

Appendix I: Presumptively Lawful Purposes

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INTRODUCTION

There are a large number of uses that are frequently presumed to be non-infringing in many countries, either through specific statutory exceptions or in judicial interpretations. Some of the most important and pressing of such uses are listed and categorized below, with citations to illustrative examples. It is noteworthy that no copyright laws with closed lists of limitations and exceptions that we have reviewed include protection for every one of the purposes listed below. It is the view of the drafters of the Model Flexible Use provision that an otherwise reasonable use for any of the purposes identified below would (and should) be adequately protected by the model, as well as by the Examples of Flexible Limitations and Exceptions identified in Appendix II. This list could be used by policy makers in drafting report language, legislative history, regulatory interpretations, statutory presumptions or other guidance for the implementation of a Flexible Use clause.

PRESUMPTIVELY LAWFUL PURPOSES

A. Contributing to criticism and public discourse

e.g.

1. criticism or review of any work or idea¹
2. quotation in any medium,²
3. satire, parody, pastiche and caricature³
4. illustration or demonstration, including for commenting on any work or explaining any point.⁴

B. Promoting education, research and public archiving

e.g.

1. facilitating research or scholarship;⁵
2. teaching, studying, examination or other educational purposes;⁶

¹ See Law No. 19 of July 29, 2002 on Copyright, art. 15 (2002) (Indon.) (“... criticising or reviewing an issue”); EU Information Society Directive 2001/29/EC, art. 5(3)(d).

² See Netherlands Copyrights Act, Art. 15(a) (“Quotations in an announcement, criticism, polemic or scientific treatise shall not be deemed an infringement of copyright” where they meet listed conditions).

³ *Copyright 1968 (last amended 2012) 1968* (Cth) s. 41(A), 103(A)(a) (Austl.) (satire); CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L122-5 (Fr.); EU Information Society Directive 2001/29/EC, art. 5(3)(k) (parody, pastiche and caricature).

⁴ Loi FÉDÉRALE DU 9 OCTOBRE 1992 SUR LE DROIT D’AUTEUR ET LES DROITS VOISINS (ÉTAT LE 1ER JANVIER 2011) [FEDERAL LAW OF OCTOBER 9, 1992 ON COPYRIGHT AND NEIGHBOURING RIGHTS (STATUS AS OF JANUARY 1, 2011)] Oct. 9, 1992, RO 1993 ch. 5, art. 25 (Switz.) (“reference or demonstration”); Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of People’s Republic of China] (as last amended on February 26, 2010) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1990) art. 22(2), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm (“appropriate quotation from another person’s published work in one’s own work for the purpose of introducing or commenting on a certain work, or explaining a certain point”).

⁵ EU Information Society Directive 2001/29/EC, art. 5(3)(a).

⁶ See Copyright Act 1994 (last amended 2011) 1994, s.49 (N.Z.) (specifying that “[c]opyright is not infringed by anything done for the purposes of an examination, whether by way of setting the questions, communicating the questions to the candidates, or answering the questions”); 2001. évi XLVIII. törvény a formatervezési minták oltalmáról (Hatály: 2011.III.1-től) (Act No. XLVIII of 2001 on the Legal Protection of Designs (consolidated text as of March 1, 2011)), Ch. IV, art. 34 (Hung.) (“[t]he work may be adapted for purposes of school education in the course of school classes.”); Copyright Act of B.E. 2537, art. 32(6) (1994) (Thai.) (providing that “. . . adaptation, exhibition or display by a teacher for the benefit of his teaching”); Law No. 5846 on Intellectual and Artistic Works, art. 34 (1995) (Turk.) (“[i]t is free to create selected or collected works, which are dedicated to educational purposes” and that this limitation “shall also apply to school radio broadcasts made exclusively for schools and approved by the Ministry of Education”); Code of Copyright & Neighboring Rights, art. 75(2)(f) (2004) (Port.) (“[t]he reproduction, distribution and making available to the public, for teaching or education purposes, of parts of a published work, as long as they are solely for purposes of teaching at such establishments, and are not directly or indirectly aimed at an economic or commercial benefit”); Copyright Act, 2005 (Act 690), art. 19(1)(c)(ii) (2005) (Ghana) (“the communication for teaching purposes of the work, broadcast for use in educational institutions.”); The Copyright & Neighboring Rights Act, art. 12(7) (1999) (Tanz.) (“electric storage, by . . . educational establishments”); Law No. 22 on Copyright & Neighboring Rights, art. 21(b) (June 25, 2006) (Bahr.) (“[u]sing a legally published literary or artistic work in publications, radio or television programmes or audiovisual recordings, as a means of clarification for purposes of education, if undertaken by non-profit educational institutions”); Copyright Act, art. 46 (2007) (Taiwan) (reproduction “within a reasonable scope.”); Intellectual Prop. Laws, pt. 7 § 98 (2008) (Laos) (“Reproduction of any works for the purposes of teaching.”); Copyright Act (Act No. 48 of May 6,

3. archiving, preserving, and providing public access to material held by libraries, educational establishments, museums, and archives.⁷

C. Expanding access for underserved populations

e.g.

1. creating accessible formats by or for people with disabilities;⁸
2. translations of works where necessary to promote significant economic or social advances, subject to remuneration where appropriate.

D. Enabling or taking advantage of beneficial new technologies

e.g.

1. making of copies or adaptation of a computer program by the lawful possessor, including to obtain information to promote interoperability;⁹
2. temporary acts of reproduction that are integral to a technological process to enable a transmission in a network or to enable a lawful use of a protected work, including acts to enable web browsing and the effective operation of digital transmission systems;¹⁰
3. intermediate uses through which any final product created from the use is not itself the main subject matter of the new work, including, for example, digitization that enables search, data-mining, encryption studies or computational analysis.¹¹

E. Safeguarding personal or private uses of works

e.g.

1. enabling a work to be listened to or viewed at a preferred time, in a preferred

1970, as last amended by Act No. 65 of December 3, 2010), art. 35(1) (Japan) (providing that “[a] person who is in charge of teaching and those who are taught in a school or other educational institutions (except those institutions established for profit-making) may reproduce a work already made public if and to the extent deemed necessary for the purpose of use in the course of lessons”); Law on Copyright & Related Rights, art. 23(2) (Ukr.) (“for educational institutions to reprographically reproduce for classroom lessons published articles and other small works and excerpts from written works, with or without illustrations”); EU Information Society Directive 2001/29/EC, art. 5(2)(a) and (b) (reproductions on paper or digital media for non-commercial personal study).

⁷ EU Information Society Directive 2001/29/EC, arts. 5(2)(c) and 5(3)(n); WITTEM GRP., THE WITTEM PROJECT: EUROPEAN COPYRIGHT CODE, art. 5.3(1)(c) (2010).

⁸ EU Information Society Directive 2001/29/EC, art. 5(3)(b).

⁹ Copyright Act of B.E. 2537, art. 35(5) (1994) (Thai.) (copies or adaptation of a computer program by the lawful possessor); The Copyright Act, No. 14 or 1957, INDIA CODE (1957), art. 52.1(ab), (ac) (for promoting interoperability, observation, study or testing functioning of a computer program in order to determine the ideas and principles which underline any elements of the program. . *Id.* art. 52.1(ad).

¹⁰ See EU Information Society Directive 2001/29/EC, art. 5(1) (“Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2”).

¹¹ Law No. 9.610 of Feb. 19, 1998, on Copyright & Neighboring Rights, art. 46.VIII (1998) (Braz.).

format, or with a preferred device;¹²

2. the non-remunerative communication, display, or performance of a work in a domestic environment, or among a group people having personal relationships, or for a student gathering within an educational institution;¹³

3. the importation of a copy of a work by any person for his own personal purposes if the exhaustion principle does not apply to such use;¹⁴

4. modification of a lawfully acquired work for personal purposes.¹⁵

F. Ensuring proper performance of public administration

e.g.

1. the use of copyrighted works as evidence or otherwise in governmental proceedings, including as part of a submission to a governmental authority or as part of a decision or report from a governmental inquiry.¹⁶

¹² Emergency (Copyright) Order, 1999, art. 73. (1999) (Brunei).

¹³ Law No. 1328/98 on Copyright & Related Rights, tit. V, ch.1., art. 38(1) (1998) (Para.) (referring to an “an exclusively domestic environment”); Law of February 4, 1994, on Copyright and Neighboring Rights, ch. 3, div. 3, art. 23 (1994) (Pol.) (exception for use “by a circle of people having personal relationships, and in particular any consanguinity, affinity or social relationship”); Law No. 9.610 of Feb. 19, 1998, on Copyright & Neighboring Rights, art. 46.VI (1998) (Braz.) (family context or student gathering); *see also* Law No. 82 of 2002, art. 171(1) (Law on the Protection of Intellectual Property Rights), Al-Jarida Al-Rasmiyya 3 June 2002 (Egypt) (“Perform the work in family context or student gathering within an educational institution, to the extent that no direct or indirect financial remuneration is obtained.”).

¹⁴ Copyright & Neighboring Rights Act, 2000, sec. 20 (2006) (Bots.); *accord* Law No. 2005-30 of April 5, 2006 relating to Copyright and Related Rights of the Republic of Benin, tit. IV, art. 22 (2006); The Copyright Act, 2059 (2002), ch. 1, art. 22 (2002) (Nepal); Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property, art. 214 (2009) (Rwanda); Intellectual Property Act, No. 36 of 2003, pt. II, ch. I, art. 12(8) (2003) (Sri Lanka).

¹⁵ Lewis Galoob Toys, Inc., v. Nintendo of America, Inc., 964 F.2d 965 (9th Cir. 1992).

¹⁶ South Africa Copyright Act (“copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings”); EU Directive on Copyright in the information society 1. art 5(3) (“to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings”).