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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:
	<p>(1) A library, etc. is permitted to make reproduction of a work included in its library materials (meaning collection items of such library, etc.), where it is necessary for the purpose of preserving the library materials (Article 31(1)(ii) of the Copyright Act (hereinafter the references to law provisions are references to this Act, unless otherwise indicated); however, such reproduction is not transferrable to users (Article 47-10).</p>
	<p>As a consequence of the wording which reads "where it is necessary for the purpose of preserving library materials," the application of this provision is limited, namely, to the case where the condition of a library material is deteriorating (e.g. a book made of acid paper). Reproductions by the use of microfilm or digital technology would be typical means of reproduction contemplated by</p>

this provision. The manner of reproduction would also include replacement of obsolete digital recording media with new ones (*Copyright Law 2nd Edition*, by Nobuhiro Nakayama, Yuhikaku Publishing (hereinafter referred to as "Nakayama"), p.316).

(2) In addition to the case mentioned in (1) above, the National Diet Library may make a record of a work included in the library material onto a recording media, if the electronic or magnetic record of such material is to be prepared for making it available to the public in lieu of the original thereof, so as to avoid deterioration, damage or defacement that may be caused by making the original available to the public (the first sentence of Article 31(2)). Such reproduction is not transferrable to users (Article 47-10). However, a user may view a reproduction thereof in an electronic or magnetic record using a computer installed at the library, as such viewing is within the scope of a presentation for not-for-profit purpose (Article 38(1)).

This provision differs from the one mentioned in (1) above in that the purpose is "to avoid deterioration, damage or defacement." This means that the National Diet Library is permitted to make reproductions even where the condition of a library material is not deteriorating, and may make digital archives by making reproductions immediately after the materials are received by the library. The reason for this is based on consideration of the significantly important mission of the National Diet Library to preserve and pass on materials to the future (Nakayama, p.316).

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

yes
Please comment:

(1) A library, etc. may, in response to a request from other libraries, etc., make a reproduction of a work included in library materials if it provides a work which is difficult to obtain due to such work being out of print or other similar reasons (Article 31(1)(iii)). Unlike the case provided in Article 31(3), automatic public transmission is not allowed. Further, such reproduction is not transferrable to users (Article 47-10). A typical case would be the case where the other library needs to supplement missing parts of a magazine which is difficult to obtain, but not the case where the other library does not have sufficient funds (Nakayama, p.316).

(2) In addition to the case mentioned in (1) above, the National Diet Library may, for the purpose of presenting the work contained in the out-of-print materials to the public at such other libraries, etc., make a record of the work contained in the out-of-print materials onto a recording media (the second sentence of Article 31(2)), and then make an automatic public transmission (i.e. facsimile, email) thereof to the other libraries, etc. using the reproduction of said work recorded onto the recording media (the first sentence of Article 31(3)). However, such reproduction is not transferrable to users (Article 47-10).

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:

(1) A library, etc. may make a reproduction of a work contained in library materials where, in response to a request from its users, it provides a reproduction of such work (Article 31(1)(i)). A

library, etc. may transfer such reproduction to its users (by way of hand delivery or postal mail) (Article 47-10); however, not by way of automatic public transmission (e.g. facsimile or email to users (public)).

(2) In the case referred to in b.(2) above, a library, etc. may prepare and provide, in response to a request from its users, a production of the work delivered by way of automatic public transmission (e.g. facsimile, email) from the National Diet Library (the second sentence of Article 31(3)). Such library, etc. may transfer such reproduction to its users (by way of hand delivery or postal mail) (Article 47-10).

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

yes

Please comment:

(1) The National Diet Library may make a reproduction of a work contained in the Internet material of the state government, local governments, incorporated administrative agencies and other organizations, to the extent deemed necessary for the purpose of gathering such materials (Article 25-3 of the National Diet Library Act, Article 42-4(1) of the Copyright Act).

(2) A national or local archive, etc. may make a reproduction of a work contained in a historical public record, for the purpose of preservation of such historical public record (Article 42-3(1)).

(3) A national or local archive, etc. may make a reproduction of a work contained in a historical public record (Article 42-3(2)) and transfer such reproduction to its users (Article 47-10), for the purpose of providing or presenting it to the public.

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

These exceptions or limitations apply to only certain organizations.

(1) Provisions applicable only to the National Diet Library:

- the first sentence of Article 31(2): reproduction of works by the use of electronic or magnetic records so as to avoid deterioration of conditions of materials that may be caused by public use

- the second sentence of Article 31(2), the first sentence of Article 31(3): automatic public transmission of out-of-print materials to other libraries, etc. (the first sentence of paragraph (3)) and reproduction thereof into an electronic or magnetic record for that purpose (the second sentence of paragraph (2))

- Article 42-4: reproduction of works relating to the Internet material of the state government, local governments, incorporated administrative agencies and other organizations.

(2) A provision applicable only to national/local archives:

- Article 42-3: a reproduction for the purpose of preservation of a historical public record, and a reproduction for the purpose of providing or presenting it to the public

(3) In addition to those mentioned in (1) and (2), facilities to which the limitation on copyright applies are designated by the laws and a Cabinet Order as follows:

- The National Diet Library (the main paragraph of Article 31(1))

- Public libraries (i.e. libraries established by local governments)(Article 2 of the Library Act)

- Private libraries (i.e. libraries established by the Japan Red Cross Society, a general incorporated association or general incorporated foundation)(Article 2 of the Library Act)

- Libraries of universities, libraries of colleges of technology (Article 1-3(1)(ii) of the Order for Enforcement of the Copyright Act)

- Libraries of the National Police Academy (Article 27 of the Police Act), the National Defense Academy (Article 15 of the Act for Establishment of the Ministry of Defense) and the National Defense Medical College (Article 16 of the same Act)(Article 1-3(1)(iii) of the Order for Enforcement of the Copyright Act)

- National museums, museums, the National Museum of Modern Art, etc. (Article 1-3(1)(iv) of the Order for Enforcement of the Copyright Act)

- Affiliated research institutions of national government agencies and local governments (Article 1-3(1)(v) of the Order for Enforcement of the Copyright Act)

- Other facilities designated by the Commissioner of the Agency for Cultural Affairs (Article 1-3(1)(vi) of the Order for Enforcement of the Copyright Act). These facilities are publicized in the "Article 31 of the Copyright Act" section on the page "List of copyright-related public notices of the Agency for Cultural Affairs" on the website of the Copyright Research and Information Center (http://www.cric.or.jp/db/domestic/bu_index.html).

In order to qualify for the exceptions/limitations, all of the aforementioned facilities are required to have librarians or other officers (the main paragraph of Article 1-3(1) of the Order for Enforcement of the Copyright Act).

The abovementioned facilities are exclusive and no other facilities are permitted to make reproductions. For example, libraries of primary or secondary educational institutions, including elementary schools, middle schools and high schools, and company libraries are not permitted to make reproductions.

In order for the abovementioned facilities to be allowed to make reproductions, they must do so within the scope of non-profit-making activities (the main paragraph of Article 31(1)). For these facilities themselves, there is no for-profit/not-for-profit purpose requirement.

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.

(1) A reproduction for the purpose of a user's research or study is subject to the following conditions (Article 31(1)(i), the second sentence of Article 31(3)):

(a) The user must use such reproduction for research purposes. However, it is practically difficult for a library to evaluate the purposes of each user.

(b) Only a portion of the entire work may be reproduced. This requirement has been imposed so as to strike a balance between copyright holders and users. It is generally understood that "a portion" means less than half of the entire work. However, it is not practical to understand that only half of a single item of a dictionary, photograph, painting or haiku can be reproduced. Therefore, supplementation by an interpretative approach would be necessary (Nakayama, p.313).

(c) As an exception to (b) above, an individual work contained in a periodical published for a considerable period of time may be reproduced in its entirety. A typical example of such work is an academic paper contained in a magazine. The benchmark for "considerable period of time" would be the period until the periodical goes off the market, as the copyright holder's right would be less likely to be prejudiced after such period (Nakayama, p.314).

(d) Only one copy of a reproduction should be provided to each user.

(2) Only the National Diet Library is expressly permitted to make an electronic or magnetic record of a work onto a recording media (Article 31(2)) and to make automatic public transmission thereof to other libraries (Article 31(3)).

Contrary to this, general libraries, etc., which are permitted to make reproductions, are not prohibited from making such reproductions by way of electronic or magnetic record (Article 31(1)). However, such libraries may not make automatic public transmission of reproductions.

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.

(1) The work must be a library material (e.g. the library's collection items) (the main paragraph of Article 31).

(2) In the case of a reproduction for a user's research and study (Article 31(1)(i), the second sentence of Article 31(3)), such work must be a published work.

(3) In the case of a reproduction in response to a request from another library, etc. (Article 31(1)(iii)), the work must be one which is difficult to obtain due to such work being out of print or other similar reasons.

5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) performance and/or display for educational purposes;

no

Please comment:

With regard to performance, etc., although there is no copyright limitation focused on educational purpose, such activities are covered by the provision on not-for-profit purpose performance, etc. (i.e. performance, presentation or recital) (Article 38). In practice, school plays are often performed based on a modified scenario, depending on the school grade of the students who make performance, etc. of the work or the time restraints. Such a case may involve the issues of exploitation by means of adaptation (Article 43) and the right to maintain integrity (Article 20).

Adaptation: Exploitation by means of adaptation is not allowed (Article 43). By not allowing adaption for school plays as mentioned above, the possibility of inconvenience for users (e.g. pupils, students) may not be denied (Nakayama, p.346).

Right to maintain integrity: The author shall have the right to maintain the integrity of his work and its title, and no distortion, mutilation or other modification thereof shall be made against his intent (Article 20(1)). In this regard, abbreviation of a long theatrical play for the purpose of a school play may in some cases satisfy the requirement of an unavoidable modification (Article 20(2)(iv)). (*Copyright Law 1st Edition* by Nobuhiro Nakayama, Yuhikaku Publishing, p.276; *Standard Copyright Law 2nd Edition* by Ryu Takabayashi, Yuhikaku Publishing, p.158).

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

yes

Please comment:

(1) It is permissible to reproduce a work in a school textbook (textbooks authorized by the Minister of Education and Science or those compiled under the authorship of the Ministry of Education and Science), textbooks intended for correspondence courses of high schools, and teachers' manuals for school textbooks (Article 33(1) and (4)) and transfer such reproductions (Article 47-10)).

In such case, a notice to the author and payment of a certain amount of copyright compensation designated by the Agency for Cultural Affairs are required (Article 33(2)).

(2) It is permissible to reproduce a work already reproduced in a school textbook by enlarging the letters and characters and other necessary methods for the purpose of providing the same for use by pupils or students with visual disabilities or developmental difficulties (Article 33-2(1) and to transfer such reproductions (Article 47-10). The "necessary methods" here would include, in addition to enlargement, digital recording (Nakayama, p.332). A notice to the publisher of a textbook is required. In addition, for commercial use, it is necessary to pay compensation to the copyright holders[A1][file:///andisk2013/japanese-

Gr/AIPPI/E6%9C%AC/E9%83%A8/E8%AD%B0/E9%A1%8C/2015/E3%80%80Rio-de-janeiro/E7%8F%8E4%BC%9A/2015/E8%AD%B0/E9%A1%8C/E5%A7%94/E5%93%A1/E4%BC%9A/EF%BC%88/E3%83%AA/E3%82%AA/E3%83%87/E3%82%B8/E3%83%A3/E3%83%8D/E3%82%A4/E3%83%AD/EF%BC%89/Q246/Q246%20Group%20Report%20Japan.doc#_msocom_1] (Article 33-2(2)).

(3) A person who teaches a lesson, and those who receive the lesson, in a school or other educational institutions may, for the purpose of making a work available in the course of the lesson, reproduce a work (Article 35(1)) and transfer such reproductions (Article 47-10).

(4) It is permissible to reproduce or make public transmissions (i.e. for the purpose of examination in a distant place) of a work for questions for a school entrance examination, knowledge or skill examination or license examination (Article 36(1)).

Reproduction or public transmission for use in a for-profit examination (e.g. company employment examination) requires compensation payment to the copyright holder (Article 36(2)). Due to the confidential nature of exam questions, a notice to the author is not required. This Article is irrelevant to reproduction of past exam questions books sold on market, as such reproduction is not for the purpose of examination (Nakayama, p.336).

Exam questions include so-called fill-in-the-blank questions and questions requiring an examinee to find and correct an error. Such questions may involve the issues of exploitation by means of adaptation (Article 43) and the right to maintain integrity (Article 20).

Adaptation: Exploitation by means of adaptation is not allowed (Article 43). For the purpose of the Copyright Act, "adaptation" means "modification to external expressions by such way of dramatizing, while maintaining innate expressions of the original work" (Nakayama, p.154). The aforementioned cases (fill-in-the-blank questions and questions requiring an examinee to find and correct an error) would often be outside the scope of "adaptation."

Right to maintain integrity: The author shall have the right to maintain the integrity of his work and its title, and no distortion, mutilation or other modification thereof shall be made against his intent (Article 20(1)). The issue of fill-in-the-blank questions, etc. comes down to the issue of whether it is an unavoidable modification (Article 20(2)(iv)) (Nakayama, p.338).

c) making translations;

yes

Please comment:

(1) Translation, arrangement, transformation or adaptation of a work (Article 43(i)) is permitted in the following cases:

- Reproduction in school textbooks, etc. (Article 33(1) and (4))
- Broadcasting of the work in school education programs, reproduction of the work in educational material for such program (Article 34(1))
- Reproduction for the use at school and other institutions (Article 35(1))
- Simultaneous distance education (Article 35(2))

(2) A translation (Article 43(ii)) can be made in the following cases:

- Making and providing reproduction at the request of a user of a library, etc. (Article 31(1)(i), the second sentence of Article 31(3))
- Reproduction and public transmission for use in exam questions (Article 36)
- Reproduction in Braille, recording and public transmission for people with disabilities including visual disabilities (Article 37(1) and (2))

(3) A transformation or adaptation (Article 43(iii)) can be made in the following case:

- Reproduction for children with disabilities such as visual disabilities and development difficulties (Article 33-2(1))

(4) A translation, transformation or adaptation (Article 43(iv)) can be made in the following case:

- Making transcription of sounds for people with disabilities including visual disabilities (Article 37(3))

(5) A translation or adaptation (Article 43(v)) can be made in the following case:

- Reproduction, etc. for people with auditory disabilities (Article 37-2)

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:

(1) It is permissible to broadcast a work in a school education program, such as The Open Air University of Japan, and reproduce it in the teaching material for such program (Article 34(1)), and transfer such reproduction (Article 47-10). A notice to the author and payment of a reasonable amount of compensation is required (Article 34(2)).

(2) In the course of the class, if the original or reproduction of a work is provided or presented (Article 35(1)) or performed (Article 38(1)), it is permissible to make a public transmission for reception by those who are receiving the same lesson at the same time in a distant place (Article 35(2)), namely, simultaneous distance education.

Making sound or picture recording of such work and re-transmission thereof at a different time is within the scope of Article 34(1) as mentioned in (1) above. Meanwhile, as the transmission within the same facility premises does not fall under "automatic transmission" (Article 2(1)(vii), in parentheses), this Article does not apply (Nakayama, p.335).

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

yes

Please comment:

(1) It is permissible to exploit a work already made public by way of quotation, provided that such quotation is compatible with fair practice and to the extent justified by the purpose of the quotation, such as research (Article 32(1)), and to transfer the cited work (Article 47-10).

(2) It is permissible to exploit a work already made public to the extent deemed necessary for the purpose of a test for development or commercialization of technology relating to sound recording, picture recording and other use of works (Article 30-4).

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

yes

if so, what activities?:

(1) It is permissible to reproduce in Braille a work for people with visual disabilities (Article 37(1)), to record a work on a recording medium or to make public transmissions of a work by means of a Braille-processing system (Article 37(2)), and to make sound recordings and make automatic public transmissions using such recordings (Article 37(3)).

(2) It is permissible to reproduce the sound by way of transcription and make automatic public transmission thereof for the benefit of people with auditory disabilities (Article 37-2(i)). In addition to making a transcription, it is permissible to make a reproduction of a work solely intended for lending to people with auditory disabilities (Article 37-2(ii)). The example of item (ii) is a reproduction of a cinematographic work with subtitles and sign language (Nakayama, p.344).

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?

(1) In principle, only not-for-profit educational institutions (Article 35(1)) are eligible to make reproductions of a work (Article 35(1), in parentheses); however, this Article applies to a for-profit organization if and to the extent a stock company is allowed to operate a school (Article 12 of the Act on Special Districts for Structural Reform). Further, it is understood that these educational institutions include specialized training colleges and vocational schools, etc., in addition to elementary schools, middle schools, high schools and universities (Nakayama, p334).

(2) Reproduction, etc. in order to prepare a school textbook, etc. in large print (Article 33-2) is permissible for for-profit organizations; however, these organizations are required to pay a certain

amount of compensation as designated by the Commissioner of the Agency for Cultural Affairs (Article 33-2(2)).

(3) Reproduction and public transmission of a work for use in an exam question (Article 36) is permissible for for-profit organizations, however, these organizations are required to pay compensation equivalent to the ordinary royalty rate (Article 36(2)).

(4) In relation to performance, etc. for not-for-profit purposes (Article 38), a charge-free performance, etc. for promotional purposes of a commercial company is understood to constitute copyright infringement, as such performance is intended for a commercial purpose of increasing sales by way of promotion and therefore is outside the scope of this Article, even if such performance contains some educational elements.

(5) In relation to not-for-profit purpose performance, etc. (Article 38), a performance by a school operator company which is a commercial company (Article 12(2) of the Act on Special Districts for Structural Reform) satisfies this Article if it is charge-free and for education/research purposes (Table of Article 12(11), the Act on Special Districts for Structural Reform).

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.

(1) The following conditions are required for reproduction, etc. at schools and other educational institutions (Article 35(1)) and public transmission for simultaneous distance education (Article 35(2)).

(a) Reproduction is permissible only for a person who teaches a lesson, and those who receive the lesson (i.e. both a teacher's and student's activities are covered.)

(b) These activities must be for the purpose of use in the course of lessons.

(c) These activities must be done within the extent deemed necessary.

(d) The work must be one which has already been made public.

(e) These activities must not unreasonably prejudice the interests of the copyright holder.

For example, a teacher's reproduction of a purchased exam question book for the purpose of distributing it to students, or reproduction of a computer program for use in class on computers to be used by students are not allowed (Nakayama, p.335).

Reproduction, etc. at schools and other educational institutions (Article 35(1)) does not require the payment of compensation to copyright holders (i.e. free-of-charge). Consequently, such activities are subject to stricter conditions compared to reproduction for use in school textbooks (Article 33) or educational broadcasting programs (Article 34) (Nakayama, p.334).

(2) Reproduction and public transmission of a work for use in exam questions (Article 36(1)) are subject to the following conditions:

(a) The work must be one which has already been made public.

(b) These activities are permitted only to the extent deemed necessary for the purpose of examinations and tests.

(c) In the case of public transmission, such activity must not unreasonably prejudice the interest of copyright holder.

This provision was introduced based on the consideration that a public transmission (online examination) more likely to unreasonably prejudice the interests of copyright holder compared to reproduction for a paper exam (Nakayama, p.337).

(3) In relation to a not-for-profit purpose performance, etc. (Article 38), both teachers and students are allowed to make a performance of a work, as there is no restriction on the person who is allowed to make a performance, etc. of the work.

8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

The provision on use of works for educational/research purposes only covers works which have already been made public (Articles 32 through 38).

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 explained above, in principle, all exceptions/limitations to copyright protection are stipulated by the statutory provisions. These exceptions/limitations are considered exclusive, and exceptions/limitations to copyright protection based on the fair use doctrine not stipulated by law is not allowed.

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

The statutory provisions on exceptions/limitations to copyright protections, as mentioned above, are understood to codify the activities which satisfy the three-step test under the Berne Convention in accordance with the nature thereof, respectively. Therefore, the issue of whether the exceptions/limitations to copyright protection apply is determined solely from the standpoint of whether the activity in question satisfies the requirement of the relevant statutory provision. Whether the activity in question satisfies the three-step test under the Berne Convention is not directly taken into account as a requirement for the application of exceptions/limitations to copyright protection (See SKY

PerfectTV case (Tokyo District Court decision on 16 May 2000) in which the court directed the same conclusion).

- 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 provisions on exceptions/limitations to copyright protection as stipulated in Articles 30 through 47-10 of the Copyright Act are automatically applied only if the requirements thereunder are met. There is no need for further procedures, such as applying for licenses from copyright holders or administrative agencies.

- 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?

For certain use activities, right of compensation is guaranteed (Article 33(2), Article 33-2(2), Article 34(2), Article 36(2) and Article 38(5)). Under these provisions, it is a user who is required to make payment of compensation, and the right to receive compensation is vested in a copyright holder. The amount of the compensation is as follows: in the case of a reproduction in school textbooks (Article 33(2), Article 33-2(2)), the amount "which will be fixed each year by the Commissioner of the Agency for Cultural Affairs"; in the case of broadcasting of a school educational program (Article 34(2)) and not-for-profit lending of cinematographic films, etc. (Article 38(5)), "a reasonable amount of compensation"; and in the case of reproduction for exam questions (Article 36(2)), "compensation in an amount which corresponds to the ordinary royalty rate." Among these, the amount "which will be fixed each year by the Commissioner of the Agency for Cultural Affairs" is to be determined each year after the Commissioner consults with the Council for Cultural Affairs (Article 71). The order of the amount of these compensations is understood as follows: the amount which will be fixed each year by the Commissioner of the Agency for Cultural Affairs; a reasonable amount of compensation; compensation in an amount which corresponds to the ordinary royalty rate.

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

In relation to exceptions/limitations under the Copyright Act, there is no special provision for orphan works. Namely, in relation to exceptions/limitations under the Copyright Act, there is no specific difference in the treatment between orphan works and other works. In the case of compensation for reproduction in a school textbook, etc. (Article 33(2), Article 33-2(2)), the payer is required to make a deposit of the amount "which will be fixed each year by the Commissioner of the Agency for Cultural Affairs" instead of paying it [to the copyright holder] (Article 74(1)(ii)).

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

In relation to this issue, authors are divided into two approaches, namely, an approach to consider the exceptions/limitations as non-mandatory provisions which may be overridden by the parties' contract, and an approach to consider such contract clause to be null and void. There have been no court precedents which expressly deals with this issue. The issue of validity of such contract clause should be determined by taking into consideration the entirety of various factors, such as the necessity (i.e. situations which necessitate the copyright holders to incorporate such clause) and proportionality (i.e.

degree of the user's disadvantage caused by such clause) of such clause, rather than by across-the-board assessment.

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.:

For libraries, the Japan Library Association, the National and Private University Libraries Cooperation Committee and the National Public Library Association, which constitute the Stakeholders Association for Use of Works in Libraries, has developed the guidelines called "Guidelines on Reproduction of Books Physically Loaned under Libraries Cooperation Arrangement" so as to facilitate provision of reproduction of books. With regard to the issue of payment of compensation to the copyright holder in the case of use by educational institutions, the Textbook Publishers Association of Japan, comprised of textbook publishers, has entered into memorandums with each of the copyright collective societies (the Japan Writer's Association for literal works, the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) for musical works, Japan Artists Association, Inc. for artistic works, the Japan Professional Photographers Society for photographic works, and Art, Photograph and Graphic Design Japan for foreign artworks) so as to facilitate payment of compensation.

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?:

The following literature is stored in libraries and archives:

- Literature which serves as basis of research.
- Literature which has academic value and becomes the subject of research.
- Literature which is out-of-print or difficult to obtain.
- Literature kept only by libraries in distant places.

In light of the development of culture, reproduction and provision of such literature, as well as reproduction for the purpose of preservation, should be allowed by creating exceptions/restrictions on copyright protection.

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

yes

If yes, in relation to what activities? :

Education (in particular, education of the national language and foreign languages and musical education) is given by the use of existing works. In order to provide high-quality education, it is essential to use a work in a textbook and exam questions, to reproduce, present or recite a work in the course of classes, and to make an adaptation of a work for pupils and students with disabilities. Further, it is also necessary to allow pupils and students to use a work (by such way of performance and recital).

These activities should be allowed from the standpoint of fostering people to lead cultural development for the next generation.

Understanding of prior research achievements is essential for the creation of new research themes. Prior achievements are found in academic journals and books. For the purpose of research, exceptions/limitations to copyright protection should be allowed to a certain extent while striking a balance between the research and protection of work. For example, a reproduction of a periodical should be allowed after a reasonable period has elapsed from the release of such periodical.

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

no

Why not?:

We do not believe that the three-step test is useful.

The three-step test is important as a theoretical principle; however, this test is merely an abstract norm, which does not directly serve the basis of rights and obligations in Japan. In other words, the three-step test is not a norm relied upon by the court. The use in question qualifies for an exception to copyright protection only if such use satisfies the requirements under the statutory exception stipulated in the Copyright Act of Japan, not the requirements under the three-step test (Tokyo District Court decision on 16 May 2000, *Hanrei Times* No.1057, at 221).

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

In principle, exceptions/limitations to copyright protection in relation to libraries/archives and educational/research institutions should not be capable of being overridden by contract.

The exceptions/limitations to copyright protection have been created mainly from the standpoint of public interests. Moreover, those who benefit from these exceptions/limitations (e.g. people who receive education) are not formed into an organization, have less influence on legislation, and are not in the strong position in negotiation between the parties. Therefore, the purpose of the legislation may be circumvented by allowing these exceptions/limitations to be overridden by a contract.

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

We believe that compensation should be paid in the following circumstances: (i) a work, although provided primarily for the purpose of education and research, is also capable of being used for normal purposes, or (ii) the purpose of use of a work includes both education/research and commercial purposes. An example of (i) is a reproduction of a work in a textbook. Pupils and students are allowed to use the work outside the class (namely, in the same manner as the book purchased at the store), in addition to usage as part of the class. An example of (ii) is the reproduction of a work for the purpose of use in questions for for-profit examinations or tests.

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?

A library may not lend a cinematographic work without a right holder's permissions, even where such lending is not for profit and the library does not receive any consideration from the lessee (exception under the parentheses of Article 38(4)). It is not always appropriate to apply this restriction to all cinematographic works (meaning not only commercial movies presented on a screen, but generally meaning works containing moving picture expressions).

It is not permissible under law to transmit a reproduction by way of facsimile or e-mail, even if reproduction thereof at a library is permitted (Article 31(1)). The reason for this is that transmission of a reproduction by facsimile or as an attachment to an e-mail correspondence constitutes an exploitation which is separate from the reproduction (i.e. public transmission). Such limitation is inconvenient for users, nor is it reasonable (for the stakeholders' opinions as to this issue, see the report of the Council for Cultural Affairs, Subdivision on Copyright, January 2006, pp.20-24).

It is permissible for Library A that has an out-of-print book to make a reproduction of such book and provide it to Library B in response to a request from Library B (Article 31(3)). However, it is not permissible under law for Library B to reproduce said book borrowed from Library A. There may be a case where Library B physically borrowed the actual book from Library A at the request of a user, and the user desires to obtain a copy of a portion of said book. However, under the laws, even if the actual book is physically present before the user, reproduction is possible only after the book is returned to Library A (In practice, such manner of reproduction is permitted under the guidelines. See "Guidelines on Reproduction of Books Physically Loaned under Libraries Cooperation Arrangement")(for the stakeholders' opinions as to this issue, see the report of the Council for Cultural Affairs, Subdivision on Copyright, January 2006, pp.17-20)

The National Diet Library may make an automatic public transmission of a work included in library materials to other libraries (limited to those prescribed in the main paragraph of Article 31(1)), if such work is difficult to obtain due to such work being out of print or other similar reasons (hereinafter "out-of-print materials"). The other library may make a reproduction and provide a portion of said work at the request of its user (Article 31(3)). As a result, the user is able to obtain a reproduction of a portion of such work at the nearest library, without the need to visit the National Diet Library. However, under the current laws, it is not permissible for a user to apply directly with the National Diet Library via the Internet for the reproduction, and then receive the reproduction using the Internet (for the stakeholders' opinions as to this issue, see the "Intermediate Summary" prepared by the Council for Cultural Affairs, Subdivision on Copyright, the Subcommittee on Protection and Use of Prior Works, October 1, 2008, pp.40-48).

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Libraries/archives often deal with foreign literature. If harmonization is not achieved, the available scope and manner of the same literature may vary among countries/jurisdictions. Considering the significant

role of libraries/archives in terms of contribution to cultural development, significant difference among countries/jurisdictions is not desirable and therefore harmonization should be attained to the maximum extent.

For education/research institutions, the limitation on copyright protection plays an important role in the efficacy of education. Without harmonization, some countries/jurisdictions may not attain a sufficient level of education. Such situation is not appropriate. Considering the significant role of education/research in terms of contribution to the development of society, harmonization should be attained to the maximum extent.

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:

Not applicable, as the answers to both Questions 16 and 17 are "Yes."

24) If yes to question 16):

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

In Japan, libraries to which the limitations to copyright protection apply are designated by a Cabinet Order, namely: (i) public libraries established by local governments; (ii) libraries of universities, libraries of colleges of technology (libraries of elementary schools, middle schools and high schools are not included); (iii) the National Police Academy and the National Defense Academy; (iv) national museums and art galleries; (v) research institutes for academic studies; and (vi) facilities established not based on laws, which are similar to those specified (iv) or (v) and designated by the Commissioner of the Agency for Cultural Affairs.

Some people are of the opinion that these limitations should be also applied to company libraries; however, we believe that it is premature to do so.

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

It has been reported that a few libraries lend e-books with the cooperation from the copyright holders, and some people are of the opinion that the law should be revised to allow other libraries to provide such service. However, we believe that revising the law without sufficiently considering measures to secure technical security and return of e-books may lead to a negative impact on protection of right holders of works.

In addition, libraries are large customers of books that support the publication culture. In the case of e-books, the maximum number of copies available for lending to users should correspond to the

number of subscription licenses, otherwise sales of the book will decline, having a material impact on the preservation of publication culture. Thus, we believe that it is premature to apply exceptions/limitations to copyright protection to lending of e-books.

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

The issue relating to lending e-books may be discussed, subject to fulfillment of an environment which can securely and sufficiently protect the right holders of works (e.g. sufficient technical safety measures should be secured for e-books to be loaned; there should be secure means of return of loaned e-books and libraries should be equipped with personnel and a physical system to secure return of e-books; the maximum number of e-books available for lending should be limited to the number of subscription licenses).

25) If yes to question 17):

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

Article 35(1) provides that it is applicable to "a person who teaches a lesson, and those who receive the lesson, in a school or other educational institution (excluding, however, those institutions established for profit-making purposes)" (such school or other educational institutions includes elementary schools, middle schools, high schools, secondary education schools, universities, colleges of technology, schools for the deaf, schools for the blind, schools for disabled children, kindergartens, specialized training colleges, miscellaneous schools, etc., as well as social educational facilities such as community halls and youth houses, education and training facilities such as education centers, and vocational facilities such as vocational training centers.)

However, this provision does not cover academies or cultural seminar centers run by private persons and companies' employee training facilities, although these institutions have the same level of needs of using works as the educational institutions.

Some of these institutions are equipped with high-level educational functions; however, it is quite difficult to establish a clear criteria. As such, discussion for the extension of the scope of application to these institutions should be the future challenge.

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

By the revision of 2003, Article 35(2) provides a limitation on copyright protection relating to a public transmission of a work for those who are receiving the same lesson at the same time at different locations, provided that those who receive the same lesson are present simultaneously on both the transmitting side and the receiving side.

However, an increasing number of people engaged in education opine that this provision should be revised: namely, when using published digital works for classes, storing the teaching material on a computer server to use them for the preparation for the class or follow-up activities would constitute "non-simultaneous use" which would unreasonably prejudice the interest of copyright holders, and therefore requires obtaining licenses from the copyright holders for each instance, but, against the

backdrop of the critical importance of e-learning for the improvement of quality of education and anticipation toward the promotion and dissemination of use of e-learning, such restriction under the Copyright Act is an obstacle to the improvement of quality of education.

- c) under what conditions should the activities be undertaken or the copyrighted work be used?
- Reference: Requests dated December 25, 2013, submitted by the Japan Universities Association for Computer Education to the Council for Cultural Affairs, Subdivision on Copyright]
- [i] The work should only be used for the purpose of classes of schools and other educational institutions.
 - [ii] The recipients of the automatic public transmission should be limited to students and teachers. IDs and passwords shall be assigned for limiting the users.
 - [iii] Works that are in stores for purchase by individual students should be excluded.
 - [iv] Appropriate measures should be taken for works subject to the automatic public transmission so as to avoid reproduction and tampering. For example, footage shall be distributed by way of streaming, and still pictures and texts should be in PDF format.
 - [v] Compliance guidelines on copyright protection relating to e-learning should be developed, so as to ensure guidance and education for the teachers and students by way of seminars and the Internet.

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)?
- "Use under the exceptions/limitations" is considered as a use which satisfies the requirement of the statutory provisions on the exceptions/limitations. Accordingly, such "use under the exceptions/limitations" should be automatically allowed without the need for further actions. We believe that there is no need for requiring the user to satisfy any further criterion or procedures.

- 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?
- Compensation for use under the exceptions/limitations should be calculated by considering various factors, such as the purpose of the provision, whether the use is for commercial purpose or not, the necessity of use of the work, disadvantages to the copyright holder, disadvantages to the users, the frequency of reproduction and use, and type of work. A user of the work is responsible for the payment of compensation, and such compensation shall be paid to the copyright holder who owns the copyright.

- 28) What special treatment, if any, should there be for use of orphan works within such exception or limitation?
- Where a user is required to pay any compensation to a copyright holder, there will arise a problem that a user cannot pay compensation to the copyright holder for use of orphan works. For the use under the

exceptions/limitations, the payment of compensation is not a condition precedent for the use of a work, and non-payment of compensation does not immediately give rise to copyright infringement. Non-payment of compensation only constitutes default of monetary obligation (*Commentary on Copyright Act II*, Masao Handa and Masayuki Matsuda ed, Keiso Shobo, p.239).

As mentioned above, the uses under the exceptions/limitations which require the payment of compensation are as follows: (i) reproduction in school textbooks (Article 33(2), Article 33-2(2)); (ii) reproduction as exam questions (Article 36(2)); (iii) broadcasting of a school educational program (Article 34(2)) and (iv) not-for-profit lending of cinematographic films, etc. (Article 38(5)).

Among these, with regard to (i), if the person liable to pay the compensation cannot ascertain the copyright holder without any negligence (which would include the case of an orphan work), the amount of the compensation "which will be fixed each year by the Commissioner of the Agency for Cultural Affairs" to be paid to the copyright holder shall be deposited instead of paying it [to the copyright holder] (Article 74(1)(ii)). With regard to (ii) through (iv) above, there is no special provision applicable to the case of orphan works.

However, in the case of orphan works, there is no reason to treat the compensation payment under (ii) through (iv) differently from the payment under (i), and, like the case of (i), a provision which requires the users to deposit compensation for orphan works should be created also for the cases of (ii) through (iv).

However, in the case of (i), the amount of compensation is the amount "which will be fixed each year by the Commissioner of the Agency for Cultural Affairs" and thus the amount to be deposited is fixed. On contrary, the cases of (ii) to (iv) involves a problem that the amount to be deposited is not fixed as such amount is left to separate consultation between the users and copyright holders. In this regard, it may be appropriate to require users to deposit the amount designated by the Commissioner of the Agency for Cultural Affairs in the same manner as Article 67(1).

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

It is understood that such circumstance should be determined by considering the totality of various factors, such as the purpose of the statutory provisions on exceptions/limitations, the necessity, the degree of disadvantages to the user of the work, and the public interests. However, the provisions related to libraries, archives and education/research institutions, which relate to the Working Question, closely relate to public interest, and overriding such exceptions/limitations by a contract would give a material disadvantage to users of works. As such, we believe that these exceptions/limitations should be understood as compulsory provisions which cannot be overridden by a parties' contract.

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?

For facilitating compensation payment, we believe that efforts by private organizations for distributing the collected compensation to copyright holders would be necessary. In addition, in order to enable such efforts by private organizations, it would be necessary to reconcile such efforts with

exceptions/limitations provided by laws.

Summary

Q246 Summary (Japan)

Library Exceptions

The Copyright Act of Japan has statutory provisions for exceptions or limitations to copyright protection for libraries. A library, etc. is permitted to reproduce a work included in its library materials (meaning collection items of such library, etc.), where it is necessary for the purpose of preserving the library materials (Article 31(1)(ii) of the Copyright Act). Also a library may, in response to a request from other libraries, reproduce a work included in its library materials if the work is difficult to obtain due to such work being out of print or other similar reasons (Article 31(1)(iii) of the Copyright Act).

National Diet Library Exceptions

The National Diet Library may make a record of a work included in the library material onto a recording media, if the electronic or magnetic record of such material is to be prepared for making it available to the public in lieu of the original thereof, so as to avoid deterioration, damage or defacement that may be caused by making the original available to the public (the first sentence of Article 31(2) of the Copyright Act). Also the National Diet Library may, for the purpose of presenting the work contained in the out-of-print materials to the public at such other libraries, etc., make a record of the work contained in the out-of-print materials onto a recording media (the second sentence of Article 31(2) of the Copyright Act).

Education Exceptions

The Copyright Act of Japan has statutory provisions for exceptions or limitations to copyright protection for educational purposes. It is permissible to reproduce a work in a school textbook (textbooks authorized by the Minister of Education and Science or those compiled under the authorship of the Ministry of Education and Science), textbooks intended for correspondence courses of high schools, and teachers' manuals for school textbooks (Article 33(1) and (4) of the Copyright Act). In principle, only not-for-profit educational institutions (Article 35(1) of the Copyright Act) are eligible to make reproductions of a work (Article 35(1), of the Copyright Act, in parentheses).

Also there are some exceptions for translations for educational purposes (Articles 33-35 of the Copyright Act).

Policy Considerations

As an example, a library may not lend cinematographic work without the right holder's permission, even

where such lending is not for profit and the library does not receive any consideration from the lessee (exception under the parentheses of Article 38(4) of the Copyright Act). It is not always appropriate to apply this restriction to all cinematographic works (meaning not only commercial movies presented on a screen, but generally meaning works containing moving picture expressions).

Harmonization

Article 35(1) of the Copyright Act provides that it is applicable to "a person who teaches a lesson, and those who receive the lesson, in a school or other educational institution (excluding, however, those institutions established for profit-making purposes)". Some of these institutions are equipped with high-level educational functions; however, it is quite difficult to establish clear criteria. As such, discussion for the extension of the scope of application to these institutions is a future challenge.

Through the 2003 revision, Article 35(2) of the Copyright Act provides a limitation on copyright protection relating to a public transmission of a work for those who are receiving the same lesson at the same time at different locations, provided that those who receive the same lesson are present simultaneously on both the transmitting side and the receiving side.

However, an increasing number of people engaged in education are of the opinion that this provision should be revised. Namely, when using published digital works for classes, storing the teaching material on a computer server to use them for the preparation for the class or follow-up activities would constitute "non-simultaneous use" which would unreasonably prejudice the interest of copyright holders, and therefore requires obtaining licenses from the copyright holders for each instance. However, against the backdrop of the critical importance of e-learning for the improvement of the quality of education and anticipation toward the promotion and dissemination of use of e-learning, such restriction under the Copyright Act is an obstacle to the improvement of the quality of education.

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.