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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 Copyright Law considers an express exception to the Copyright Law that a library or archive reproduces one single copy of a work for its preservation or replacement.

However, the law has distinguished the notion of “preservation or replacement”. Likewise, the law does not refer to distribution or any other form of use of works, that is not reproduction of the same.

The Copyright Law reads textually: “A literary or artistic work disclosed already may be used (as a) ... reproduction of one single copy by an archive or library, for reasons of

safety and preservation, and that has become exhausted, out of catalogue and in danger to disappear”.

The exception does not apply to works only, but also to sound recordings, books and video recordings, that under Mexican Copyright Law are subject-matter of neighboring rights.

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

yes

Please comment:

Yes, the archive or library utilizes for Interlibrary lending the same copy that has been entitled to make for safety or preservation

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

no

Please comment:

The law seems not to forbid that the library or archive lend the copy in their possession. However, since the law does not provide distribution exceptions, the answer to this question can be “no” in the end, since lending or providing copies of works are indeed forms of distributing works.

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

no

Please comment:

No other activities in addition to the foregoing.

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?

No, the archive or library exception, as provided by the law, cannot be extended to museums or any other organization, unless the museum or organization has lay itself an archive or library. Public archives and libraries are both beneficiaries of the exception.

Commercial archives or libraries can also be beneficiaries of the exception, provided that they do not sell or rent their safety or preservation copy or in general, they do not obtain income for making and distributing the copy.

It could be included on this consideration as archives, courts and Judiciary archives and files, when the reproduction of the literary or artistic work would be used as evidence in an administrative or judicial proceeding.

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, there are conditions under the law. First, the safety or preservation copy needs to be just one. Second, the work needs to become exhausted (no availability of copies in the market), out of catalogue (of the library's collection) and in danger to disappear (although the law does not clarify if the work needs to be in danger to disappear from the market or the original copy property of the archive or library, be in danger to disappear).

The Copyright Law does not impose any condition or restriction as to the amount of the work that can be copied or the medium utilized.

It could be assumed that the reproduction of the work should be complete and not only a portion. As mentioned the Copyright Law does not impose any specific condition.

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.

No, the law does not impose conditions regarding the type or works that can be copied. In keeping with this, it is possible making one copy of any literary or artistic work. Likewise, the exception is permitted for every lawful created work or copies thereof, copies of works in the libraries' collections or published works. Actually, unpublished or undisclosed works are outside the exceptions provided by the law. It remains unclear, however, if the exception provision restricts to the copying of works that are not part of a library's catalogue.

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

no

If not please comment:

No, the Mexican Copyright Law does not provide general exceptions or limitations to copyright protection for education and research institutions. Notwithstanding the foregoing, the law considers a limited exception for education and research institutions making one copy of a work for private use.

a. performance and/or display for educational purposes;

No, under the law educational or research institutions do not enjoy exceptions to rights for performance or display of works for educational purposes.

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

No, there are no exceptions or limitations under the above conditions. However, the law recognizes a certain exception related to the reproduction (again, distribution is not mentioned) of works that involve education and research institutions. The purpose of the exception has to do more with reproduction for private use. In light of the exception of the Mexican Copyright Law, individuals can make one copy of a library or artistic work, for “personal” and “private” use and without the purpose of a gain. Corporations are precluded from the scope said provision, unless being an “education” or “research” institution or a non-profit organization of any kind. Because its ambiguity, said exception provision of the copyright law has been the subject of many discussions.

The text of the law reads as follows in the relevant parts:

“A literary or artistic work disclosed already may be used (as a) ...one-time reproduction in a single copy of a literary or artistic work, for private use of the person who makes it, and not for profit. Corporations may not invoke the provisions of this paragraph, except for educational, research or non-commercial institutions.”

The exception does not apply to works only, but also to sound recordings.

a. making translations;

No, making translation is out of the scope of the exception.

a. making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);

No, making available of works in digital networks is out of the scope of the exception.

a. reproduction and/or distribution for research purposes; or

Yes, under the same comments as in b), above. That is, for private use only.

a. any other activities, and if so, what activities?

No other activities.

6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

The reproduction for private use exception extends to all sort of education and research

institutions and their activities

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

Yes, the Copyright Law provides certain conditions. First, it is restricted to reproduction for private use of works. Second, it allows the making of one copy of a work for the aforementioned purposes. Third, the copy needs to be made for personal use and non-lucrative purposes. Fourth, corporations do not benefit from the exception. Otherwise, the exception is broad enough to encompass all kinds of reproductions made (so long they are private copies) and the private user chose making a copy of the work as a whole or in part.

- 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.

No, there are no conditions as to the type of copyrighted work involved.

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?

Everything that has been explained so far in connection with copies for private use and copies for education or research institutions comes from the Mexican Copyright Law. So far we would know, there is no case law regarding to any of these subjects. Additional issues regarding the use of works by education or research institutions fall within the scope of should be considered by the Three-Step Test of Berne.

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

Yes, at least in theory, but not by applying the Mexican Copyright Law, but the provisions of the Berne Convention directly.

Mexican Copyright Law made a poor implementation of the Three-Step-Test. However, the Three-Step-Test can be applied in Mexico by importing the provision of the Berne Convention. It is possible to invoke Berne Convention directly, since it is an international treaty and in Mexico international treaties are placed in the same level of hierarchy as the Constitution of Mexico. Also, the Mexican Supreme Court of Justice has considered the Berne Convention as a human rights treaty, making its application mandatory to the Mexican Courts, under a *pro homine* interpretation.

- 11) Is use under the exception or limitation permitted automatically (without any further action), or must

certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s).

The exception applies automatically. It is not even considered a limitation subject to equitable remuneration.

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, such exceptions -not limitations- are not subject to remuneration of any sort.

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

No, the copyright law does not recognize any special treatment for orphan works, in connection with education or research institutions.

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

Yes, under Mexican Laws these exceptions could be overridden by contract, resulting in rights and obligations to the contracting parties, as agreed in a given contract, that may be different from what stated in the Copyright Law.

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.:

There is a Collective Managing Organization called CEMPRO, which represents the interests of authors and publishers in connection with their reproduction (reprography) rights. Copyright holders enjoy an exclusive right to authorize or prohibit the reproduction of their works -recordings and books are included- and accordingly. Users including education and research institutions, require authorization to make reproductions. Users can obtain from CEMPRO a license in bulk.

The CMO is entitled to grant licenses and collect royalties resulting from reproduction of works, but also from the communication to the public, distribution and transformation of the same. They grant licenses to private and public according to tariff schedules.

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 improved exceptions may be broader than those of the existing Mexican Copyright Law. For example, libraries or archives could be allowed to obtain the copy of work for security or preservation reasons, but also be allowed to have a reasonable stock of physical copies or limited number of digital copies, exclusively for distribution (lending). The foregoing provided that the library or archive cannot obtain original copies or wishes to preserve their physical copies. If the library or archive make more than one copy in particular for lending, remuneration to the copyright holders would seem justifiable.

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 for educational or research, are rather different than those for archives or libraries, since their needs are different as well. Education and research institutions are required by their students, teachers or investigators to make a bigger number of copies. They also demand works for display or performance. As a result, the chance to conflict with the normal exploitation of the work is greater. It would be fine restricting the rights of reproduction, distribution or communication to the public (which includes projection to limited "public" audiences and perhaps limited broadcasting or Internet making available for transmissions). However, remuneration is justified at least when groups of students or researches make copies of works. Translations should not be part of the exceptions or limitations or when the institution provide IT services uploading course packs of others.

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

yes

Why?:

The Three-Step-Test is a fair legal figure. It is very useful as well. However, as explained above, judges find it confusing sometimes when applying it. It requires perfect knowledge of copyright law and good skills for assessing facts under equity considerations.

Nowadays, with the new challenges, it is convenient to modify the Three-Step Test in order to extend such limitations into the digital environment to create new exceptions as they find appropriate, in an attempt to eliminate barriers to trade, promotion of innovation and competition, as well as the provision of consistency and stability in the international copyright framework by the creation of a fair balance between promotion of the works to support knowledge diffusion.

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

Yes, because parties in agreements are free to work on exceptions to the rights subject to the contract. They should be free so long their agreement does not conflict with public interest.

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

For 16), making more than one copy for lending should require remuneration. For 17) making of more than one copy (course packs, etc.) should require remuneration. In general, remuneration is fair for making more than one copy or any other form of use resulting from communication (whether public or private).

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?

Yes, definitively as it has been explained above.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Yes, since harmonization is always a desirable goal to achieve for improving legal systems. It is desirable as well since Berne and other important treaties do not provide any standards in this regard. However, if the applicable criteria is the Three-Step-Test, then the harmonized international standard would have been set already and no further action would be required at an international level.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

yes

Please comment:

Please refer to our response in 16) and 17), since it was given pretending global solution.

24) If yes to question 16):

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

To every library, archive or organization.

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

To every activity.

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

Provided that more than one copy is made for researching or teaching purposes.

25) If yes to question 17):

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

To every education and research institution.

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

To every education and research institution.

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

Provided that more than one copy is made for researching or teaching purposes.

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)?

Exceptions should apply 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?

The standard is number of copies made.

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

Just by following ad hoc orphan work exceptions.

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

Only if contract clearly contradicts public interest.

As it was mentioned previously, with the new challenges before the digital environment and how the information is now available for users of the internet, it is convenient. that the interpretation of the contract, bear in mind the principles of consistency and stability in the international copyright framework

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?

They would be free to represent right holders, provided that their performance does not conflict with the exception regime set internationally and locally.

Summary

Briefing

Mexican Copyright Law recognizes exceptions for libraries and archives. It also recognizes a restricted exception for educational and research institutions, regarding copies of works, recordings or books that they make for private use. The system can be improved with the purpose to provide limitations that imply a remuneration for the copyright holder. The foregoing when archives or libraries make more than one copy for lending or when education or research institutions make copies for teaching or investigation. The same consideration viewed in order to improve the Mexican system would be desired to work on a global basis. In principle, the Three-Step Test should be the applicable standard. However, express exceptions and limitations should be required still.

Résumé

La Loi mexicaine sur les droits d'auteur reconnaît des exceptions pour les bibliothèques et archives. Elle reconnaît aussi une exception restreinte pour les institutions de recherche et d'enseignement, quant aux copies d'œuvres, d'enregistrements ou de livres qu'elles font pour une utilisation privée. Le système peut être amélioré pour offrir des limitations qui impliquent une rémunération du titulaire du droit d'auteur quand les archives ou bibliothèques font plus d'une copie pour prêt ou quand les institutions de recherche et d'enseignement font des copies pour l'investigation ou l'instruction. Il serait souhaitable que cette considération, contemplée pour améliorer le système mexicain, soit adoptée globalement. En principe, l'épreuve des trois critères devrait être le standard applicable; cependant, des exceptions et limitations spécifiques devraient être requises.

Zusammenfassung

Das mexikanische Urheberrecht erkennt Ausnahmeregelungen für Bibliotheken und Archive. Es erkennt auch eine begrenzte Ausnahme für lehr- und Forschungszwecke, hinsichtlich der Vervielfältigung von

Werken, Aufnahmen oder Büchern für privaten Gebrauch. Das System kann verbessert werden, um Beschränkungen, die eine Vergütung des Rechteinhabers beinhaltet, durchzuführen, in dem Fall dass Bibliotheken und Archive mehr als eine Kopie zwecks Ausleihe machen oder Bildungs- und Forschungseinrichtungen Werke vervielfältigen zwecks Lehre oder Forschung. Die Überlegungen, die beabsichtigt sind, um das Mexikanische System zu verbessern, könnte auf globaler Ebene eingeführt werden. Grundsätzlich, sollte der Drei-Stufen-Test die Norm sein, jedoch mit ausdrücklichen Ausnahmeregelungen und Begrenzungen.

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.

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