



Date: 7th June 2015

Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

Responsible Reporters: by Sarah MATHESON, Reporter General John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General Yusuke INUI, Ari LAAKKONEN and Ralph NACK Assistants to the Reporter General

National/Regional Group	New Zealand
Contributors name(s)	Catherine EDMONDS and Kate MCHAFFIE
e-Mail contact	kate.mchaffie@ajpark.com
Date	19-05-2015

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:

Section 55 of the Copyright Act 1994 provides that a librarian may make a copy (other than a digital copy) of any item in the collection of the library or archive for the purposes of preserving or replacing that item, but only where it is not reasonably practicable to purchase a copy of the item.

Digital copies may be made only in certain specified circumstances.

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

yes

Please comment:

Section 53 of the Copyright Act 1994 provides that a librarian may copy a reasonable proportion of any literary, dramatic, or musical work (and any included artistic work) for supply to another library, provided that the copy is supplied for the purposes of research or private study.

Section 54 provides that a librarian may copy a literary, dramatic, or musical work (and any included artistic work) from a book for supply to another librarian under certain circumstances, including that the librarian to whom the copy is supplied has been unable to obtain the work at an ordinary commercial price within the 6 months preceding the supply. The librarian receiving the copy must, on demand, pay equitable remuneration to the copyright owner.

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:

Section 51 of the Copyright Act 1994 provides that a librarian may copy a reasonable proportion of a published literary, dramatic, or musical work (not being an article in a periodical) for supply to any person, provided that person is not supplied on the same occasion with more than one copy of the same material and that the copy is only used for the purposes of research or private study. There is a cap on how much the library may charge for the copy.

Section 52 provides a similar exception for articles in periodicals.

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

yes

Please comment:

Exceptions applicable to libraries and/or archives are set out in the Copyright Act 1994 sections 50-58. These include:

- copying by librarians of parts of published works
- copying by librarians of articles in periodicals
- copying by librarians for users of other libraries
- copying by librarians for collections of other libraries
- copying by librarians or archivists to replace copies of works
- copying by librarians or archivists of certain unpublished works
- communication of digital copy to authenticated users by library or archive
- playing or showing sound recordings or films
- making archived works available for public viewing
- copying by the Parliamentary Library for members of Parliament.

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

The exceptions applicable to libraries apply only to 'prescribed libraries', as defined in section 50 of the Copyright Act 1994. Prescribed libraries include the National Library, the Parliamentary Library, certain law libraries and libraries maintained by an educational establishment, government department or local authority.

The exceptions applicable to archives apply to archives defined in s50 of the Copyright Act 1994, including Archives New Zealand, the National Library, and national radio, television, and film archives.

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.

The exceptions applicable to libraries and archives are subject to various conditions including around the proportion of works that may be copied and the number of copies that may be created. The conditions are set out in sections 51-58 of the Copyright Act 1994.

In some cases there are also additional conditions relating to the supply of works in digital format, for example a requirement to give written notice of the terms of use of the copy and a requirement to, as soon as is reasonably practicable, destroy any additional copy made in the process of making the copy supplied.

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.

See 4) above

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

yes

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

a) performance and/or display for educational purposes;

yes

Please comment:

Section 47 of the Copyright Act 1994 provides an exception to infringement for the performance of a literary, dramatic or musical work before students or staff members of an educational establishment, by a student or staff member or by any person for the purposes of instruction.

The exception also includes the playing or showing, for the purpose of instruction, of a sound recording, film or communication work to the students or staff members.

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

yes

Please comment:

Section 44 of the Copyright Act 1994 provides an exception to infringement for copying the whole or part of a literary, dramatic, musical, or artistic work or typographical arrangement of a published edition for an educational purpose. The exception is subject to certain conditions around how the copy is made and by whom, the purpose for which the copy is provided, the number of copies that may be made, and the proportion of the work that may be copied. Different conditions apply in different circumstances.

Section 46 provides an exception to infringement for copying anthologies for educational use. This exception allows copying of a short passage from a literary, dramatic or musical work in a collection

that is intended for use in educational establishments for educational purposes and which consists mainly of material in which no copyright exists or in which copyright is owned by the publisher of that collection or the Crown. No more than 2 passages from copyright works by the same author in collections published by the same publisher over any 5 year period may be copied.

c) making translations;

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:

Section 44A of the Copyright Act 1994 provides an exception to infringe for an educational establishment making a work available on a website or other electronic retrieval system by storing a copy of the page/s in which the work appears if certain conditions are met, including that the material is stored for an educational purpose and is restricted to use by authorised users. The exception won't apply if the educational establishment knowingly fails to delete the stored material within a reasonable time after the material becomes no longer relevant to the course of instruction for which it was stored.

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

yes

Please comment:

Section 43 of the Copyright Act 1994 provides that fair dealing with a work for the purposes of research or private study does not infringe copyright in the work. The section sets out the matters to which the court shall have regard in determining what constitutes fair dealing, including the purpose of the copying, the nature of the work copies, and the effect of the copying on the value of the work.

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

yes

if so, what activities?:

Exceptions applicable to education and research institutions are set out in the Copyright Act 1994 sections 44–49. These include:

- copying for educational purposes of literary, dramatic, musical or artistic works or typographical arrangements
- storing copies for educational purposes
- copying for educational purposes of films and sound recordings
- anthologies for educational use
- performing, playing, or showing work in course of activities of educational establishment
- copying and communication of communication work for educational purposes
- things done for the purposes of examination.

'Fair dealing' exceptions for criticism, review and news reporting, and research or private study, are set out in section 42 and 43 of the Copyright Act.

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?

In most cases these exceptions only apply to 'educational establishments', as defined in section 2 of the Copyright Act 1994. These are schools and educational institutions approved under the Education Act 1989.

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

The exceptions applicable to education and research institutions are subject to various conditions including around the proportion of works that may be copied and the number of copies that must be created. The conditions are set out in sections 44-49 of the Copyright Act 1994.

- 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.

See 7) above

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

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

Each exception or limitation described above is statutory and is set out in the Copyright Act 1994.

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

There is no specific adoption of the Three-Step Test in the Copyright Act 1994

- 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).

Use under the exceptions described is permitted provided the conditions described above and set out in the statute are met.

- 12) Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?

The exceptions set out in sections 44-49 and 51-58 of the Copyright Act 1994 prescribe the permitted remuneration.

Educational establishments may not charge students or the persons receiving the copies made.

Libraries and archives may charge for making copies, but the payment received must be no larger than the total cost of producing the copy and a reasonable contribution to the general expenses of the library/archive.

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

There is no specific reference to orphan works in relation to each exception and limitation.

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

In theory, New Zealand law allows these exceptions to be overridden by contract. However, if the effect of the contractual provisions were contrary to public policy or unconscionable, they may be unenforceable.

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.:

Specific educational licences are available from licensing bodies such as Copyright Licensing New Zealand.

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?

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

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

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

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

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?

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

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?

24) If yes to question 16):

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

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

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

25) If yes to question 17):

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

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

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

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)?

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?

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

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

Summary

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.