Article 69-septies** provides a list of sources considered useful for the diligent search.

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

The law does not provide for any provision in this regard, with the exception of **art.71-ter** that allows publicly accessible libraries, educational institutions, museums and archives to communicate and make available, on terminals located on their premises, only the works or other materials contained in their collection that are "**not subject to restrictions deriving from acts of assignment or licensing**".

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.:

Three separate **collective agreements** have been entered into by SIAE (i.e., the Italian Collecting Society), on one side, and the representatives of school, university and (in general) public libraries, on the other, to regulate the compensation for photocopies of literary works other than music scores, according to the provision of **art. 69**.

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?:

Exceptions and limitations for libraries and archives should be allowed within a context of balanced copyright protection and subject to the application of the three-step test. In particular:

a) Libraries and archives should be free **to digitize their collections for preservation and archiving purposes** and all other uses allowed by law, without any direct or indirect economic or commercial advantage. This exception should also include large-scale digitization and format shifting;

b) Libraries and archives should be allowed to **offer digital copying services** to their users, within the limits of **Art. 68** (see above)

c) Libraries and archives should be allowed to use and/or authorize third parties to use their collection for **data mining purposes**, provided that the copies made during the process are automatically destroyed after use as stated in the ECJ Infopaq case;

d) **e-lending** could be allowed subject to the following limits:

- libraries must have purchased at least one copy of the work;

- e-lending should be limited to the copies owned by the libraries;

- e-lending should be limited to the library's registered members or restricted to the geographic area where physical lending takes place;

- libraries must ensure that digital copies are protected by effective technical protection measures against unauthorized reproduction;

- e-lending should be limited in time;

e) The libraries should be allowed to **lend e-readers** containing the work;

f) Digital distribution of the work for the purposes of **interlibrary lending** should not be permitted, unless (i) the number of digital copies of the same work simultaneously lent to different libraries is not greater than that which the lender have acquired in analogue or digital format, (ii) interlibrary lending is limited in time and (iii) lent copies are protected by effective technical protection measures against unauthorized reproduction.

g) **Out-of-commerce works** can be digitized and made available to the public through collective agreements between collecting management organizations representing right holders (authors/publishers) and publicly accessible libraries. Legislative measures should be introduced to extend the effects of collective licenses to non-represented authors, subject to an opt-out provision.

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

yes

If yes, in relation to what activities? :

Exceptions and limitations to copyright protection for education and research institutions as provided by Italian law (see above) should be maintained with the following adjustments and amendments:

a) Communication to the public of fragments or parts of works for purposes of teaching and scientific research should include expressly **the right to make them available on line**, within the limits of the teaching and scientific research purposes;

b) The exception provided for in **Art. 70** should be extended to the **entire work of fine art and photography**. Such exception may be subject to the payment of an equitable compensation to right owners.

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

yes

Why?:

The three-step-test should be used as a **general criterion** for determining any exceptions or limitations and their compliance with the key principles of copyright protection.

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

At least in certain cases, exceptions and limitations should **not be capable of being overridden by contract**. The public interests protected by certain exceptions and limitations need to be protected against the contractual power or expertise of right-holders.

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

See above.

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?

See above.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Yes, harmonisation in the area of exceptions and limitations to copyright protection is essential for the enhancement and improvement of the digital environment.

In particular the lack of harmonisation due to the differences in the implementation of Article 5 of the InfoSoc Directive by the EU Member States is capable of producing negative effects with regard to cross-border transactions and determining an artificial compartmentalization of national markets within the EU.

The objective of harmonisation is also desirable at international level, considering that a harmonised regulation of exceptions and limitations constitutes an essential part of the harmonisation of copyright protection obtained through international treaties.

The harmonization should be carried out through the introduction of specific exceptions or limitations, without prejudice to the freedom of national legislators to apply any other specific or general exception or limitation allowed by the relevant international and regional laws.

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:

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;
Only libraries and archives which are publicly accessible and do not pursue a direct or indirect economic or commercial advantage should benefit from such exceptions or limitations.

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

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

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;
All education and research institutions, irrespective of whether they are publicly or privately owned, should be allowed to perform the activities described above.

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

c) under what conditions should the activities be undertaken or the copyrighted work be used?
See 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)?
	<p>16 a) Digitization of collections belonging to libraries and archives : Automatically</p> <p>16 b) Libraries and archives digital copying services: Automatically</p> <p>16 c) Data mining: Automatically</p> <p>16 d) Libraries e-lending: Automatically</p> <p>16 e) e-readers lending: Automatically</p>

16 f) Interlibrary lending: Automatically

16 g) Out-of Commerce Works digitization and making available: Collective agreements are required

17 a) e-learning: Automatically

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?

In general terms, remuneration must be determined and calculated through collective agreements between the associations representing right holders, on one hand, and the users, on the other. â€œ

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

The European Directive 2012/28/EU concerning certain permitted uses of orphan works has recently introduced a discipline at Community level. Italy has implemented the Directive in November 2014. It is believed that European legislation could be a good model for the use of orphan works by libraries, educational institutions and archives. However its impact should be assessed in the next few years before adopting it as a a model for international harmonization.

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

16 a) Digitization of libraries and archives collections: Never

16 b) Digital copying services : Never

16 c) Data mining: Never

16 d) E-lending: Never

16 e) E-readers lending: Never

16 f) Interlibrary lending: Never

16 g) Out-of Commerce Works: Opting-Out mechanism

17 a) E-learning: Never

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?

Exceptions or limitations, whether newly introduced or not, set some basic and most of the time mandatory freedoms that may, or may not, be exploited by their beneficiaries. In particular, the mere existence of such exceptions or limitations may create an incentive for rightholders to provide the services that otherwise libraries, archives, museums and educational institutions can organize by themselves. At the same time, such institutions may find it more efficient to rely on services offered by the rightholders (or entities acting with their consent) instead of using the aforementioned exceptions or limitations. For example, a library may prefer to obtain on a contractual base an e-lending service

performed by a publisher or a coalition of publishers instead of buying a certain amount of physical copies of books, digitise them, and create the technical infrastructure which is needed to exploit the corresponding exception or limitation. Another example could be the massive digitisation of the collections of libraries and archives: even if allowed by the law, it is very unlikely that such institutions will ever do it. However, the mere fact that they could may create an incentive for rightholders to invest in such activities and provide value-added services built on that heritage.

Moreover, exceptions or limitations are typically limited in scope. For example, many of them do not allow the utilization of an entire work or cover only acts which are not performed for profit. Consequently, they leave a great amount of free space for initiatives which go beyond their intrinsic limitations.

In some cases, taking advantage of these opportunities may require the intervention of collective rights management organizations, which, in turn, would have to extend proportionally the range of the rights that they manage. For example, the digitisation and re-use of out of print works may become reality (e.g. to build digital libraries which could be used by academic institutions to provide their services also on-line) if collecting rights management organizations extend their reach to the rights required for digital reproduction and making available on-line. To this end, such organizations should lobby for the introduction of the legislative measures that may be needed (e.g. to implement extended collective licensing management systems).

Summary

Abstract

Italian law provides for exceptions and limitations to copyright protection for libraries and archives as well as for education and research institutions. Such exceptions and limitations apply in respect of specific acts of reproduction and of communication and making available within the strict limits of Article 5 of Directive 2001/29/EC and in compliance with the Three-Step Test.

The provisions on exceptions and limitations to copyright protection are only statutory, and our jurisdiction does not have a general or broad exception or limitation such as a "fair use" rule.

Based on the assessment of existing legislation, it is recommended that exceptions and limitations for libraries and archives and for education and research institutions be adjusted and extended to take into consideration the needs of the digital environment and of the global scope of science and learning.

Harmonization in the area of exceptions and limitations to copyright protection both at the regional and the international level is also strongly desirable in order to avoid the negative effects on cross-border transactions and the further development of international trade.

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.

It must be considered that pursuant **art. 71-decies** all exceptions and limitation provided by the Italian copyright Act apply also to **neighbouring rights**.