



Date: 7th June 2015

## Q246

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

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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:

a) Reproduction can be made when the work is fragile or rare that it cannot be lent in its original form.

b) Reproduction can be made to preserve and replace a copy, in the event that the work is lost, destroyed or rendered unusable, in the permanent collection and copies are not available with the publisher.

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

yes

Please comment:

A library or archive may make a copy of a work to replace in the permanent collection of another

similar library or archive, a copy which has been lost, destroyed or rendered unusable, and copies are not available with the publisher.

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:

Reproduction can be made for purposes of research or study, when the works are isolated articles contained in composite works or brief portions of works, and the reproduction is necessary and expedient, instead of lending all the volumes or booklets which contain them. Reproduction can also be made when the work is fragile or rare that it cannot be lent in its original form.

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

yes  
Please comment:

Works may also be used without the permission of the copyright owner if by or under the direction or control of the National Library where such use is in the public interest or compatible with fair use.

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 reproduction exception applies to library and archives whose activities are not for profit. However, the exception for use applies only to the National Library.

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.

Apart from the condition that the activities of the library or archive must not be for profit, the other general conditions for reproduction are the following:

- a. Only a limited number of copies of the work may be reproduced as may be necessary for such institutions to fulfill their mandate.
- b. The library or archive cannot produce a volume of a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock. However, when special reasons so require, a library which, by law, is entitled to receive copies of a printed work, may reproduce a copy of a published work which is out of stock but considered necessary for the collection of the library.

The condition for the exception of use by or under the direction and control of the National Library is where such use is in the public interest or compatible with fair use.

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.

While it is not specifically stated, it can be inferred from the exceptions that legitimate copies must be existing in the library's or archive's collection or, were existing, in the case of works that have been lost or destroyed.

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:

a) There is an exception under Philippine law for the inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film for teaching purposes.

b) An institution for educational purpose only whose aim is not profit making may also publicly perform or communicate to the public a work in a place where no admission fee.

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

yes

Please comment:

Such acts may fall under the provision allowing use of a work by or under the direction or control of educational institutions in the public interest or compatible with fair use.

c) making translations;

yes

Please comment:

Although Philippine law does not expressly provide an exception for translation for educational purposes such act may fall under the provision allowing use of a work by or under the direction or control of educational institutions in the public interest or compatible with fair use.

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:

Although Philippine law does not expressly provide an exception for making available in digital networks, such act may be covered under the provision allowing use of a work by or under the direction or control of educational institutions in the public interest or compatible with fair use.

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

yes

Please comment:

The exception may fall under the provision allowing use of a work by or under the direction or control of educational institutions in the public interest or compatible with fair use.

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

yes

if so, what activities?:

There is an express limitation for recordings made in schools, universities or educational institutions of a work included in a broadcast for the use of such schools, universities or educational institutions.

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

The exception applies to schools, universities, or educational institutions in general and without qualification. Moreover, the exception for the inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film is not limited to an educational and research institutions. Thus, individuals may also avail of said exception as long as it is done for teaching purposes. However, the exception to public performance or display requires that the institution be for educational purpose only whose aim is not profit making.

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 exception for the inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film for teaching purposes requires only that the manner of inclusion is compatible with fair use and that the source and the name of the author, if appearing in the work, is mentioned;

The exception for the recordation by schools, universities, or educational institutions of a work included in a broadcast requires that the recording be deleted within a reasonable period after it was first broadcast. Also, the exception does not apply to audiovisual works which are part of the general cinema repertoire of feature films except for brief excerpts of the work.

The exception of use by or under the direction or control of the educational institution requires the use to be in the public interest or compatible with fair use, while the exception to public performance or the communication to the public of a work requires no admission fee to be charged by the educational institution.

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 exception applies to any type of copyrighted work.

*For the questions below, please provide an answer for each exception or limitation mentioned 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?
	The exceptions stated above are specifically provided under the Intellectual Property Code of the Philippines (IP Code). <sup>[1]</sup>
	<b>Footnotes</b>
	1. <sup>^</sup> Sections 184.1 (e), 184.1 (f), 184 (h), 184 (i) and 188, IP Code; <a href="http://www.wipo.int/wipolex/en/text.jsp?file_id=129343">http://www.wipo.int/wipolex/en/text.jsp?file_id=129343</a>

10)	Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?
	Yes, the IP Code includes a provision that the exceptions stated above shall be interpreted in such a way as to allow the work to be used in a manner which does not conflict with the normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interests. <sup>[1]</sup>
	<b>Footnotes</b>
	1. <sup>^</sup> Section 184.2, IP Code; <a href="http://www.wipo.int/wipolex/en/text.jsp?file_id=129343">http://www.wipo.int/wipolex/en/text.jsp?file_id=129343</a>

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 use under the exceptions stated above is automatically permitted without any pre-requisite procedure to be followed.

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 stated above are not subject to any remuneration.

13)	Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.
	The IP Code does not contain a provision specifically dealing with orphaned works. Consequently, the exceptions stated above do not give special treatment to orphaned works.

14)	Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?
	Under the rule of autonomy of contracts, the exceptions may be overridden by agreement. However,

such change shall only effect the parties to the contract.

15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?

no

If not please comment. :

We are not aware of any current efforts by private organizations to address use by libraries, archives and educational and research institutions.

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

16) Should there be any exceptions or limitations to copyright protection for libraries and archives?

yes

If yes, in relation to what activities?:

Yes, there should be exceptions for libraries and archives in relation to their activities that are non-profit. Copyright law has always been viewed as protection to be enforced in a way that will best serve the public interest in the dissemination of knowledge. Libraries and archives are the traditional repository of knowledge and it is only fitting and proper to make an exception to the reproduction of copyright materials by these institutions in the fulfillment of their mandate.

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

yes

If yes, in relation to what activities? :

Yes, there should be limitations on copyright in relation to research and private study activities. Copyright law seeks to balance the interest between the creators and public. The creators seek an incentive to create, while the public seeks to have access to the work. Allowing the public free access to a work for purposes of research, under certain conditions, does not unduly lessen the copyright owners' incentive to create. The unrestricted use of a copyrighted work for purposes of research and education should be allowed as long as it is reasonable.

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

yes

Why?:

Yes, the Three-Step Test is useful in balancing the interests of the public and the copyright owners. The three-step test requires the exception is: 1) limited to special cases; 2) does not conflict with a normal exploitation of the work; and 3) does not unreasonably prejudice the legitimate interests of the author. Each step provides a safeguard against excessive applications of the exceptions to copyright protection at the expense of the copyright owners.

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

Following the principle of autonomy of contracts, the exception or limitation to copyright protection should be capable of being overridden by contract as there can be instances where the terms of the contract would provide more benefits to both parties than the application of just the exceptions under the law.

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

We do not suggest that remuneration be payable for such activities since, as required by the law, they should not conflict with the normal exploitation of the work and should not unreasonably prejudice the legitimate interests of the author. Given such restrictions, it does not appear to be necessary to compensate the copyright owner. Compensation should only be given if the use of the work will result in commercial gain for the use or a compensable loss to the copyright owner.

21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

The exception for the recordation by schools, universities, or educational institutions of a work included in a broadcast requires that the recording be deleted within a reasonable period after it was first broadcast. Also, the exception does not apply to audiovisual works which are part of the general cinema repertoire of feature films except for brief excerpts of the work. It is submitted that education and research will benefit, with no unreasonable prejudice to the rights of the copyright owner, if the requirement to delete and non-inclusion of audiovisual works which are part of the general cinema repertoire of feature films are removed.

### III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Yes, harmonization in this area is desirable considering that copyrighted works are more easily accessible across various jurisdictions due to the internet. Thus, it is not unusual for libraries, archives and other research institutions to deal with copyrighted works that are found in jurisdictions other than their country of origin.

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;

The exception should apply to libraries, archives and other organizations whose activities are not for profit. It would be unjust enrichment if the libraries will conduct activities for commercial profit using

the exceptions and not pay royalties to the copyright owners.

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

It should apply to all activities of the non-profit libraries, archives and other organizations that are consistent with their mandate.

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

The libraries, archives and other organizations should have lawfully obtained a copy of the original work to be reproduced. Copies to be reproduced should be limited and only to the extent necessary to carry out the intended purpose. In the area of digital reproduction, it is suggested that safeguard or conditions be made to ensure that the person having access to the digital copy of the work will not be able to reproduce it for distribution. Without any safeguards, a work that has been digitized can easily be reproduced and distributed.

25) If yes to question 17):

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

The exception should apply to any educational and research institution.

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

The exception should apply to any activities of the educational and research institution as long as the work product will not be used for direct or indirect commercial activities. If it will be used for commercial activities, it is only proper that compensation be given to the copyright owner.

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

At a minimum, any reproduction should be conditioned on the requirement that the education or research institution has in its possession a legitimate copy of the work. Reproduction of copies should be limited to the extent necessary to carry out the activity. Any other condition may be imposed as long as it is consistent with the three-step test.

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)?

It would be better if the exception or limitation be permitted automatically. Requiring the user to comply with certain pre-conditions prior to use may impede education and research activities.

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?



Remuneration for use should be by way of royalty payment, i.e., percentage of revenue derived. Payment should be made by the person or institution using the copyrighted work for commercial purpose, which is to be paid to the copyright owner.

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

For orphan works, royalty payments may be deposited with the relevant copyright office.

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

The exceptions or limitation may be overridden by contract if the clauses are mutually more beneficial to both parties.

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?

The efforts by these private organizations may be deemed to override the exceptions or limitations provided by law through contract.

#### Summary

The Intellectual Property Code of the Philippines states that “[t]he use of intellectual property bears a social function. To this end, the diffusion of knowledge and information for the promotion of national development, progress and the common good is to be encouraged.” Consequently, while the Philippines recognizes the right of copyright owner to control the reproduction and exploitation of their works, such right must be balanced with interest of the public to access the work. The balance is not disturbed in the instances of reproduction and use by libraries, archives, educational and research institutions under certain conditions in the fulfillment of their mandate as a repository of knowledge and institutions for the advancement of education and research. As long as safeguards are in place against abuse, such as the three-step test, the rights of the authors to profit from their works is secure. For a developing country like the Philippines, gaining access to literary works is vital to the development of its next generation of citizens. Having these exceptions to copyright for libraries, archives, educational and research institutions will aid in that development.

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.