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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:

§ 35 (4) a) and b) of the Copyright Act (Act 76 of 1999, as amended, hereafter: CA).

Please see the CA at:

http://www.sztnh.gov.hu/hu/English/jogforras/hungarian_copyright_act.pdf[http://www.sztnh.gov.hu/hu/English/jogforras/hungarian_copyright_act.pdf]

We will use below the abbreviation LAMS in relation to beneficiary institutions. LAMS stands for libraries, archives, museums and schools.

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

yes

Please comment:

§ 35 (4) b) CA

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:

§ 35 (4) a) CA reproduction by all LAMS institution

§ 35 (4) b) CA reproduction for library use

§ 38 (5) CA study of digital copies by the user of the LAMS institution on the spot

§ 40 CA free public lending in nationwide professional libraries and

§ 23/A CA free public lending in other libraries in consideration of a fair remuneration to be paid by the state budget to the responsible collective management organisation that has to distribute such remuneration on the basis of selected lending data

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

yes

Please comment:

If we properly evaluate the exception of the studying of digital copies in beneficiary institutions on the spot and the fact that the beneficiaries of this exception may set up cross-border connections via dedicated networks to provide access to such copies, this exception can be regarded as a free display = public performance + a "free making available" (= communication to the public) of the copies made available to the visitors of the beneficiary institutions.

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 existing for the benefit of libraries are full LAMS exceptions save for the public lending of tangible copies provided for in § 23§A and §40 of CA that exists for the benefit of libraries.

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.

- Schools (primary, secondary, high schools on condition they are afforded accreditation) enjoy an additional exception under § 35 (5) CA, namely that they may copy specific parts of a work published as a book as well as newspaper and periodical articles for purposes of school education in a number corresponding to the number of students in a class, or for purposes of exams in public and higher education in a number necessary for the said purpose.
- LAMS institutions may copy minor parts of works published or of newspapers or periodical articles for internal purposes of the entity under § 35 (4) c)
- the copying is allowed by the provisions of a separate act in exceptional cases and under specified conditions.

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| 4) | <p>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.</p> |
| | <p>All copies should only be made from lawfully acquired copies. It follows from the three step test (please see below) and the mandatory narrow interpretation of exceptions that are general clauses of the Chapter of CA on exceptions and limitations (§ 33 (2) and (3)).</p> <p>All exceptions are made subject to the condition that they are not intended for earning or increasing income even in an indirect way.</p> <p>In addition the on the spot free use of works by visitors of LAMS institutions can only be exercised with regard to copies of works in the collection of the LAMS institution on condition that there is no agreement to exclude this exception. It is an unclear provision: one may not know whether such agreement should be concluded by and between the rightholder and the user (publisher, content provider) or the rightholder and the LAMS institution or the publisher (other user) and the LAMS institution.</p> <p>Moreover this exception can only be used in accordance with a detailed government regulation (117/2004. (IV. 28.) Korm. rendelet) that provides for the responsibility of the LAMS institutions to exclude any use that would go beyond the exception (LAMS institutions are obliged to apply secure technology measure to prevent further reproduction, distribution etc.)</p> |

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| 5) | <p>Does your law provide for exceptions or limitations to copyright protection for education and research institutions?</p> |
| | <p>yes</p> <p>If so, please provide details of such exceptions or limitations, including in relation to the following activities::</p> |

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| a) | <p>performance and/or display for educational purposes;</p> |
| | <p>yes</p> <p>Please comment:</p> <p>§ 34 (2)-(4) CA</p> |

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| b) | <p>reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);</p> |
| | <p>yes</p> <p>Please comment:</p> <p>§ 35 (5) CA</p> |

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| c) | <p>making translations;</p> |
| | <p>yes</p> <p>Please comment:</p> <p>§ 34 (4) CA: in schools for educational purposes, the exception does not apply for research purposes</p> |

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| d) | <p>making available in digital networks for educational purposes (e.g. uploading course packs onto on-line</p> |
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| platforms, compilations or anthologies, providing distance education); |
| no |
| Please comment: |
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| e) reproduction and/or distribution for research purposes; or |
| yes |
| Please comment: |
| § 34 (2, (3) CA |

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| f) any other activities, and if so, what activities? |
| no |
| If not please comment: |
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| 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? |
| <p>As far as educational institutions are concerned, the exceptions shall serve the purposes of school education as it is implemented in accordance with the requirements of education and with the curricula applied for kindergarten, primary school, secondary school, vocational training and technical school education and the primary education of arts, as well as for higher education falling under the scope of the Act on Higher Education. In a nutshell: educational institutions shall be accredited and the exception shall be used in accordance with the approved curricula. (§ 33 (4) CA)</p> <p>There no limitations whatsoever concerning research institutions. The reason is that the exception exists for the benefit of scientific research (the activity) and not for the benefit of research institution.</p> | |

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| 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. |
| <p>As far as the scope of activities is concerned, please see the answer to Q 7. As to the number of copies and other restrictions are concerned, the reproduction may be exercised to the extent justified by the purpose and on the condition that the borrowing work is not used for commercial purposes. Borrowing shall mean the use of a work in another work to an extent that goes beyond quotation. (§ 34 (3) CA). the number of copies may not exceed the number of pupils/students who are taught by using the work. (§35 (5) CA).</p> <p>The person using the exception (student/teacher) is not restricted.</p> | |

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| 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 see the answer to Q 4. | |

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

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| 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? |
| Yes, there are statutory provisions to acknowledge such exceptions. Please see the answers to Q 5-7. | |

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| 10) | Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation? |
| Yes, this is a general, introductory clause applying to all exceptions enshrined in § 33 (2) CA, supplemented with the mandatory narrow interpretation of exceptions in § 33 (3) CA. | |

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| 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 free uses (exceptions) dealt with above are permitted automatically. | |

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| 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? |
| Only public lending in libraries other than nationwide professional libraries (listed in a separate act on libraries) is made subject to a remuneration under § 23/A CA. The remuneration is set by the responsible collective management organisation of the interested stakeholders (literary authors and musical authors of sheet music) in a tariff announcement within the budgetary limit set annually by the annual budget act. The remuneration is part of the budget of the ministry responsible for culture. | |

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| 13) | Is there any special treatment for orphan works for use within such exception or limitation? If so please explain. |
| Yes, on the one hand the entire Orphan works Directive of the EU (2012/28/EU) is truly transposed into a separate Chapter of the CA (§ 41/A, §41/F-41/K CA). On the other hand for profit and not for profit non-exclusive domestic uses of all orphan works and subject-matters protected by copyright for 5 years can be licensed via a compulsory license granted by the Hungarian Intellectual Property Office pursuant to § 41/A -§ 41/E of the CA. | |

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| 14) | Does the law of your jurisdiction allow the exception or limitation to be overridden by contract? |
| No. Such a contract may not have a legal effect, namely it is null and void, since it infringes upon the legal provisions on the statutory exemptions. | |

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| 15) | Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations |
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| (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 such efforts. |

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

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| 16) | Should there be any exceptions or limitations to copyright protection for libraries and archives? |
| | yes |
| | If yes, in relation to what activities?: |
| | All mandatory exceptions in accordance with the international copyright treaties and the EU copyright law exist in our legal system. |

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| 17) | Should there be any exceptions or limitations to copyright protection for education and research institutions? |
| | yes |
| | If yes, in relation to what activities? : |
| | All mandatory exceptions in accordance with the international copyright treaties and the EU copyright law exist in our legal system. |

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| 18) | Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection? |
| | yes |
| | Why?: |
| | Please see our answer to Q 4 and 10. |
| | We are of the view that the three step test as it is interpreted by the WTO; please see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm [https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm] : European Communities v U.S.A. |
| | and the European Court of Justice (e.g. C-435/12 - ACI Adam and Others, please see: http://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=292370) |
| | serve as a good harmonizing starting point to interpret exceptions as uniform, as possible. |

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| 19) | Should the exception or limitation be capable of being overridden by contract? Why? Why not? |
| | In no event. An exception if used in accordance with the three step test is a lawful right of the beneficiary to be relied on, and all exceptions are devised to mirror various public interests balancing the rightholders' and the beneficiaries' (users') aspects and the general interests of society. |
| | Exceptions if devised this way and used within their limits should |

- precede the private patrimonial interests of rightholders, but
- never should not precede the moral right of authors that is deeply rooted in the protection of human dignity of the creative people.

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

Remuneration should be payable for acts that might seriously intervene with the profit making exploitation "right" of the right holder. The public lending (including the "lending" of digital copies) in libraries and the on the spot display of works if it will be broadened to distant access are such exceptions. In other LAMS exception cases the remuneration is not justified.

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?

It would be necessary

- to broaden the educational exception of reproduction and distribution with a tethered making available that is essential for all forms of distant learning and distant study of textbooks and other materials, in conjunction with a fair remuneration right to be exercised via mandatory collective management,
- to broaden the exception of on the spot study in LAMS institution with a tethered making available in conjunction with a fair remuneration right to be exercised via mandatory collective management.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

It would be desirable, since the economic rights are harmonized in Europe. The exceptions are the "other side of the coin". It is logical, that further harmonisation would be desirable.

We are however of the view that the two differing approaches of exceptions in the various copyright legal systems (general clause of fair use/fair dealing vs. single cases of exceptions) are invincible obstacles of further harmonization. Therefore we do not go into details of a further harmonization, since we do not think that it is realistic.

We have made the proposals to improve the system of exceptions in the answer to Q 21.

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;

all non profit LAMS institutions

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

to education in accordance with the government accreditation of educational institutions
all ordinary library activities (public lending inter library lending),
all museums' and archives' activities that belong to the preservation of cultural heritage

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

If it does not generate income directly or indirectly

25) If yes to question 17):

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

Please see our answer to Q 24.

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

Please see our answer to Q 24.

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

Please see our answer to Q 24.

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)?

The exceptions should operate automatically. Please see our answer to Q 11.

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 remunerations have to be set and collected and distributed on the basis of samples taken by the responsible collective management organization. The tariffs should be subject to either government control or special court review (let alone the competition law review). The remuneration right should be made subject to mandatory collective management to provide full legal warranty (indemnification) for the beneficiary institutions. The remunerations should be paid either by the institutions, or - it would be the appropriate solution - by the entities (agencies) that operate/maintain the institutions on the basis of global agreements concluded with the collective management organizations.

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

The treatment provided for in the EU Directive on orphan works.

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

Never.

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?

Such efforts can not be reconciled with a statutory exception.

Summary

In Hungary all exceptions for the benefit of LAMS (libraries, archives, museums schools) exceptions that are rooted in the copyright international instruments and in the EU acquis are included in the Copyright Act. All categories of free uses can only be exercised in conformity with the three step test that is enshrined as an introductory, general clause of the chapter of the Copyright Act on exceptions and limitations. The LAMS exceptions should be improved in a harmonized way by broadening.

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.