

Overview of models of operation of RROs under national exceptions and limitations regarding educational activities

The purpose of the following overview is to provide a description of the different models of operation under the national exceptions and limitations in legislation as a basis for the licensing of educational institutions by Reproduction Rights Organisations (RROs). Regarding the international and European legal framework, reference is being made to the WIPO-IFRRO publication “Collective Management in Reprography”.¹

I. Different national legal systems: “Fair use”, “fair dealing” and “private use”

In accordance with Article 9.1 of the Berne Convention (BC) the copyright legislation of a country which is party to the BC has to grant an exclusive right to the author of a work to make or authorise the reproduction of the work in any manner of form. The possibility for national legislation to make exceptions and limitations to this exclusive right is offered in Article 9.2 of the BC provided the “three step test” is observed. Similar stipulations are found in the WIPO Copyright Treaty (WCT) in respect of the right to make a work available to the public and distribute it.

National copyright legislation needs to be in harmony with commonly accepted international and regional norms. It may include “free uses”, i.e. no prior consent with or without remuneration, only in carefully designed special cases, when the reproduction does not conflict with the normal exploitation of the work and does not prejudice the legitimate interests of the rightholders (“three-step-test”). Common law jurisdictions often focus on “**fair use**” or “**fair dealing**” provisions. Other, in most cases civil law-based, legislations focus on “**private use**”.

1. “Fair use”

Some legislations, for instance the **United States** (US), are based on the legal principle of “**fair use**”, which provides certain limitations on the exclusive rights (see Section 106 of the US Copyright Act) of copyright holders. Section 107 of the US Copyright Act sets forth the four fair use factors which should be considered in each instance, based on particular facts of a given case, to determine whether a use is a “fair use”: (1) the purpose and character of use, including whether such use is of a commercial nature or 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.

In addition to the four part test, a fifth criterion has been considered by a court decision in *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006). The court noted that the Copyright Act authorises courts to consider other factors than the four non-exclusive factors typically

¹ Also available on IFRRO’s website, <http://www.ifrro.org/show.aspx?pageid=library/publications&culture=en>.

referenced, and considered a fifth, non-statutory, “fair use” factor: “whether an alleged infringer has acted in good faith”.

There are also more specific guidelines: In 1976, the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, of the Authors League of America, Inc., and the Association of American Publishers, Inc. reached an agreement on US **Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals** under Section 107 of H.R. 2223 and S. 22². The purpose of the guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The agreement refers only to copying from books and periodicals. The parties also agreed (i) that the conditions determining the extent of permissible copying for educational purposes may change in the future; (ii) that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely (iii) that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines. These guidelines limit the permissible use of a copyright work in education:

“I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,
- B. Meets the cumulative effect test as defined below; and
- C. Each copy includes a notice of copyright.

Definitions:

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

(Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced. (...)

Cumulative Effect

² Available under: <http://www.ciu.edu/library/document/guidelines.pdf>; see also “Circular 21” of the US Copyright Office: <http://www.ciu.edu/library/document/guidelines.pdf>.

- (i) The copying of the material is for only one course in the school in which the copies are made.
- (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- (iii) There shall not be more than nine instances of such multiple copying for one course during one class term. (The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.”

Furthermore, the Consortium of College and University Media Centers (CCUMC) produced widely adaptable voluntary guidelines, drafted and endorsed by major players in the user and content provider communities. These **US Fair Use Guidelines for Educational Multimedia** of 1996³ provide guidance on the application of fair use principles by educators, scholars and students who develop multimedia projects using portions of copyrighted works under fair use rather than by seeking authorization for noncommercial educational uses. While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent a consensus of conditions under which fair use should generally apply and examples of when permission is required. As regards text material (4.2.2 of the guidelines):

“Up to 10% or 1000 words, whichever is less, in the aggregate of a copyrighted work consisting of text material may be reproduced or otherwise incorporated as part of a multimedia project created under Section 2 of these guidelines. An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by different poets from a single anthology may be used.”

However, according to Section 6.7 of the Multimedia Guidelines,

“Educators and students should determine whether specific copyrighted works, or other data or information are subject to a licence or contract. Fair use and these guidelines shall not preempt or supersede licences and contractual obligations.”

Consequently, due to the narrow scope of the guidelines, authorisation under licences with rightholders or their representatives is necessary.

Also, the US Copyright Office released in May 1999 a study on distance education, stressing that licensing should continue to be the rule for educational uses, also in respect to Digital Distance Education, and that digital transmission in at least some distance education settings should be treated just like face-to-face teaching and receive the same exceptions from copyright coverage.⁴

Countries which apply exceptions and limitations to the exclusive rights based on fair use normally refer explicitly to – or *de facto* base – interpretations of it on the specific US guidelines or case laws.

³<http://www.utsystem.edu/OGC/IntellectualProperty/ccmcguid.htm>;
<http://www.ccumc.org/system/files/MMFUGuides.pdf>.

⁴ www.loc.gov/copyright/disted/

2. “Fair dealing”

Section 29 of the UK Copyright, Designs and Patent Act (CDPA) provides an example of the concept of “**fair dealing**” in relation to education. It stipulates that fair dealing with a library, dramatic, musical or artistic work for the purposes of “research” or “private study” does not infringe copyright. In both cases the copying must be done “for non-commercial purposes”:

“(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if—

(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or

(b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.”

Obligation to take up a licence

As regards reprographic copying by educational establishments of passages from published works, Section 36(3) of the CDPA limits the copying of copyright works in educational institutions under fair dealing provisions to cases when a licence is not available. The whole section reads:

“(1) Reprographic copies of passages from published literary, dramatic or musical works may, to the extent permitted by this section, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, or in the typographical arrangement.

(2) Not more than one per cent. of any work may be copied by or on behalf of an establishment by virtue of this section in any quarter, that is, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorised by this section if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) The terms of a licence granted to an educational establishment authorising the reprographic copying for the purposes of instruction of passages from published literary, dramatic or musical works are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

(5) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes.

For this purpose “dealt with” means sold or let for hire or offered or exposed for sale or hire.”

The licence can be available from the rightholder (author or publisher) directly or offered by an RRO. Similar stipulations are found in the legislation of several countries in Africa, Asia, the Caribbean and Europe, where copyright legislation is inspired by the UK copyright laws (see Chapter III and Annex to this Memorandum).

The “fair dealing” tests have been built up by case law and look at the scale, purpose, and character of the copying.

3. “Private use”

The concept that allows reproduction for **private use** varies from one country to the other. An example of a national legislation that defines it is the **Spanish** copyright law. Article 25 of the Spanish Copyright Act states:

“(1) Reproduction carried out exclusively for private use by means of non-typographical technical apparatus or instruments, of works publicly exploited in the form of books or publications assimilated thereto by regulation for those purposes, and also in the form of phonograms, videograms or other sound, visual or audiovisual media, shall give rise to a single equitable remuneration for each of the three forms of reproduction mentioned, payable to the persons specified in subparagraph (b) of paragraph (4) of this Article and intended to compensate for the intellectual property royalties that are not received on account of the said reproduction. This entitlement shall be unrenounceable for authors and performers.”

The rightholder’s consent is not needed to make a copy for private use if it is made by a natural person for his/her own private use from works which have been legally accessed, and in case the copy is not to be used collectively or for profit (Article 31, item 2). The Copyright Act specifies, however, that the following are not private copies:

- copies made in establishments that provide the public with copying services (‘copy shops’),
- copies made in places where copiers and copying materials are made publicly available (e.g. libraries), and
- copies made for collective use or for circulation at a price.

This means that, for all practical purposes, multiple copying for classroom use is generally not considered private use and requires the authorisation from the rightholders concerned, for example through a collective licence signed with an RRO.

II. Different models of operation of RROs: “Voluntary collective licensing”, “voluntary collective licensing with legal back-up”, “legal licence”

IFRRO, for instance in the publication *Collective Management in Reprography*⁵, classifies the RRO models of operation into three main categories: (i) voluntary collective licensing; (ii) voluntary collective licensing with back-up in legislation; and (iii) legal licence. There are different sub-models, and even mixed models of operations are possible. In the following section, the main legislative options, serving as a basis for the operation of RROs, will be highlighted⁶:

1. Voluntary collective licensing

In voluntary collective licensing, the RRO issues licences to copy protected material on behalf of those rightholders who have given it a mandate to act on their behalf on the basis of the exclusive rights granted to rightholders to reproduce or authorise a reproduction of the work, observing limitations to the exclusive rights such as fair use, fair dealing or private use provisions. There are no stipulations in the law to grant a portfolio to the RRO or provide a basis for licensing.

RROs obtain licensing authority from mandates given by national rightholders, and the international repertoire through bilateral agreements with RROs in other countries. These bilateral agreements are based on the principle of reciprocal representation.

A voluntary licence based exclusively on the mandates from authors and publishers may be combined with an indemnity clause. This would normally indemnify the educational institution that has reproduced the work of a non-mandating rightholder financially but not legally.

Obligation to take up a licence

In many countries where the RRO operates under a voluntary collective licensing model, educational institutions cannot copy under an exception to the exclusive right if a licence is made available to them, or if they should know that such a licence could be obtained from the rightholders directly or from the RRO (see page 4). This is for instance the case in Hong Kong, Ireland, Jamaica, Mauritius and the UK. A list of countries where copying under fair dealing is replaced by a licence, when available, is annexed to this Memorandum, whereas examples of the wording of such stipulations in national legislation are given for each of the regions in Chapter III.

2. Voluntary collective licensing with back-up in legislation

Voluntary licensing is, in a number of countries, supported by legislation. Since no collective management organisation can represent all rightholders in its own country, let alone all

⁵ <http://www.ifrro.org/show.aspx?pageid=library/publications&culture=en>.

⁶ A list of RROs/countries operating under the different models is attached to this Memorandum (Annex).

countries of the world, legislative support covers the situation of non-represented rightholders. The underlying idea is to provide the user, for instance an educational institution, with legal certainty when reproducing the work of a non-mandating rightholder, while at the same time treating mandating and non-mandating rightholders equally, in order not to discriminate against the non-mandating rightholder. Mandating and non-mandating rightholders must also be treated equally in respect of the distribution of the proceeds.

RROs operate under three legislative support mechanisms: **extended collective licence**, **compulsory collective management** and **legal presumption**. Also, some RROs operate under a **mixed regime**, combining for instance a private copy levy scheme with voluntary licensing.

A list of countries which provide a legal back-up to voluntary licensing is annexed to this Memorandum, whereas examples of the wording of such stipulations in national legislation are given for each of the regions in Chapter III.

a. Extended collective licence

The legal technique called **extended collective licence (ECL)** is a support mechanism for freely negotiated non-exclusive licensing agreements between an organisation representing rightholders and users in certain sectors for specific uses. Once the voluntary agreement is achieved and comes into force, it is extended to cover the works of other rightholders that are not members of or have not mandated the organisation. These may have the option to opt out of the agreement, or the Collective Management Organisation (for instance the RRO) issues the licence based on mandates granted on a non exclusive basis.

The elements of an extended licence system are the following⁷ :

1. The organisation and the user conclude an agreement on the basis of free negotiations.
2. The organisation has to be representative in its field.
3. The agreement is by law made binding on non-represented rightholders.
4. The user may legally use all materials without needing to meet individual claims.
5. Non-represented rightholders have a right to individual remuneration.
6. Non-represented rightholders have in many cases a right to prohibit the use of their works.

Licensing of educational institutions on the basis of an ECL is, for instance, in use in the Nordic countries.

b. Compulsory collective management

In 1995, the legislation in France introduced, for the first time, the concept of compulsory collective management in the area of reprographic reproduction rights. Even though the management of rights is voluntary, rightholders are legally obliged to authorise the use of their works in education and make claims only through a collective management organisation,

⁷ J. Liedes, H. Wager, T. Koskinen and S. Lahtinen, *Extended Collective Licence*, leaflet prepared by the Ministry of Education, Finland (June 2001)

an RRO, approved by the Ministry of Culture. This safeguards the position of and provides legal certainty to users, as a non-mandating rightholder cannot make claims against them.

The legislation in **France** is based on the concept of compulsory collective management in the area of reprographic reproduction rights. The relevant articles of the French Copyright Act read as follows:

“**Art. L. 122-5.** Once a work has been disclosed, the author may not prohibit:

1. private and gratuitous performances carried out exclusively within the family circle;
2. copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1;
3. on condition that the name of the author and the source are clearly stated:
 - (a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated;
 - (b) press reviews;
 - (c) dissemination, even in their entirety, through the press or by telediffusion, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as also in public meetings of a political nature and at official ceremonies;
 - (d) complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a sale by public auction held in France by a public or ministerial officer, in the form of the copies of the said catalogue that he makes available to the public prior to the sale for the sole purpose of describing the works of art on sale. A Decree in Council of State shall determine the characteristics of the documents and the conditions governing their distribution.
4. parody, pastiche and caricature, observing the rules of the genre.”

“**Art. L. 122-10:** The publication of a work shall imply assignment of the right of reprographic reproduction to a society governed by Title II of Book III and approved to such end by the Minister responsible for culture. Only approved societies may conclude an agreement with users for the purpose of administering the right thus assigned, subject, for the stipulations authorizing copies for the purposes of sale, rental, publicity or promotion, to the agreement of the author or his successors in title. Failing such designation by the author or his successor in title on the date of publication of the work, one of the approved societies shall be deemed the assignee of the right.

Reprography shall mean reproduction in the form of a copy on paper or an assimilated medium by means of a photographic process or one having equivalent effect permitting direct reading.

The provisions of the first paragraph shall not affect the right of the author or his successors in title to make copies for the purposes of sale, rental, publicity or promotion.

Notwithstanding any stipulation to the contrary, the provisions of this Article shall apply to all protected works whatever the date of their publication.”

3. Legal licence

In a legal licence system, the licence to photocopy is given by law, and consequently, no consent from rightholders is required. They have, however, a right to remuneration, which is collected by an RRO. Furthermore, also RROs operating under a legal licence collect mandates from the rightholders, *inter alia* to document representativity and to establish a basis for the entering into bilateral arrangements with other RROs.

If the royalty rate is determined by statute, the system is referred to as “a **statutory licence**”. If rightholders can negotiate the royalty rate with the users, although they are not able to refuse authorisation, the term “**compulsory licence**” is used. Both statutory and compulsory licences fall under the broader term of legal licences, and the management of rights is non-voluntary. In Switzerland, RROs and federations of users are negotiating the tariffs, while the Arbitration Board is approving these tariffs after successful negotiations. On the other hand, if the parties do not reach an agreement on the tariffs, the Arbitration Board will set the tariffs.

In many countries’ legislations, reproduction for **private use** is compensated through **levies on equipment**. There can, in addition, be a levy on the underlying material, e.g. photocopying paper. The levy system is in many countries complemented by an **operator levy**, reflecting the high copying volumes by some user groups to provide equitable remuneration to rightholders for the use of their works, for instance for the multiple copying of copyright material in educational establishments.

A list of RROs/countries with a legal licence regime is annexed to this Memorandum, whereas examples of the wording of such stipulations in national legislation are given for each of the regions in Chapter III.

a. Non-voluntary system with a legal licence

In a non-voluntary system with a legal licence, the permission to photocopy is given by law. Rightholders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rightholders. In respect of education, this model applies for instance in Australia, Singapore, the Netherlands, Switzerland and, partly, Italy.

b. Private copying remuneration with a levy system

Under a levy system, a copyright fee is added to the price of copying equipment such as a photocopying machine, multifunctional machine, printer, etc. Producers and importers of equipment are liable for paying the fees (levies) to the RRO (generally reclaimed from the user/buyer of the device), which then distributes the collected revenues to rightholders. The levy system is often composed of **two elements**:

1. **Equipment levy** on hardware, such as copy-machines, fax machines, reader printers, scanners, multifunctional devices and CD and DVD burners;

2. **Operator levy** (a “user fee”), payable by heavy photocopiers such as schools, colleges, universities, libraries, and government and research institutions.

This is the case, for instance, in Austria, Belgium, the Czech Republic and Germany.

In some countries only an equipment levy is payable (for instance in Ecuador, Burkina Faso, Cameroon, Nigeria, Spain; Greece and Romania also on underlying material, such as paper). Multiple copying in education has to be authorised by the rightholders, for instance, through a collective licence.

IV. Licensing of access to content by RROs

Access to content is provided by authors and publishers through various channels, including book stores; subscriptions; direct sales of books/journals/access/downloads from publishers and other rightholders or their representatives; and libraries. Authorisation to make multiple copies of fragments of multiple works for internal use, especially requested in education, is frequently granted through licences with the RROs.

RROs also act in some respect as agents for publishers and authors in their functions as intermediaries between rightholders and consumers. E.g. they may, on a transactional basis, licence the reproduction of major portions or even complete works, and also enable through their licensing arrangements with educational institutions the making of course-packs and copying of works which are (temporarily) out of print.

Usually, the main characteristics of the typical RRO licence are that the copy (i) represents a portion of the work; (ii) is strictly for internal use; and (iii) shall not replace the purchase of the work when this would be the normal way of getting access to it.

In brief, the basic conditions (apart from the term and the tariff) in a licensing agreement for educational institutions – whether schools, universities or other educational institutions – are the following:

- **Who?** Included are usually employees (members of the teaching staff, members of the administrative staff, etc.) of the institution and students.
- **What?** Copyright-protected text and imaged based material, i.e. literary, scientific and artistic works, photographic works etc., from published publications (both national and foreign).
- **How much?** The permitted use is usually limited by a certain portion, e.g. 5%-15% of the total number of pages; an entire chapter or similar unit, an entire short story, an entire scene of a play from one and the same publication etc.
- **Where copied?** If carried out by means of equipment that the institution owns or leases, otherwise by contract which the institution has at its disposal.
- **Purpose of use?** The purpose of the use contains clauses like e.g. “not to be carried out in order to substitute copies by a publisher or copies available by purchase”; “only for the purpose to be used in the institution and for internal use in research and administration in the institution”; etc.
- **Digital uses?** Digitisation, such as scanning of analogue material for the printing out of a hard copy or for the posting to secure networks is often included in licences offered by RROs. Several RROs also license copying from digital originals for internal use; downloads from the Internet and similar sources, including for the making of further hard copies or for posting to internal networks; downloads and re-use of paid-for digital content; downloads and re-use of free-to-view web pages; projection of material to whiteboards, the inclusion of copyright material in power point presentations, etc.

- **Virtual Learning Environments (VLE)?** Licensing of education frequently includes Virtual Learning Environments (VLE), also for digital uses.

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