



Date: 27th July 2015

Q246

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

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Date	27-07-2015

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:

General (response to Q1 above)

Yes, in terms of the provisions of section 12(5) of the Intellectual Property Act no. 36 of 2003, (hereafter referred to as "the Act"), exceptions or limitations to copyright protection are afforded to libraries and archives in limited circumstances under the concept of 'fair use':

Notwithstanding the provisions of paragraph (a) of subsection (1) of section 9 [NB - this section sets out what the exclusive economic rights of an author are], any library or archives, whose activities do not serve any direct or indirect commercial gain may, without the authorization of the owner of copyright, make a single copy of the work by reprographic reproduction.

The limited circumstances are set out in section 5(a).

Response to Q1 sub (a):

In terms of section 12(5)(b) of the Act:

Where the copy is made in order to preserve and, if necessary replace a copy, or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archives:

Provided that it is not possible to obtain such a copy under reasonable conditions; and provided further, that the act of reprographic reproduction is an isolated occurrence occurring if repeated, on separate and unrelated occasions.

Therefore, reproduction for the purpose of preservation or replacement is permitted by the Act in limited circumstances for libraries and archives, including digital format covered under the scope of reprographic reproduction.

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

yes

Please comment:

Section 12(5)(b) of the Act may be (arguably) interpreted to provide for interlibrary lending, on the occasion that there is a need for preservation and replacement where it is not possible to obtain a copy under reasonable conditions. The law does not however specify what those said reasonable conditions may entail.

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:

The exception for libraries and archives provided in section 12(5)(a) of the Act is applicable:

Where the work reproduced is a published article, other short work or short extract of a work, and where the purpose of the reproduction is to satisfy the request of a physical person, provided that:

(i) the library or archives is satisfied that the copy will be used solely for the purposes of study, scholarship or private research,

(ii) the act of reproduction is an isolated occurrence, occurring if repeated, on separate and unrelated occasions.

The said provision allows for the distribution of a copy in a limited form to users of libraries and archives. However the burden is placed on the library or archive to identify whether the use would be for educational or research purposes only

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

yes

Please comment:

In terms of section 12(3) of the Act, the reproduction, in the form of a quotation of a short part of a published work shall be permitted without authorisation of the owner of the copyright provides that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose of such reproduction. Further, the quotation must be accompanied by an indication of the source and the name of the author if his name appears in the work from which the quotation is

taken.

In terms of section 12(7)(a)(ii) of the Act, a reproduction or adaptation of a computer programme by the lawful owner of the copy of the programme is permitted without the copyright owner's authorisation, if the copy or adaptation is necessary,

- for use of the computer program for the purpose and extent for which the computer program has been obtained;
- for archival purposes and for replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, destroyed, or rendered unusable.

In terms of section 12(9) of the Act, the public display of originals or copies of works shall be permitted without the authorisation of the owner of the copyright provides that the display is made other than by means of a film, slide, television image or otherwise on screen or be means of any other device or process; provided further that the work has been published or the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title.

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?

As per the provisions in section 12(5) of the Act, any library or archive the activities of which do not serve any direct or indirect commercial gain falls within the scope of the provision.

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, with regard to the exception specifically provided for libraries and archives, the conditions are stipulated in section 12(5) and have been set out in the answer to 1) c. Only a single copy of the work by reprographic reproduction is permitted for non-commercial use, without the authorisation of the owner. With regard to the general exceptions details of the conditions have been set out in the answer to 1) d.

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.

In terms of reproduction of a work by a library or archive for a person, the condition is, that the work reproduced is a published article, other short work or short extract of a work.

(Subject to the other conditions contained in section 12(5)(b)), reproduction for replacement or preservation is permissible where the copy is made in order to preserve and, if necessary, replace a copy, or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archives.)

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:

General (response to Q5):

Yes, in terms of section 11 of the Act, notwithstanding the provisions of subsection (1) of section 9 of the Act, the fair use of a work, including such use by reproduction in copies or by any other means specified by that section, for purposes such as criticism, comment, news reporting, **teaching, (including multiple copies for classroom use), scholarship or research**, [our emphasis] shall not be an infringement of copyright.

This is subject to the following:

(2) The following factors shall be considered in determining whether the use made of a work in any particular case is fair use:

(a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(b) the nature of the copyrighted work;

(c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) the effect of the use upon the potential market for, or value of, the copyrighted work.

Response to Q 5(a) performance and/or display for educational purposes;

In terms of Section 12(10)(a) of the Act, the performance or display of a work for educational or teaching purposes by government or non profit educational institutions, in classrooms or similar places set aside for education does not constitute an infringement of copyright, provided that, in the case of audiovisual work, the performance or the display of individual images, is given by means of a lawfully made copy, or the person responsible for the performance did not know or has no reason to believe that the copy was not lawfully made.

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

yes

Please comment:

In terms of section 12(4) of the Act, notwithstanding the provisions of paragraph (a) of subsection (1) of section 9 of the Act, the following acts shall be permitted without the authorization of the owner of the copyright:

*(a) the reproduction of a short part of a published work for **teaching purposes** [our emphasis] by way of illustration, in writing or sound or visual recordings, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose of such reproduction.*

The said section 12 is an expansion from section 11 which allows for reproduction for the purpose of teaching, scholarship and research generally; however, there is no specific mention of an exception

for the preparation of course packs, compilations or anthologies, and such.

c) making translations;

no

Please comment:

There aren't any specific provision dealing with translations under the Act in this context.

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

no

Please comment:

In terms of section 12(4)(b) of the Act, reprographic reproductions for face to face teaching in any educational institution the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions, provided however the source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under this subsection; are permitted.

There is no specific mention with regard to digital networks or on-line platforms for education, compilation or anthologies or distance education.

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

yes

Please comment:

In terms of section 11(1) of the Act, the fair use of a work including fair use by reproduction in copies or by any other means specified in section 9 of the Act for the purposes of research shall not be an infringement of copyright. The reproduction is subject to the factors set out in section 11(2) in determining whether the use made of a work in any case is fair use.

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

yes

if so, what activities?:

In terms of section 12(3) of the Act, the reproduction in the form of a quotation is permitted of a short part of a published work, without the copyright owner's authorisation, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose of such reproduction is permitted. The quotation must be compatible with fair practice and must also be accompanied by an indication of the source and name of the author if such name appears in the work from which the quotation is taken from.

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 exceptions mentioned apply generally for teaching, scholarship and research purposes.

However, there is specific mention of the following institutions in regard to specific acts under the Act: the reprographic reproduction for face to face teaching in any educational institution, without direct or indirect commercial gain, of published articles, other short works or short extracts of works, and the performance or display of a work for educational or teaching purposes by government or nonprofit educational institutions, in classrooms or similar places set aside for education

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.

In general, in terms of the provisions of the Act discussed in detail above, the fair use of a work must give consideration to the following factors as stated in section 11(2) of the Act:

- the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for, or value of, the copyrighted work.

Moreover, in specific instances such as reproduction in the form of a quotation of a short part of a published work, such reproduction shall be compatible with fair practice and shall not exceed the extent justified by the purpose of such reproduction.

In regard to instances of reprographic reproductions for teaching, the extent must be justified by the purpose and the source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made, thus ensuring that the moral rights of the author are protected. Additionally, the act of reproduction must be an isolated one occurring, if repeated, on separate and unrelated occasions.

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.

Please refer to previous answers.

As per the provisions contained in the Act, the type of copyrighted works which fall under section 12(4)(a) are published works.

As per the provisions contained in the Act, the type of copyrighted works which fall under section 12(4)(b) are published articles, other short works or short extract of a work.

As per the provisions contained in the Act, the type of copyrighted works which fall under section 12(5) are published articles, other short works or short extract of a work.

In terms of Section 12(10)(a) of the Act, in the case of an audiovisual work, the performance or the display of individual images, is given by means of a lawfully made copy, or the person responsible for the performance did not know or has no reason to believe that the copy was not lawfully made.

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 statute law which specifically provides for the exceptions or limitations of copyright referred to hereinbefore is the Intellectual Property Act no.36 of 2003.

10)	Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?
	<p>Sri Lankan law does not explicitly adopt the 'Three-Step Test' as such in relation to such exceptions or limitations.</p> <p>However, the law could arguably be construed to incorporate the same as indicated hereafter.</p> <p>The factors to be considered in determining whether a use of a work shall be fair use are contained section 11(2) of the Act; and the exceptions to the exclusive rights of the owner of the copyright are set out in section 11 and section 12 of the Act, as discussed above. The factors that must be considered incorporate the spirit and intent of the Three-Step Test. For instance, only certain acts are considered to be exceptions which link to step one (in certain special cases). Similarly, section 11(2)(d) states that the effect of the use upon the potential market for, or value of, the copyrighted work must be considered, which relates to the second step (when the reproduction does not conflict with a normal exploitation of the work). Finally, by way of ensuring the moral rights of the author, where certain provisions of the Act provide that the reproduction must contain the source and name of the author, the third step (when the reproduction does not unreasonably prejudice the legitimate interests of the author) is manifested.</p>

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 is permitted without further action. It should be noted that the owner of the copyright retains the ability to assign or licence the author's rights under section 16 of the Act.

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?
	There is no specific provision in the Act with regards to remuneration being payable for such use.

13)	Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.
	There are no provisions for treatment of orphan works in the Act. However, section 15 of the Act states that the physical person whose name is indicated as the author on a work will be presumed to be the author of the work in the absence of proof to the contrary. Through this presumption of ownership, if the name is indicated, even in situations the author is unaware of his rights; the Act shall apply

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

There are no provisions under the Act that expressly allow the exception or limitation to be overridden by 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?

yes

If so, please explain those efforts.:

Not applicable. There are four collective management entities, one of which is the "Sri Lanka Performing Rights Society". Information on whether this entity has or intends to address use by libraries, archives and educational and research institutions is not available.

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. The activities referred to herein.

Exceptions with regard to reproduction for preservation or replacement, interlibrary lending for such purposes, and lending of copies to users of the libraries or archives are provided for in the Sri Lankan Act.

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.

Exceptions with regard to the performance or display of works and reproduction or distribution for educational purposes in educational and research institutes are provided for in the Sri Lankan Act. However, the law should be amended to contain specific provision in relation to translations and communication networks for educational and research purposes as mentioned hereafter.

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 useful to an extent as it provides parameters for limiting and assessing the scope of exceptions for libraries, archives, educational and research institutions. However, the test is broad and as such is subject to various interpretations which would prevent a universal application of the said legal provisions relating to exception. For instance, the first step states 'in certain special cases' which does not specify the criteria and leaves the door open for varied circumstances which may be perceived as a 'special case'. The concept of 'normal exploitation' would also need to be clarified as it allows a broad scope of interpretation. As such, criteria for assessing the normal exploitation should be specified.

Moreover, the interests of the author should be specified, for example by identifying which economic and moral rights would be applicable

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

The statute law should generally prevail over contract to ensure that there is a uniform system with regards to exception or limitation. Therefore, in situations in which the contracting parties are in disagreement in regard to the agreed terms of a contract resulting in a situation of conflict, or the terms themselves are inconsistent or subject to interpretation, the law would prevail creating consistency.

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

Remuneration for use should not be necessary for libraries, archives, educational and research institutes considering public interest and the imperative that all persons should be able to access education and in circumstances where the said institutions are not making a copy for direct or indirect commercial gain.

However, if there is a situation of commercial gain, there needs to be a balance with the rights of the author (copyright owner) in which case, it is suggested that, an amount should be payable calculated on the basis of a percentage of profit depending on the number of copies used.

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 current law could be improved in relation to digital formats. With technological advances rapidly occurring in the modern day and age, it is necessary for law reforms to stay up to date with these developments. For instance, the present law does not make provision for communication networks through the internet, which issue would need to be tackled in order to achieve greater access to education; but at the same time tackling the issue in a manner that prevents infringement of copyright / the rights of authors.

Further, the law needs to contain provision in regard to translations as this has not been addressed under the Act.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Yes. Through harmonisation, a unified system which guarantees a balance between the rights of the copyright owner or author of the work and the use of works in the public interest by ensuring access to education through institutes such as libraries, archives, educational and research institutes could be established.

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: In the interest of harmonisation, and to address situations where certain jurisdictions do not have laws providing for exceptions for libraries, archives, educational and research institutions, it would be reasonable to explicitly set out such exception or limitation in an international treaty or convention. Despite there being provisions in existing international treaties and conventions which address the exception with regard to libraries, archives, educational and research institutions such as the Three-Step Test under the Berne Convention of 1886, there needs to be a greater clarity in regard to these matters in international intellectual property instruments

24)	If yes to question 16):
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a)	to what libraries, archives and other organizations should these exceptions or limitations apply;
	see above - this has already been covered

b)	to what activities should these exceptions or limitations apply;
	see above - this has already been covered

c)	under what conditions should the activities be undertaken or the copyrighted work used?
	see above - this has already been covered

25)	If yes to question 17):
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a)	to what educational and research institutions should these exceptions or limitations apply;
	see above - this has already been covered

b)	to what activities should these exceptions or limitations apply;
	see above - this has already been covered

c)	under what conditions should the activities be undertaken or the copyrighted work be used?
	see above - this has already been covered

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)?
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Yes.

The Act provides for the use of certain works for educational and research purposes under both exceptions (libraries and archives, and educational and research institutes) which do not require the authorisation of the author or owner of the copyright, thereby being automatic.

Nevertheless, there are factors that need to be considered and met, such as use of a published work, to ensure fair use under the exceptions.

In addition, the act provides a course of action in the event of infringement of the exclusive rights of the owner.

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?

Not applicable to this jurisdiction. However, generally, if there is a commercial gain through reproduction of the works, a charge on the percentage of profit depending on the number of copies made and used may be applicable. The payment should be made from the person or institute who or which is making the copy and the payment should be made to the owner of the copyright in the work.

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

Not applicable to this jurisdiction since the Act does not contain relevant provisions. However, generally, orphan works should be afforded the same treatment as other works under copyright exception or limitation, where practicable.

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

not applicable

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?

Not applicable as information on private organisations is not available. However, generally, a private organisation for the purpose of monitoring and regulating the use of copyright works for educational purposes may be a method by which the infringement of the rights of the copyright owner or author could be reduced. The private organisation could be granted a licence by the owner of the copyright and as such be responsible for the effective monitoring of the copies made and issued.

Yet, such an organisation and process may hinder the free access to educational and research material available as some owners may not wish to issue a licence. In this context, the concept of automatic use for educational purposes appears to be justified.

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.

