



Date: 7th June 2015

Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

Responsible Reporters: by Sarah MATHESON, Reporter General John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General Yusuke INUI, Ari LAAKKONEN and Ralph NACK Assistants to the Reporter General

National/Regional Group	United Kingdom
Contributors name(s)	Ashley ROUGHTON, Alisa KHOZINA, Professor Lionel BENTLY, Penelope THORNTON, Cam GATTA and Jonathan D.C. TURNER
e-Mail contact	secretary@aippi.org.uk
Date	19-05-2015

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:								
	General introductory comments, relevant to all our answers:								
	In these answers the current law is governed by the United Kingdom Copyright, Designs and Patents Act 1988 (as amended from time to time) - the CDPA. A reference to a section number alone is a reference to the corresponding provision of the CDPA. The part of the CDPA which govern libraries and so on are governed by sections 40A- 44A. The general scheme is as follows:								
	<table border="1"> <thead> <tr> <th>Section</th> <th>Short title</th> <th>Answer</th> <th>Brief reference</th> </tr> </thead> <tbody> <tr> <td>40A.</td> <td>Lending of copies by libraries or archives.</td> <td>A1.c(l).</td> <td>lending.</td> </tr> </tbody> </table>	Section	Short title	Answer	Brief reference	40A.	Lending of copies by libraries or archives.	A1.c(l).	lending.
Section	Short title	Answer	Brief reference						
40A.	Lending of copies by libraries or archives.	A1.c(l).	lending.						

Section	Short title	Answer	Brief reference
40B.	Libraries and educational establishments etc: making works available through dedicated terminals.	A1.c(II).	dedicated terminal.
41.	Copying by librarians: supply of single copies to other libraries.	A1.b.	single copy supply.
42.	Copying by librarians etc: replacement copies of works.	A1.a.	replacement copy.
42A.	Copying by librarians: single copies of published works.	A1.c(III).	published works.
43.	Copying by librarians or archivists: single copies of unpublished works.	A1.c(IV).	unpublished works.
43A.	Sections 40A to 43: interpretation.	Intro.	
44.	Copy of work required to be made as condition of export.	-	
44A.	Legal deposit libraries.	A1.d.	legal deposit.

Definitions:

A library is defined in a dictionary sense as a building, room or place (including cyberspace) containing collections of books, periodicals, and sometimes films and recorded music for use or borrowing by the public or the members of an institution. Likewise an archive (though undefined in our national legislation) is a collection (and a place where such a collection is housed or situate) of historical documents or records providing information about a place, institution, or group of people.

A reference to a library is to a library which is publically accessible (s43A(2)(a)) or a library of an educational establishment (s43A(2)(b)). A reference to a museum includes a gallery (s43A(3)). A body being conducted for profit includes a body which forms part of or is administered by a body conducted for profit (s43A(4)). A reference to a librarian, archivist or curator includes a person acting on their behalf (s43A(5)).

The expression “**exception**” is an exception to the law of copyright where the acts sanctioned by the CDPA are otherwise copyright infringing under the CDPA. These answers do not provide any guidance as to whether other rights are infringed or other acts (not being related to libraries and archives) are excepted from infringement.

We believe that the word “**item**” appearing in s42 is of the widest ambit and includes a work of any type.

Finally “**deposit library**” means the authorities controlling the British Library, the National Library of Scotland, the National Library of Wales, the Bodleian Library, Oxford, the University Library, Cambridge and the Library of Trinity College, Dublin and “relevant material” means a copy delivered to a deposit library of a work published in a medium other than print, a copy of a computer program and information necessary to access it or a copy (at any remove) of that copy.

Answer (a): (s42 - replacement copy exception)

A librarian or archivist may, subject to conditions, make a copy of, *i.e.* reproduce, an item held in the institution’s permanent collection, provided that:-

i. the making of the copy is done in order to preserve or replace an item in the collection or

ii. the making of the copy is done in order to preserve or replace an item in the collection of another library or archive where that other, receiving, library or archive is not conducted for profit and it has lost its copy of the same work or it has been destroyed or damaged.

The conditions are:

(1) that the originating item is kept on the premises of that part of the collection of the institution which is wholly or mainly for reference purposes, is in a closed collection, or is only for inter-library or inter-archive loan and

(2) that it is not reasonably practicable to purchase a copy of the item in order to achieve the objects stated in a.i and a.ii above.

Finally any charge made for the making of the necessary copy made by the originating library or archive to the receiving library or archive must not exceed the reproduction charge.

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

yes

Please comment:

b. (s41 - single copy supply exception)

A librarian may, subject to conditions, make a single copy of the whole or part of a published work and supply it to another library, without infringing copyright in the work.

The conditions are-

(1) the copy is supplied in response to a request from a library (which is not conducted for profit) for a copy of the work, and

(2) (where the work is not an article in a periodical) at the time of making the copy the librarian does not know, or could not reasonably find out, the name and address of a person entitled to authorise the making of a copy of the work.

Finally any charge made for the making of the necessary copy made by the parent library or archive to the receiving library or archive must not exceed the reproduction charge.

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:

(1) (s40A - lending exception)

Any person acting for or on behalf of a public library (*i.e.* a library which is run by a state designated library authority) and in relation to a certified book (*i.e.* a book which is certified by the said state designated library authority), audio book or e-book, being certified by the state as being a work which is deemed part of a state specified public lending scheme or in relation to a not-for profit library or archive other than a public library may lend any book without infringing any copyright of any work in that book. Any copy of any audio book or e-book may also be lent without infringing any copyright of any work in that other kind of work and in addition the making of any incidental copy, incidental to the lending of the audio book or e-book is also permitted. Further there is no

infringement where copies of the book etc. are lent by a library or archive (other than a public library) which is not conducted for profit. By lending it is meant making available to a member of the public for use away from library premises for a limited time, but does not include being communicated by means of electronic transmission to a place other than library premises, and "loan" and "borrowed" are to be read in the same way.

(2) (s40B - dedicated terminal exception)

Copyright in a work is not infringed by a library, an archive, a museum or an educational establishment communicating a work to the public or making it available to the public by means of a dedicated terminal on its premises (and digitising any specific work held by it for that purpose - wholesale digitization would not be allowed - see Case C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer KG* ECLI:EU:C:2014:2196; [2014] E.C.D.R. 449, C.J.E.U.), provided that the work or a copy of the work has been lawfully acquired by the library or archive, is communicated or made available to individual members of the public for the purposes of research or private study, and is communicated or made available in compliance with any purchase or licensing terms to which the work is subject.

(3) (s42A - published works exception)

A librarian (but not archivist) of a not-for-profit library may, subject to conditions, make and supply a copy of, *i.e.* reproduce a single copy of the whole or part of a work which was published or which appeared in any one issue of a periodical before the date of any request for such a copy, provided that the copy is supplied in response to a request from a person who has provided the librarian with a written declaration which includes certain information (see below) and where the librarian is not aware of the declaration being false in any material particular.

The information required in the declaration is : (1) the name of the requesting party and the identity of the required material or part thereof and (2) declarations that (i) the said material or part thereof has not previously been supplied to the requestor by any other library, (ii) the requestor requires the copy for non-commercial research purposes or private study, (iii) the requestor will only use the supplied copy for the purposes set out in the previous declaration, (iv) to the requestor's knowledge no person with whom the requestor works or studies has made or intends to make at about the same time as the request, a request substantially for the same material for substantially the same purpose.

Finally any charge made for the making of the necessary copy made by the parent library or archive to the receiving library or archive must not exceed the reproduction charge.

(4) (s43 - unpublished works exception)

A librarian or archivist may, subject to conditions, make and supply a copy of the whole or part of a work unless before being deposited in the library or archive the librarian knew or ought to have been aware of the fact that the work had been published or communicated to the public or that the author of the work had prohibited copying, provided that the copy is supplied in response to a request from a person who has provided the librarian with a written declaration which includes certain information (see below) and where the librarian is not aware of the declaration being false in any material particular.

The information required in the declaration is : (1) the name of the requesting party and the identity of the required material or part thereof and (2) declarations that (i) the material or part thereof has not previously been supplied to the requestor by any other library or archive, (ii) the requestor requires the copy for non-commercial research purposes or private study, (iii) the requestor will only use the supplied copy for the purposes set out in the previous declaration.

Finally any charge made for the making of the necessary copy made by the parent library or archive

to the receiving library or archive must not exceed the reproduction charge.

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

yes

Please comment:

d. Copies of a work may be taken from the internet by a deposit library or person acting on its behalf if-

(a) the work is published in a medium other than print, published on or off line, but not including (1) works consisting only of a sound recording or film or both, or such material and other material which is merely incidental to it (2) works which contain personal data and which are only made available to a restricted group of persons or (3) works which were published before the 6th of April 2013.

(b) its publication on the internet, or a person publishing it there, is connected with the United Kingdom if (1) it is made available to the public from a website with a domain name which relates to the United Kingdom or to a place within the United Kingdom or (2) it is made available to the public by a person and any of that person's activities relating to the creation or the publication of the work take place within the United Kingdom. However a work published on line shall not be treated as published in the United Kingdom if access to the work is only made available to persons outside the United Kingdom.

(c) the copying is otherwise done in accordance with any conditions so prescribed, which are highly complex. The rules are:-

(i) Where terminal access is made available by a deposit library then it must ensure that only one computer terminal is available to readers to access the same relevant material at any one time.

(ii) In the case of relevant material which is work published on line, at least seven days must elapse from the date of delivery of that relevant material to the deposit library before a reader may be permitted to view it.

(iii) A copyright owner, in relation to relevant material, may make a request in writing to a deposit library to withhold access to that relevant material from readers for a specified period of time, provided that (a) the period specified in the request does not exceed three years from the date on which the request is made and (b) the deposit library is satisfied on reasonable grounds that, for the period specified in the request, viewing of the relevant material by a reader would, or would be likely to, unreasonably prejudice the interests of the person making the request.

(iv) A deposit library may make and supply for use on its premises accessible copies of relevant material, other than if it is a database in which copyright subsists, for a visually impaired person if copies of the relevant material are not commercially available in a form that is accessible to the visually impaired person. But:-

(I) A deposit library must ensure that only one reader uses an accessible copy of the same relevant material made under this regulation at any one time.

(II) An accessible copy made above must be accompanied by—

(a) a statement that it is made under the relevant rules; and

(b) a sufficient acknowledgement.

(III) A deposit library entitled to make accessible copies may hold an intermediate copy of the relevant material which is necessarily made during the production of the accessible copies, but

only—

(a) if and so long as the deposit library continues to be entitled to make accessible copies of that relevant material; and

(b) for the purposes of the production of further accessible copies.

(III) A deposit library may lend or transfer the intermediate copy to another deposit library which is entitled to make accessible copies of the relevant material provided that the intermediate copy is used only for the purposes of the production of further accessible copies.

(IV) A deposit library must—

(a) keep records of accessible copies made under this regulation and of the persons to whom they are supplied;

(b) keep records of any intermediate copy lent or transferred under this regulation and of the deposit libraries to whom it is lent or transferred;

(c) allow a copyright owner or a person acting for a copyright owner, on giving reasonable notice, to inspect the records at any reasonable time.

(IV) Within a reasonable time of making an accessible copy or lending or transferring an intermediate copy, the deposit library must notify—

(a) each representative body; or

(b) if there is no such body, the copyright owner.

(V) A representative body is a body which—

(a) represents particular copyright owners, or owners of copyright in the type of copyright work concerned; and

(b) has given notice to the relevant government minister of the copyright owners, or the classes of copyright owner, represented by it.

(VI) The requirement to notify the copyright owner does not apply—

(a) if it is not reasonably possible for the deposit library to ascertain the name and address of the copyright owner; or

(b) (where there is more than one copyright owner of the work to which the notification relates) in respect of those persons for whom it is not reasonably possible for the deposit library to ascertain their names and addresses.

(v) A deposit library may, if the following conditions are met, produce and supply to a person a copy of relevant material. Those conditions are that—

(a) in relation to relevant material in which database right does not subsist, the deposit library is satisfied that the copy is required by that person for the purposes of non-commercial research or private study, criticism or review or reporting current events, parliamentary or judicial proceedings or a Royal Commission or statutory inquiry and will not be used for any other purpose,

(b) in relation to relevant material in which database right subsists, the deposit library is satisfied that the copy is required by that person for the purposes of parliamentary or judicial proceedings or a Royal Commission or statutory inquiry and will not be used for any other purpose,

(c) that person has delivered to the deposit library a signed declaration in writing in relation to the relevant material substantially in accordance with the Form in the Schedule to these Regulations and

(d) in relation to a copy of relevant material required for the purposes of non-commercial research or private study, the deposit library is satisfied that the requirement of the person requiring the copy is not related and similar to that of another person; requirements shall be regarded as similar if the requirements are for copies of substantially the same relevant material at substantially the same time and for substantially the same purpose and requirements of persons shall be regarded as related if those persons receive instruction to which the relevant material is relevant at the same time and place.

(vi) Where the relevant material is capable of being supplied in print, a deposit library must supply a copy of the relevant material in print unless the copyright owner or database right owner (as the case may be) has given permission for a copy to be supplied in a medium other than print in which case it may be supplied in that medium.

(vii) Where the relevant material is not capable of being supplied in print, a deposit library may only supply a copy of the relevant material in a medium other than print if the copyright owner has given permission for the deposit library to supply a copy in that medium.

(viii) In relation to a copy of relevant material required for the purposes of non-commercial research or private study—

(a) a deposit library must not supply a person with more than one copy of the same relevant material,

(b) the copy of the relevant material supplied by a deposit library must not represent more than a reasonable proportion of the relevant material of which the element copied forms a part and

(c) if the relevant material being copied is an article in a periodical, a deposit library must not supply a person with more than one copy of that article or more than one article contained in the same edition of that periodical.

(ix) The person requiring the copy of the relevant material is required to pay for that copy a sum not less than the cost (including a contribution to general expenses) attributable to its production.

A deposit library may copy relevant material if the copy is made (whether from the relevant material itself or from a copy made by the deposit library by virtue of this regulation) in order—

(a) to preserve or replace the relevant material by placing the copy in the permanent collection in addition to or in place of the relevant material or

(b) to replace the relevant material in the permanent collection of another deposit library if that relevant material has been lost, destroyed or damaged.

A copy may be made in a different medium or format from the relevant material if the deposit library considers the change is necessary or expedient for the purpose for which the copy is made.

A deposit library may adapt relevant material if the adaptation is made (whether from the relevant material itself or from a copy made by the deposit library for the following purposes—

(a) to preserve or replace the relevant material by placing the adaptation in the permanent

collection in addition to or in place of the relevant material or

(b) to replace the relevant material in the permanent collection of another deposit library if that relevant material has been lost, destroyed or damaged.

An adaptation may be made in a different medium or format from the relevant material if the deposit library considers the change is necessary or expedient for the purpose for which the adaptation is made.

- 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 libraries, archives or other organizations (as defined above) entitled to the benefit of the exceptions are set out in the answer to Q2 above and summarised below.

Exception	Section	Beneficiaries
lending.	s40A & s36A	Public libraries and educational establishments and not for profit libraries but not other institutions.
dedicated terminal.	s40B.	Libraries, archives, museums and educational establishments.
single copy supply.	s41.	A librarian of a library but not to other individuals or institutions.
replacement copy.	s42.	Librarians of libraries, curators of museums or archivists of archives but not to other individuals or other institutions.
published works.	s42A.	A librarian of a library but not to other individuals or institutions.
unpublished works.	s43.	Librarians of all libraries and archivists of archives but not to other institutions.
legal deposit.	S44A.	The Deposit libraries or person acting on their behalves.

- 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.

The scope of permitted activities are set out in the answer to Q1 above and summarised below.

Exception	Section	Scope
lending.	s40A.	No limitation.
dedicated terminal.	s40B.	Digital reproduction only.
single copy supply.	s41.	Make and supply a single copy of whole or part of work but excluding the copying of an article in a periodical.
replacement copy.	s42.	Make and supply a copy of the item to be replaced or preserved.

Exception	Section	Scope
published works.	s42A.	Make and supply a single copy of an article in a periodical or a reasonable proportion of any other published work.
unpublished works.	s43.	Make and supply a single copy of the whole or part of a work.
legal deposit.	s44A.	No limitation.

- 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.

The scope of any conditions as to the type of copyrighted work that may be used are set out in the answer to Q1 above and summarised below.

Exception	Section	Scope
lending.	s40A.	It must be a book (including audio book or e-book) declared by the government to be part of a statutory scheme called the public lending right scheme.
dedicated terminal.	s40B.	The work or a copy of thereof must have been lawfully acquired by the institution.
single copy supply.	s41.	No limitation.
replacement copy.	s42.	The work to be copied and must have been (1) included in the part of the collection kept wholly or mainly for the purposes of reference on the institution's premises, (2) included in a part of the collection not accessible to the public or (3) available on loan only to other libraries, archives or museums. Finally it must not have been reasonably practicable to purchase a copy of the item to achieve the replacement purpose.
published works.	s42A.	All Published works (limited to one article in any one issue of a periodical or a reasonable proportion of any other published work) - published before a request is made for the copy.
unpublished works.	s43.	All unpublished works - unpublished before a request is made for the copy. If the work had been published or communicated to the public before the date it was deposited in the library or archive or the copyright owner has prohibited the copying of the work then a copy may be still be made and supplied unless and at the time of making the copy the librarian or archivist is or ought to be aware of those facts.

Education and research institutions

In these answers the current law is governed by the CDPA. The part of the CDPA which govern education and research institutions and so on are governed by sections 29-30 and 32- 36A. The general scheme is as follows:

Section	Short title	Answer	Exception
29	Research and private study.	A5.e A5.f	research private study.
29A.	Copies for text and data analysis for non-commercial research.	A5.f	text analysis. data analysis.
30.	Criticism, review, quotation and news reporting.	A5.f	criticism. review. quotation. news reporting.
32.	Illustration for instruction.	A5.b(i)	illustration.
33.	Anthologies for educational use.	A5.b(ii)	anthologies.
34.	Performing, playing or showing work in course of activities of educational establishment.	A5.a	performing, playing or showing.
35.	Recording by educational establishments of broadcasts.	A5.b(iii) A5.d	broadcasts.
36.	Copying and use of extracts of works by educational establishments.	A5.b(iv) A5.d	extracts.
36A.	Lending of copies by educational establishments.	-	lending.

A reference to an educational establishment means (a) any school, and (b) any other description of educational establishment specified by the government minister being any university empowered by Royal Charter or Act of Parliament to award degrees and any college, or institution in the nature of a college, in such a university, (c) any institution in England and Wales which provides a course of any prescribed description, (d) any higher education institution in Scotland, (e) any institution in Northern Ireland which provides a course of any prescribed description or any institution in Northern Ireland which is a college of education, (f) any institution in England and Wales, Scotland or Northern Ireland the sole or main purpose of which is to provide further education, and (g) any theological college. A school in relation to England and Wales, means an educational institution which is outside the further education sector and the higher education sector and is an institution for providing primary education, secondary education, or both primary and secondary education, whether or not the institution also provides part-time education suitable to the requirements of junior pupils or further education. In relation to Scotland, school means an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school but does not include an establishment or residential establishment provided for social security purposes. In relation to Northern Ireland a school means an institution for providing primary or secondary education or both primary and secondary education, being a grant-aided school or an independent school.

A reference in relation to an educational establishment to "teacher" and "pupil" include, respectively, any person who gives and any person who receives instruction.

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:

(s34 - playing, performing or showing exception)

So far as concerns performance for educational purposes, the performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment (a person is not taken to be directly connected with the activities of the educational establishment simply because that person is the parent of a pupil at the establishment) (a) by a teacher or pupil in the course of the activities of that establishment or (b) at the establishment, by any person for the purposes of instruction does not amount to an infringement of copyright arising by way of a public performance. Further the playing or showing of a sound recording, film or broadcast before such an audience at an educational establishment for the purposes of instruction is not an infringement of copyright arising by way of a public performance. Infringement may, however arise in other circumstances such as distributing recordings of such performances.

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

yes

Please comment:

(i) (s32 - instruction exemption)

The fair dealing of any work by means of illustrating an idea or concept (though this is not intended to be limiting - the overarching purpose is instruction) for the purpose of instruction (including exam setting and communicating questions and answers to pupils), such as power point or prezzie presentation to a class for example, for that sole purpose does not infringe copyright in the work provided that the dealing is (a) non-commercial, (b) by a person giving or receiving instruction (or preparing for those things), and (c) there is sufficient acknowledgment (unless this would be impossible for reasons of practicality or otherwise).

(ii) (s33 - anthology exception)

The inclusion of a short passage from a published literary or dramatic work in a collection, consisting mainly of material in which no copyright subsists and which (a) is intended for use for the educational purposes of an educational establishments and is so described in its title, and in any advertisements issued by or on behalf of the publisher and (b) consists mainly of material in which no copyright subsists, does not infringe the copyright in the work if the work itself is not intended for use in such establishments and the inclusion is accompanied by a sufficient acknowledgment. However what is not authorised is the inclusion of more than two excerpts from copyright works by the same author in collections published by the same publisher over any period of five years. Further in relation to any given passage the reference to excerpts from works by the same author (a) shall be taken to include excerpts from works by him in collaboration with another, and (b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another. We comment that this section is unlikely to be of any real utility; for instance it is highly unlikely that there would ever be a work which "consists mainly of material in which no copyright subsists."

(iii) (s35 - broadcast exception)

A recording of a broadcast, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without infringing

copyright in the broadcast, or in any work included in it, provided that (a) the educational purposes are non-commercial, and (b) the recording or copy is accompanied by a sufficient acknowledgment (unless this would be impossible for reasons of practicality or otherwise). Further, copyright is not infringed where a recording of a broadcast or a copy of such a recording is communicated by or on behalf of the educational establishment to its pupils or staff for the non-commercial educational purposes of that establishment. However so far as concerns a communication received outside the premises of the establishment then the exception only applies if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff. Finally if licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that then the exception does not apply. If a copy is subsequently sold or let for hire, offered or exposed for sale or hire, or communicated otherwise than as permitted than that is an infringing act.

(iv) (s36 - extracts exception)

Copying of extracts of a relevant work (being a copyright work other than a broadcast, or an artistic work which is not incorporated into another work) where the copy is made for the purposes of instruction for a non-commercial purpose, and the copy is accompanied by a sufficient acknowledgment (unless this would be impossible for reasons of practicality or otherwise) by or on behalf of an educational establishment does not infringe copyright in the work. Further, copyright is not infringed where a copy of an extract made above is communicated by or on behalf of the educational establishment to its pupils or staff for the purposes of instruction for a non-commercial purpose. However this exception only applies if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff outside the premises of the establishment. The copying of an "extract" is defined as an act of copying where not more than 5% of a work (where a work which incorporates another work being treated as a single work) is copied by or on behalf of an educational establishment in any period of 12 months. Finally if licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that then the exception does not apply. If a copy is subsequently sold or let for hire, offered or exposed for sale or hire, or communicated otherwise than as permitted than that is an infringing act.

c) making translations;

yes

Please comment:

The making of a translation of a work is an infringing act. No specific provision exists for exceptions to copyright works so far as concerns translation. However the fair dealing for the purposes of illustration for instruction for non-commercial purposes (s 32) would be wide enough to include translations made for such purposes.

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:

(ss 35 & 36 - broadcast and extract exception)

the broadcast and extract exceptions (and no other) also apply to communications received outside the premises of the establishment if those communications are made by means of a secure electronic network accessible only by the establishment's pupils and staff.

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

yes

Please comment:

(s29 - research exception)

reproduction, distribution or both for research purposes is permitted. The extent of the reproduction or distribution must be fair, which is a matter of fact dependant upon the individual circumstances of each case. The research must be for a non-commercial purpose and the copied work must be accompanied by a sufficient acknowledgment unless it is impossible to make the acknowledgment (whether for reasons of practicality or otherwise).

It is not fair dealing:-

(i) for a person other than a researcher himself or a student himself, where that person is a librarian carried out an act not permitted by s42A or 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,

(ii) to convert a computer program expressed in a low level language into a version expressed in a higher level language, or incidentally in the course of so converting the program, to copy it or

(iii) to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program

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

yes

if so, what activities?:

There are other excepted activities, being s29 - fair dealing for the purposes of non-commercial (direct or indirect) private study, s29A - the copying, with sufficient acknowledgment, of anything for the purposes of non-commercial research by way of computational analysis and s30 - fair dealing, with sufficient acknowledgment, for the purposes of criticism, review or quotation.

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 exceptions apply to educational institutions as extensively defined above. There is no concept (and, we submit, no need for such a concept) of a research institution so far as concerns copyright exceptions under the laws of the United Kingdom.

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.

There are conditions as to the type or scope of the activities and the persons who may engage in such activities. Those conditions are explained as follows:-

Exception	Section	Type and scope of activities.
research private study.	29.	Fair Dealing. No limitation on who.
text analysis. data analysis.	29A.	Only to making enough of a copy with a sufficient acknowledgment to enable text and data analysis for non-commercial research. No limitation on who.
criticism. review. quotation. news reporting.	30.	Fair dealing. No limitation on who.
instruction.	32.	Fair dealing - limited to a person giving or receiving instruction.
anthologies.	33.	Inclusion of short passage in a work intended for use in an educational establishment. No limitation on who.
performing, playing or showing.	34.	Performing, playing or showing work in course of activities of educational establishment before teachers and pupils and other persons connected directly. No limitation on who.
broadcasts.	35.	Non-commercial recording of broadcasts for educational purposes of an educational establishment, with a sufficient acknowledgment. May only be done for or on behalf of that educational establishment.
extracts.	36.	Copying and use of extracts of works for the purposes of non-commercial instruction. May only be done for or on behalf of an educational establishment.
lending.	36A.	Lending of copies by educational establishments.

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.

There are conditions as to the type of copyrighted work that may be used, as follows:-

Exception	Section	Type of work.
research private study.	29.	Any.
text analysis. data analysis.	29A.	Any.
criticism. review. quotation. news reporting.	30.	Any.
instruction.	32.	Any.
anthologies.	33.	Short passages from published literary or dramatic work.

Exception	Section	Type of work.
performing, playing or showing.	34.	Literary, dramatic or musical works and films, sound recordings and broadcasts.
broadcasts.	35.	Broadcasts and their fixations.
extracts.	36.	Any work which is not a broadcast or artistic work which is not incorporated into another work.
lending.	36A.	Any.

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

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?

There are statutory provisions which specifically provide for such exceptions or limitations. They are, so far as concerns libraries and the like

Section	Short title	Exception
40A.	Lending of copies by libraries or archives.	lending.
40B.	Libraries and educational establishments etc: making works available through dedicated terminals.	dedicated terminal.
41.	Copying by librarians: supply of single copies to other libraries.	single copy supply.
42.	Copying by librarians etc: replacement copies of works.	replacement copy.
42A.	Copying by librarians: single copies of published works.	published works.
43.	Copying by librarians or archivists: single copies of unpublished works.	unpublished works.
44A.	Legal deposit libraries.	legal deposit.

And so far as concerns research and so on:-

Section	Short title	Exception
29.	Research and private study.	research private study.
29A.	Copies for text and data analysis for non-commercial research.	text analysis. data analysis.

Section	Short title	Exception
30.	Criticism, review, quotation and news reporting.	criticism. review. quotation. news reporting.
32.	Illustration for instruction.	instruction.
33.	Anthologies for educational use.	anthologies.
34.	Performing, playing or showing work in course of activities of educational establishment.	performing, playing or showing.
35.	Recording by educational establishments of broadcasts.	broadcasts.
36.	Copying and use of extracts of works by educational establishments.	extracts.
36A.	Lending of copies by educational establishments.	lending.

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

The answer to this question is a matter for the Court of Justice of the European Union yet to decide in interpreting article 5(5) of Directive 2001/29/EC of the European Parliament and of the Council of the 22nd of May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. We observe that there is no statutory or case law in the United Kingdom which, in relation to copyright exceptions, expressly requires the operation of a three-step test, as such. However, and importantly it may be that the National or European legislators in framing the legislation concerned may have adopted this test in relation to each of the exceptions upon which we have been asked to comment. If that be the case then it is highly likely to be legitimate for the court construing the legislation to do so on the basis that the wording and operation of the exception is consistent with and satisfies the three step test. This approach has been supported by case law of high authority both here and in the Court of Justice of the European Union.

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).

Use under the exception or limitation is permitted automatically without any further action save that in relation to the broadcasts and extracts exceptions they do not apply if there is a licensing scheme in operation; further, so far as concerns the provision of certain materials in alternative formats by deposit libraries permission is also required to provide that material in that alternative format. In addition under the single copy supply and published & unpublished works exceptions a request has to be made for the copy in question which must include certain declarations as to the *bona fides* of the person making the request for the excepted copy in question.

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?

Remuneration is payable in relation to the broadcasts and extracts exceptions if there is a licensing scheme in operation. Licensing schemes are governed by statute and a tribunal sets rates (if not agreed) for such licences. Royalties are to be reasonable or in some other way as may be agreed or determined in default of agreement by the said tribunal.

In relation to broadcasts there is a collection scheme in operation run by the Educational Recording Agency scheme. In relation to extracts there is a collection scheme run by the Copyright Licensing Agency scheme but it does not apply to the exceptions unless the purpose of the acts of reproduction are commercial in which case a flat fee of £12.50 is payable per work used. So far as concerns broadcasting the rates are as follows

(a) for students in Primary schools (including Preparatory schools, special schools, pupil referral units and non-maintained special schools):-

From the 1st of April 2014 to the 31st of March 2015 – 35p per student viewing.

From the 1st of April 2015 to the 31st of March 2016 – 40p per student viewing.

From the 1st of April 2016 to the 31st of March 2017 – 43p per student viewing.

(b) for students in Secondary Schools and students in educational establishments of Further Education (including former Sixth Form Colleges) who have not attained the age of 18 at the start of the education year:-

From the 1st of April 2014 to the 31st of March 2015 – 89p per student viewing.

From the 1st of April 2015 to the 31st of March 2016 – 91p per student viewing.

From the 1st of April 2016 to the 31st of March 2017 – 93p per student viewing.

The person liable for payment is the person making or distributing or making the copy concerned.

(b) for students in universities and like institutions of higher education an annual fee of £7.06 is payable by the institution per student - this is a blanket, one off, fee which is payable for copies of works, scans thereof or playing online for up to 5% of any given work.

In relation to lending, a scheme is also in operation which confers a right on authors to receive payments under the public lending right scheme in relation to certified books which are certified to be part of the scheme. The payment is subject to a cap of £6,600 and is payable in proportion to the number of times a particular book has been lent out. The actual benefit is calculated by reference to an annual allocation by the UK parliament which is divided by the total number of books lent in any one period of account, yielding a price per book per lend. Fees are then paid by the government minister (acting through the British Library) to each author on the basis of how many times their books have been lent.

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

There is no special treatment for orphan works for use within such exception or limitation

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

The law of our jurisdiction does allow the exception or limitation to be overridden by contract as follows:-

They are, so far as concerns libraries and the like

Section	Short title	Possible to Contract out?
40A.	Lending of copies by libraries or archives.	â☐☐ - but this section only applies if an author applies to join the scheme.
40B.	Libraries and educational establishments etc: making works available through dedicated terminals.	â☐☐
41.	Copying by librarians: supply of single copies to other libraries.	â☐☐
42.	Copying by librarians etc: replacement copies of works.	â☐☐
42A.	Copying by librarians: single copies of published works.	â☐☐
43.	Copying by librarians or archivists: single copies of unpublished works.	â☐☐
44A.	Legal deposit libraries.	â☐☐

And so far as concerns research and so on:-

Section	Short title	Possible to contract out?
29.	Research and private study.	â☐☐
29A.	Copies for text and data analysis for non-commercial research.	â☐☐
30.	Criticism, review, quotation and news reporting.	â☐☐
32.	Illustration for instruction.	â☐☐
33.	Anthologies for educational use.	â☐☐
34.	Performing, playing or showing work in course of activities of educational establishment.	â☐☐
35.	Recording by educational establishments of broadcasts.	â☐☐
36.	Copying and use of extracts of works by educational establishments.	Cannot contract out so far as restrict amount which may be copied.

Section	Short title	Possible to contract out?
36A.	Lending of copies by educational establishments.	â☐☐

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.:

Efforts are made by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions. Those efforts are mainly carried out by collecting societies, copyright owning associations, consumer associations and copyright users (such as, for instance, newspapers and suppliers of materials for publication such as photographic agents) and concern the terms of licensing schemes and royalty rates. So far as collecting societies are concerned they represent copyright owners before the rate setting tribunals.

So far as broader copyright is concerned these bodies also negotiate with the legislatures to achieve outcomes representing the best possible benefit for their members of parties whom they represent.

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?:

We believe that the justification for a library or archive scheme is to enable access where otherwise the works in question would not be accessible for a variety of reasons. On the assumption that the copyright owner is entitled in every case to compensation (an assumption with which we do not necessarily agree), where a work is copied then accessibility impacts principally on those who may desire the works but cannot, whether for objective or subjective reasons, afford them or any licence fee associated with making those works available. Absent the library system or a system of exceptions and limitations for archives such people could be excluded; in addition important cultural and like information would have no natural repository and scientific and cultural advancement may be inhibited. Hence there is a justification of a library system and a system of exceptions and limitations for archives. We believe that the current scope of activities which are allowed under UK legislation strike the correct balance between the rights of the copyright owner and the needs of the relevant public. However this answer is confined to libraries and archives of a public or non-commercial nature. Where money is to be made from the venture of a library or archive then the situation would tend to suggest that remuneration (at least) should be available to copyright owners.

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

yes

If yes, in relation to what activities? :

The justification for education based exceptions stems from the fact that the volume of educational material generated by any educational establishment on a term to term basis is likely to be huge by reason of the volume of students passing through the doors of such institutions and that there is a strong social interest in maintaining, furthering and improving education and standards of education.

We believe that this outweighs the totality of rights of a copyright owner but that a reasonable, fair and affordable royalty is made available. In the United Kingdom such schemes exist for determining the level of such royalties.

The justification for a research based exception stems from the fact that in a non-commercial context, research budgets are constrained and that there is a benefit to be attained from having such research carried out. Whether this outweighs the rights of the copyright owner is a matter of debate but it is likely that focused research would lead to greater exposure of the copyright work to the public and to increasing the sum total of human knowledge and in all likelihood would encourage further research (including commercially based research which could benefit the copyright owner). We believe that the current scope of activities which are allowed under UK legislation strike the correct balance between the rights of the copyright owner and the needs of the researcher. However this answer is confined to non-commercial researchers. Where money is to be made by the researcher then the situation would tend to suggest that remuneration (at least) should be available to copyright owners.

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

yes

Why?:

The Three-Step Test can be a useful test for determining any exceptions or limitations to copyright protection but only if applied by legislators and provided that a special case is not to be regarded as rare or exceptional. The Three-Step Test seeks to confine exceptions to special cases which do not conflict with a 'normal exploitation of the work'. A possible difficulty is the potentially circular nature of the concept of 'normal exploitation'. On the one hand, one could interpret it as the unfettered exploitation of copyright works by the copyright owner each time the work is used by a person other than the copyright owner. Under that extreme interpretation, obviously any use would conflict with the copyright owner's normal exploitation of the work and that cannot have been the legislator's intention. On the other hand, one could interpret 'normal exploitation' as factoring in/carving out specific exceptions and limitations (which would not constitute the normal exploitation of the work). However, by doing so, there is the risk of determining a priori what is or is not a legitimate exception or limitation (i.e. what constitutes a special case) even before applying the Three-Step Test.

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

The exception or limitation should be capable of being overridden by contract but only in cases of equal bargaining power on an arm's length basis and provided that the public interest underlying the exception is borne in mind when assessing compensation due to the copyright owner.

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

Remuneration should be available for the activities described in Q16) and Q17) for commercial activities but not otherwise for the reasons set out in answers A16) and A17).

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?

We do not believe that our current law as it applies to exceptions and limitations to copyright protection

for libraries, archives and educational and research institutions needs to be amended. The United Kingdom recently underwent significant amendment and updating of these exceptions following a government commissioned independent review (called the Hargreaves review). The recommendations were implemented from the 1st of June 2014. We submit that given that recent changes have taken place it is better to wait until they have had a chance to have effect before considering yet further changes to the law.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

Simply yes, harmonisation in this area is desirable. We say this because institutions are increasingly of an international nature as indeed are the relevant 'audiences' and the channels for content distribution. However, harmonisation may not mean that the law has to be the same everywhere within the world since it is an important consideration that there be different considerations for countries which are at different stages of economic development.

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?

yes

Please comment:

Our answers to question Q16) or Q17) are yes but bearing what we say below under A27.

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

the libraries, archives and other organizations to which the exceptions apply should not be the subject of any discrimination; however different considerations may apply if the organisations in question are of a commercial nature, such as private or commercial libraries; to this we add that we foresee practical difficulties of definition where organisations of a non-commercial nature have commercial operating subsidiaries (such as university intellectual property commercialisation companies),

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

these exceptions should apply to activities which are conducive to education, heritage preservation and research needs and

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

the conditions under which the activities should be undertaken or the copyrighted work used are

those consistent with the objects of education, heritage preservation and research needs.

25) If yes to question 17):

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

the educational and research institutions to which the exceptions apply should not be the subject of any discrimination,

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

these exceptions should apply to activities which are conducive to education and research needs and

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

the conditions under which the activities should be undertaken or the copyrighted work used are those consistent with the objects of education and research.

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)?

We believe that use under the exceptions should be permitted subject to specific conditions (as outlined above) otherwise there is a danger of abuse.

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?

So far as a remuneration scheme should exist (which we do not believe should always be the case) then such remuneration should be determined or calculated by reference to what is equitable, having regard to the effort of the copyright owner, the need to encourage creation, the need to encourage use, including but not limited to the benefit attained by recipients and the accretion of the copyright owner's goodwill arising by reason of the increased exposure of his works. It stands to reason that the person making such remuneration should be the person who would otherwise be the infringer or any body standing in his or its stead and the recipient should be the copyright owner.

However in answering his question there are a number of additional points we would make:-

(1) In many cases the allocation of a royalty to a specific copyright owner is not possible or the transaction costs related to such an allocation outweigh the benefits to be attained. In such cases a rough and ready or estimation approach is used.

(2) In many cases licensing schemes are operated by more than one entity although the use in question relates to only one cultural product (for example, a book which may contain a number of different types of copyright, such as literary copyright, artistic copyright and so on); this may necessitate multiple licensing arrangements, such as cross or onward licensing.

(3) The licensing schemes and cross and onward arrangements may operate in different ways and may, in some cases, be compulsory.

(4) Some regard must be had to developing countries whose priorities may be more orientated towards industrial growth and establishing or improving standards of living than the establishment of a coherent copyright policy.

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

In relation to the exceptions concerning libraries, archives or educational establishments, we do not believe that orphan works deserve any better or different treatment than is delivered by UK legislation. This is not least because the UK has recently implemented the long-awaited EU Directive relating to the permitted uses of orphan works. The consequence is that a limited exception - to permit the digitisation of collections of works - has been introduced for libraries, archives and certain other institutions. Given the extensive debate that led to the EU Directive in the first place we believe that this exception strikes the correct balance between the expectations of right owners and the public interest.

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

The exception or limitation should be capable of being overridden by contract but only in cases of equal bargaining power on an arm's length basis.

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?

The 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 by asking whether the exception in question is such as to cause substantially fewer works to be created.

Summary

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.

1. We believe that the starting point so far as exceptions are concerned (and only so far as exceptions are concerned) is that all copyright should be the same and that inroads into it are made by way of exception as opposed to limitation. That way will ensure that there is no danger of unclear and different interpretations on a necessarily more complicated set of copyright laws. This comment should not be taken out of context; it is in no case to be extended or used to support any argument concerning term, ownership, subsistence, qualification or any other aspect of copyright
2. A proper basis for copyright protection and exceptions to it should be evidence-based. However we in the UK have just undergone a change in our law concerning exceptions to copyright infringement - the time for change has passed
3. The right of communication to the public (however that expression is construed) is, at present, not included in the exceptions. We believe this to be wrong. The question of remuneration aside it would preclude, for instance, the making of a presentation in a library exhibition, by a library, of the or some of the contents of (or extracts thereof) the works kept in the library for the purpose of encouraging use of the library

4. Finally it is understood that in 2010 WIPO commissioned the International Federation of Library Associations and Institutions and others to carry out work on proposing a draft treaty on limitations and exceptions for archives in an attempt to achieve harmonisation on a number of issues raised by this question. A draft treaty was published at the beginning of December 2013. It is not known what the progress of this draft is but the document proposed is to be found on the IFLA website (ifla.org).

AIPPI