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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:

Yes^[1], section 108 of the Copyright Act, 17 U.S.C. 108, establishes specific exceptions from copyright infringement of a library or archives with publicly accessible physical premises, or any of its employees acting within the scope of their employment for certain activities.

Additional exceptions may be available under the "fair use" doctrine. Fair use has long been part of U.S. copyright case law and was codified in the Copyright Act of 1976. The statute provides examples that may constitute fair use, such as "criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, and research." Fair use is applied on a case-by-cases basis taking into consideration the following factors:

1. the purpose and character of the use, including whether the use is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

and

4. the effect of the use upon the potential market for or value of the copyrighted work.

As such, neither the statutory examples nor any other uses are automatically considered to constitute fair use.

With regard to preservation, section 108(h)(1) provides that during the last 20 years of any term of a copyrighted work, a library or archive may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of the work, or portions of it, for purposes of preservation. However, reproduction, distribution, display, or performance are not authorized if the work meets any of three conditions:

1. the work is subject to normal commercial exploitation;
2. a copy or phonorecord of the work can be obtained at a reasonable price; or
3. the copyright owner or its agents provides notice that the conditions of (1) and (2) apply.

Section 108(b) further establishes the rights of reproduction and distribution of an unpublished work for up to three copies or phonorecords solely for the purposes of preservation and security.

With regard to replacement, section 108(c) establishes a right of reproduction limited to three copies or phonorecords for the sole purpose of replacement of a copy or phonorecord that is damaged, deterioration, lost, or stolen, or if the existing format has become obsolete.

Footnotes

1. [^ ASDASDSAFASFAS](#)

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

yes

Please comment:

Section 108(d) provides the rights of reproduction and distribution apply where the user makes his or her request from that of another library or archives. Section 108(g)(2) does not prevent a library or archive from participating in interlibrary arrangements so long as the arrangements do not have the purpose or effect of the receiving library or archive substituting this arrangement for a subscription to or purchase of the work.

- 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 108(a)(1) provides an exception for reproduction and distribution made by a library or archive under the condition that it is made without any purpose of direct or indirect commercial advantage. Section 108(g) establishes the rights of reproduction and distribution to isolated and unrelated reproduction or distribution of a single copy of phonorecord of the same material.

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

yes

Please comment:

Fair use of a copyright work may apply to other activities.

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 of section 108 of the Copyright Act extend to libraries and archives if:

1. the reproduction or distribution is made without any purpose of direct or indirect commercial advantage, and
2. the collections of the library or archives are (i) open to the public, or (ii) available not only to researches affiliated with the library or archives but also to other persons doing research.

The exception for reproduction and distribution for the purpose of preservation of published works extends to nonprofit educational institutions that function as a library or archives. In general, museums and other organizations are currently not eligible for section 108 exemptions.

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.

Reproduction is limited to no more than one copy or phonorecord of a work except for the sole purposes of preservation of an unpublished work or for the purpose of replacement of a work that is damaged, deteriorating, lost, stolen, or if the existing format has become obsolete. In those instances, three (3) copies or phonorecords may be made.

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.

Section 108(i) of the Copyright Act provides that the right of reproduction and distribution afforded to library and archives does not apply to musical works, pictorial, graphical, sculptural work, a motion picture or other audiovisual work other than the news. However the rights of reproduction and distribution for the purpose of preservation of an unpublished work, replacement, or preservation of a work during the last twenty (20) years of its copyright term are not excluded.

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:

Yes, as described above, the fair use doctrine codified in Section 107 and the exemptions codified in Section 108 may apply to education and research institutions. Also, section 110 of the Copyright Act, 17 U.S.C. § 110, provides exceptions of the exclusive rights of performance and display to

instructors or pupils in the course of face-to-face teaching or in the course of transmission with restrictions.

Performance or display of a work in the course of face-to-face teaching of a nonprofit educational institution does not infringe copyright.

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

yes
Please comment:

Reproduction and distribution of copies or phonorecords for the purposes of teaching is not copyright infringement if it is found to be fair use. However, U.S. case law has interpreted this provision narrowly. See e.g. *Basic Books v. Kinko's*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

c) making translations;

yes
Please comment:

Making translations are considered derivative works. There is no express exemption for educational institutions to make derivative works.

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:

The display of a work made in the course of transmission is exempt if, as section 110 provides, the performance or display is:

1. an integral part of a class session of a systematic mediated instructional activity of a governmental body or by an accredited nonprofit educational institution;
2. related and of material assistance to the teaching content of the transmission;
3. made solely for the students enrolled in the course, or officers or employees of governmental bodies.

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

yes
Please comment:

Fair use of a copyrighted work may apply reproduction or distribution for purposes of research.

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

yes
if so, what activities?:

Fair use of a copyright work may apply to 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 performance or display of a work in face-to-face teaching activities applies only to nonprofit educational institutions.

The fair use doctrine is not limited to certain institutions but the purpose and character of the use are considered such as whether the use is for a commercial nature or a nonprofit educational purpose, along with the other factors.

The transmitting body or institution that displays a work in the course of a digital transmission must institute policies regarding copyright to promote and describe compliance with U.S. copyright law. The institution must also provide notice to students that course materials may be subject to copyright protection.

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.

Either the instructor or pupil may perform or display a work in face-to-face teaching. The performance or display must also occur in a classroom or a similar place of devoted instruction. The performance and display made in a live classroom session or in the course of digital transmissions must be made by, at the direction of, or under the actual supervision of an instructor. Further, the performance or display must be directly related to the content of the transmission and of material assistance to the teaching content.

In the case of fair use for the purposes of teaching, whether copies can be made, what type of copies can be made, and the number of copies made for the purposes of teaching or research will be subject to determination using the a fair use analysis outlined above, including the amount and substantiality of the portion used and the effect the use would have on the value of the copyrighted 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 performance or display of work in face-to-face teaching activities of a motion picture or other audiovisual work by means of a copy not lawfully made or the person responsible for the performance knew or had reason to believe the copy was not lawfully made is not exempt under section 110 of the Copyright Act.

The nature of the work is considered, and so fair use determination may depend on the whether the work is published or an unpublished work.

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 statutory provisions of the Copyright Act specifically provide for exceptions and limitations. As discussed above, specific exceptions for reproduction and distribution by libraries and archives are covered in 17 U.S.C. § 108. Additional exceptions can be made under the fair use doctrine set forth in 17 U.S.C. § 107 that may also be applied to educational and research institutions. Case law supports the application of the four factors used to determine whether a particular use is fair use. Still further, 17 U.S.C. § 110 provides limitations on the exclusive rights to certain performances and displays, including those made in the course of face-to-face teaching activities, and through the course of digital transmission as part of a class session offered by an accredited nonprofit educational institution or through the systematic mediated instructional activities of a governmental body.

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

The exceptions and limitations in sections 107 and 108 satisfy the Three-Step Test set forth in Article 9(2).

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 exceptions of reproduction and distribution under section 108 of the Copyright Act are automatic. There are no additional requirements that must be 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?

No. There is no remuneration payable for use under the exceptions for libraries or archives nor is there remuneration payable for fair use.

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

No. Orphan works legislation does not exist under U.S. law at this time

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

Yes. Section 108 of the Copyright Act does not excuse a library or archives from enforceable contracts, including license agreements that restrict or prohibit reproduction or distribution.

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.:

Yes. At the urging of the Chair and other members of the House Judiciary Subcommittee, three groups representing educators, authors, and publishers delivered to Congress an "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," in 1976, which is reproduced in the legislative history of the Copyright Act of 1976. "The [Classroom] [G]uidelines were designed to give teachers direction as to the extent of permissible copying and to eliminate some of the doubt which had previously existed in the area of the copyright laws," but they "are not controlling on the court." *Marcus v Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983). Whatever persuasive value the Classroom Guidelines may possess, they (1) were drafted by partisan groups (2), state the minimum and not maximum standards in fair use, and (3) adopt presumptions as to which types of use is fair the Supreme Court has since warned against. See, *Cambridge University Press v Patton*, 769 F.3d 1232, 1246 n. 12 (11th Cir. 2014).

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. As discussed above, the Copyright Act currently provides for a number of exceptions and limitations to copyright protection for libraries and archives.

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. As discussed above, the Copyright Act currently provides for a number of exceptions and 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?

yes

Why?:

Yes. The Three-Step Test is flexible and technology neutral to allow the national copyright laws to balance the interests of the rights holders and the users.

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

The AIPPI-US Group does not take a position at this time as to whether these exceptions or limitations should be capable of being overridden by contract.

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

As discussed above, the Copyright Act does not provide for remuneration. Whether remuneration should be payable is dependent on a number of complex practical and policy considerations including how such

payments are to be made and by what mechanism.

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?

Recognizing that section 108 was enacted in the pre-digital era, the U.S. Copyright Office has indicated that new technologies had altered the activities of libraries and archives in such a way as to call into question the continued relevance and effectiveness of section 108. Consequently, the Library of Congress's National Digital Information Infrastructure and Preservation Program in cooperation with the Copyright Office convened a Section 108 Study Group to conduct a reexamination of the exceptions and limitations applicable to library and archives under the Copyright Act, specifically in light of digital technologies. While the AIPPI-US Group recognizes that the recommendations for improvement published by the Section 108 Study Group are worthy of further consideration, we make no endorsement one way or the other as to the specific recommendations at this time.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

While the AIPPI-US Group generally supports harmonization of intellectual property rights, the Berne Convention already provides for the Three-Step Test. Many countries of the world already successfully provide for exceptions and limitations for libraries and archives and educational and research institutions. These tend to vary in their detail based on numerous local needs, practices and practicalities. Specific implementations of these exceptions and limitations do not affect the rights of the copyright owners beyond that afforded with the Three-Step Test. Harmonization may occur organically, but there is no perceived need for additional harmonization at this time, which may prove disruptive to local practices and rightsholders. Specific implementations of these exceptions and limitations may affect the rights of virtual-only libraries and archives (those that do not conduct their operations through physical premises) that may span multiple jurisdictions. The AIPPI-US Group does not currently take a position on specific proposals for harmonization of rights with respect to virtual-only libraries and archives.

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;

See the answer to Question 22 above.

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

See the answer to Question 22 above.

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

See the answer to Question 22 above.

25) If yes to question 17):

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

See the answer to Question 22 above.

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

See the answer to Question 22 above.

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

See the answer to Question 22 above.

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)?

See the answer to Question 22 above.

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?

See the answer to Question 22 above.

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

Orphan works legislation, based in part on a U.S. Copyright Office report in 2005, recently was been introduced and not passed, and it may be reintroduced in the future. Issues relating to orphan works arise broadly across many different uses in addition to those of libraries and archives, and the AIPPI-US Group knows of no effort or formal recommendation to pass an orphan works exception specific to libraries and archives. Therefore, see the answer to Question 22 above with regard to harmonization, generally.

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

The AIPPI-US Group does not take a position at this time as to what circumstances the exceptions or limitations should 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?

Any efforts by private organizations should not grant exemptions and limitations beyond those available with the Three-Step Test.

Summary

Section 108 of the U.S. Copyright Act establishes specific exceptions from copyright protection of a library or archives with publicly accessible physical premises for certain activities and under certain restrictions. Activities include reproduction for preservation or replacement, interlibrary lending, and for private study, scholarship and research. These exceptions may also apply to education and research institutions, and additional exceptions may be available under the “fair use” doctrine. The U.S. Copyright Office has indicated that new technologies have altered the activities of libraries and archives in such a way as to call into question the continued relevance and effectiveness of Section 108, which was enacted in the pre-digital era. While the AIPPI-US Group recognizes that recommendations for improvements to Section 108 are worthy of further consideration, we make no endorsement as to specific recommendations. Further, the AIPPI-US Group does not currently take a position on specific proposals for harmonization of rights.

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.