

Limitations and Exceptions in Copyright Law for Educational and Research Activities

WIPO Regional Meeting for the Latin America and Caribbean Group on Libraries,
Archives, Museums and Educational and Research Institutions in the Field of
Copyright

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Santo Domingo, July 4-5th 2019

Education and Research

Education: any acts (uses) to convey instruction and to study: teaching, exercises, exams, etc.

Research: any acts (uses) necessary to gather and discover information.

Uses may be covered by:

Exceptions and Limitations in Copyright Laws (E&L)

- Uses authorized by Law
- For free or remunerated (non-voluntary licensing)

Voluntary Licensing

- Collective licensing (by CMOs – based on mandates)
- Individual licensing (by © owners – i.e. databases)

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WIPO *Study on Copyright Limitations and Exceptions for Educational Activities*, by Prof. Seng (2017)

Practices and challenges for online teaching and research

INTERIM REPORT ON PRACTICES AND CHALLENGES OF EDUCATIONAL AND RESEARCH INSTITUTIONS IN RELATION TO ONLINE DISTANCE EDUCATION AND RESEARCH ACTIVITIES, prepared by M.Torres, R.Xalabarder, SCCR/38/9

→ *Work in progress ... send us comments and info!!*

**Survey of E&L for teaching and research in
LATAM and Caribbean**

Exceptions and Limitations

All National Laws provide for E&L:

- ✓ For private study / purposes (Art. 9.2 BC)
 - ✓ For quotations (Art. 10.1 BC)
 - ✓ For teaching and research purposes (Art. 10.2 BC)
 - ✓ ... how far does it cover?
 - ✓ ... also online uses?
-
- Some under “fair dealing” / for free
Some under remuneration / compensation (often via collective licensing)

 - **No uniformity** in national laws (but patterns)

Scope of E&L ... depends on several Factors:

- **Purposes:** illustration for teaching, school, classroom use, lessons, lectures, instruction, exams, etc.
- **Exempted acts:** reproduction (photocopying), distribution, performance, communication to public, making available... translations? digitization?
- **Beneficiaries:** all educational levels?, non-profit, for-profit?
- **Individual users:** teachers, students, researchers, staff
- **Kind of works:** any kind? Only publications?
- **Amount of works:** 10%, 5%, 15 pages, 1 image, etc.?
- **For free or Remunerated:** if remunerated, mandatory collective licensing?

Survey E&L for teaching and research in LATAM & Caribbean

	Lat. Am. & Caribbean		World	
	M. States	Provisions	M. States	Provisions
Private/Personal Use	29	53	179	358
Quotations	32	38	183	256
<i>Performances</i>	25	35	131	199
<i>Reproduction for teaching & research</i>	27	84	160	413
<i>Illustration for teaching & research in Broadcasts & Recordings</i>	24	39	137	270
<i>Illustration for teaching & research in Publications</i>	19	20		
<i>Online (specifically)</i>	0	0		

Private/Personal Use | Berne Convention

Article 9 BC (Stockholm, 1967)

[...]

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The “three-step-test”

Private/Personal Use | Member States



29 Member States

53 provisions

Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay, Uruguay, Venezuela, Dominican Republic, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago

Blue: all of the above

Private/Personal Use | Examples

Paraguay Law on Copyright and Related Rights, 1998

Artículo 38.- Las obras del ingenio protegidas por la presente ley podrán ser comunicadas lícitamente, sin necesidad de la autorización del autor ni el pago de remuneración alguna, en los casos siguientes:

1. cuando se realicen en un ámbito exclusivamente doméstico, siempre que no exista un interés lucrativo, directo o indirecto;
3. cuando se traten de copias únicas y personales que con fines exclusivamente didácticos utilicen los docentes en establecimientos de enseñanza;

Private/Personal Use | ... compensated or not?



3 States apply levies (CMOs)

Ecuador, Dominican Republic, Paraguay: Phonogram, videos, reprographic copies

26 States for free

Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago

● (9) Fair use/dealing

Antigua and Barbuda, Bahamas, Barbados, Belize, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines.

Fair use/dealing factors:

- ✓ purpose or character of use;
- ✓ amount and substantiality of part used;
- ✓ effect of use on market.
- ✓ nature of work;

Private/Personal Use | Examples

Paraguay Law on Copyright and Related Rights, 1998

34. The owners of the rights in works published in graphic form or in the form of videograms or phonograms or any kind of sound or audiovisual recording shall have the right to a share in the **compensatory remuneration** for reproductions of those works or products that are made exclusively for **personal use** by means of non-typographical technical apparatus.

The remuneration shall be determined according to the equipment, apparatus and materials used for making the reproduction.

Payment shall be proved by an identifying mark on the recording or reproduction apparatus and on the physical materials used for the duplication, as appropriate.

Copyright owners may incorporate anti-copying technology and oversee the reproduction of their work.

Private/Personal Use | Examples

Jamaica Copyright Act, 1993

52. Subject to section 54, **fair dealing** with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe copyright in the work or, in the case of a published edition, in the typographical arrangement

54. For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of **all factors** which appear to it to be relevant, **including**— (a) the nature of the work in question; (b) the extent and substantiality of that part of the work affected by the act in relation to the whole of the work; (c) the purpose and character of the use; and (d) the effect of the act upon the potential market for, or the commercial value of, the work.

Quotation | Berne Convention

Article 10.1 BC

- **Quotations** (scientific, critical, information, educational purposes)
- *To the extent justified by the purpose*
- *Compatible with fair practice*

- **Open (for any purposes), flexible („quote”) and tech neutral**
- **Any acts of exploitation**
- **All kind of works**
- **Mandatory for Member States**

Quotation | Member States



32 States

38 Provisions

Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Peru, Paraguay, Uruguay, Venezuela, Dominican Republic, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago

Blue: all of the above

Quotation | Examples

El Salvador Law on Intellectual Property

Art. 46.- Es permitido realizar **en forma breve**, sin autorización del autor ni pago de remuneración, **citas** de obras lícitamente publicadas, con la obligación de indicar el nombre del autor y la fuente, y a condición de que tales citas se hagan conforme a los **usos honrados y en la medida justificada por el fin** que se persiga.

Quotation | Examples

Dominican Rep. Copyright Act, 2003

65. (1) Notwithstanding the provisions of section 1(1)(a), the reproduction, in the form of quotation, of a short part of a published work that has been made available shall be permitted without the authorization of the author or other owner of copyright; provided that the reproduction is **compatible with fair practice and does not exceed the extent justified by the purpose.** (2) The quotation shall be accompanied by an indication of source and the name of the author, if his name appears in the work from which the quotation is taken.

Illustration for teaching ...

Article 10.2 BC (Stockholm, 1967)

- *For purposes of illustration for teaching*
- *To the extent justified by the purpose*
- *Compatible with fair practice*

- **Open, flexible and tech neutral**
- **Any acts of exploitation**
- **All kind of works**
- **All levels of teaching (BC Appendix)**
- **Remuneration... not required but possible**

*“It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the **utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.**”*

Illustration for teaching...

- **Face to Face uses ... In classrooms:**
 - “Chalk & Talk” (handmade copies)
 - Photocopies (analogue copies)
 - Performances (recite, sing, play, etc)
 - Showing audiovisual recordings and phonograms
 - Communications (broadcasting)
 - Compilations of teaching materials (anthologies?)
- ... as long as **“extent justified”** and **“compatible with fair practice”**
- **Digital and online uses ... not always** formally exempted.

Again ... No uniform national solutions.

Reproduction for Teaching | Member States



27 Member States

84 Provisions

Brazil, Chile, Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Perú, Paraguay, Venezuela, Dominican Rep.

Antigua and Barbuda Bahamas, Barbados* Belize* Dominica, Grenada, Guyana, Jamaica* Saint Kitts and Nevis* Saint Lucia* St. Vincent and the Grenadines* Trinidad and Tobago*

F2F / reprographic copies

* Non-reprographic copies (*Talk and Chalk?*) +
Reprographic copying (where no licensing available)

All for free!

Reproduction for Teaching | Examples

Rep. Dominicana, 2000

Art. 32.- Podrán ser reproducidos por **medios reprográficos**, para la **enseñanza o para la realización de exámenes en instituciones educativas**, en la medida justificada por el fin que se persiga, artículos lícitamente publicados en periódicos o colecciones periódicas, o breves extractos de obras lícitamente publicadas, a condición de que tal utilización se haga conforme a los usos honrados y que la misma no sea objeto de venta u otra transacción a título oneroso, ni tenga directa o indirectamente fines de lucro.

Reproduction for Teaching | Examples

Guyana Copyright Act, 1956

41.-1) Where copyright subsists in a literary, dramatic, musical or artistic work **the copyright shall not be taken to be infringed by reason only that the work is reproduced**, or an adaptation of the work is made or reproduced.

(a) in the course of instruction, whether at a school or elsewhere, where the reproduction or adaptation is made by a teacher or pupil otherwise than by the use of a duplicating process, or

(b) as part of the questions to be answered in an examination, or in an answer to such a question.

Performance for Teaching | Member States



25 Member States

35 Provisions

Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, Uruguay, Venezuela, Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Trinidad and Tobago

All for free!

Performance | Examples

Chile Law on Copyright (Last am. 2017)

Artículo 71 N

No se considera comunicación ni **ejecución pública de la obra**, inclusive tratándose de fonogramas, **su utilización** dentro del núcleo familiar, **en establecimientos educacionales**, de beneficencia, bibliotecas, archivos y museos, siempre que esta utilización se efectúe sin fines lucrativos. En estos casos no se requerirá autorización del autor o titular ni pago de remuneración alguna.

Performance | Examples

Saint Kitts and Nevis Copyright Act, 2002

79. Playing of sound recording for purposes of charitable organisation. It shall not be an infringement of the copyright in a **sound recording** to play it **as part of the activities of, or for the benefit of, a club, society or other organisation if**

(a) the organisation is not established or conducted for profit and its objects are charitable or are otherwise concerned with the advancement of religion, **education** or social welfare; and

(b) the proceeds of any charge for admission to the place where the recording is to be heard are applied solely for the purposes of the organisation.

... In Publications, Broadcasts and Recordings



27 Member States

59 Provisions

Argentina, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, Uruguay, Venezuela, Dominican Republic, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago

- *Green: only broadcasts and recordings / Red: only in publications / Blue: broadcasts, recordings, and publications*

... In Publications, Broadcasts and Recordings

Cuba Copyright Law, 1977

Artículo 38.— Es lícito, sin el consentimiento del autor y sin remuneración al mismo, pero con obligada referencia a su nombre y fuente, siempre que la obra sea de conocimiento público, y respetando sus valores específicos:

*b) utilizar una obra, incluso íntegramente si su breve extensión y naturaleza lo justifican a título de ilustración de la enseñanza, **en publicaciones, emisiones de radio o televisión, filmes o grabaciones sonoras o visuales;***

Teaching Compilations | Examples

Colombia Copyright Law (Last am. 2017)

Artículo 32º.- Es permitido utilizar obras literarias o artísticas o parte de ellas, **a título de ilustración en obras destinadas a la enseñanza**, por medio de publicaciones, emisiones de radiodifusión o grabaciones sonoras o visuales, dentro de los límites justificados por el fin propuesto, o comunicar con propósitos de enseñanza la obra radiodifundida para fines escolares, educativos, universitarios y de formación profesional sin fines de lucro, con la obligación de mencionar el nombre del autor y el título de las obras así utilizadas.

Compulsory Licensing to Translate & Publish | Examples



7 Member States

13 provisions

*Bolivia, Colombia, Cuba, El Salvador,
Honduras, Mexico, Dominican Republic*

Blue: all of the above

What about Online Uses?

- **Art.10(2) BC** covers it ... as long as
 - *To the extent justified by the purpose*
 - *Compatible with fair practice*
- “distance learning” and “online courses”
- Online uses involve *reproduction + making available rights*
- *Adaptation and Translation* also important

Online Teaching Uses | Member States



0 Member States (*Bahamas?*)

0 Provisions

Online uses are often formally “excluded” (i.e. Reprographic uses, face to face teaching)

... but what about “implicitly”
exempted? → **Legal uncertainty**

Specific Online Teaching Uses? | Examples

Bahamas Copyright Act, 1998 (Am. 2004)

75. Notwithstanding the provisions of section 9, the following are not infringement of copyright —

(a) **performance or display of a work by instructors or pupils in the course of teaching activities in an educational establishment, in a classroom or similar place of instruction**, unless, in the case of a motion picture, or the display of individual images, the performance or display of the work was given by means of a copy that was not lawfully made under this Act, and that the person responsible for the performance knew or had reason to believe it was not lawfully made;

(b) performance of a non-dramatic, literary or musical work or display of a work, by or in the course of a transmission, if —

(i) the performance or display is a regular part of the **systematic instructional activities** of a governmental body or educational establishment, Exemption of certain performances and displays.

(ii) the performance or display is directly related and is of material assistance to the teaching content of the transmission, and

(iii) the **transmission** is made primarily for —

(A) reception in classrooms or similar places of instruction, or

(B) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places of instruction, or

(C) reception by officers or employees of governmental bodies as a part of their official duties or employment;

Online uses excluded | Examples

Ley de derechos de autor y derechos conexos de Panamá (2012)

Artículo 67. Son comunicaciones lícitas, sin autorización del autor ni pago de remuneración:

[...]

4. Las que se realicen **dentro de una institución de investigación**, solo para fines investigativos y de ningún carácter lucrativo, cuando se efectúen **mediante una red cerrada o interna a través de terminales especializados** instalados a tal efecto **en la sede del instituto**, siempre que tales obras figuren en la colección permanente del propio establecimiento y sin perjuicio de las licencias a adquirirse sobre los programas de ordenador usados en el sistema informático.

Online uses exempted? | Examples

Grenada Copyright Act, 2011

11.—(1) The following acts shall be permitted without authorization of the author, or other owner of copyright—

(a) the utilization by way of illustration for teaching, or scientific research purposes of a work that has lawfully been made available 2011 Copyright Act 21 495 to the public, in publications, broadcasting or sound or visual recordings, provided that such utilization is **compatible with fair practice**, and does not exceed the extent justified by the purpose;

the utilization can also include the making available of such works in computer networks, provided that access to the works is only available to enrolled pupils or students and their teachers;

Online uses exempted? | Examples

Chile – Ley Derecho de Autor, 2017

Artículo 71 M. Es lícito, sin remunerar ni obtener autorización del autor, **reproducir y traducir** para fines educacionales, **en el marco de la educación formal** o autorizada por el Ministerio de Educación, pequeños fragmentos de obras o de obras aisladas de carácter plástico, fotográfico o figurativo, excluidos los textos escolares y los manuales universitarios, cuando tales actos se hagan únicamente **para la ilustración de las actividades educativas**, en la medida justificada y sin ánimo de lucro, siempre que se trate de obras ya divulgadas y se incluyan el nombre del autor y la fuente, salvo en los casos en que esto resulte imposible.

Online Uses exempted as Fair Dealing | Examples

Fair use/dealing factors:

- ✓ purpose or character of use;
- ✓ amount and substantiality of part used;
- ✓ effect of use on market.
- ✓ nature of work;

- Flexible and technology-neutral (adaptable to new markets)
- Unpredictable? Legal uncertainty

(9) General fair dealing :

*Antigua & Barbuda, **Bahamas**, Barbados, **Belize**, Guyana, Jamaica, St. Kitts & Nevis, Saint Lucia, **St. Vincent & the Grenadines***

(3) Fair dealing for teaching purposes

Bahamas, Belize, St. Vincent & the Grenadines

Online uses as Fair dealing? | Examples

- **Fair use for Teaching purposes:**

BAHAMAS – Sec. 58. (1) Subject to section 60, **fair dealing** with a copyright work, including such use by reproduction in copies or phonorecords for purposes such as research, private study, scholarship or teaching does not infringe copyright in the work. (2) For the purposes of subsection (1), teaching shall mean **instruction at an educational establishment**.

- **General fair use** (private study & research):

Jamaica – Sec. 52.- Subject to section 54, fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe copyright in the work or, in the case of a published edition, in the typographical arrangement.

Practices and Challenges for teaching and research uses conducted online

Based on INTERIM REPORT ON PRACTICES AND CHALLENGES OF EDUCATIONAL AND RESEARCH INSTITUTIONS IN RELATION TO ONLINE DISTANCE EDUCATION AND RESEARCH ACTIVITIES, prepared by M.Torres, R.Xalabarder, SCCR/38/9

1. Challenges for the enforcement of E&L

- **Legal uncertainty about exempted uses?**
(unclear language, insufficient scope, applicable law)
- **Awareness of © law? Lack of guidance? Misconceptions?**
(off-line = online, 10% always allowed, as long as non-commercial, library licensed material)
- Exempted uses **prevented by TPM** and/or **contractual terms?**

Exempted uses prevented /restricted by TPM

- © owner is obliged to provide means to lift TPM (*Grenada*)
- TPM can be removed/circumvented/disabled (*Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panamá, Dominican Rep.*)
- “remit” statutory damages in “Good faith” infringements (*Bahamas*)

Exempted uses prevented / restricted by licensing terms

- Terms of overriding E&L are: Unenforceable (*i.e. UK, Antigua and Barbuda, Barbados, Belize, Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines*) or Null and void (*i.e. EU*)

2. Licensing (Individual / Collective)

Licensing systems and availability vary widely

- **Market, economic, cultural (language) circumstances**
 - ✓ **CMOs** and collective licensing fully operational in some countries. Not in others.
 - ✓ Different licensing availability for **kind of Works** (IFRROs, audiovisual, music).
- **Different licensing models**
 - ✓ **Collective licensing** based on voluntary CMO mandates; Collective licensing prescribed or “incentivized by law”; Extended collective licensing?
 - ✓ **Direct licensing** by copyright owners: individual or blanket license?

Licensing Challenges

- Are licenses available in that market?
- For all kind of works?
- CMOs or individual?
- Have CMOs obtained “mandates” from © owners?
- Can authors/owners/CMOs be identified & located?
- Scope of licensing: is it sufficient?
- Conditions to obtain license : price, time, TPMs restricting E&L?
- Cumulation & incompatible licensing? Loops? Gaps?
- Territorial scope

3. Territorial challenges

- Online teaching and research may be cross-border
- Students, researchers located in different countries
- Materials obtained from sources “abroad”

Which law applies online? (Art. 5.2 BC) different scope of E&L → **Legal uncertainty**

Difficulties in **identifying & locating owners** from other countries...

Collective licensing is often territorial-based → online uses are often cross-border (multi-territorial)

Attempts to overcome territoriality

- **Licensing** based on number of students with access to intranet (regardless of territory) and apply one national law & one territorial license
- **Licensing** “branch campuses” separately by each RRO
- **Statutory provision** (aka “legal fiction“?): teaching takes place in **one country only**
- ☐ One national law / one E&L or one license ... covering uses in all territories

Let's get to work!